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DISPUTES YEARBOOK 2024

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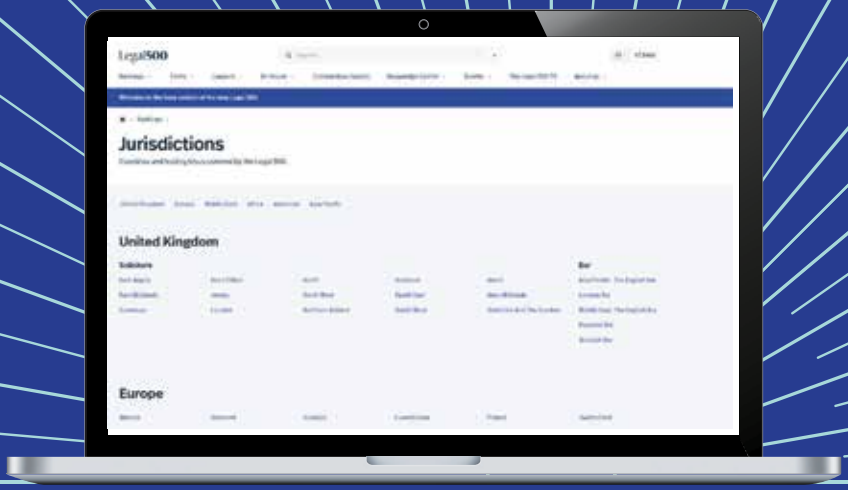

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Editor's letter

Welcome to the latest edition of the *Disputes Yearbook* from the *Legal 500* and *Legal Business*; a special edition marking ten years of our annual guide to all things contentious, and a must-read for every self-respecting litigator.

This supplement brings together analysis of the key issues facing disputes lawyers, interviews with senior figures in the market, and an in-depth round-up of some of the biggest cases around.

Those cases are covered in one of two showcase features - 'Holding court' (page 6), which looks at the most complex, high-stakes and multifaceted disputes making their way through the courts this year, from group actions to competition claims and ESG-related litigation, with full details of the glittering array of counsel lining up to make their case.

Our second set-piece feature, 'Scaling up' (page 34), looks back over the last decade of disputes in London, checking in with leading London litigators to find out how much has changed in terms of both the work and the firms involved.

This edition also features four Perspectives interviews, featuring practitioners from all corners of the market – from the Bar, Fountain Court's Bankim Thanki KC (page 70), who talks epic trials, great movies and clients doing a runner; from the world of funding, Bench Walk co-founder Adrian Chopin (page 20); and from private practice; heavyweights representing both the UK and the US – Stewarts arbitration head Sherina Petit (page 78) and Skadden Europe international litigation and arbitration head Kate Davies KC (page 84).

Elsewhere, we showcase the firms with the most *Legal 500* UK disputes rankings and also the firms with the most individuals ranked across our core sections.

You can also find out what's happening in the wider world of disputes in the articles from our partner firms in locations from the UK to South Korea.

We hope you enjoy this Yearbook, and we'd love to hear from readers about the issues you think we should be covering in future. Please do get in touch if you're keen to share ideas.

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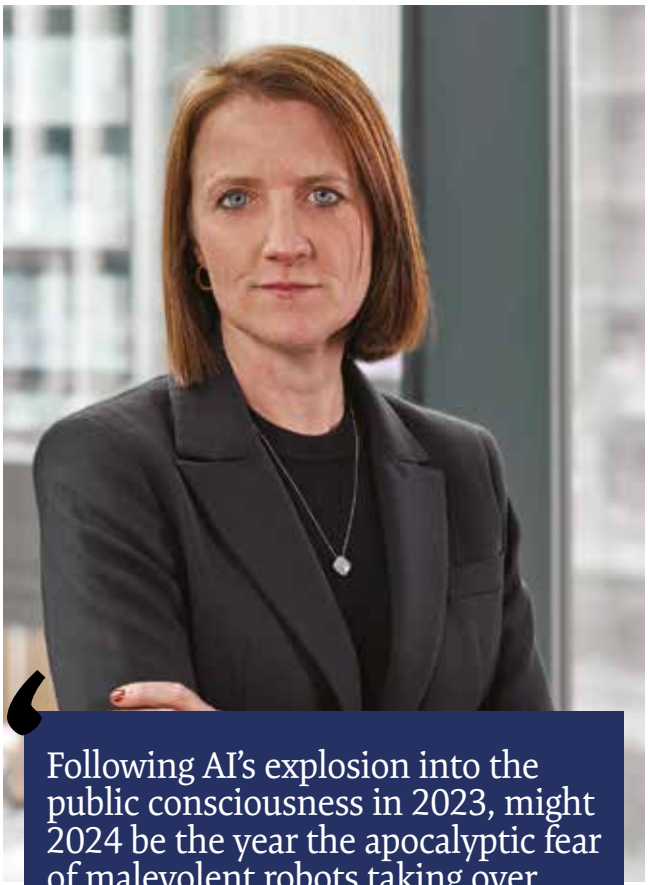
Groundhog Day?

A quick scan of the inevitable January opinion pieces predicting trends in the litigation market for the year ahead gives a fairly consistent view of topics we are likely to see. Against a backdrop of continued economic and geopolitical instability, ongoing inflation, high interest rates and supply chain disruption, commentators foresee an increase in insolvency-related litigation and disputes resulting from pressure on commercial contracts. The same factors are likely to increase loan defaults and distressed debt claims. In addition, frauds inevitably emerge in the wake of failing businesses.

Commentators are similarly consistent in their observations that ESG-related litigation will likely increase due to increased regulation and undeterred shareholder activism. Lastly, no forecast is complete without referencing AI and the possible disputes that may arise from its increasing integration into our lives and the resultant regulation.

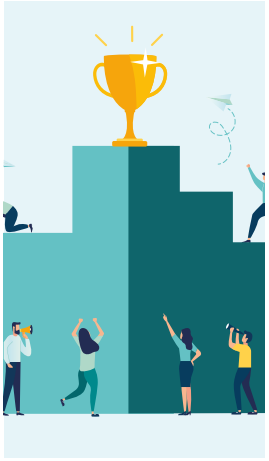
This all feels familiar. Turn the clock back a year to early 2023 and the predictions were pretty much the same. That perhaps comes as no surprise, given such predictions are a commentary on current themes coupled with educated assumptions rather than new topics dreamt up from a crystal ball. Furthermore, the economic, political, and social climate of 2024 seems little different from that of 2023. The world may not feel stable right now, but that instability is a constant in itself, and it seems likely that 2024 will be similar to 2023 in the litigation market. Thankfully, we are not (so far as we know, at least) in a year such as 2020 when everything changed. Is there a risk we are lulled into the false sense of security of thinking we know what to expect?

If you had to wager which current trend has the potential for surprise curve balls, surely it has to be generative AI. Its breakneck development speed and potential for integration into a broad range of sectors, from healthcare to manufacturing, gives it the power to create seismic changes. Following its explosion into the public consciousness in 2023 (a JP Morgan analysis paper notes that 40% of S&P 500 companies mentioned AI in their Q2 2023 earnings calls), might 2024 be the year the apocalyptic fear of malevolent robots taking over comes true? Or perhaps a new tool that finally allows us to clone our favourite associate? Perhaps not. But I don't rule out the possibility that something dramatic happens regarding how we operate as lawyers or the litigation issues arising for our clients. Beyond the current seam of copyright infringement and data privacy claims emerging in the US, who knows what is next? Even ChatGPT can't answer that question.



> Following AI's explosion into the public consciousness in 2023, might 2024 be the year the apocalyptic fear of malevolent robots taking over comes true? Perhaps not.
>
> Lucy Ward, partner and head of commercial litigation, Stewarts

Contents

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River Wye pollution

Holding court – cases of the year

From group actions to competition claims and ESG-related litigation, 2024 is set for an array of complex and multifaceted disputes, with the stars of the Bar out in force. *LB* analyses the cases of the year

Alex Ryan and Bethany Burns

If any trend is set to define the London disputes market in 2024, it is the continued rise of group litigation. A vast array of mass claims are winding their way through the courts, spurred on by an increased willingness to adapt to the challenges of case management, heightened awareness of environmental, social, and governance (ESG) issues on the parts of corporates and the general public, the maturing of the claimant Bar, and the development of the Competition Appeals Tribunal (CAT) regime – including the rise of the first opt-out class actions.

The comprehensive failure of ClientEarth's derivative claim against Shell has not slowed activity in the environmental space. In addition to the upcoming decision in the major *Municipio de Mariana & Ors v BHP Group*, a number of other group actions are brewing, with Leigh Day among the firms leading the charge. The firm is bringing a claim on behalf of more than 11,000 claimants from Nigeria's Ogale and Bille communities, alleging that oil spills from Shell pipelines have caused long-term contamination of claimants' land and water. Judgment is awaited in a petition to further expand the claim to address questions about the right to a clean environment.

Closer to home, Leigh Day is also looking to bring a claim on behalf of thousands of residents of the River Wye Valley alleging phosphorous pollution caused by intensive poultry farming. The claim is currently at the pre-action stage, and is expected to be issued in 2024. If allowed to proceed, the claim would pursue both compensation for damages and remedies to restore the river. The firm is also bringing a £330m opt-out class action on behalf of prospective class representative Carolyn Roberts against Severn Trent Water, with a further five claims expected. Reflecting what one competition disputes head calls the 'interface between competition and environmental law', the claims centre on an abuse of dominant position argument alleging that misreporting of pollution incidents allowed the defendants to charge higher prices for sewerage services than they otherwise would have.

The courts will also hear arguments in the highly publicised 'Dieselgate' group litigation, with claimants alleging that a raft of

manufacturers fitted their vehicles with 'defeat devices' designed to cheat nitrogen oxide (NOx) emissions tests. The first major trial is set to begin in February 2025 in *Ms Aurora Cavallari & 157 Ors v Mercedes-Benz Cars UK Ltd & Ors*. Eighteen claimant firms are bringing an estimated 1.25 million claims against a defendant class of 16 manufacturers and as many as 1,600 other defendants. In December 2023 the High Court brought claimants and defendants from 13 existing and prospective claims together for a mass hearing in what is now dubbed the 'pan-NOx' emissions litigation. The court ruled that the cases will be jointly managed – demonstrating its embrace of the sort of novel approaches to case management that make litigation at this scale possible.

This was also on show in the CAT's 9 January 2024 ruling in *The Trucks Second Wave Proceedings*, which laid out a roadmap for the next wave of stand-alone claims relating to alleged cartel behaviour on the part of truck manufacturers. It ruled in favour of an issues-based approach: 'trying important (case settling) issues arising from the generality of the litigation in one go, across all cases'. The ruling came after the first wave of proceedings rolled to an end when the claims to be tried in trials two and three, scheduled for 2023 and 2024 respectively, settled. The CAT also proposed to list informal remote case management hearings every three weeks throughout 2024. The claims bundled together in the second wave proceedings comprise 82 actions brought by separate claimant groups made up of hundreds of individual entities issued in England and Wales, Northern Ireland, and Scotland. While the substance of the issues will not be resolved until an eight-week trial beginning in May 2025, litigators will watch the hearings closely for indications as to how such mass claims will be handled. In addition to the second wave proceedings, the CAT also gave the go-ahead last year to the Road Haulage Association (RHA)'s trucks claim, which follows on directly from the European Commission's findings related to the cartel. The Court of Appeal upheld the CAT's approval of the RHA's opt-in claim, but found a conflict within RHA's claimant class between those who bought trucks new and those who bought them used. The issue was remitted to the CAT, with the next hearing scheduled for two days in June. Though it establishes no general preference for opt-out claims over opt-in ones, the decision adds another strut to the scaffolding of the emerging CAT regime.

Securities group actions are also on the rise, with the first such claim, *Various Claimants v Serco Group*, set to go to trial in June, alleging fraudulent overcharging and misleading the market against Serco on behalf of over 60 institutional investors. Meanwhile, another s90a Financial Services and Markets Act (FSMA) claim *Group Action v Glencore plc*, is set for a case management conference in May. The claim sees financial institutions allege bribery and corruption against commodity training and mining multinational Glencore in relation to its 2011 IPO and its May 2013 merger with Xstrata.

A number of consumer class action decisions are also awaited, from the CAT's ruling in the £1.3bn *Justin LePatourel v BT* to *Sony v Alex Neill*, which continues its progress through the courts after the £5bn claim was certified in November 2023. Brought on behalf of anyone who purchased either games or content from the PlayStation Store between August 2016 and 2022,

Gormsen v Meta

Following the refusal of the CAT to allow Dr Gormsen to commence collective proceedings in February 2023, a hearing at the start of January considered the reformulated claim. The revised claim alleged that Meta had abused its dominant position through its collection of 'off-Facebook data', and had combined this with data gathered on the platform to enable extremely targeted advertising. Through this collection, and arguing it formed a 'take-it-or-leave-it' condition, it was argued Meta had imposed an unfair trading condition on its users, who subsequently had suffered losses of over £2bn.

The reformulated claim was ultimately successful, with the CAT satisfied that there was a clear blueprint to trial laid out and that the 'Pro-Sys' test was met. The decision in the certification hearing was eagerly anticipated, in providing insight to the CAT's ongoing approach to certifying class representatives, and whether they would continue with a low-bar approach. The CAT granted a collective proceedings order (CPO) based on the new application, holding there was an arguable and triable case against Meta. It was clarified that the CAT will be looking closely at funding arrangements at the appropriate stage, and, that collective proceedings were largely encouraged, with the judgment stating that 'the certification process should be viewed in the light of access to justice'.

Michael Jacobs at Boies Schiller contends that the saga demonstrates the approach of the CAT to ensuring only meritorious claims are heard. 'At the certification stage, you used to think the CAT would green light everything. In *Gormsen v Meta*, the tribunal said "hold on, the claim looks badly formulated", and sent it away to reformulate. The CAT just greenlit bringing the reformulated claim forward. There are checks and balances in place to ensure claims aren't entirely ill-conceived.'

For Liza Lovdahl Gormsen: Greg Adey (One Essex Court), Robert O'Donoghue KC and Sarah O'Keeffe (Brick Court Chambers) and Tom Coates (Blackstone Chambers) instructed by Quinn Emanuel Urquhart & Sullivan

For Meta: Tony Singla KC, Marie Demetriou KC and David Bailey (Brick Court Chambers), Andrew Lomas (One Essex Court), and James White (Henderson Chambers) instructed by Kim Dietzel and Stephen Wisking (Herbert Smith Freehills)

the certification saw the first approval of a litigation funding agreement (LFA) since the Supreme Court ruled in *PACCAR* in July that percentages-based LFAs were unenforceable under damages-based agreement (DBA) regulations. While this provided much needed clarity to the industry, funders will watch closely to see how the government will progress its commitment to legislate to overturn *PACCAR*.

Again, the *Sony* case sees the CAT taking an active role in case management, directing how experts should work together in relation to disclosure and requiring them to identify the methodologies they rely on and the categories of data required to prove factual points at issue.

Data issues are also at the heart of *Gormsen v Meta* – a competition class action alleging abuse of dominance against Meta for its use of consumers' data. The CAT granted certification in January after last year requiring prospective class representative Dr Liza Lovdahl-Gormsen to reformulate her claim. The initial denial of certification seemed to indicate stricter limits on what sort of claims could be formulated as competition claims to proceed in the CAT. And litigators will study the case's progression with interest to gain more information about precisely where the CAT's limits lie.

> Major Covid cases have, so far, been notable by their absence. The courts continue to work out the implications of the pandemic for business interruption claims.

Another high-value collective action against a leading tech company is the case against Amazon alleging that the site's featured product offers in the 'buy box' favoured Amazon suppliers, amounting to an abuse of the online retail giant's dominant position. The claim is another that is linked to investigations by the EU Commission and the UK's Competition and Markets Authority (CMA). In February the case saw the first CAT pre-certification hearing concerning a carriage dispute, with Julie Hunter and Robert Hammond both seeking to represent UK consumers in the £1bn opt-out class action. The CAT ruled in favour of Hammond, who is now class representative on the claim.

Away from group actions, competition, and ESG, it is difficult to identify major trends among the most anticipated cases of the year. Litigators remain somewhat split on the significance of the Covid-19 pandemic. Several note the rise in insurance litigation in the aftermath of the pandemic, and data from disputes analytics platform Solomonic shows an 84% year-on-year rise in the number of claims in the insurance sector in 2023. But this increase is related to not just the pandemic but disputes in the aviation sector too, in particular the mass of claims relating to Russia's seizure of aircraft after the outbreak of the Ukraine war.

Justin LePatourel v BT

2018 saw Ofcom decide that BT held significant market power in relation to stand-alone landline customers, finding that the company had been overcharging customers by at least £7 a month. Due to the significant market power exerted by BT, Ofcom and BT agreed to reduce its prices going forward. However, compensation was not provided for consumers for the previous years of overcharging, nor for clients who had purchased both internet access and phone access.

The initial claim, filed in 2020, saw class representative Justin LePatourel seeking compensation on behalf of these consumers. In the first-ever opt-out collective action to reach trial, it is set to be closely watched by claimant and defendant firms alike, and is anticipated to have significant effects on the class action landscape in England and Wales.

The CAT first considered the claim, brought on behalf of over three billion BT customers and valued at £1.3bn, in a six-week hearing from 29 January. Milberg partner Natasha Pearman explains that the claim has already dealt with a range of novel issues including class certification and disclosure. The proceedings following trial will provide clarity regarding the tribunal's approach to damages and returns to funders – in particular in cases where a high proportion of class members who are either elderly or deceased.

For Justin LePatourel: Ronit Kresiberger KC, Jack Williams, and Michael Armitage (Monckton Chambers) and Derek Spitz and Matthew Barry (One Essex Court) instructed by Sarah Houghton (Mishcon de Reya)

For BT: Daniel Beard KC, Daisy Mackersie and Natalie Nguyen (Monckton Chambers) and Ali Al-Karim and Sarah Love (Brick Court Chambers) instructed by Patrick Boylan and Satyen Dhana (Simmons & Simmons)

For the Competition and Markets Authority as an intervening party: David Bailey and Jennifer MacLeod (Brick Court Chambers) instructed by the CMA in-house team

Major Covid cases have, so far, been notable by their absence. The courts continue to work out the implications of the pandemic for business interruption (BI) claims. The *Arsenal Football Club Plc & Ors v Allianz Insurance Plc & Anor* is set to go to trial in the Commercial Court in May, and will bring further clarity on the extent to which policyholders can make separate BI claims for disruptions caused as a result of the pandemic. Disputes have also arisen from government procurement decisions, such as *Secretary of State for Health and Social Care v Primer Design Ltd and Novacyt SA*, which sees Primer Design and its parent company defending a £135m claim brought by the government alleging it supplied defective Covid test kits, and bringing its own £81m counterclaim, set for a four-week trial in the summer. More disputes may follow, but will likely await further findings from the ongoing parliamentary inquiry.

Insolvency, too, has failed to generate a huge boom in contentious work. Some of this may be yet to come: according to Insolvency Service statistics company insolvencies in January 2024 were up 5% year-on-year and 13% on January 2022, while compulsory liquidations increased by 66% and administrations by 40% year-on-year. The British economy entered recession as of February's announcement that GDP contracted 0.3% in the three months to December 2023 after a 0.1% decline July to September, but more recent figures show a return to slight positive growth. And firms report increases in both non-contentious insolvency and restructuring appointments and queries over covenants and supply chain costs in real estate. High-profile bankruptcies such as that of WeWork, which filed for chapter 11 bankruptcy in New Jersey last November, have already produced litigation in London, with Ashurst's head of real estate disputes Alison Hardy leading on cases brought by property investors Almacantar and Nuveen against the US coworking provider. But at time of publication, insolvency litigation remains more of a potential on the horizon than an active factor driving large-scale disputes in London.

Finally, neither price volatility nor geopolitical turmoil has resulted in a significant uptick in energy disputes in either the English courts or London-seated arbitrations. One London litigator explains this with reference to the UK's lower level of exposure to Russian gas than continental Europe. And disruptions to Red Sea shipping due to Houthi activity are too recent to have showed up in litigation. Meanwhile, though consumer price hikes produced both misery and discontent, they have not yet resulted in mass claims against power companies. The one major class action awaiting certification, with a CAT hearing set for April, is unrelated to the economic and geopolitical factors that have brought the energy sector to the front pages of UK newspapers in the last year. Instead, Burford Capital is funding a case against cable manufacturer Nexans alleging price increases linked to European Commission rulings in 2014 concerning high-voltage power cables.

It is, as ever, difficult to make predictions, especially about the future. And litigators will continue to monitor economic and geopolitical developments to identify dispute risk. But when it comes to the cases of the year, collective actions and the evolving role of the courts remain front and centre. ■

Train tickets cases

Gutmann v Govia Thameslink Railway, Govia Ltd, The Go-Ahead Group, Keolis Ltd, MTR South Western, Stagecoach South Western, London & South Eastern Railway, and Secretary of State for Transport

The train tickets cases continue to move through the courts, with trial one set to take place in June and July. Issues linked to the alleged dominance abuse will be heard in this trial, with quantification of damages left to be heard in trial two, following in June 2025. The claim is expected to total over £166m in damages across all claims.

The claim rests on whether people in possession of a travelcard that was valid for a London portion of a journey were effectively overcharged when paying a full fare for a journey leaving London, due to the rail franchise operators not making boundary fares obvious. The alleged behaviour, it is argued, would constitute an abuse of the companies' dominant market position, and breach UK competition laws. Freshfields Bruckhaus Deringer competition litigator and London managing partner Mark Sansom explains the case as indicative of a wider trend. 'It's one of those consumer-type complaints, it's not really a conventional antitrust issue, but there are a lot of them now,' with the trial addressing whether the complaint is capable of constituting an abuse in a competition law sense.

For Justin Gutmann: Philip Moser KC, Stefan Kuppen and Alexandra Littlewood (Monckton Chambers) instructed by Hausfeld and Charles Lyndon

For London & South Eastern Railway and Govia Thameslink Railway: Paul Harris KC, Anneliese Blackwood, Michael Armitage and Clíodhna Kelleher (Monckton Chambers) instructed by Mark Sansom and Nicholas Frey (Freshfields)

For First MTR: Tim Ward KC and James Bourke (Monckton Chambers) instructed by Slaughter and May

For Stagecoach South Western Trains: Sarah Abram KC and Jonathan Scott (Brick Court Chambers) instructed by Dentons

For the interveners: Anneli Howard KC, Brendan McGurk KC and Khatija Hafesji (Monckton Chambers)

Shepherd Construction v Kingspan & Ors

Building contractor Shepherd Construction is bringing a claim valued at almost £70m against 12 defendants, including building materials company Kingspan in the first dispute to consider the new cause of action against cladding manufacturers introduced in the Building Safety Act 2022.

The dispute concerns four cladding systems used on a mixed-use development in Colindale, London. Shepherd alleges numerous defects including that cladding and insulation products provided were non-compliant with building regulations.

The case is set to be heard in the Technology and Construction Court in an 11-week trial from October. The Court's decision will shape the development of legal principles on fire safety issues under the new post-Grenfell regime – and will by extension help determine the number and manner of cases brought against cladding manufacturers.

For Shepherd Construction: Sean Brannigan KC and Luke Wygas (4 Pump Court) and Sarah Williams and Thomas Saunders (Keating Chambers) instructed by Mayer Brown

For Kingspan entities: Rachel Ansell KC (4 Pump Court) and Jonathan Lewis (Monckton Chambers) instructed by Fenwick Elliott

For Leach Rhodes Walker Ltd: Katie Powell (Atkin Chambers) instructed by Brabners

For Cladtech Associates: Ben Patten KC (4 New Square) instructed by Emily Monastiriotis and Jeremy Roberts (Simmons & Simmons)

For Drytech Facades Ltd: Lynne McCafferty KC (4 Pump Court) and Daniel Churcher (4 Pump Court) instructed by CMS

For Bickerdike Allen Partners: Peter Oliver (4 Pump Court) instructed by Keoghs

For Hamilton Underwriting: Paul Cowan (4 New Square) instructed by Weightmans

For Hoare Lea entities: Adrian Williamson KC and Abdul Jinadu (Keating Chambers) instructed by Hill Dickinson

For Axis Specialty Europe SE: David Pliener KC (Gatehouse Chambers) instructed by Beale & Co

For Newline Insurance Company: Reynolds Colman Bradley

For Atrium Underwriters Ltd: Imran Benson (Hailsham Chambers) instructed by Kennedys

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Serco

Serco hits the High Court at the start of June in the first s90A securities group action to go to trial. Claimants allege that they were shareholders of Serco and acquired, held, or disposed of shares in Serco between 2006 and 2013, asserting that they suffered loss due to untrue or misleading statements published by Serco. With this being the first case under s90A of the Financial Services and Markets Act 2000 (FSMA) to reach judgment, there are a range of fundamental issues to be addressed, touching on the interpretation of key provisions of the statute. The case also involves novel issues of reliance, loss and quantum, and the identification of persons discharging managerial responsibility.

The case continues the development of securities litigation, which started in 2013 in the high-profile case brought against The Royal Bank of Scotland. It will also provide clarity on the effects of the *Autonomy* litigation, which considered the issue of reliance.

For institutional investors: Andrew Onslow KC, Calum Mulderrig and Katherine Boucher (3VB) and Shail Patel KC and Carola Binney (4 New Square) instructed by Chris Warren-Smith (Morgan Lewis)

For Serco: Richard Hill KC, Andrew de Mestre KC and Andrew Rose (4 Stone Buildings) instructed by Luke Tolaini and Kelwin Nicholls (Clifford Chance)

Municipio de Mariana & Ors v BHP Group

Described by one London disputes head as 'the biggest class action ever', *Municipio de Mariana & Ors v BHP Group* sees a claimant class of more than 700,000 bringing claims for damages in excess of £36bn arising from the 2015 collapse of Brazil's Fundão Dam.

On 5 November 2015 the dam suffered a catastrophic failure. Nineteen people were killed and over 40 million cubic metres of iron ore waste poured into the Doce River in what became the worst environmental disaster in Brazil's history.

The dam was owned and operated by Samarco, a joint venture between Brazilian companies Vale SA and BHP Billiton Brasil Ltda. BHP Brazil is a subsidiary within the BHP group, headed by BHP England and BHP Australia.

The English class action was first brought in 2018. The High Court struck the claim out in 2020 but in 2021 the Court of Appeal granted the claimants leave to appeal. The Court of Appeal allowed the appeal in July 2022 and the case is currently set for an 11-week trial beginning in October this year. The High Court also in November 2023 allowed BHP to bring a part 20 claim against Vale for 50% of any damages BHP may be required to pay as a result of the litigation.

The decisions to allow the case to proceed in the English courts and to allow BHP's part 20 claim against Vale further demonstrates the increased willingness of the English courts to handle large and complex multijurisdictional claims. The rulings build on decisions in similar environmental mass claims such as *Vedanta* in 2019 and *Okpabi* in 2021 that expanded the extent to which UK-based parent companies can be held liable for the actions of their overseas subsidiaries. Both *Vedanta* and *Okpabi* also concerned environmental disasters, in Zambia and Nigeria respectively. And a win for the claimants in *Mariana* would give further incentive


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to victims of environmental disasters to seek redress in the English courts.

BHP denies the claims in their entirety and continues to hold that the English proceedings are unnecessary because 'all claimants have avenues in Brazil to resolve any potential claims'.

For Vale: Simon Salzedo KC, Richard Eschwege KC, Michael Bolding, Crawford Jamieson and Charles Wall (Brick Court Chambers) instructed by Lawson Caisley and Stephanie Stocker (White & Case)

For Municipio De Mariana: Alain Choo Choy KC (One Essex Court), Russell Hopkins (Temple Garden Chambers), Nick Harrison and Jonathan McDonagh (Serle Court), Antonia Eklund (Blackstone Chambers) and Pippa Manby (4 New Square) instructed by Pogust Goodhead

For BHP: Daniel Toledano KC, Nicholas Sloboda, Oliver Butler, Patricia Burns, Tamara Kagan, Maximilian Schlote, Stephanie Wood, Veena Srirangam, Jade Fowler, Michael Kotrly and Joseph Johnson (One Essex Court)

Mastercard proceedings

Complex claims are being brought against Mastercard and Visa in an ongoing decade-long saga involving over 1,800 corporate claimants across the hospitality, arts, financial services, and leisure sectors. With three different strands of cases – *Merricks v Mastercard*, collective cards, and umbrella proceedings – lawyers involved are finding themselves in court almost weekly. The first of these, the *Merricks* claim, is the second collective proceedings to have ever been brought in the CAT, starting seven years ago. Judgment on a causation hearing came through in February, examining the veracity of the central facts, which ultimately determined that on the factual basis, the European interchange fees did not drive the UK fees. Cited as a success by Freshfields, a spokesperson for the firm commented, 'this is a very significant judgment. It finds that over 90% of Mr Merricks' case fails factually'. If the judgment is left to stand, the value of the claim will be reduced by £9bn from a total of £10bn. Merricks' lawyers have indicated their intention to push for a trial on a counterfactual scenario, which if successful, would bring this amount back into play.

Commercial claims involving merchants and retailers, including an opt-in claim for large businesses with more than £100m in revenue and an opt-out claim for smaller businesses, will face a certification hearing in the first few days of April. The final proceedings are the high-profile umbrella cases, the first ever of their type in the CAT, pulling together all types of similar claims under the same banner and jointly case managing them. Ricky Versteeg at Freshfields comments that 'almost everything in this claim is groundbreaking', expanding that the umbrella proceedings procedure is almost a practice area in itself.

Trial one on liability of the first umbrella proceedings in the CAT first went to the courts in a six-week trial from 14 February. Trial two is set to follow in November, with an estimated six weeks commencing on 11 November. All interchange claims filed in the High Court have been transferred across to the CAT, and they are now being actively case managed by CAT president Marcus Smith and two other members of the Tribunal. This, according to Genevieve Quierin at Stephenson Harwood, is quite unusual, with the CAT liaising with the High Court and pulling all claims in together of its own motion, including those that have not been pleaded out and are stayed, with the outcome being binding on all claimants.

On Merchant Interchange Umbrella proceedings

For the Mastercard Scheme defendants: Timothy Otty KC and Naina Patel (Blackstone Chambers), Matthew Cook KC and Ben Lewy (One Essex Court) instructed by Mark Sansom and Ricky Versteeg (Freshfields)

For the Visa Scheme defendants: Simon Salzedo KC and Daniel Piccinin KC (Brick Court Chambers), Jason Pobjoy and Isabel Buchanan (Blackstone Chambers) instructed by Linklaters and Milbank

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For the class representative in *Merricks*: Nicholas Saunders KC (Brick Court Chambers), Aidan O'Neill KC (Matrix Chambers) and Anneliese Blackwood (Monckton Chambers) instructed by Willkie Farr & Gallagher

For some Umbrella Interchange Fee claimants: Mehdi Baiou (One Essex Court) instructed by Humphries Kerstetter and Scott & Scott

For some Umbrella proceedings claimants: Ronit Kreisberger KC, Philip Woolfe KC and Antonia Fitzpatrick (Monckton Chambers) and Oliver Jackson (11KBW) and instructed by Stephenson Harwood

Commercial cards collective proceedings

For the proposed class representatives: Alexander Hutton KC (Hailsham Chambers), Flora Robertson (Blackstone Chambers) and James White (Henderson Chambers) instructed by Harcus Parker

For Mastercard: Sonia Tolaney KC, Matthew Cook KC and Veena Srirangam (One Essex Court) and Hugo Leith (Brick Court Chambers) instructed by Mark Sansom and Ricky Versteeg (Freshfields) with Nick Cotter and Sarah Batley (Jones Day)

Merricks collective proceedings

For Merricks: Marie Demetriou KC and Crawford Jamieson (Brick Court Chambers) and Paul Luckhurst (Blackstone Chambers) instructed by Willkie Farr & Gallagher

For Mastercard: Joe Smouha KC and Stephen Donnelly (Essex Court Chambers), Matthew Cook KC (One Essex Court) and Hugo Leith (Brick Court Chambers) instructed by Mark Sansom and Ricky Versteeg (Freshfields)

Russian aircraft claims

In line with the trend towards mega-trials, the Commercial Court in October is due to hear the highly publicised Russian aircraft insurance claims, with aircraft lessors bringing multiple proceedings across a range of jurisdictions.

The losses arise from the detention of hundreds of commercial aircraft in Russia due to its invasion of Ukraine and the subsequent implementation of international sanctions against it. The litigation encompasses complex multi-party insurance claims, involving expert evidence across Russian politics, civil aviation, insurance underwriting, and US sanctions.

The trial includes claims brought by AerCap, Merx Aviation, and Genesis, and is listed for a joint trial of an estimated 11 weeks. For Clifford Chance litigation and dispute resolution head Helen Carty, the case highlights the exciting nature of the profession. 'Ten years ago we were doing a huge amount of banking work. Now things look very different. If you'd asked me even five years ago I'd never have expected that our biggest case this year would be related to aircraft.'

February claimants

For AerCap: Stephen Midwinter KC, Charlotte Tan and Edward Ho (Brick Court Chambers) instructed by Alexander Oddy, Fiona Treanor, Antonia Pegden and Gregg Rowan (Herbert Smith Freehills)

For Aircastle Ireland: Stephen Hofmeyr KC, Josephine Higgs KC, Stephen Du and Douglas Grant (7KBW) instructed by Peter Sharp, David Waldron and Paul Mesquitta (Morgan, Lewis & Bockius)

For Avolon, BOCA, CDBA, DAE, Falcon, Hermes, KDAC, NAC and SMBC AC: Alistair Schaff KC, Rebecca Sabben-Clare KC, Alexander MacDonald, Sandra Healy, Frederick Alliott and Daniel Corteville (7KBW) instructed by Philip Hill, Julian Acratopulo, Claire Freeman and Lindsay Bickerton (Clifford Chance)

For Carlyle Aviation Management: Stephen Hofmeyr KC, Michael Holmes KC, Sarah Martin and Henry Moore (7KBW) instructed by Peter Sharp, David Waldron and Paul Mesquitta (Morgan Lewis)

For FTAI Aviation (Fortress): Josephine Higgs KC, Stephen Du and Douglas Grant (7KBW) instructed by Peter Sharp, David Waldron and Paul Mesquitta (Morgan Lewis)

For Dubai Aerospace Enterprise: Alistair Schaff KC, Rebecca Sabben-Clare KC, Alexander MacDonald, Sandra Healy, Frederick Alliott and Daniel Corteville (7KBW) instructed by Philip Hill, Julian Acratopulo, Claire Freeman, Lindsay Bickerton and Baljit Rai (Clifford Chance)

For KDAC Aircraft Trading 2: Alistair Schaff KC, Rebecca Sabben-Clare KC, Alexander MacDonald, Sandra Healy, Frederick Alliott and Daniel Corteville (7KBW) instructed by Philip Hill, Julian Acratopulo, Claire Freeman, Lindsay Bickerton and Baljit Rai (Clifford Chance)

For Falcon 2019-1 Aircraft 3 Ltd: Alistair Schaff KC, Rebecca Sabben-Clare KC, Alexander MacDonald, Sandra Healy, Frederick Alliott and Daniel Corteville (7KBW) instructed by Philip Hill, Julian Acratopulo, Claire Freeman, Lindsay Bickerton and Baljit Rai (Clifford Chance)

For AIG Europe: Gavin Kealey KC, Andrew Wales KC, Clara Benn and Sophie Hepburn (7KBW) and David Murray (Fountain Court Chambers) instructed by Edward Spencer and Mark Waters (HFW).

For Fidelis Insurance Ireland: Dominic Kendrick KC, Peter MacDonald Eggers KC, Timothy Kenefick and Rebecca Jacobs (7KBW) and Timothy Howe KC and Christopher Knowles (Fountain Court Chambers) instructed by Naomi Vary

For Global Aerospace: Jonathan Gaisman KC, Siobán Healy KC, Adam Fenton KC, Keir Howie, Jason Robinson and Charles Littlewood (7KBW) instructed by Gillie Belsham (Wikborg Rein)

For the HAR insurers (Fidelis Underwriting): Paul Stanley KC (Essex Court Chambers) and John Bignall (7KBW) instructed by Kathryn Ward, Victoria Cooper and Lucy Stevens (DLA Piper)

For HDI Specialty: N G Casey KC and Timm Jenns (7KBW) instructed by Stephen Netherway (Devonshires)

For Liberty Mutual Insurance Europe: David Bailey KC and Richard Sarll (7KBW) and Charles Kimmins KC and Susannah Jones (Twenty Essex) instructed by Tristan Thompson (Kennedys)

For Lloyd's Insurance: Richard Waller KC, Jawdat Khurshid KC, Michael Ryan and Joshua Fung (7KBW) instructed by Chris Zavos and Andrew Westlake (Kennedys)

For Swiss Re: SJ Phillips KC, Elizabeth Lindesay, Harry Wright and James Goudkamp (7KBW) instructed by Louise High and Lisa Hillary (Penningtons Manches Cooper)

For Tokio Marine Underwriting Ltd: David Edwards KC and James Brocklebank KC (7KBW) instructed by Leon Taylor (DLA Piper)

October claimants

For AerCap: Mark Howard KC, Stephen Midwinter KC, Edward Ho and Sophie Bird (Brick Court Chambers) instructed by Alexander Oddy, Fiona Treanor, Antonia Pegden and Gregg Rowan (Herbert Smith Freehills)

For Dubai Aerospace Enterprise, Falcon 2019-1 Aircraft 3 and KDAC Aircraft Trading 2: Alistair Schaff KC, Rebecca Sabben-Clare KC, Alexander MacDonald, Sandra Healy, Frederick Alliott and Daniel Corteville (7KBW) instructed by Philip Hill, Julian Acratopulo, Claire Freeman and Lindsay Bickerton (Clifford Chance)

Defendants

For AESA/AIG Europe: James Cutress KC, Simon Paul, Ian Bergson, and Adam Sher (Fountain Court Chambers) instructed by Alex Davis (Stephenson Harwood)

For AIG Europe: Gavin Kealey KC, Andrew Wales KC, Clara Benn and Sophie Hepburn (7KBW) and David Murray (Fountain Court Chambers) instructed by Edward Spencer (HFW)

For Chubb European Group: Jeffrey Gruder KC, David Peters KC and Helen Morton (Essex Court Chambers) and Ben Lynch KC and Daniel Schwennicke (Fountain Court Chambers) instructed by Dorothy Cory-Wright and Ricci Potts (Dechert)

For Fidelis Insurance Ireland: Dominic Kendrick KC, Peter MacDonald Eggers KC, Timothy Kenefick and Rebecca Jacobs (7KBW) and Timothy Howe KC and Christopher Knowles (Fountain Court Chambers) instructed by Naomi Vary (RPC)

For Global Aerospace: Jonathan Gaisman KC, Siobán Healy KC, Adam Fenton KC, Keir Howie, Jason Robinson and Charles Littlewood (7KBW) instructed by Gillie Belsham (Wikborg Rein)

For the HAR insurers (Global Aerospace Underwriting): Christopher Hancock KC (Twenty Essex), Guy Blackwood KC, Tom Bird and Robert Ward (Quadrant Chambers) instructed by Weightmans

For the HAR insurers (Convex Insurance): Nigel Tozzi KC and James Hatt (4 Pump Court) and Bajul Shah (XXIV Old Buildings) instructed by DACB

For the HAR insurers (Fidelis Underwriting): instructed by Paul Stanley KC (Essex Court Chambers) and John Bignall (7KBW) instructed by DLA Piper

For HDI Specialty: N G Casey KC and Timm Jenns (7KBW) instructed by Stephen Netherway (Devonshires)

For Liberty Mutual Insurance Europe: David Bailey KC and Richard Sarll (7KBW) and Charles Kimmins KC and Susannah Jones (Twenty Essex) instructed by Kennedys and Shoosmiths

For Lloyd's Insurance: Richard Waller KC, Jawdat Khurshid KC, Michael Ryan and Joshua Fung (7KBW) instructed by Chris Zavos and Andrew Westlake (Kennedys)

For Lloyd's Insurance Company: David Railton KC, Simon Atrill KC, Ian Bergson and Joseph Leech (Fountain Court Chambers) instructed by Kennedys

For Swiss Re: SJ Phillips KC, Elizabeth Lindesay, Harry Wright and James Goudkamp (7KBW) instructed by Louise High and Lisa Hillary (Penningtons Manches Cooper)

For Syndicate 3010 at Lloyds): Bankim Thanki KC (Fountain Court Chambers) and Andrew Neish KC, Kate Livesey and Ron Chatterjee (4 Pump Court) instructed by HFW

For the Tokio Marine Kiln war risk insurers: Akhil Shah KC, James Duffy KC, Nick Daly and Max Kasriel (Fountain Court Chambers) instructed by Alaina Wadsworth (CMS)

For Tokio Marine Underwriting Ltd: David Edwards KC and James Brocklebank KC (7KBW) instructed by Leon Taylor (DLA Piper)

Securities litigation in the UK: A changing landscape?

Stewarts look at the UK financial market, with special focus on FSMA

The recently published fourth edition of the City of London Corporation's international competitiveness study[1] ranked London as the world's top global financial centre. The foreword to that report states: 'Amidst a range of macroeconomic and geopolitical challenges, this latest report shows how the UK's financial services are key to driving growth and promoting the breadth of specialist expertise available in the City of London.'

To ensure the UK financial services market can continue to grow, it should possess:

1. an effective capital raising regime to attract issuers to list securities in the UK; and

2. an effective liability regime that upholds corporate governance standards, thereby encouraging investors to purchase listed securities in the UK.

This piece examines the interplay between these two aspects and the role securities litigation has played (and should continue to play) in promoting the UK financial services market.

Changes to the UK listing rules

The study that ranked London as the world's leading financial centre also noted that the number of foreign companies listed in the UK is dropping. As part of an effort to reverse this trend, in December 2023, the Financial Conduct Authority (FCA) announced proposals for what it referred to as 'the most far-reaching reforms of the UK's listings regime in three decades'.

The aim of the FCA's proposals appears to be to facilitate the listing process by adopting a 'simplified listing regime with a single listing category, with streamlined eligibility and ongoing requirements, aimed at encouraging a greater range of companies to list in the UK and compete on the global stage'.

While this may be welcome news for a prospective issuer wishing to list their securities in the UK, it has provoked some negative reaction from the investor community. For example, the International Corporate Governance Network, a group of global institutional investors with $77trn of assets under management, wrote to the Chancellor of the Exchequer and the FCA stating that the proposed reforms 'may be detrimental to corporate governance standards and shareholder protections, thereby undermining the UK's economic growth and attractiveness as a global financial centre… and… are likely to harm the UK's reputation as a market with robust investor protection, high corporate governance standards, a strong reporting regime and a stable policy environment'.

This emphasises the need to strike a delicate balance. On the one hand, the listing regime must be permissive enough to attract issuers. On the other hand, investors need to be satisfied that the issuers are worth investing in, and issuers must maintain high standards of corporate governance to engender such confidence from potential investors. In addition, investors are likely to be encouraged to invest in a market if a legal system exists that holds issuers to account should they fail to uphold such standards.

The role of claims under s90/90A Financial Services and Markets Act 2000 (FSMA)

Sections 90 and 90A/schedule 10A of FSMA provide the backbone of the UK's investor protection legislation. They provide for compensation to investors who suffered loss as a result of untrue or misleading statements or omissions contained in either listing particulars or prospectuses (in the case of s90 FSMA) or in other published information (in the case of s90A FSMA).

Despite these legislative provisions being effective since 2001 (s90) and 2006 (s90A), they have not been commonly used. This is perhaps surprising given the number of public companies that have issued securities in the UK during that period and the fact that equivalent claims are so prevalent in jurisdictions such as the US and Australia.

Unlike the US, the UK legal system does not permit a US-style 'opt-out' class action regime, save for collective proceedings brought under s47B of the Competition Act 1998 (as amended by the Consumer Rights Act 2015). Outside of the competition sphere, the English courts have increasingly had to grapple with the advent of multi-claimant litigation in recent years. It is fair to say no consistent or uniform approach to securities claims has emerged, and cases are managed on an individual basis.

> FSMA claims are time-consuming and expensive. Substantial 'book-building' exercises are often required to pool the necessary investors to make a claim commercially viable.


Keith Thomas

Challenges of FSMA claims

Only 13 issuers have had s90 or 90A claims issued against them in the English courts since the legislation became effective. There are several potential reasons for this.

- FSMA claims are time-consuming and expensive. Substantial 'book-building' exercises are often required to pool the necessary investors to make a claim commercially viable. Establishing a cause of action under either s90 or 90A can be labour-intensive, particularly given the requirement under s90A for an investor claimant to prove reliance. Quantum issues are also complex and likely to require extensive expert evidence.

- Given the cost of bringing and defending FSMA claims, they are usually only viable when funded by third-party litigation funders and underwritten with appropriate after-the-event (ATE) insurance. It can take months, if not years, to structure and implement the necessary funding structures to allow FSMA claims to get off the ground.

- There has never been a trial of a s90 claim, and the merits of a claim under s90A/schedule 10A have only been tried once, in the *Autonomy* litigation[2] (which was an atypical s90A claim due to its so-called 'dog leg' structure). While this may send positive signals to litigation funders that settlements are available in FSMA claims, the flip side is that there remains uncertainty about how the English court approach various legal issues.

- Certain 'threshold' issues that might make s90A claims more attractive to potential claimants (and funders) have not yet been brought before the English courts for determination. The main example of this is the 'fraud on the market' theory recognised in the US, which effectively removes the requirement for a claimant to prove direct reliance. Currently, index/passive investors (recently estimated to comprise 48% of global investors) may not have any protection from losses suffered as a result of fraudulent misstatements or omissions by directors under the current s90A/schedule 10A legislation. If the English court were to embrace a similar concept to fraud on the market, it would provide comfort to those investors and would increase the attractiveness of the UK securities market to the large global index funds.

Case management approaches in FSMA claims

Notwithstanding the above difficulties, claimants have tried to innovate how FSMA claims are case-managed to make them more cost-effective.

Most notably, the question of whether the 'representative action' procedure (set out in Civil Procedure Rule (CPR) 19.8) can be applied to securities claims has recently been examined by the English courts. Essentially, where more than one person has the 'same interest' in a claim, the representative action procedure allows the claim to be brought by one or more of the persons who have that same interest, ie, in a representative capacity on behalf of any other person who shares such an interest.

This approach emerged following Lord Leggatt's judgment in *Lloyd v Google*[3], where he stated that absent a detailed legislative framework for collective actions (save for competition law claims), there is no reason to decline to apply the representative action procedure or interpret it restrictively. Rather, he said, it should be treated as 'a flexible tool of convenience in the administration


Harry McGowan

> The inherent and fundamental purpose of the FSMA regime is to scrutinise issuers' conduct.

of justice'. Lord Leggatt also raised the prospect of adopting a 'bifurcated approach' in representative actions whereby 'issues common to the claims of a class of persons may be decided in a representative action which, if successful, can then form a basis for individual claims for redress'.

Ostensibly, such an approach might seem well suited to a claim under s90A/schedule 10A FSMA, where common issues of defendant liability, such as whether information published to the market was untrue/misleading (or contained omissions) and whether persons discharging managerial responsibility had the requisite knowledge, could be resolved by way of a more streamlined representative action brought by one representative claimant (on behalf of many others). That would leave non-common issues such as reliance and quantification of loss to be resolved later in the usual way, ie, by each claimant having to prove those aspects of its claim.

This concept was put to the test in two recent s90A cases brought by Wirral Council, which commenced representative actions pursuant to CPR 19.8 against Indivior plc and Reckitt Benckiser Group plc[4] on behalf of classes of claimants who acquired, held or disposed of securities in both defendants during the claim period.

The defendants in both cases successfully applied to strike out these representative actions. The court was persuaded that if the representative claimant were permitted to dictate the structure of the proceedings according to the proposed representative action (in particular as to what issues should be tried at the bifurcated 'first stage'), this would prevent the court from exercising its case management powers in the usual way, which would include a discretion to bifurcate the issues in a manner it saw fit. The court found there was no reason why the claims could not proceed as ordinary multi-party proceedings (such claims having also been issued in parallel with the representative actions).

Wirral Council submitted that its proposed approach would promote several case management benefits, including (i) facilitating access to justice, particularly for retail investors; (ii) by focusing only on common issues of defendant liability, deferring claimant-specific issues to a later trial if needed thus avoiding the need for claimants to incur the up-front cost of having to deal with those issues at the outset of the claim; and (iii) promoting scope for earlier settlement of individual claims following a declaration of liability in relation to common issues.

While those objectives might seem self-serving from a claimant's point of view, the better argument is that the inherent and fundamental purpose of the FSMA regime is to scrutinise issuers' conduct. Unsurprisingly, the defendants' response to Wirral Council's arguments was that it was unfair that the burden should be so lopsided against them. The court agreed, confirming that 'claimants must properly plead and particularise their cases from the beginning, and it should not be as simple as subscribing to litigation without any risk or cost being incurred'.

Although Wirral Council has applied for permission to appeal, for the time being it appears that s90A claims must proceed by reference to the established approach of ordinary multi-party proceedings, despite the practical challenges and costs referred to above.

The case for reform?

The current formulation of s90A FSMA resulted from an independent review carried out by Professor Paul Davies KC regarding issuer liability to investors in respect of misstatements to the market. That review culminated in the Davies Report of June 2007.

> The decision in *Wirral* shows that investor claimants and issuer defendants have diametrically opposed views regarding whether representative actions provide a suitable structure for securities claims.


Zachary Sananes

One of the terms of reference for the Davies Report was to 'consider the competitiveness of the UK as a good place to do business'. In the almost 20 years since, are s90 and 90A of FSMA still fit for purpose? Is the statutory framework being deployed as effectively as initially hoped? Crucially, is it playing its part to uphold the UK's competitive advantage as a place to invest?

The fact that London is still regarded as a leading global financial centre might suggest the current system works well. However, in light of the reforms to the UK listing rules (and the concern about the negative impact this could have on corporate governance standards), is this an opportune time to revisit the efficacy of the issuer liability regime? For example, as to the reliance requirements under s90A/schedule 10A (and how they should be interpreted), while potentially appropriate for a time when active investment dominated and analysts diligently read all published information, they now have the potential to deprive investors of any protection in a future world of investment strategies driven predominantly by index trading, computer algorithms and AI.

There also remains the issue of whether there should be a more structured approach to how securities claims are brought in the UK?

The court's decision in the *Wirral* case shows that investor claimants and issuer defendants have diametrically opposed views on the question of whether representative actions provide a suitable structure for securities claims. For its part, the court has expressed the importance of preserving its discretion to decide how such cases will be managed, thus maintaining the status quo. That said, the court made clear in *Wirral* that it was deciding how to exercise its discretion in that particular case and was not seeking to establish a general policy or precedent as to how securities claims should be brought.

It therefore remains to be seen whether the challenges with the current FSMA regime will impact investor sentiment more widely as to the desirability of investing in UK listed companies and, if so, what the wider macroeconomic consequences, if any, might be.

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1. www.theglobalcity.uk/PositiveWebsite/media/Research-reports/Our-global-offer-to-business-2024.pdf
2. *ACL Netherlands BV & Ors v Lynch & Anor* [2022] EWHC 1178 (Ch) (17 May 2022)
3. [2021] UKSC 50
4. [2023] EWHC 3114 (Comm)

STEWARTS

ADRIAN CHOPIN

'Never forget you are there to do a deal, not to burn the other side to the ground' – Bench Walk co-founder Adrian Chopin on top trumps, pompous lawyer language and all-staff email calamities

WORDS: BETHANY BURNS

When I was nine years old, an elderly relative told me I should consider being a lawyer because I was an argumentative brat. On that flimsy basis I studied law with German law. For my first year, I hated the subject – everything had come easily to me at school but this new thing required a lot of effort. I nearly gave up. At some point I had one of those moments that still makes me wince, but that nevertheless shaped my life. I was sitting on the floor of my room alone, pre-loading on vodka and listening to Pink Floyd's *Time* when I had a moment of white panic that I was going to achieve nothing with my life. I ended up learning that the surest way to start to enjoy something is to get good at it, which is usually the reward of a tonne of hard work. I ended up loving my law degree.

When I joined Allen & Overy, I discovered that I adored the puzzle of understanding, structuring, and negotiating derivatives transactions. It was a total nerd bonanza, and it was perfect for me. During this time, as a junior associate, I squiffily wrote an email to a girl I was dating telling her how much I liked her and... well you get the idea. I put my BlackBerry into my pocket but forgot to lock the keypad. While it was in my pocket, I somehow pressed the combination of buttons to forward my amorous email to 'A&O New York (all)'. I checked my BlackBerry the next morning and my blood ran cold. I was certain my career was going to end with an article picking over my lovestruck sweet nothings.

> I squiffily wrote an email to a girl telling her how much I liked her, put my BlackBerry into my pocket but somehow pressed the buttons to forward my amorous email to 'A&O New York (all)'.

I tried to phone anybody and everybody in the A&O New York IT team, but it was the middle of the night, and nobody answered. After about four stomach-churning hours I finally got hold of a lovely chap who confirmed that the mailbox filter had quarantined my email for review and that he would delete it without reading. I almost wept with relief. I put a picture of that guy up on the wall of my office. Old A&O NY IT guy, if you're out there reading this and you ever need anything, you just have to call me.

One of my colleagues at A&O once said, 'we cheer as loudly when a deal dies as when a deal closes'. He was right: when a deal closed or aborted the associates would get a few days' respite from working long hours and would mostly be paid the same amount either way. By contrast, in my first month as an investment banker, when I showed relief at the death of my first deal, my boss observed 'you won't last long here with that attitude'. Things have improved at law firms since those days, but I still think that sense of ownership is something many lawyers don't really experience until they are much later in their careers. Also, Deutsche Bank involved a lot more swearing.

I loved the combination of law and finance and I observed there were lots of litigators but not enough finance professionals in the industry. I thought I could bring something a bit different and that it would be exciting to be part of building a new market. So I took the plunge in 2015, which now makes me one of the dinosaurs of this young industry.

My biggest achievement is setting up a litigation funding business from scratch in 2015: I had no track record, no employees, no models, no documents and all my legal contacts were at Magic Circle and white-shoe firms, none of whose clients wanted funding. I had to spend nights and weekends drafting template documents, building models,

and setting up operational systems, all starting from nothing. And during the day I was running around the City taking meetings to build a new network of contacts. I was hugely grateful to John Young and Gary Wee at Orchard, who took a flier on me when I had just an idea; their support, and the fact that they paid me a salary, made it possible. It was the greatest learning experience of my life.

But in close second place, is the deck of 'top trumps: funder mentals' that my wife and I made during lockdown. We made cards for high-profile figures in the funding industry with ratings in categories such as 'charisma', 'nerd number', 'spin factor' and 'pain infliction' and we included a fairly robust comment on each person at the bottom of the card. People in the industry now beg to be included in the deck. The only thing worse than being in top trumps is not being in top trumps.

> If you think you're a better litigator than the lawyer you are backing, you shouldn't be backing them. It's better to back a great lawyer with a good case than a great case with a good lawyer.

For budding lawyers, my advice would be to learn to write professionally and succinctly but always ensure you remain a normal human being. As a trainee I thrived on sprinkling bombast into my emails, like 'timeous' and 'eleemosynary'. But I mostly sounded pompous and insecure. And never forget you are there to do a deal, not to burn the other side to the ground. This is just as important in litigation and arbitration as in transactional work. So don't act as if you're engaged in mortal combat, but try to cultivate a decent, professional relationship. It will make your work fun and fruitful.

For those considering a move from law into funding, you need to learn that you aren't litigating these cases, and you need to start thinking like an investment professional. That's multifaceted – you need to learn a bit about maths, a bit about finance, and a bit about deal structuring even if you're in a pure due diligence role. It will make you a far better funder.

Also, if you think you're a better litigator than the lawyer you are backing, you shouldn't be backing them. It's better to back a great lawyer with a good case than a great case with a good lawyer.

My biggest inspiration in the law is David Benton, my old boss from A&O. He is an extraordinary individual: he wears his planet-sized intelligence as lightly as the ugly camo jacket he used to wear to client meetings. And he allies it to a casual, generous sense of humour. He taught me many things, including that real confidence comes from understanding your subject matter and that the best lawyers are not rule-moaners, they are imaginative, creative, and solution-oriented. He built a team that was bright, hardworking, and happy, which made being at work a pleasure, even when the hours were tough.

I think over the next few years we'll see some more consolidation in the industry, especially in continental Europe, where the market will continue to grow but some smaller funders will end up being absorbed into larger platforms. Both Europe and the UK will see further development of their class action regimes. We'll probably see at least one or two absolute 'gut buster' wins in a non-US group action and this will lead to another flood of cash trying to come into the market. They'll struggle to build platforms that replicate the success of the more established funders. But that's fine; we'll still be here making it work after the fast money has retreated.

My favourite book is *The Book of Ebenezer Le Page*. It's an awkward and engaging canter through the twentieth century history of Guernsey via the life of an oddball. I grew up in Guernsey and I still get dewy-eyed reading some passages. Do yourself a favour and give it a try.

Adrian Chopin is co-founder and managing director at Bench Walk Advisors.

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Two themes in arbitration cases before the English courts: state parties and the nature and extent of the court's pro-arbitration approach

Stewarts on some recent developments in arbitration in the UK

Claims relating to arbitration make up a significant portion of the English Commercial Court's case list. Arbitration is by its nature international and London's enduring status as a global hub for international arbitration reflects its position as a destination for international parties to resolve their disputes. Recent cases before the English courts which this article addresses corroborate that fact. They arose in the context of important world events. Several high-profile cases involved states. Also last year, the Law Commission published its recommendations as to how the Arbitration Act 1996 (the Act), the arbitration law of England, Wales and Northern Ireland, should be modernised. The new legislation is expected to be enacted by the end of 2024.

This article considers two themes which these developments bring into focus:

1. the nature and extent of the support the English courts will provide to arbitrations; and

2. the continuing evolution of issues in cases involving states and how some special concerns may apply to them.

Support of arbitration

The English courts have a reputation for a 'pro-arbitration' approach. However, what that means in any given case will vary depending on the context. What the court might consider is the appropriate course can for instance differ depending on the stage of the arbitration. Once an arbitration is on its feet, or once it has progressed such that an arbitral award has been rendered, the nature and extent of the court's involvement may be different to if it has not yet started. Some cases from last year, and the proposals of the Law Commission, shed some light on this.

> Once an arbitration is on its feet, or once it has progressed such that an arbitral award has been rendered, the nature and extent of the court's involvement may be different to if it has not yet started.

Before arbitration

Two key scenarios which the court may face before arbitration has been commenced are where a dispute said to be subject to an arbitration agreement has been commenced in proceedings before the English, or a foreign, court. If 'competing' litigation proceedings have been commenced before a foreign court, a party to the alleged arbitration agreement may seek anti-suit injunctive relief from the English court to restrain the other party from pursuing the litigation. If those competing proceedings have been commenced before the English court, a party may ask the court to stay those proceedings in favour of a referral to arbitration. The court had to consider both scenarios in recent high-profile cases.

In a series of cases (two of which went to the Court of Appeal: *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144; and *Unicredit Bank GmbH v RusChemAlliance LLC* [2024] EWCA Civ 64), the court was asked to grant anti-suit relief to


Daniel Wilmot

> If competing litigation proceedings have been commenced before the English court, a party may ask it to stay those proceedings in favour of a referral to arbitration.

restrain competing litigation commenced in Russia. The contract in each case was governed by English law and included a disputes clause providing for ICC arbitration, but seated in Paris. In each case, the Russian counterparty commenced litigation in Russia, and the other party then applied to the English court for anti-suit relief to restrain the Russian counterparty from pursuing the Russian court proceedings.

As the seat specified under the arbitration agreement was Paris, not London, the Act was not triggered. This provided an unusual question for the English court. Normally when a party seeks anti-suit relief from the English court it is because it is the court of the seat and has supervisory jurisdiction by virtue of the Act over the arbitration agreement (and so any arbitration (to be) commenced pursuant to it). In this case, it was not; the French courts were.

Despite that novelty, the court granted the relief sought. Although it appeared to be accepted that the French courts would not have granted anti-suit relief if it had been requested from them, they would recognise such relief, and the fact the French courts could not do so was a reason the English court should. The court referred to 'the policy of English law that parties to contracts should adhere to them, and in particular the parties to an arbitration agreement'. And it considered that although in theory the relief might be available from a tribunal constituted in the relevant arbitration, there would be delay in obtaining it, it would not be enforceable in Russia (whose courts had already found the arbitration agreement unenforceable), and further, without the English court granting relief, there would be nothing preventing the Russian party seeking an injunction from the Russian courts restraining the arbitration. The court therefore proceeded to grant relief. One of the cases has been appealed to the Supreme Court for hearing in 2024.

While those decisions might be said to show an example of the English court's 'pro-arbitration' approach, the court is nonetheless analytically careful in exercising its powers. In *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Ors* [2023] UKSC 32 the UK Supreme Court was willing to carefully work through a series of related contracts involving various parties to identify matters that should be arbitrated and those that could be litigated.

A party to litigation before the English courts alleged that matters in respect of which the litigation was brought fell within the scope of arbitration agreements and so ought to be stayed and referred to arbitration under s9 of the Act.

The claims alleged bribery and conspiracy to injure the claimant state arising in relation to contracts for the supply of assets and services (which contained arbitration agreements), credit lines extended in respect of that supply (which did not) and guarantees in respect of the same (which also did not). The

claims in question arguably straddled the differing jurisdictional clauses within the suite of agreements.

To determine whether there were matters which fell within the scope of the arbitration agreements, the court had to first identify what those 'matters' were. It determined a matter was a 'substantial issue' that is 'legally relevant' and 'an essential element of the claim or… a relevant defence'. Judicial evaluation had to be applied to work out whether an issue raised in the claims satisfied these requirements.

The court analysed the legal investigation and steps necessary to determine the claims, and found the matters they raised would not fall within the scope of the arbitration agreements within the supply contracts and so refused a stay and allowed the court proceedings to continue.

During arbitration

When and to what extent the English court can intervene to support an ongoing arbitration is regulated by the Act and a key source of its powers is in s44. Broadly, the court's support requires a balancing of the need for the court to exercise its powers without straying into matters the arbitral tribunal can (and should) determine according to the parties' agreement.

An example of this was in *JOL and JWL v JPM* [2023] EWHC 2486 (Comm), where a party applied to the court under s44(3) for urgent injunctive relief for the redelivery of two vessels under agreements which it had a contractual entitlement to terminate with 'immediate effect' under circumstances which it was common ground between the parties had arisen. Despite the immediate nature of the contractual right (and the alleged risk of the possible deterioration of the vessels pending relief), the court did not consider the circumstances gave rise to urgency (a necessary requirement for it to exercise its power) such that it should leave the matter for the arbitral tribunal (once constituted). The court considered that the decision it would make on the matter would be 'final', thus effectively taking the decision out of the hands of the arbitral tribunal, contrary to the parties' agreement to arbitrate. But the court did not rule out that it might rule on the matter in future if the tribunal considered it could not grant the relief sought in a suitable timeframe and permitted the party to approach the court.

> Enforcement cases involving states posed particular questions for the court in the last year, and it seems likely they will continue to do so in the near future.

Legislative reform

The extent of the court's powers in support of ongoing arbitral proceedings was considered by the Law Commission when it reported its recommendations for updating the Act. One of the updates it recommended concerns the court's powers to make orders against non-parties to an arbitration. Because it is by its nature a contractual and consensual process, the binding nature of arbitration and the powers of arbitral tribunals over a third party is limited. This can be a perceived limitation by comparison to litigation before a court which may have further reaching powers. The Law Commission has suggested that new legislation confirm that the court's powers to make such orders in support of arbitration be available against third parties. While the court had iteratively expanded its powers to third parties, third-party orders previously not granted by the court included a freezing order to enforce an award against subsidiaries and an order for the taking of evidence from a non-party. So the Law Commission's recommendation could have a significant impact.

After an award

Two grounds on which an arbitral award can be challenged are a lack of the tribunal's substantive jurisdiction (s67) and in the event of a serious irregularity affecting the tribunal, the proceedings, or the award (s68).

The court takes a different approach to each type of case. In s67 proceedings, a full rehearing of the relevant issues before the court typically takes place. However, the Law Commission has recommended a change in this approach, whereby a full rehearing of all issues is replaced with a more focused approach: the challenge will be limited to the grounds of objection and supporting evidence on which it was brought before the tribunal, save certain limited circumstances, and that evidence will not be reheard save in the interests of justice. It seeks to limit those matters which can be put before the court.

In s68 proceedings, the reconsideration of evidence is far narrower and the courts typically apply high thresholds, historically success rates have been low, and such challenges can be dismissed on the papers. However, in a recent high-profile case regarding awards valued at $11bn including interest against the Federal Republic of Nigeria (*Nigeria v P&ID* [2023] EWHC 2638 (Comm)), the court upheld a challenge to the award on the basis of it being 'obtained by fraud or the award or the way in which it was procured being contrary to public policy'. The court found that during the arbitration, a witness had not mentioned that bribes had been paid to officials when the relevant contract had been entered into, and that they had continued to be paid during the arbitration. It also found that the 'successful' party had received and improperly retained Nigeria's internal legal documents during the arbitration. It found the awards had been obtained 'only after and by practising the most severe abuses of the arbitral process'.

Louis Peacock-Young

> Recent cases have focused on questions of sovereign immunity and whether states have waived immunity from enforcement.

Special concerns regarding states

Enforcement cases involving states posed particular questions for the court in the last year, and it seems likely they will continue to do so in the near future.

Cases involving the attempted enforcement of awards obtained from arbitrations constituted under intra-EU bilateral and multilateral investment treaties have been high-profile in recent years following the *Achmea* and *Komstroy* decisions of the Court of Justice of the European Union (CJEU), which broadly found that arbitration agreements in such treaties were contrary to EU law and so not enforceable. With the UK's withdrawal from the EU, the question of to what extent such EU law findings bind the English courts has often arisen, with defendant EU states arguing against the enforcement of awards in this context.

The UK Supreme Court's decision in Micula and the CJEU's recent finding that the UK infringed EU law in allowing enforcement in that case will continue to fuel the question. However, recent cases have focused the issue more on questions of sovereign immunity and whether states (including EU states) have waived such immunity from enforcement by entering into such treaties (and, if not, whether that prevents enforcement against them within the English jurisdiction). In a key case, *Infrastructure Services Luxembourg S.A.R v Kingdom of Spain* [2023] EWHC 1226 (Comm), the court was unwilling to accept a submission that Spain had not waived sovereign immunity by acceding to the International Centre for Settlement of Investment Disputes (ICSID) convention in so far as it applied to intra-EU disputes. This was despite the court noting the 'juridical dilemma' in which Spain found itself following the CJEU decisions which, in effect, voided the arbitration agreements under EU law, which imposed on it inconsistent obligations under the relevant intra-EU treaties and under the ICSID convention.

In contrast, in *Border Timbers Ltd and Hangani Development Co. Ltd v Republic of Zimbabwe* [2024] EWHC 58 (Comm), the court took what might be seen as the beginnings of a different approach. It considered Zimbabwe's accession to the ICSID convention alone might not be sufficient to trigger two exceptions to sovereign immunity recognised under the UK State Immunity Act 1979. Although the scope of that judgment must carefully be understood, it appears to pave a different path to Infrastructure Services. An appeal of that Spain judgment is awaited, and may address the decisions together to clarify the position.

The status of cases referred to in this article is up to date as of March 2024.

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STEWARTS

The UK mediation sector

Independent Mediators' provide insight into the recent developments in the mediation sector in the UK

Churchill v Merthyr Tydfil County Borough Council

In a landmark decision, the Court of Appeal in *Churchill v Merthyr Tydfil County Borough Council* [2023] made a significant stride in the evolution of dispute resolution within the legal system of England and Wales. The case, stemming from Merthyr Tydfil's approach to managing Japanese Knotweed on its land, has revisited the contentious issue of court-mandated dispute resolution processes. Three dispute resolution bodies, The Civil Mediation Council (CMC), Ciarb and CEDR, were intervenors in the landmark case regarding the concept of court-ordered mediation. The aim was to overturn a 2004 Court of Appeal decision that determined that compelling parties to mediate was a breach of provisions in the European Convention on Human Rights that guarantee the right to a fair trial.

Previously, in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 (Halsey), Lord Justice Dyson's remarks had been perceived as a barrier to mediation, suggesting that forcing unwilling parties into mediation infringed their right to court access.

However, this view was critically reassessed by a specially convened Court of Appeal panel including Baroness Carr, Lady Chief Justice, Sir Geoffrey Vos, Master of the Rolls, and Lord Justice Birss. They unanimously concluded that Dyson LJ's observations were merely *obiter dicta*, and not part of the *ratio decidendi*. In modern language: 'they were not a necessary part of the reasoning that led to the decision', adopting the words of Lord Justice Leggatt in *R (Youngsam) v The Parole Board* [2019] EWCA Civ 229.

The Deputy District Judge initially reluctantly ruled against compelling the parties to engage in non-court-based dispute resolution processes, citing *Halsey*. However, the appellate court clarified that while *Halsey*'s principles remain influential, they are not a straitjacket that binds judicial discretion. Consequently, the court has the authority to stay proceedings for non-court-based dispute resolution if it is proportionate and preserves the essence of the parties' right to a judicial hearing.

This ruling underscores the court's commitment to dispute resolution that is fair, expedient, and cost-effective, without strictly prescribing when such measures should be applied. It reaffirms that the Court of Appeal will not lay down absolute rules but will consider the specifics of each case. For practitioners, this decision reiterates the need for a strategic approach to dispute resolution, considering both litigation and alternative methods as viable pathways to resolving complex disputes.

Independent Mediators' Michel Kallipetis KC was part of the team representing the successful appellant council and Rebecca Clark was part of the team of intervenors in her role as chair of the CMC.

Ministry of Justice integrating mediation into the court process

Following a consultation in 2022 on 'Increasing the use of mediation in the civil justice system' it was confirmed in 2023 that mediation would be integrated into all defended small track claims (those valued under £10,000). Unless an exemption is granted by the court, all parties to a defended small claim will be required to attend a free mediation appointment with His Majesty's Courts and Tribunals Service before their case can progress to a hearing. The mediation session will be provided via the existing Small Claims Mediation Service run by HMCTS. Parties each have an hour-long telephone conversation with the mediator. If settlement is reached a binding settlement agreement is drawn up. This service is free.

The proposal is expected to help an additional 272,000 parties every year to access the opportunity to resolve their dispute consensually through mediation. It is also expected to divert up to 20,000 cases each year from the court system, freeing up judicial resources to be used for complex cases.

The government is also considering whether a requirement to mediate should be expanded beyond small claims.

This initiative forms part of the government's broader efforts and ambition to help parties realise the benefits of consensual dispute resolution processes, such as mediation, and integrate these processes as a key step within the justice system.

UK signs the Singapore Convention on Mediation

In 2023 the [UK] government became a Party to the Singapore Convention on Mediation (the Singapore Convention). A clear signal to international partners that the UK is committed to maintaining and strengthening its position as a centre for

dispute resolution and to promote the UK's flourishing legal and mediation sectors.

The Singapore Convention responds to the demand from a growing body of mediation users for an enforcement mechanism applicable to mediated settlement agreements in cross-border disputes.

UNCITRAL perceived a need from the international business community for an enforcement mechanism for mediated settlement agreements in international (or cross-border) disputes akin to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

The Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (settlement agreement) which, at the time of its conclusion, is 'international'. International is defined as the situation where at least two parties to the settlement agreement have their places of business in different states; or the state in which the parties to the settlement agreement have their places of business is different from either:

i. the state in which a substantial part of the obligations under the settlement agreement is performed; or

ii. the state with which the subject matter of the settlement agreement is most closely connected.

The Convention does not apply to settlement agreements arising out of transactions for family, personal or household purposes or relating to family, inheritance or employment law, nor to court-approved settlement agreements enforceable as a court judgment or arbitral awards.

On 7 August 2019 The Singapore Convention was signed by 46 states including two of the world's largest economies – the US and China – as well as three of the four largest economies in Asia – China, India and South Korea. Another 24 countries attended the signing ceremony in Singapore to show their support for the Convention. Since then other states have also signed.

On 25 February 2020, Singapore and Fiji became the first two countries to deposit their respective instruments of ratification of the Convention at the United Nations Headquarters in New York. With the third instrument of ratification deposited by Qatar on 12 March 2020, the Convention entered into force on 12 September 2020.

As of February 2024, the Convention has 55 signatories, of which eight are parties to the Convention.

The team

Independent Mediators comprises ten full-time commercial mediators. They are nationally and internationally recognised for their work. Between them they have mediated over 9,500 matters in almost every sector of business and law. Cases ranges from ten of thousands of pounds in value to multi-billion. They are at the forefront of developments in the mediation sector both in the UK and overseas.

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Independent Mediators

Class/collective actions

Mayer Brown discusses the importance of businesses understanding their exposure

2024 is shaping up to be another significant year for the UK's burgeoning class/collective action regimes. New developments in several areas means that businesses need to have an understanding of their exposure across collective proceedings orders (CPOs) and umbrella proceedings orders in the Competition Appeal Tribunal (CAT), to group litigation orders (GLOs) and representative actions in the High Court.

Overview

2023 saw a continuation of trends from previous years – collective actions in the High Court are still primarily brought on an opt-in basis, either by multiple claims being brought together in a single action (eg, using a schedule of claimants); or the court making a GLO.

In terms of opt-out class actions, the CPO regime continues to be the most active for such claims since the Supreme Court's lowering of the class certification threshold in its 2020 judgment in *Merricks v Mastercard*[1], and this shows no sign of slowing down. There are now over 40 registered opt-out class actions, involving claimant classes in the millions and potential damages sums in the billions. Representative actions remain an option for opt-out claims in the High Court, but have not seen the same level of activity, following the Supreme Court's decision in *Lloyd v Google*[2] which raised the bar for the 'same interest' criteria that the claimant class must fulfil.

Recent developments

In the CAT

The increase in CPO claims has resulted in parties rigorously testing how various aspects of the regime are to be administered, as claims reach each procedural stage. In particular, we have seen the first settlement in a CPO claim, in the proceedings against the participants of the so called 'Ro-Ro' shipping cartel[3], where the smallest defendant's (1.7%) share of the potential damages still amounted to £1.5m. Also arising from a CPO claim, the Supreme Court's July 2023 judgment in *PACCAR*[4] cast serious doubts over the enforceability of certain litigation funding agreements (LFAs) where the funder takes a percentage of the overall damages awarded. Despite this, claimant firms and funders seem to have taken the judgment in their stride, amending LFA wording to comply with the post-*PACCAR* requirements. Two amended LFAs have been approved by the CAT to date, with these decisions remaining subject to appeal.

Another key development has been the first environmental disputes brought under the CPO regime. In 2023, six opt-out class actions were commenced against UK water companies, alleging that they abused their dominant positions in the market by under-reporting the number of sewage spills into the environment, and providing misleading information to their regulator. The claimants allege that the defendants benefited from this by charging higher prices than they would otherwise have been able to if they had provided accurate reporting.

In the High Court

Late 2023 and early 2024 saw a surge in activity in the GLO litigation against vehicle manufacturers relating to the alleged use of 'defeat devices' to cheat emissions tests. Ten GLOs, which are being collectively case managed, have now been granted (the '*NOx Group Litigation*'). The total claimant group includes over 1.2 million individuals who have brought the claim against the defendant manufacturers and authorised dealerships, with a total of 1,500 defendants. The claim value is yet to be determined, but based on a previous settlement in these proceedings, could be above £2.4bn.

As for representative actions, the January 2024 High Court decision in *Commission Recovery Ltd v Marks and Clerk LLP*[5] demonstrated that despite the setback for claimants in *Lloyd v Google*, the English courts are amenable to permitting representative actions where the claims take a bifurcated approach. They may be appropriate to deal with issues in which the claimant class do have the 'same interest' on an opt-out basis (eg, establishing the defendant's breach), with individual issues (eg, liability to an individual claimant or quantum of damages) to be dealt with separately at a subsequent stage of proceedings.

What's next?

There are several noteworthy trials taking place in the coming 12 months in UK class actions.

The first full trial of a claim under the CPO regime in *Le Patourel v BT*[6] commenced in January 2024 for eight weeks, and the certification hearings for many of the pending CPO applications have been listed this year. The first trial using the umbrella proceedings order mechanism will also take place this year in the *Merchant Interchange Fee Umbrella Proceedings*[7], encompassing approximately 1,000 bundled claims by UK


Ian McDonald


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businesses alleging damages caused by the defendants' overcharging of multilateral interchange fees.

Environmental damages claims are expected to continue to grow in prominence in UK class actions, particularly those brought against UK parent companies for the alleged acts/omissions of their foreign subsidiaries. One of these claims, *Mariana v BHP*[8], is listed for trial in October 2024 and is among the largest collective actions ever commenced in England and Wales. The eight-week trial will determine the claims of 700,000 Brazilian claimants who allege that an estimated £36bn in environmental damages arising from the Mariana dam disaster in 2015 was caused by the defendants.

The most progressed GLO in the *NOx Group Litigation* (against Mercedes) will go to trial in February 2025. It, along with two other GLOs (yet to be determined), will act as test cases, the result of which will bind the remainder.

Important case management decisions are also expected to continue to shape the regimes as they arise.

1. *Mastercard Incorporated & Ors v Merricks* [2020] UKSC 51
2. *Lloyd v Google* [2021] UKSC 50
3. *Mark McLaren Class Representative Ltd v MOL (Europe Africa) Ltd & Ors* (Case no 1339/7/720)
4. *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28
5. [2024] EWCA Civ 9
6. *Justin Le Patourel v BT Group PLC* (Claim No: 1381/7/7/21)
7. Claim no: 1517/11/7/22 (UM)
8. *Municipio de Mariana & Ors v BHP Group (UK) Ltd & Ors* (Claim No: HT-2022-000304)
9. bills.parliament.uk/publications/54762/documents/4592
10. publications.parliament.uk/pa/bills/cbill/58-04/0003/230003.pdf

Outside the courts, there are two important proposed pieces of legislation that may have major impacts on UK class actions if they become law in 2024. The first is a new bill which would reverse the effect of the Supreme Court's decision in *PACCAR*, in relation to damages claims brought in the CAT.[9] The second concerns amendments to the Digital Markets, Competition and Consumers Bill to expand the CPO regime to include consumer rights class actions.[10] This is one for businesses to watch closely, as it would radically increase the risks of non-compliance with UK consumer protection laws for any companies with a UK customer base.

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MAYER | BROWN

A focus on ESG litigation

Osborne Clarke on how seriously companies should take greenwashing accusations

How do you see ESG litigation developing?

The concept of ESG is not a new one – but the attention it has gained is fresh and here to stay. Put simply: no-one has solved the climate crisis, globalisation has made supply chains harder to monitor, and levels of public scrutiny over companies' actions (and omissions) has never been higher. The result is that governments and regulators will continue to produce rules and guidelines which demand responsible action by businesses. The trend we're seeing more of is individual stakeholders using any means available – including litigation – to hold businesses to account where they perhaps don't feel governments and regulators are acting quickly enough.

Which parts of the acronym do you think will generate the most litigation?

It's perhaps artificial to carve up ESG when it comes to litigation – if a company is acting in a way which is not sustainable, that activity will arguably involve environmental sins, antisocial conduct and questionable governance at once. The directors' statutory duty to promote the success of the company explicitly includes reference to the long-term impact of the company's operations on the community, environment, suppliers, employees. Recent high-profile litigation has focused on governance (ie, derivative actions) in order to try to force a change in company activities. Businesses in the private sector need also to be prepared for more class actions focusing on supply chain practices and seeking compensation related to environmental issues such as carbon emissions and pollution.

What constitutes greenwashing under UK law?

Under English law, there is no single legal definition of 'greenwashing'. However, the term is commonly used to describe an entity making misleading or unsubstantiated claims about the environmental benefits of its products, services, or practices. The focus has developed swiftly from laws aimed at protecting consumers from false advertising to preventing the anti-competitive nature of greenwashing in a B2B context. It's not just about what label you put on a product, but how you promote your business more generally. Companies don't realise that every single statement (whether on their websites, in their sustainability reports, in their recruitment campaigns) that talks about their sustainability credentials is a potential hostage to fortune.

What has been the most significant greenwashing claim to date in the UK and what does it demonstrate?

So far in the UK, there haven't been many legal cases that could definitively be categorised as greenwashing. There are some examples of derivative actions aimed at forcing a change of approach by companies, but the most high-profile examples of greenwashing have resulted in fines and investigations by the Advertising Standards Agency, rather than legal claims in the courts. Additionally, the Competition and Markets Authority has initiated investigations into green claims made by several prominent companies. The UK's Financial Conduct Authority has also indicated its intention to crack down on greenwashing within the financial services sector by implementing an anti-greenwashing rule effective from 31 May 2024. This demonstrates that regulatory enforcement is currently the primary battleground for tackling greenwashing in the UK

How are most consumer/competitor legal claims against misleading environmental claims being made and funded in the UK?

As above, most greenwashing claims are pursued by regulators rather than consumers or competitors. However, this situation could change significantly in the coming years as large companies become subject to mandatory sustainability disclosure obligations. This could potentially lead to a surge in litigation based on misleading disclosures in published materials, such as under s90 and 90A (now schedule 10A) of FSMA 2000. The UK is increasingly becoming a favourable legal market for class actions, with a mature litigation funding market and a growing number of claimant law firms operating on a conditional fee agreement basis. Consequently, there may be an increase in class actions against companies engaging in greenwashing practices in the future.

How seriously should companies take the threat of greenwashing accusations?

Companies in the UK should take the threat of greenwashing accusations very seriously. With increasing public awareness and concern about environmental issues, consumers are becoming more discerning and demanding when it comes to sustainability claims. Regulatory bodies, activist groups and shareholders are also actively monitoring and challenging companies' sustainability claims and practices.

What are the potential legal liabilities for those accused of greenwashing in the UK?

Where a regulator investigates a business for false or misleading green claims it has wide ranging investigatory powers and a range of penalties that can be imposed. At its most serious, both a business and senior personnel within the business can be criminally prosecuted and face a fine or, for individuals, possible imprisonment. However, more typically, businesses may be required to commit to undertakings to prevent greenwashing, which will be enforced by the courts if necessary. In addition, businesses may have to offer compensation or some other form of redress if the greenwashing has influenced consumer transactions and may need to commit to removing any misleading advertising. Outside of regulatory investigations, businesses and individuals are at risk of the usual array of common law legal action to recover damages in contract and tort (including claims for breach of contract, misrepresentation or even fraud), as well as the applicable statutory remedies (for example, individual directors can be disqualified for the most egregious conduct or otherwise fined for reckless or dishonest reporting under the Companies Act 2006).

How can companies best prepare themselves (inc what steps can they take to ensure their environmental claims do not open them up to the risk of legal action)?

The potential developments in ESG litigation are driven by a combination of factors, including societal expectations, regulatory changes, investor demands, and the increasing recognition of the financial and reputational risks associated with poor ESG performance. It is important for companies to proactively assess and manage how their business impacts the environment and human rights at every stage of the value chain. This includes engaging with stakeholders, taking the time to really understand their environmental impact and their supply chains, ensuring accurate reporting, and proactively tracking evolving legal requirements to mitigate the risk of litigation. To meet the raft of new regulatory obligations, businesses also need to collect and store significant volumes of sustainability data and implement new ESG compliance and governance systems.

What legal defences are available to those facing claims?

Defences to claims by regulators include demonstrating adequate due diligence processes, being able to substantiate the claims in question and evidencing compliance with the relevant regulations. Failing that, if the greenwashing allegation is essentially well founded, a company should focus on demonstrating that it took reasonable steps to ensure that the green claim in question was accurate and it had appropriate systems and controls in place regarding making green claims. It should also take immediate corrective action.

How much experience does Osborne Clarke have working on ESG claims generally and greenwashing specifically? Do you have a highlight case and if so why?

Osborne Clarke is currently advising clients who are subject to regulatory investigation for misleading green claims. Our ongoing work means that we have first-hand knowledge of the standards regulators expect businesses to meet to achieve compliance, particularly around the Green Claims Code. This contentious experience has proven invaluable when helping clients assess their current claims, review substantiation, devise playbooks and train marketing and business teams.

What are Osborne Clarke's plans to build this part of its disputes practice and why? Are there one or two partners with a particular focus on this area?

Around our international network, our lawyers advise across the extensive range of legal services that are touched by ESG and disputes lawyers are just part of the multi-disciplinary team. As the web of public and regulatory interest and legislation grows, so do the contentious risks for our clients and so the team is expanding rapidly.

Katie Vickery and her team regularly advise clients in relation to misleading environmental claims enforced by the CMA and Trading Standards as well as wider ESG compliance, circular economy, deforestation-free products and supply chain risk management. With regard to governance, both Jane Park-Weir and Charlie Crowne are recognised experts in the field of directors' and officers' duties, ethics, corporate reporting obligations. Jane has a particular focus on handling complex corporate disputes, including derivate actions against directors and unfair prejudice claims. Charlie has a wealth of experience advising clients in relation to ESG and greenwashing risks in the financial services sector, including pension and investment funds.

Osborne Clarke's disputes and risk practice group also holds itself accountable in supporting the firm's broader ESG strategy. Osborne Clarke For Good is the firm's way of ensuing it's a good corporate citizen, a good employer and a good business.

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Ten-year review

Scaling up: a look back at the last ten years of disputes in London

Ten years on from the publication of *Legal Business*' inaugural *Disputes Yearbook*, Bethany Burns and Alex Ryan check in with London litigators to find out how much has changed in terms of both the work and the firms involved

Bethany Burns and Alex Ryan

When *Legal Business* first launched its *Disputes Yearbook* back in 2014 Brexit was barely on the radar, most people had not heard of Wuhan and post-financial crisis disputes work and oligarchs were helping firms cast aside any doubts about how sustainable further disputes growth was at either the biggest players in the City or the boutiques spinning out from them.

While much has changed, many of the key market players are still the same today and some of the bigger trends keeping litigators busy now were still evident a decade ago – albeit in nascent form.

Take one of the biggest disputes stories of recent years – the development of the group actions regime and the introduction of opt-out claims in the Competition Appeals Tribunal (CAT).

This work has pushed many firms to strengthen their competition litigation expertise and helped a clutch of disputes-only firms achieve prominence, not to mention supported the growth of the UK litigation funding market and spurred the development of a true claimant Bar. But firms were still talking about it and – in the case of Herbert Smith Freehills (HSF) – writing books about it last decade.

Facts and figures

In truth, while the work firms are doing has evolved over the years, much of it is still being done by the same firms. Disputes heavyweight HSF for example has held onto its top tier *Legal 500* ranking for commercial litigation consistently and almost doubled its revenue from contentious work from £320m in 2014 to £569.3m during the last financial year, despite London partner numbers in the disputes team staying broadly the same at around 50.

> There's been significant growth in really big cases, which are high-value, involve huge numbers of potential litigants, and often play out across multiple jurisdictions.
>
> Simon Day, Macfarlanes

While practice areas such as private equity have seen significant changes at the top of the *Legal 500* rankings, for premium commercial litigation in London there are only two firms ranked in the top tier that were not there in 2014 – Quinn Emanuel, which moved up in 2021, and Slaughter and May, which moved up in 2024. Clifford Chance, Freshfields, and Hogan Lovells have all been consistently ranked at the top, with Hogan Lovells notching a particularly impressive £752m in disputes revenue in 2024.

Quinn Emanuel aside, US firms are yet to make their mark at the very top of this ranking in the same way they have in some transactional areas.

As Ashurst dispute resolution head Jon Gale comments: 'US firms have put a footprint on the market', but they have not dominated. Many London litigators put this down to two factors: the longer timespan of litigation that makes it harder to buy-in market share quickly through just a few key hires; and US firms' reluctance to build the kind of big benches needed to handle the large claims that are so crucial to top-level London disputes.

Recruiters also observe that disputes partners tend to move less frequently than corporate, a point backed up by the fact that of the 37 names in the *Legal 500* Hall of Fame for premium commercial litigation today, only eight have moved firms over the last ten years.

Gale notes that US firms have been 'more successful in the arbitration space than in litigation'. This is borne out in the *Legal 500* data where there is not a single Magic Circle firm in the top tier for arbitration in the most recent research. Instead, the top spots are split between US firms Debevoise & Plimpton, King & Spalding, Skadden, WilmerHale, and White & Case. They sit alongside HSF, and 2014-founded London-Paris-Washington DC arbitration boutique Three Crowns.

In contrast, disputes only firms – whether large like Quinn or small like Three Crowns – have made more of an impact across the practice rankings.

HSF's former disputes head Damien Byrne Hill describes the change in these boutiques over the last ten years as making the market 'a different world'.

Of the 64 firms ranked for premium commercial litigation in 2024, seven (11%) are disputes-only. This is up from eight specialists out of a total of 123 firms ranked for commercial litigation in 2014 (7%). Quinn Emanuel, Stewarts, Enyo, Cooke, Young & Keidan, and Signature Litigation all made their way straight into the premium ranking when commercial litigation was split into premium and mid-market in 2021.

They were joined by Hausfeld, which was founded in 2009 and first ranked for competition litigation in 2015 before winning a space in the commercial litigation rankings in 2017; Seladore, which was founded in 2020, first ranked for banking litigation in 2023, and joined the premium commercial litigation table in 2024. Finally, Boies Schiller spin-out Pallas Partners was established in 2022, first ranked for banking litigation in 2023, and entered the commercial litigation rankings in tier six last year.

ESG and data: mass claims in two growing sectors

Regardless of whether a firm is a large UK player, a US giant or an independent boutique the activity trends are the same.

Macfarlanes partner and competition litigation and multiparty disputes specialist Simon Day points to the increase in large-scale 'mega' claims: 'There's been significant growth in really big cases, which are high-value, involve huge numbers of potential litigants, and often play out across multiple jurisdictions.'

For Byrne Hill, lawyers' ability to handle these cases has gone from a specialism to 'part of the toolkit for everyone who does litigation'.

As a result of this change and the growth in disputes work generally, firms have stacked their disputes benches both in the UK and worldwide (see box, page 40) to enable them to meet the needs of clients involved in mammoth claims.

Stephenson Harwood fraud and asset recovery team lead Ros Prince points to the 'significant development of specialism throughout the market' as a related shift, as firms promote and hire partners with niche expertise in areas from IP and regulatory to arbitration, insurance, and competition.

Mega litigation is not limited to any one sector. But litigators do highlight particular areas of activity.

Chief among them right now is ESG – an acronym that has surged to prominence over the last decade, and is now ever-present in law firm promotional materials and at conferences, not to mention the public consciousness, the press, an expanding web of regulation and, ultimately perhaps, the courts too.

Firms and claimants are enthusiastic about the future of ESG litigation, with the high-profile failure of ClientEarth's derivative

action against Shell doing little to dampen spirits (see cases of the year for more on environmental claims).

'We're seeing more activism playing out through litigation,' notes Leigh Day partner Meriel Hodgson-Teall. 'Sometimes claims will have a campaigning element to them. Charities and NGOs also have an important role to play and will sometimes use litigation as a way to help achieve their aims.'

Some doubt the prospects of this sort of claim though, with Helen Carty, London head of litigation and dispute resolution at Clifford Chance warning that 'litigation is generally more suited to claiming damages' than spurring changes in behaviour.

ClientEarth v Shell may have closed the shareholder derivative action route, but activists will be watching with keen eyes the progress of cases such as the mega class action over the Fundao Dam collapse and prospective claims against UK water companies (see 'Cases of the year', page 6).

Despite all of the talk and activity, some litigators are sceptical about exactly how this activity will shift the disputes market in the long term. 'There's a lot of commentary that ESG litigation will be big, with people looking at the extent to which greenwashing, corporate behaviour, and corporate governance will drive future litigation,' says Mark Molyneux, head of group disputes at Addleshaw Goddard. 'But E, S, and G each cover a wide range of issues. As yet it is unclear how that will play out, who are the claimants and what are the causes of action that claimant firms are targeting.'

Gale is of a similar view: 'ESG litigation is such a broad concept, encompassing a range of quite different types of dispute. There are things that would now be regarded as ESG litigation that we were [already] doing ten years ago. There absolutely were cases about things like environmental contamination and parent company liability, for example, but they weren't called ESG litigation.'

Away from ESG, litigators point to data as a key area for future mass claims. 'Data is the perfect fit for collective actions,' explains Lawson Caisley, head of commercial disputes at White & Case. 'Everyone uses data, so you have a huge pool of potential claimants. The evidential issues facing potential claimants can also be less complex as there is usually a record of whose data has been impacted. If you or I bought a packet of nuts six years ago, it'd be hard to prove in any group action based on that purchase because we don't tend to keep receipts from Sainsbury's from six years ago. But it should be relatively easy to prove that our data was included in a data breach.'

The route by which data group actions can be brought is by no means clear though.

The Supreme Court in *Lloyd v Google* [2021] struck out a representative action against Google. 'But famously,' notes Freshfields global disputes head Sarah Parkes, 'it didn't shut the door', leaving scope for claims under the GDPR and where claimants can establish that class members had suffered compensable harm.

Claimant firms and funders have their eyes on a bigger prize though: opt-out claims. As opt-out claims can only be brought in the CAT, they must be formulated as competition claims. Results so far have been mixed – but there are encouraging signs. Chief among them was the CAT's January certification of a reformulated

> 'Data is the perfect fit for collective actions. Everyone uses data, so you have a huge pool of potential claimants.'
>
> Lawson Caisley, White & Case

claim against Meta. Of course, certification does not mean success, and any flood of litigation in this area is unlikely until the first claimant wins at judgment.

As Gale notes: 'Many of those cases where a consumer law claim has been framed as a competition issue may start to fall down as they get to trial. There's a much higher standard to be met at trial compared to certification.'

Still, there is little reason to disagree with Parkes' assessment that 'we're going to continue to see the envelope being pushed in relation to data claims.'

Stopping the bus going off the cliff: the changing roles of litigators and courts

The shifts in the type of litigation that can be brought and the move towards mega cases and group claims has also changed the way litigators engage with clients.

'It used to be easier to contain litigation risk,' says Caisley. 'Companies' key exposure tended to be to regulators and commercial counterparties, and so they could exert a high degree of control over their risk of being sued. The threat of mass claims didn't really exist in this jurisdiction. That has now changed. If you're operating in a jurisdiction where mass claims can be brought, that changes how the boardroom sees litigation. Large corporates are now managing their business with an eye to the possibility that, if they suffer an event that affects a lot of people, the risk of a mass claim against them is increasingly real.'

> Sophisticated clients were never going to start writing contracts to the local law of European countries. London still has certainty of process and some of the top judges in the world.
>
> Natasha Harrison, Pallas Partners

Paul Lewis, joint managing partner of HSF's global disputes practice, makes a similar point: 'Litigators are often the people you don't want to see. But because class actions are a threat for effectively everyone now, businesses know they need to understand the risks.'

As Caisley comments: 'A lot of a litigator's skillset is risk management. Yes, we deal with what happens after the bus has gone off the cliff. But our job is also to try to stop the bus going off the cliff in the first place.'

Courts, too, are adapting to this new world, with several of the cases highlighted in our cases of the year feature demonstrating a willingness to both hear and actively manage a far wider range of large claims.

'One of the themes that comes out of these cases,' notes Day, 'is that the damage is often suffered in another jurisdiction, but claims are brought in the English courts against a UK holding company. The courts are increasingly willing to hear these sorts of claims.'

These developments lend force to the assertion, near-universal among London disputes partners, that the English court system remains capable and robust enough to assure the jurisdiction's status as a top venue for dispute resolution for clients from all around the world.

'Global companies facing significant disputes have confidence that the English courts remain unbiased and high quality,' says Caisley. Fears that the uncertainty of Brexit would cause global corporates to seat their disputes elsewhere have proven unfounded.

'Sophisticated clients were never going to start writing contracts to the local law of European countries,' argues Natasha Harrison, who founded Pallas Partners in 2022 after leaving Boies Schiller Flexner the previous year. 'London still has certainty of process and some of the top judges in the world.'

Indeed, Brexit may even have increased activity, incentivising the Competition and Markets Authority (CMA) to, in Freshfields London managing partner Mark Sansom's words, 'assert itself on the world stage as a serious, tough but fair regulatory authority'.

As Parkes adds: 'There was a sense after Brexit that competition law in the UK would ossify. Obviously that hasn't happened.' On arbitration, too, 'the UK has remained a strong, well established, arbitration-friendly jurisdiction', observes Simmons & Simmons disputes partner and global AI lead Minesh Tanna.

Mega cases and the litigation funding explosion

Regulatory activity provides an important framework for competition disputes – and the courts deserve praise for the way they have embraced the challenges of mega claims. But the group litigation boom would not have been possible without litigation funders. The courts can only respond to claims. And many mass claims would never be brought without access to litigation funding.

How technology is changing disputes

'The increase in the amount of data litigators have to handle is genuinely exponential', says HSF's Damien Byrne Hill. 'It's a bit like castles getting thicker walls and cannons getting better at firing through those walls. As fast as people can develop tools to interrogate the data and identify the important bits, the amount of data just keeps multiplying.'

And disputes lawyers are using tech to build ever more powerful cannons. As Ashurst's Simon Bromwich comments: 'It's now day-to-day business for a litigation practice to deal with huge document loads. We need technology to search through those huge loads, and that's now blessed by the courts. It was really in its infancy ten years ago but now it's in its element. And, with the development of AI, it will keep growing over the next ten years.'

In addition to third-party AI tools such as Harvey, which is backed by OpenAI's startup fund and used by firms including Allen & Overy and Macfarlanes, the market is also witnessing the growth of dedicated litigation analytics tools and vendors.

Solomonic is one such example – an analytics platform that tracks the progress of cases through the courts and allows lawyers to identify trends in sectors, value, and types of claim. Linklaters has used Solomonic since April 2022, and last November announced a partnership to help it develop a module to analyse cases in the CAT.

Another is Somos, a group action management company established in Brazil in 2019, in part in response to the novel case management issues thrown up by the ongoing mass claim against BHP over the collapse of the Fundao Dam (see 'Cases of the year', page 6). Mishcon de Reya acquired Somos in February 2024, hiring in founders Pedro Martins and Tomás Mousinho as equity partners. The acquisition adds to the firm's portfolio of litigation solutions, which also includes MDR Solutions, a litigation financing venture launched by the firm in September 2021, with support from major litigation funder Harbour.

Litigators' eagerness to discuss the potential impact of generative AI and other technologies on their practices outstrips their willingness or ability to make concrete predictions about how such technologies will be used and what level of investment will be required. There is good reason for this: even among tech industry specialists there is little consensus on the pace and scale of the change that tools like AI will unleash. In the legal sector, partners reach for analogies. Some argue that AI will be equivalent to the typewriter or the word processor – a tool that massively reduces the burden of mundane tasks such as document review and drafting. Others, that 'it's more like the invention of electricity: the use-cases aren't obvious yet, but it makes an enormous number of things possible'.

For now, firms are eager to find the sweet spot in terms of investment – putting enough money in that they can harness and benefit from technology, but avoiding spending so much that it hits their bottom line. What's clear though, is that the sort of mega cases that are increasingly dominating the London market cannot be properly handled without significant tech investment.

'Group litigation and litigation funding have grown hand in hand,' says Nicola Vinovrški, partner at Milberg London, a claimant boutique established in 2020. Hodgson-Teall agrees, adding: 'The explosion of litigation funding has changed what's possible and the scale of the litigation that's being brought.'

Litigation funding has been permitted in some form in England and Wales since 1967. But it was not until the 1990s and 2000s that the sector began to take off. *Legal 500* introduced its litigation funding ranking in 2023. The three top-tier funds Bench Walk Advisors, Harbour Litigation Funding, and Therium were founded in 2017, 2007, and 2009, respectively. The Association of Litigation Funders (ALF) was established in 2011, the same year as the release of the official Code of Conduct for Litigation Funders, while the International Litigation Finance Association launched in Washington DC in 2020.

The Supreme Court's 2023 *PACCAR* ban on percentage-based litigation funding agreements (LFAs) is widely seen as little more than a bump in the road. And this year justice secretary Alex Chalk KC announced plans for a legislative reversal and a wider review of the funding sector – a decision interpreted, in the words of Clifford Chance's Maxine Mossman, as 'trying to signal that as a jurisdiction we're supportive of third-party litigation funding, not least on the grounds of access to justice'.

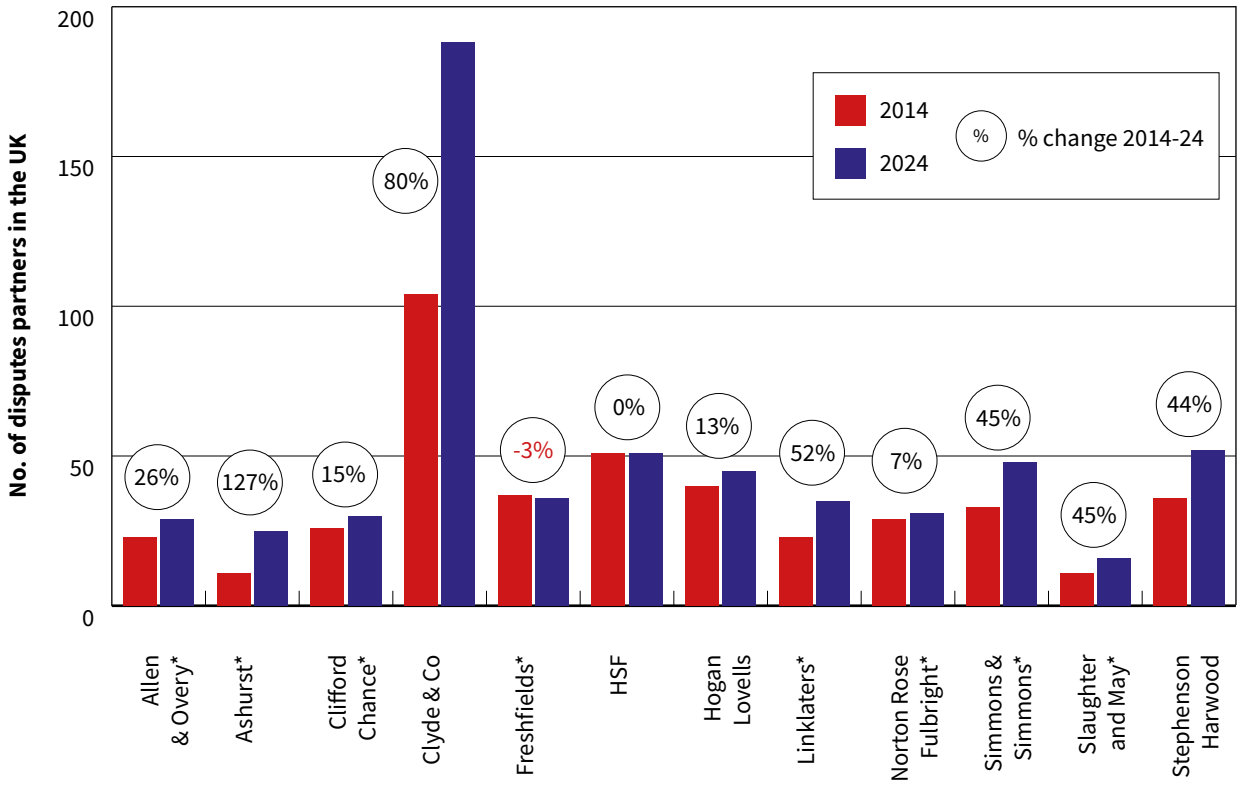
Stewarts head of aviation and international injury risk and funding partner Julian Chamberlayne is similarly positive: 'It's pleasing to see the CAT certify more opt-out claims and building a head of steam,' he says. 'It's been impeded a bit by *PACCAR*, of course, but routes are being found through that.'

In addition to offering funders high returns, group litigation also has a clear access to justice argument working in its favour, enabling claims from those who would otherwise have been unable to pay for litigation, particularly against major corporates. But funders are keen to stress that they are not solely interested in group claims, with a more diversified portfolio of cases allowing them to better hedge against the risks of one or two big losses. This pursuit of opportunity has even seen funders go beyond funding cases to back law firms in recent years. Bench Walk kicked this trend off when it helped launch Pallas Partners. Harbour meanwhile agreed a £33m facility with Slater and Gordon in 2023.

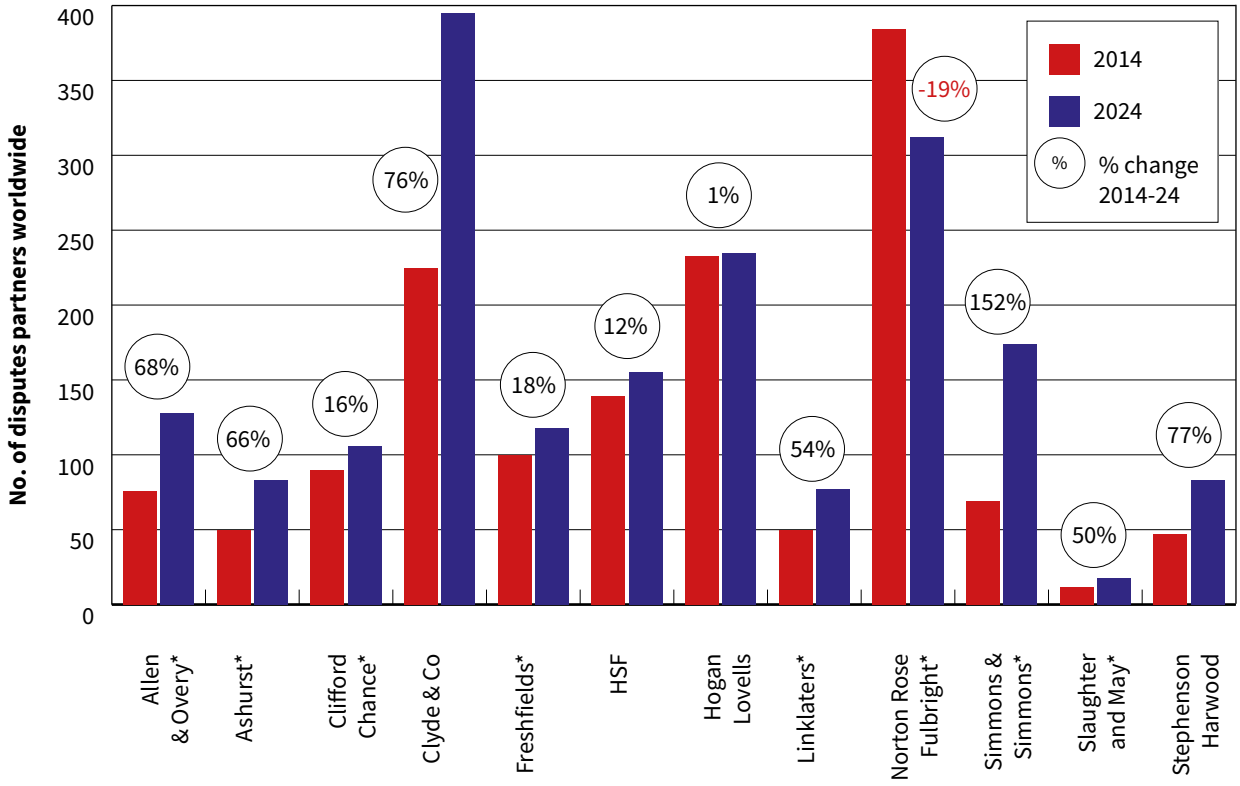
With firms under ever more intense pressure to compete for market share, and with many predicting big investments in technology on the horizon, it is possible that funders may further extend their activities backing firms.

Disputes by the numbers

No. of disputes partners in the UK 2014 and 2024



No. of disputes partners worldwide 2014 and 2024



* Numbers estimated by *Legal Business*

The rise of group litigation and funding are far from the only stories of the London disputes market over the last ten years though.

'Ten years ago, there was more Russian oligarch work,' notes Simon Bromwich, who headed Ashurst's dispute resolution practice before Gale after serving as the firm's managing partner from 2004 to 2012. 'Now, notwithstanding events of the last couple of years, no-one thinks they'll be doing enough of that to eat up their time.'

The rash of banking sector work that followed the 2008 financial crash is also in the past: 'Ten years ago we were doing a huge amount of banking work,' says Carty, 'now things look very different.' Worldwide government support prevented any comparable financial meltdown after 2020, and it is too early to say just how much countercyclical disputes work will be generated by the economic storm clouds that have gathered over the UK since 2022.

> In reality the big trend now is a number of these individual trends merging together. We're going to see more and more of these things combining, merging into really large cases.
>
> Martin Davies, Latham & Watkins

Martin Davies, global vice chair of Latham & Watkins' litigation and trial department, says: 'In reality the big trend now is a number of these individual trends merging together. You don't just get an ESG case anymore – chances are it's an ESG case against a banking background involving shareholders in a class action. Or you see things like alleged misuse of data by a dominant corporate – again you have data, competition, and class actions all bundled in. We're going to see more and more of these things combining, merging into really large cases, where legal teams are going to have to be adept at data, class actions, ESG – all of it.'

While the factors changing the disputes market are clear, what is less clear at this point is whether anything will shift the dynamics of the firms operating at the top of the London market. Only time will tell whether anything will prompt more aggressive recruitment moves by US firms in a bid to penetrate the market. If recent English-law entrant and, in the words of one US market commentator, 'litigation kings' Paul Weiss were to enter the City disputes market there may be no going back. ■

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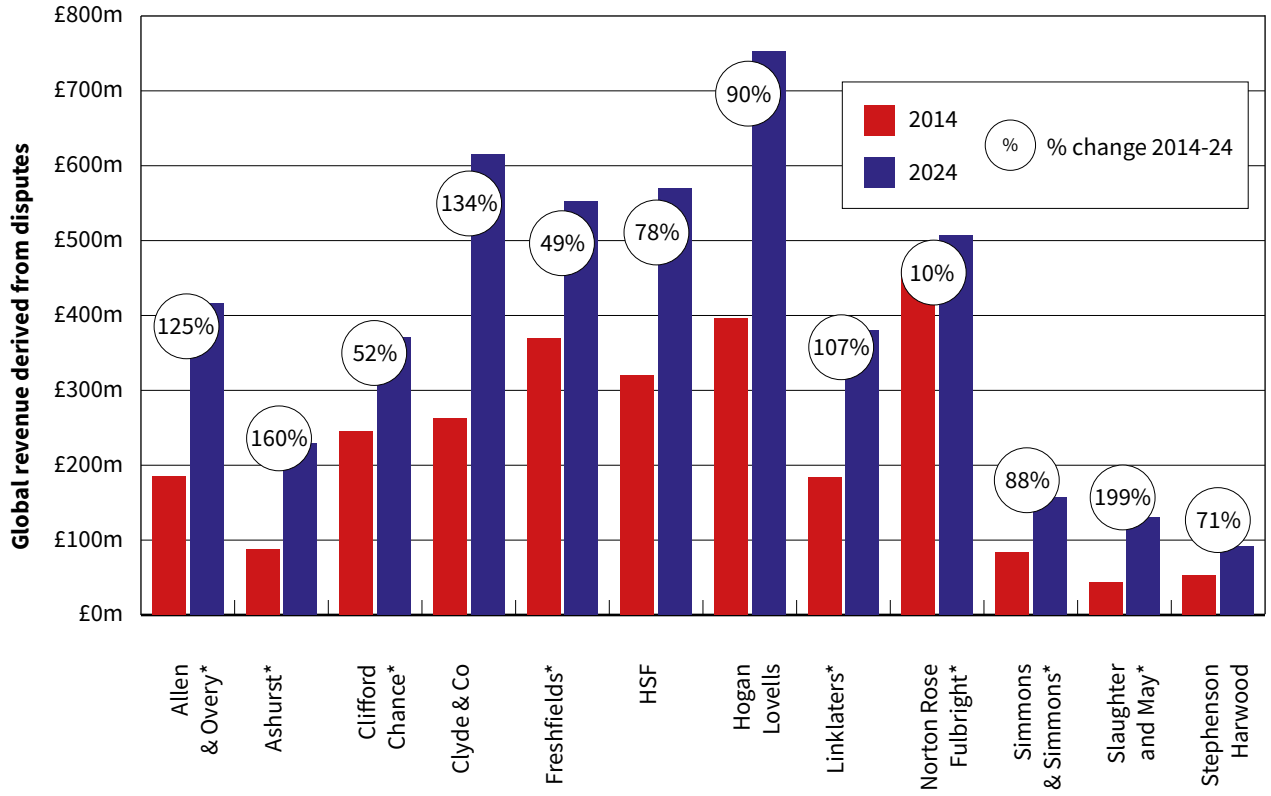
Change in estimated global revenue derived from disputes 2014 and 2024



Q&A: Giorgos Landas LLC

Iro Petrou and Myria Pornari examine trends and sectors in the Cyprus disputes market

What are the key regulatory frameworks that govern the disputes legal market in Cyprus, and how have recent changes impacted the landscape?

The key regulatory frameworks that govern the disputes legal market in Cyprus are European Union law and constitutional law. For civil disputes in the legal market in Cyprus, the key regulatory frameworks include the Civil Procedure Rules. Moreover, one of the key regulatory frameworks is the Civil Procedure Law, which outlines the procedural rules for dispute resolution in the courts and applies to all civil cases before the courts of Cyprus. The most recent change, regarding the implementation of the new Civil Procedure Rules, has a crucial role in the Cyprus legal system since it is aiming to achieve efficiency and timeliness in the resolution of civil disputes.

Can you provide an overview of the major types of disputes handled by legal professionals in Cyprus, highlighting any emerging trends or areas of growth?

The major types of disputes are commercial disputes arising from business transactions and contractual relationships. Further there are major disputes arising in the construction and real estate field. Our firm handles a wide range of cases regarding banking disputes, representing banks and financial institutions regulated by the Central Bank of Cyprus, as well as disputes arising from construction and real estate agreements and disputes relating to corporate litigation.

How do Cyprus courts typically handle commercial disputes, and what alternative dispute resolution mechanisms are commonly utilised in the jurisdiction?

Cyprus courts encourage parties to settle and resolve the arising commercial dispute at a primary stage. The alternative dispute resolution mechanisms which are commonly utilised in the Cyprus jurisdiction are arbitration and mediation. Both arbitration and mediation offer various advantages in terms of speed, cost, flexibility and confidentiality.

What role does international arbitration play in the Cyprus disputes legal market, and are there any recent developments or notable cases that have shaped this aspect of the industry?

International arbitration serves as a valuable tool in the Cyprus disputes legal market by providing a neutral, enforceable and specialised forum for resolving complex issues in a confidential and flexible manner. In the Cyprus legal system, the Arbitration Law governs the legal framework for disputes referred to arbitration. Contractual and commercial agreements may contain specific clauses for the settlement of any disputes that may arise to arbitration. The most notable cases in respect of the choice of international arbitration process concern disputes that may arise between contractors, employers, and the architects of construction agreements. The recognition, registration, and enforcement of international arbitral orders in the Cyprus legal system are also of considerable importance to ensure the protection and promotion of clients' interests.

How has the adoption of technology and digital tools affected the practice of dispute resolution in Cyprus, and what opportunities or challenges does this present for legal professionals?

The adoption and development of technology and digital tools has affected the practice of dispute resolution in Cyprus. The courts and lawyers have adopted electronic implements to communicate and speed up court processes which have traditionally been bureaucratic and time-consuming. Technology and digital tools in the Cyprus legal system enable the conduct of dispute resolution proceedings remotely, allowing parties to participate from different locations from the early stages of the litigation until the hearing stage. Adversely, the use of technology introduces concerns related to the security and privacy of sensitive legal information. Additionally, digital tools may lack interpersonal dynamics and non-verbal cues present in face-to-face interactions.

What are the key considerations for businesses and individuals seeking legal representation for disputes in Cyprus, and how do legal practitioners differentiate themselves in this competitive market?

Several key considerations are applicable when businesses or individuals are seeking legal representation in disputes. Specifically, clients often look for lawyers with expertise and specialisation in the relevant area of law related to their dispute. Furthermore, they seek legal professionals who are considered efficient, trustworthy and credible. It is also important for a legal practitioner to provide high-quality services at reasonable costs and handle the litigation in the most effective and time-consuming way and in the best


Iro Petrou


Myria Pornari

interests of the clients. Certainly, legal practitioners can differentiate themselves by specialising in specific areas of law, becoming experts in niche markets, and demonstrating in-depth knowledge.

How has the Covid-19 pandemic influenced the Cyprus disputes legal market, both in terms of case volumes and procedural changes within the legal system?

The pandemic undoubtedly accelerated the adoption of legal technology solutions and digital tools. In reference to the above-mentioned, the outbreak of Covid-19 resulted in the implementation of the electronic justice system. As regards the case volume of legal disputes, the outbreak of the pandemic had as a consequence a decrease in the submission of legal cases before the courts in Cyprus.

Are there any specific industries or sectors in Cyprus that are particularly prone to disputes, and what specialised expertise do legal professionals need to effectively navigate these areas?

It is beyond any doubt that certain industries are more prone to disputes due to their unique complexities, regulatory frameworks and business dynamics. The commercial, lease, banking and corporate fields are the main sectors which are subject to disputes due to the nature of their operations, complex regulations and various interacting parties. Legal professionals need to have an in-depth knowledge of the legal framework and regulations and need to assess the strengths and weaknesses of each legal case to effectively navigate the disputes.

What are the current trends in legal fees and billing structures within the Cyprus disputes market, and how are clients responding to evolving pricing models?

The current trend in legal fees and billing structures within the Cyprus disputes market is scale of court costs, which are determined according to the amount of the claim of each legal case. The legal fees may exceed the billing structures in specific circumstances. Moreover, legal professionals have the option to not follow the scale of court costs when they provide their legal services by offering legal opinions, drafting contractual agreements and resolutions, and providing migration services. Specifically, lawyers have the option to charge clients at an hourly rate, including everyday tasks related to the project's completion. Typically, clients provide positive feedback as they recognise the high-quality services offered by these professionals.

How does the geopolitical and economic context of Cyprus impact the disputes legal market, especially in relation to international clients and cross-border disputes?

The geopolitical and economic context of Cyprus can significantly impact the disputes legal market, influencing the types of disputes that arise, the demand for specific legal services, and the business environment for law firms operating in the region. Cyprus has positioned itself as an international business hub, attracting foreign investors and companies. Disputes involving international clients may arise from cross-border transactions, investments or commercial activities. The geopolitical and economic context of Cyprus attracts international clients and consequently cross-border disputes may arise. Furthermore, as countries or regions experience growth like Cyprus, there is a higher likelihood of cross-border transactions, mergers, acquisitions and foreign investments.

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ATTORNEYS AT LAW

Q&A: Sylvie Gallage-Alwis, Signature Litigation

Signature Litigation's Paris office co-founding partner on the French litigation system

Can you describe your experience and areas of expertise within the French legal system, particularly in relation to dispute resolution? How do you stay updated with changes in French law and jurisprudence that impact your practice?

I am both an avocat à la cour in France and a solicitor in England and Wales. I became a solicitor while being seconded in the London office of my previous firm. I spent ten years in an international full-service law firm before opening the Paris office of the disputes-focused firm Signature Litigation with two other partners in 2019. Five years later, our Paris office counts six partners and more than 20 associates. We have become one of the largest dispute-only teams in Paris.

My focus has always been to defend manufacturers, whether French or international, doing business in France which are facing litigation and regulators' investigations.

I am therefore involved in all types of litigation manufacturers can get involved in: commercial litigation (unfair competition, termination of contract, breach of contract); product liability; product safety; toxic tort and hazardous substances; and environment/pollution/climate change litigation. I also help our clients when they are subject to investigations by the French regulators on the compliance of their products or of their selling channels (this is how for instance we have developed specific expertise in assisting marketplaces).

As such, we try cases before commercial, civil, administrative, and labour/social security courts, both at first and appellate levels.

The topics we encounter are very varied and it is important to stay up to date, not just with French law and case law but also at European Union level and even worldwide as product or manufacturing-related issues are generally global and the strategy implemented in one jurisdiction should not impact the strategy that could be developed in other jurisdictions later on. We obviously review case law on a regular basis, as well as new regulation, we follow updates through media statements from the French state and the European Union authorities. We monitor the websites of the French and European regulators and courts. We are also keeping ourselves updated through websites compiling case law and LinkedIn.

> My focus has always been to defend manufacturers, whether French or international, doing business in France which are facing litigation and regulators' investigations.

What approaches to dispute resolution do you find most effective in France, and how do you decide on the best strategy (litigation, arbitration, mediation) for a particular case? Could you provide an example where a specific strategy led to a successful outcome?

Given my expertise, my clients are often defendants rather than plaintiffs. What we are increasingly seeing is the filing of multiple claims, on different grounds and before different courts, at the same time. We saw this first happening in France in asbestos-related cases where criminal complaints were filed to force the criminal authorities to investigate and identify relevant defendants. In parallel, people who developed what they believe were asbestos-related diseases would file claims before the labour and civil courts. People who have not developed a disease started filing claims on the ground of fear of cancer (so-called anxiety claims). In parallel, the authorities would investigate the working conditions, the compliance with environmental obligations, etc., with administrative and criminal proceedings potentially being initiated. Unions or any member of the population could also try to request from the state the documents the latter has in its possession to determine if all is compliant.

> French courts are known to be pro-consumers, pro-plaintiffs. The consequence is that some types of damages are recognised in France while they would not be elsewhere, or at least not that easily.


Sylvie Gallage-Alwis

We are now seeing this trend developing these past years outside toxic tort. Similar litigation strategies are indeed implemented in consumer-related claims (notably because collective redress mechanisms have not been much used yet in France) and environment/climate change allegations.

What unique challenges do you face when navigating the judicial process in France for dispute resolution? How do these challenges influence your case strategy and client advisement?

The challenges for our clients when they are involved in litigation in France are multiple. The first one would be around how evidence is gathered and shared. There is no discovery or disclosure in France as there would be in common law systems or in arbitration. Although this could sound favourable to the party which has more data/knowledge than the other, as it can technically pick and select what it wants to share, the reality is that there exist strong presumptions against companies in cases where they face consumers, NGOs, employees, individuals, or regulators. This means that even if they do not have in their possession data that would be useful for their defence, they will be deemed as having them and not wanting to share them, assuming that this data would be detrimental to their position. Winning as a plaintiff in this type of configuration is therefore easier as there is often a shift in the burden of proof.

This brings us to another challenge, which is that French courts are known to be pro-consumers, pro-plaintiffs. The consequence is that some types of damages are recognised in France while they would not be elsewhere, or at least not that easily (eg, the anxiety to develop a disease in the future due to the potential exposure to a chemical substance). To counter such presumptions, it is important to have a full picture of the matter and therefore, even if all will not be disclosed, we recommend conducting a full internal investigation before determining the best strategy to apply.

Another challenge for our international clients is how the trial works. Contrary to many jurisdictions, in France, there will only in very rare circumstances, at least in civil and commercial cases, be witness or experts' oral testimonies. Everything is in writing and the trial consists in the lawyer doing a mix of opening and closing statement before the court. Also, commercial courts and employment courts are composed of lay judges in the lower courts. It is only at appellate level that the case is heard by career judges. The way factual and legal arguments are presented should therefore be adjusted in such cases depending on whether you are before the lower court or the Court of Appeal.

Given France's role in the European Union and the international community, how does EU law and international law influence your dispute resolution practice? Can you share an instance where international or EU law played a critical role in a case?

EU law greatly influences French law and French case law. When it comes to litigation, the use of the procedural technique whereby a party asks French courts to ask questions to the European Union Court of Justice for guidance in how to interpret EU regulation has very much developed. This helps ensuring that there is a harmonised application of EU law throughout the EU territory.

However, EU law can also be at the origin of issues. Indeed, EU law allows member states to adjust EU law when it is deemed necessary for national reasons. This can lead to situations where a company is treated in a different way in different member states


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while EU law is supposed to provide legal predictability on the risks encountered by a business operator. For example, Regulation (EU) 2017/2394 of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws provides in Article 9 that the regulators of the member states shall have the power 'to remove content or to restrict access to an online interface'. In other words, member states should ensure that it is possible to ban a website from their jurisdiction if they believe that its content presents a risk. French law includes such a power in the Consumer Code (Article L. 521-3-1). However, this article grants such power to the French regulator (the DGCCRF – Directorate General for Consumer Affairs, Competition and Fraud Prevention), without any prior authorisation to be obtained by a court. In other words, the DGCCRF can take measures that would infringe freedoms without any possibility to first debate such a measure before a court, in the scope of an adversarial process. France is, to my knowledge, the only member state which has decided to directly grant this power to its regulator while other member states have granted this power to their courts. If an internet operator does not know this, it can be negatively surprised by a decision that it did not see coming, with major consequences to its business.

There is also an international influence on French litigation. These past years, I have observed an increasing number of plaintiffs who decide to first file their claim in the US while the correct forum would rather be France (eg, the plaintiff is French, damage occurred in France, the alleged fault/negligence happened in France). The result is that the US judge will rule that the case should be transferred to the French courts, adding however that some conditions should be met. Such conditions can be that the defendant agrees not to raise any statute of limitations' defence or that it will provide the necessary documents needed for the case to be heard by the French judge. The plaintiff's counsel will then try to have the French courts implement the US 'discovery'. Obviously, our position is that French Civil Procedure Law should apply to the request to have documents provided by the defendant and we have obtained judgments agreeing with this. However, this creates new types of debates before French courts due to the international nature of the case that the plaintiffs introduce by seizing a foreign court first.

‘These past years, I have observed an increasing number of plaintiffs who decide to first file their claim in the US while the correct forum would rather be France.’

How do you balance zealous advocacy for your clients with the ethical standards and professional responsibilities required by the French legal system? Could you discuss a time when this balance was particularly challenging?

I am a true believer that you can be a fierce litigator and a decent opponent at the same time. Complying with ethics should never be questioned and it does not have to. In France, you must ensure notably that the adversarial process is respected. Courtesy is also key, and I believe in allowing an opposing counsel to explain himself or herself in case there is an issue. For instance, I came across a case where we had a doubt as to whether opposing counsel really informed his/her client of all the developments in a case. Contacting him/her ahead of taking any step is the minimum we can do as colleagues in my view.

The principle of independence is also an important principle applying to French lawyers. When you work in product liability litigation, you can sometimes end up being asked to represent

both the manufacturer and its insurance. This could lead to a conflict of interest at some point. It is of tantamount importance to highlight to the client that this can happen and to always be vigilant throughout the handling of the case not to face any conflict, should you be representing both. I believe that it is the same issue that firms can face when a third-party litigation funder is involved. This is not yet standard in France but the same precautions will have to be discussed when the time comes.

France's economy is significantly globalised. How do you handle cross-border disputes, and what complexities arise from these cases? Please share an example of a cross-border dispute you managed and the outcome.

As mentioned above, when you represent a manufacturer in the scope of allegations that a product would not be compliant, the dispute quickly becomes a cross-border dispute. It is important to consider which jurisdictions offer collective redress mechanisms such as opt-out class actions. Indeed, based on experience, class actions are quickly launched in such jurisdictions (in the EU, you have Portugal and The Netherlands, under specific circumstances). This is important as class certification and document disclosure debates will shape the types of civil liability claims that could be launched in other jurisdictions.

> France has tried to modernise itself in the wake of Brexit and the creating of a specific international commercial chamber at the Paris Court of Appeal.

You also need to identify which jurisdiction would consider that the non-compliance leads to criminal proceedings (for instance, misleading commercial practices, greenwashing or planned obsolescence are criminal offences in France). This is important as in the scope of criminal proceedings, the authorities or judges in charge of investigating the issue generally have important powers, such as seizing documents, hearing witnesses/employees, conducting dawn raids. It is also important because in some jurisdictions, when a company believes that a criminal offence may have occurred, it should come forward to the authorities.

You should also take into account that any statement may lead to an interpretation of an admission of liability in a jurisdiction, while having to warn consumers should there be a safety concern.

We therefore always advise to draw up a list of jurisdictions where the product is most sold and involve either in-house legal teams or outside counsel in such jurisdictions early in the definition of the global strategy, even if the case is starting in France only, at first.

How do cultural and linguistic factors play a role in your dispute resolution practice, especially when dealing with international clients or parties? Can you provide an example of how you navigated such considerations in a dispute?

The oldest French piece of legislation is the 1539 Villers-Cotterêts Order imposing the use of French language as the official language in France. One of the many consequences is that all documents filed with French courts should be in French. Therefore, if you have documents that are in a foreign language that you wish to file as exhibits, you must translate those documents into French. France has tried to modernise itself in the wake of Brexit and the creating of a specific international commercial chamber at the Paris Court of Appeal. In this chamber, evidence can be provided in English as the judges in this chamber speak English. A witness or expert could also testify in English. Will this lead to other chambers to agree to documents in English? I do not believe so for the moment, but we can hope that this will happen in the future, especially if all parties involved understand English.

Another specificity of the French legal culture is that, based on experience, it is always better, in product liability cases, to have a French laboratory or French expert involved in the proceedings alongside any foreign laboratory or expert, even if the latter would be more knowledgeable on a specific technical issue. Indeed, the French regulator and the French experts appointed by a court will feel more comfortable taking into account the position of a French laboratory or French private expert than a foreign one, thinking that a foreign one could apply different sets of standards or rules or work differently than they would. This also ensures that the client's position is well-understood as the English language is not always fully commanded by French regulators and court-appointed experts.

A final cultural consideration related to something that often comes up in commercial and civil litigation is the fact that rules around questioning French employees are strict, as well as rules around looking into their emails or documents. When launching an internal investigation, it is therefore important to first ensure that French law and also EU law, such as the General Data Protection Regulation (GDPR) are complied with.

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Access to justice

Spurious claims under the spotlight – best intentions or base motives?

While many argue that litigation funding has an important role to play in access to justice, others are wary of the risks of unmeritorious claims being brought

Bethany Burns

With the marked increase in group litigation and rapid development of the litigation funding industry, the Competition Appeal Tribunal is consistently seeing novel claims. New theories of dominance are appearing, with what actually constitutes a dominant position widening. And the type of claim presented to the tribunal is expanding, with an increasing number of ESG claims filed.

As the only court in the jurisdiction to allow for opt-out group litigation, the CAT is the only means by which North American style class actions can be brought. Supporters of the expansion of the CAT's domain and these new claims see it as a necessary means of consumer redress. The system is seen as one that provides access to justice for consumers, and a way of holding major corporates to account.

Critics, however, argue that some in the market – on both the claimant firm and litigation funding side alike – are going too far in formulating novel claims. They argue that claims that wouldn't be traditionally considered 'competition' claims are being artificially wrapped up , and inappropriately shoehorned into this forum. Some argue that the claims that are being brought are poorly formulated, and based on political motivations, rather than legal merit.

Those on both sides of the debate argue that the growth of the funding industry has allowed claims that wouldn't have otherwise been heard to make their way to court. Supporters contend that this funding allows for important cases that are otherwise economically unviable to be heard, providing redress for consumers and holding corporates to account for their behaviour. On the other side, critics argue that the commercial motivations of the funders, and the returns they receive dramatically undermines the 'good' they are actually doing.

> It's more plausible for a privately paid case to be run on poor merits than a funded case.
>
> Julian Chamberlayne, Stewarts

Everything is politics

On the advent of spurious claims, Damien Byrne Hill, former global disputes head at Herbert Smith Freehills, references unmeritorious claims brought by lawyers for purely financial reasons. 'In the US, for example, claims tend to be law firms rather than funders, with contingency fee arrangements allowing firms to bring cases to make money out of settlements rather than to remedy losses,' he explains.

ClientEarth v Shell is evidence of one such case, with a derivative action brought against Shell alleging a breach of the Companies Act 2006. The judge decided that ultimately, ClientEarth had not brought the case in good faith, and held that it was for the directors to decide how to promote the success of a company.

Shell denounced the attempt, commenting 'the court has clearly found that ClientEarth's claim is fundamentally false', and deriding it as 'utterly misconceived'. The case is now regularly referred to by critics as evidence of the 'spurious' claims being sought by claimant firms and funders.

Macfarlanes competition litigation partner Simon Day argues that the characterisation of a case as 'spurious' will always depend on the perspective of whoever is making such a claim. 'There's always a political angle,' he says. 'ClientEarth obviously thinks it's doing good by trying to hold companies to account, trying to get them to hit targets adopted by governments in things like the Paris Agreement. Those cases are transparently political'.

Others are more absolute in their dismissal of the 'spurious claims' arguments, including Milberg London partner Nicola Vinovrski. 'This narrative that all claims made against huge corporations are necessarily spurious is quite convenient for corporate defendants. Where harm has been done, law firms and funders using available collective redress mechanisms facilitate consumers getting access to justice in relation to that harm.'

Vinovrski is one of many partners spoken to for this feature drawing attention the time devoted to due diligence undertaken by law firms and litigation funders alike ahead of commencing claims. The view echoes one taken by many, who view the attempts of defendant firms to undermine the basis of the claims as an easy form of defence.

While the popular criticism is that the advent of litigation funding has allowed for these unmeritorious claims, Stewarts cost and funding head Julian Chamberlayne disagrees, also stressing the due diligence undertaken by litigation funders. 'Once in a while, rich individuals or companies are prepared to pay their lawyers to argue cases that aren't particularly strong,' he says. 'It's more plausible for a privately paid case to be run on poor merits than a funded case.'

Chamberlayne's colleague, tax litigation head David Pickstone concurs. 'It's simply not possible to run unmeritorious claims,' he argues. 'Independent entities look at funders, insurers, and law firms, and every one of those bodies has a strong incentive in making sure claims are commercially viable.'

Checks and balances

On what can be done to prevent unmeritorious claims becoming rife, Byrne Hill says: 'The question is what level of control should there be and how should that control be operated in order to ensure that the market is operating efficiently and allowing claims to be brought that ought to be brought without encouraging senseless litigation that would never go to trial and is just a way of securing a settlement? There are two factors that go to finding the right balance. One is regulation, which doesn't exist. And the other is judicial control over the process, which does.'

Irrespective of an individual's view on how often claimant firms and funders are attempting to bring poorly formulated claims, there is largely consensus that the veracity of courts in England and Wales means even if they are brought, they are unlikely to succeed. Tracey Dovaston at Pallas Partners sums up the checks and balances inherent in the certification of group claims that takes place in the jurisdiction. 'There are always claims which may be spurious. But absolutely not all or even many claims are. In order to get funding you have to be able to show the merit of the claim. What you'll find when they're spurious is that they get thrown out at the early stages.'

Dovaston's Pallas colleague Fiona Huntriss points to a further safeguard in the system that prevents spurious claims – namely the adverse costs regime that differentiates proceedings here from in North America. 'England is a loser-pays jurisdiction, so there's a built-in safeguard against spurious claims. I don't think England is susceptible to a rise in spurious claims, due to adverse costs.'

While many interviewed acknowledged the flurry of novel claims to have appeared in recent years, and question the merits of them, most trust that the judiciary in England and Wales will prevent unmeritorious claims making their way through courts. As Michael Jacobs of Boies Schiller concludes: 'There are lots of controls and balances in place to ensure claims aren't completely rubbish and ill conceived.' ■

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Navigating dispute resolution: Exploring expert determination mechanisms – Polish perspective

Sołtysiński Kawecki & Szlęzak on the increasing importance of dispute adjudication boards

In recent years, court proceedings in Poland have been taking increasingly longer. The natural answer to this is arbitration, but unfortunately, in business reality even arbitration turns out to be too long for the parties. Probably for this reason we observe seeking for dispute avoidance by incorporating different kinds of dispute-resolving mechanisms into contracts. Does it have a chance of working?

The above-described trend applies in particular to the expert determination clauses. The mechanism is simple: if a dispute between the parties pertaining to a particular non-legal issue arises, the parties will appoint an independent expert to determine who is right. We observe that the number of such clauses in commercial contracts has increased significantly in recent years.

A similar idea lies behind the dispute adjudication board (DAB) mechanism known from FIDIC model contracts. DAB was designed to resolve all disputes arising between the parties during execution of a contract. The common understanding was that DAB should be preferably composed of engineers who – if needed – have an expert knowledge essential to resolve the dispute between the parties. Formerly, it had been a common practice in Poland for the DAB part of FIDIC Clause 20 to be crossed out from FIDIC contracts. The pioneers of the exclusion of the DABs mechanism from FIDIC contracts were public sector investors. Private entrepreneurs have followed in their footsteps, as due to the ongoing dynamic development of public infrastructure projects in Poland public sector investors represent a massive share of the largest construction contracts in Poland and are shaping market trends for construction projects. Now, there's an ongoing discussion about reintroducing DABs into construction contracts based on FIDIC model contracts. The discussion is being fuelled by the hope that this will speed up the resolution of disputes, which are an integral part of almost every major construction project.

> There's an ongoing discussion about reintroducing DABs into construction contracts based on FIDIC model contracts.

However, while the use of expert determination clauses and FIDIC's DAB is long established in Anglo-Saxon legal cultures, such mechanisms may not be effective in the Polish context. Common-law contractual clauses on expert determination or DAB directly transposed into Polish law may prove to be *lex imperfecta*. Breaching these clauses and skipping or bypassing the expert determination/DAB mechanism may not trigger any significant sanctions, rendering these provisions toothless.

FIDIC models are widely used around the world, which creates the assumption that they operate in exactly the same way. However, different FIDIC-based contracts are governed by different national laws and the courts of different countries assess the validity, meaning and effect of the provision of such FIDIC-based contracts, including the DABs mechanism, in the context of different legal frameworks. This also applies to other expert determination mechanisms, which appear to be international standards, but nevertheless may function quite differently from one jurisdiction to another.

In many jurisdictions, if a contract provides for expert determination/DAB, the use of this mechanism is mandatory. If a party tries to bypass this mechanism and refer an issue that was to be determined by an expert directly to arbitration or a court, such an attempt will be doomed to failure; the arbitral tribunal or court will simply reject such a claim as premature.

This is not the case in the Polish jurisdiction. Polish courts and arbitral tribunals generally do not consider that skipping an expert determination mechanism is a reason to reject a claim without considering the merits of the case. Instead, depending on


Katarzyna Paczuska-Tokarska


Justyna Kucia

the circumstances of the particular case, they either determine the issue that the expert was supposed to have determined themselves, or they order the parties to carry out expert determination, suspending the proceedings until the parties comply with this order, or they find that, in the absence of an expert determination, the claim is unfounded and decide on the merits of the case by dismissing the claim.

In the case of DABs in FIDIC contracts, Polish courts most often find that referring a dispute to the DAB is in fact not mandatory and that either party may refer the dispute directly to court or arbitration. They derive such a conclusion from the constitutional right to a court and oftentimes also from FIDIC sub-clause 20.8, which states that a dispute may be referred directly to arbitration when 'there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise'. The Polish courts recognise that the 'otherwise' could mean a situation where the parties fail to appoint a DAB or to request an appointing entity to do it, so no DAB is appointed. This was the approach taken, for example, by the Court of Appeal in Gdańsk in its judgment of 28 November 2013, case No. I ACa 550/13, and subsequently confirmed by the Supreme Court in its judgment of 19 March 2015, case No. IV CSK 443/14.

Whether or not skipping the dispute avoidance mechanism blocks the possibility of taking the dispute directly to arbitration or court, it still remains a breach of contract. Polish law does, of course, provide for sanctions for breach of contract, but these tend to be ill-suited to a breach involving bypassing expert determination/DAB mechanism. The primary sanction for breach of contract is liability for damages. While the occurrence of damage is an indispensable element allowing application for sanction and being awarded damages, in the context of the expert determination/DAB mechanism, bypassing such mechanism and referring the dispute directly to arbitration or court, it may be challenging to identify whether and what damage it inflicts on the other party.

The highlighted difficulties with the effective application of the expert determination/DAB mechanism in Polish contracts might be – to some extent – mitigated. However, in order to do so and to provide entrepreneurs with an effective, fast-track dispute resolution scheme, expert determination/DAB clauses must be carefully drafted, taking into account the nuances and peculiarities of the Polish legal framework and case law.

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Bifurcation – More risk than reward?

Gernandt & Danielsson look at the recent trend of bifurcation in Swedish litigation and arbitration

Like most other legal practices, arbitration and litigation are sensitive to trends. Arbitration even more so, due to its flexibility and dispositive nature compared to the many times rigid and robust procedural codes that – for better or for worse – tend to bar more creative approaches from the courts or counsel.

In recent years, bifurcation of disputes has become trendy in Swedish litigation as well as Swedish domestic and international arbitration. Many times, it is presented as a cost-efficient way to resolve the dispute or as a means to refine and streamline the case in order to put focus on the relevant issues. Although it is easy to be caught in the flow, old apprehensions as well as recent experiences, justify that the matter of bifurcation be addressed with due caution and diligence.

One dispute, two cases – declaratory reliefs and orders

A claimant can achieve a form of bifurcation by first bringing an action with a request that the court declare that there is a legal relationship, eg, an obligation to deliver or pay, and then, if the first request is successful, request that the court order the respondent to perform. In this manner, issues relating to the existence of an obligation as such will generally be addressed in the first case and issues relating to the quantification of the obligation will be addressed in the second case. Through this approach, the dispute will be divided into two separate proceedings before two differently composed courts or arbitral tribunals (assuming that the same arbitrators are not engaged).

> A claimant can achieve bifurcation by bringing an action with a request that the court declare that there is a legal relationship, and if successful, request that the court order the respondent to perform.

Under the Code on Judicial Procedure, a request for declaratory relief is only allowed if it concerns uncertainty about a legal relationship, eg, an obligation to pay a debt, that is to the claimant's detriment. Fulfilling these criteria is essentially a matter of designing an appropriate request for relief, which can be quite challenging at times.

In addition, a request for declaratory relief requires that the court find that the action is suitable. This assessment involves a balancing of the respondent's interest in not having to endure two proceedings and the claimant's interest in receiving a declaration before spending resources on the matter of quantification. In general, the probability that a decision in the declaratory case is followed by additional proceedings, the respondent's interest in being able to produce an adequate defence and the extent to which the action is intended to mitigate the claimant's detriment, are decisive for the assessment. If, for example, in a damages dispute, the claimant requests a declaration about liability, but not causality, the action may very well be dismissed. The judgment would only cover a small portion of the entire dispute, not cure the uncertainty about the legal relationship to any greater extent and most likely be followed by a second set of proceedings. With that said, the Swedish courts' threshold for allowing declaratory reliefs is lower than what the law implies.

The Code on Judicial Procedure is not applicable in arbitration and the Swedish Arbitration Act is silent on the criteria of declaratory reliefs. Hence, an arbitral tribunal will have a wide discretion also to decide questions about the appropriateness of allowing declaratory reliefs. Another important difference is that an arbitral tribunal can make declarations about the existence or non-existence of facts, not only legal relationships. However, the starting point is that an arbitral tribunal shall not, upon the respondent's objection, allow a request for declaratory relief unless it is suitable, which

> In a damages case, a declaratory judgment or award that does not address the matter of causality is of very low value to the claimant.


Björn Tude

largely depends on a similar test as to the balancing of the parties' respective interests.

It may seem tempting to a claimant to divide a dispute into two separate sets of proceedings. The usual rationale is that the claimant is quite sure about the subject of liability, eg, a breach of contract, but uncertain if and to what extent it has actually suffered a loss and how such loss will be quantified. Therefore, the claimant seeks a declaration hoping to reach a settlement once a judgment or award has been rendered in its favour. Through this method, the claimant may hope to save time and resources by not having to fully assess and prove the quantification.

It is important to note that in a damages case, a declaratory judgment or award that does not address the matter of causality is of very low value to the claimant. Such a judgment or award will not only allow the respondent to object against the amount of the loss, but also to the issue of whether the ground for the damages, eg, the breach of contract, has actually led to a compensable loss. Conversely, if the requested declaration is very wide and encompasses every aspect of the dispute except the quantification of loss, the claimant may be faced with an objection that the relief is not suitable. The grounds would be that it is not proportional to burden the respondent with two sets of proceedings when the claimant can request an order without significant additional costs. Accordingly, a claimant who contemplates bringing an action for declaratory relief needs to consider thoroughly the scope of the proceedings.

Furthermore, if the respondent is a sophisticated counterparty, it will seldom accept a settlement following a declaratory judgment or award unless the respondent itself has thoroughly analysed the extent of the liability. Thus, the argument that the claimant can save time and resources by not having to fully assess and prove quantification is, many times, moot.

Another risk with dividing a dispute into two separate proceedings is that the duration of the first dispute and the time between the first and the second dispute can be very long. This risk is oftentimes overlooked. At least in court litigation, an appeal could add several years to the proceedings. Persons and counsel who were involved in the first case may no longer be available when the second case begins. This will, of course, increase the time and resources required in relation to the second dispute, but can also cause that the quality of evidence of importance for both disputes may be lower in the second dispute. For new persons working with the case, the judgment or award from the first dispute will be the first and main source of information. If the judgment or award is very brief, ambiguous or sweeping, it may cause the second dispute to take another form than foreseen during the first dispute. This may add unwelcome surprises, usually to the claimant's detriment.

One case, two judgments or awards – Separate judgments and awards

Another form of bifurcation is the splitting of one case into two or several judgments or awards. In Sweden, a separate judgment or award can either concern a separate claim, or the existence or non-existence of one or more facts which are of immediate importance to the outcome of the case, eg, that a contractual provision shall be interpreted in a specific manner, that an obligation exists, or that a claim has been subjected to a statute of limitation. The latter type of separate judgment or award can also concern how a specific issue, mainly relating to the application of law, shall be decided in connection with the adjudication of the case. By nature,


Daniel Waerme

> Separate awards concerning matters that primarily relate to the application of law have gained popularity in recent years.

a separate judgment or award does not conclude the case. Even if the court or tribunal finds that a fact of immediate importance to the requested relief is not at hand, the court or tribunal would still need to render a final judgment or award. The basic objective of separate judgments and awards is improving the procedural economy. The reasoning is that by addressing a preliminary issue that will affect the case, costs can be avoided if the result of the assessment is that the action cannot be granted.

Particularly in arbitration, separate awards concerning matters that primarily relate to the application of law have gained popularity in recent years. The theme for such awards is usually that a contractual provision relevant to the dispute should be interpreted in a specific manner or that a specific valuation method should be used when assessing a loss or a claim. Such awards differ quite significantly from the separate awards that concern the existence of non-existence of dispositive facts. The objective is not procedural economy in the sense that the award may lead to a situation where the remainder of the case can be easily adjudicated, but rather to streamline the case and direct the parties to address issues in a specific manner. A separate motive is that parties may be more inclined to settle a case on quantum if they have been provided with the right tools – in the form of the tribunal's assessment – to do so. Although this can bring benefits from a procedural economy perspective, it is also a form of substantive procedural guidance.

Just as with dividing a dispute into two cases using declaratory relief, there are certain risks with separate awards, some of which are oftentimes overlooked. A separate judgment can be appealed under certain circumstances and a separate award can be challenged. Depending on the circumstances, an appeal or challenge can add further time to the proceedings. Through such actions, the potential procedural economic benefits of the separate judgment or award are usually lost.

If a separate award concerns the interpretation of an agreement or the application of law, there is a risk that the parties adjust their positions due to the award. If such adjustments have the effect that the separate award is no longer relevant, the intended procedural economic benefits are lost. In such situations, the proceedings have arguably become more expensive through the rendering of the separate award. Adjusted positions after a separate award can also put an arbitral tribunal in a difficult position. What should the tribunal do if the adjustments seem caused by a misinterpretation of the award? This may give rise to complicated issues relating to the permitted scope of the tribunal's substantive procedural guidance. In addition, if the parties adopt new positions based on a misinterpretation of a separate award, there is risk that the parties perceive that the dispositive part of the final award deviates from the dispositive part of the separate award, which typically constitute grounds for a successful challenge of the final award.

Similar issues are subject to resolved and pending challenge proceedings before the Swedish courts. Without going into details of those particular cases, it is noteworthy that separate awards concerning the application of law or contract tend to have a profound impact on the course of the proceedings in larger arbitrations. The awards simply tend to adjust the direction of the parties' argumentation, with no real effect as to the number of arguments that are made or the amount of evidence that is adduced. From this perspective, the argument that a separate award would be beneficial from a procedural economic perspective is more or less a fiction.

> Bifurcation can have benefits. A claimant may have an interest in establishing that its counterparty is liable for a breach of contract at a stage when it has not yet suffered loss.


Oscar Nyrén

Is it at all worth it?

Bifurcation can have benefits. A claimant may have an interest in establishing that its counterparty is liable for a breach of contract at a stage when it has not yet suffered loss, eg, if the claim would otherwise be subjected to limitation. In such cases, it can be necessary to allow a bifurcation of a damages dispute through the use of a declaratory award. However, in light of the procedural economic risks, the approach should rightly be regarded as a resort rather than an opportunity. Similarly, a separate judgment or award can be a good tool if the case hinges on a threshold issue that is clearly separated from the other issues, for example a jurisdictional objection based on arguments and evidence separate from the case on the merits. However, many times the issues to be determined separately are entangled, eg, liability and quantum, and depend on the same arguments and evidence. The risk for entanglement will not only mean that the benefits from a procedural economy perspective will be lost, but also that the precise scope or theme for the separate award will have to be very carefully determined. If the scope and theme are not thoroughly considered and determined, the separate award may have devastating effects on the procedural economy and, even worse, affect the parties' ability to plead their cases effectively. An unclear theme may lead to issues of interpretation and uncertainties that can affect how the cases are pleaded both before and after the separate judgment or award.

Accordingly, even though the promises of efficient and economic procedures may seem tempting, there is every reason to be cautious when the subject of bifurcation is brought up. If the matter is brought up by the court or the tribunal, the parties should remember that they most likely know more about the issue in dispute – depending on the stage of the proceedings – and assist the court or tribunal in its assessment by pointing out risks. If the matter is brought up by a party, the court or tribunal should be very mindful and make sure that the theme of the contemplated separate judgment or award does not risk leading to further disputes.

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Debate winners – which disputes teams are best at making their case to the *Legal 500*?

From High Court stalwarts to national powerhouses, an analysis of the *Legal 500* UK disputes rankings highlights the firms at the top of their game, with HSF, Quinn and DLA leading the pack

Ben Wheway

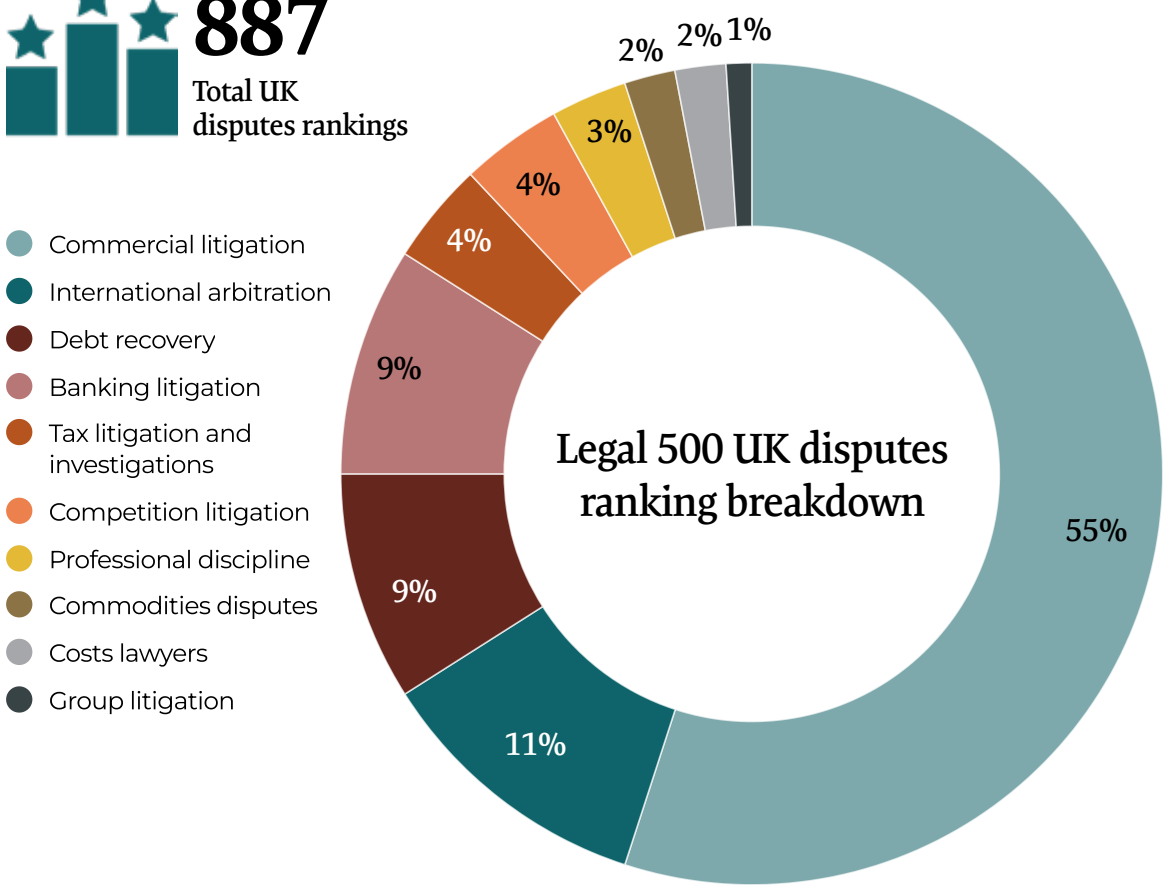
Disputes is one of the broadest areas of work covered by the *Legal 500*; while commercial litigation accounts for over half of all of our disputes rankings, a diverse range of specialisms also fall under the disputes umbrella, from professional discipline and commodities to debt recovery and costs.

In London, Herbert Smith Freehills, Quinn Emanuel and DLA Piper have the most rankings with seven, but HSF stands alone as the only firm with five top-tier rankings, and also holds the most individual rankings, with 30. Three HSF partners have two rankings – public international law head Andrew Cannon, next generation partner Hannah Ambrose and former global disputes head Damien Byrne Hill (*pictured*).

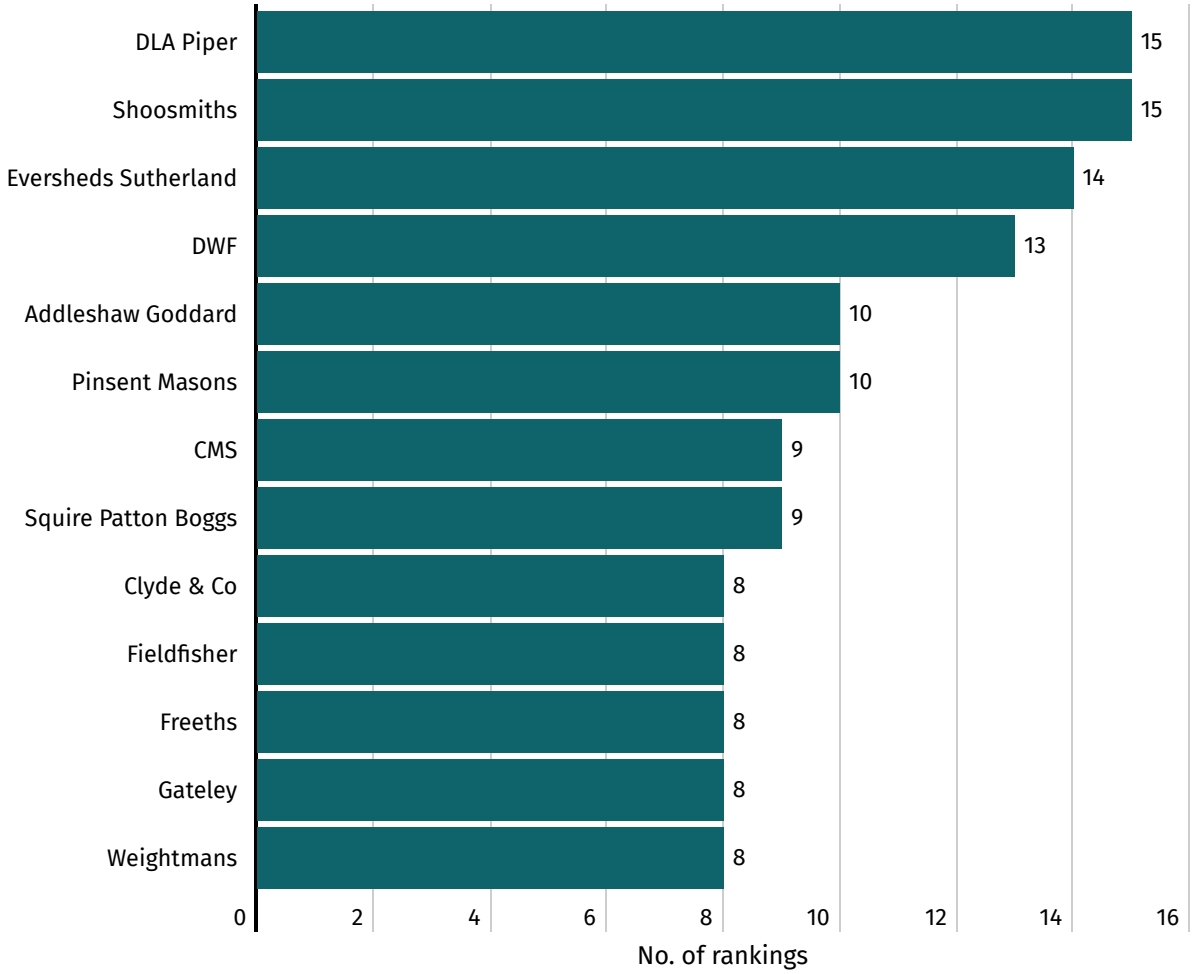
On a national level, DLA comes out top for most top-tier rankings with six, as well as the most ranked individuals – the firm is home to 31 hall of famers, leading individuals, next generation partners and rising stars across the country. DLA and Shoosmiths share the top spot for the most UK disputes rankings with 15 apiece, closely followed by Eversheds Sutherland and DWF. ■


Photographer
JUAN TRUJILLO

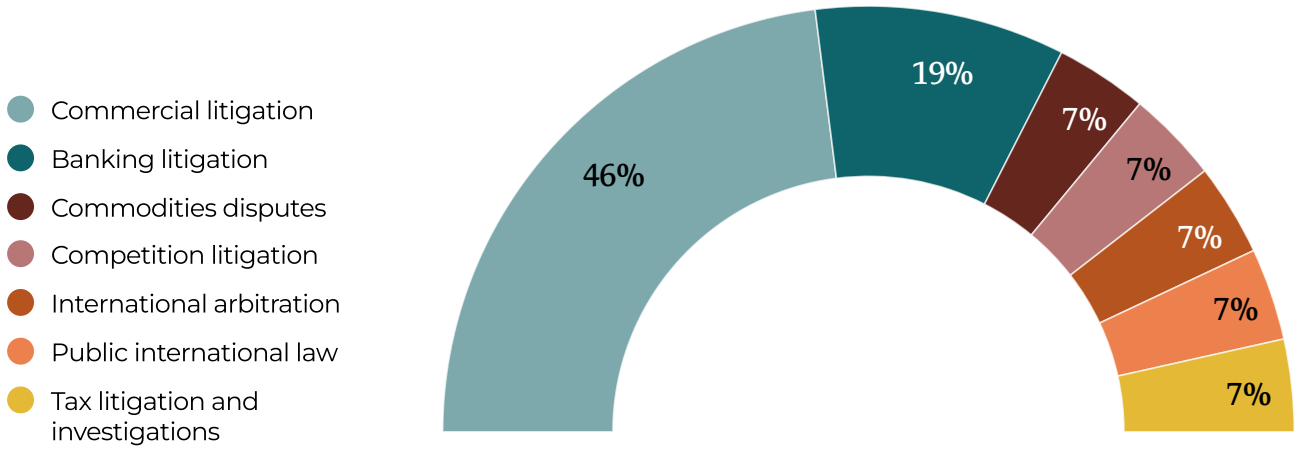
887
Total UK disputes rankings



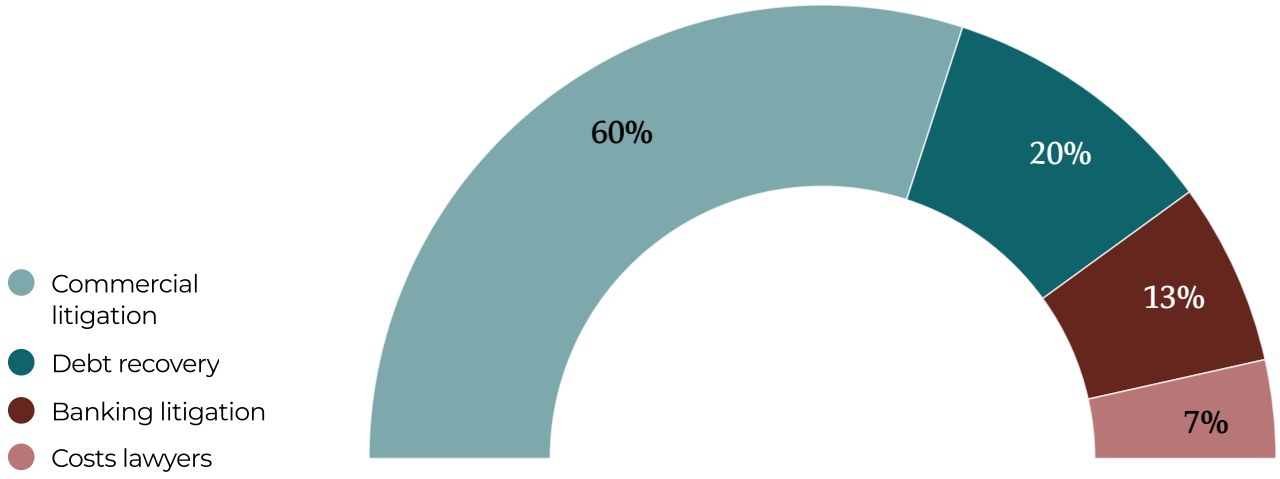
Firms with the most rankings: UK wide



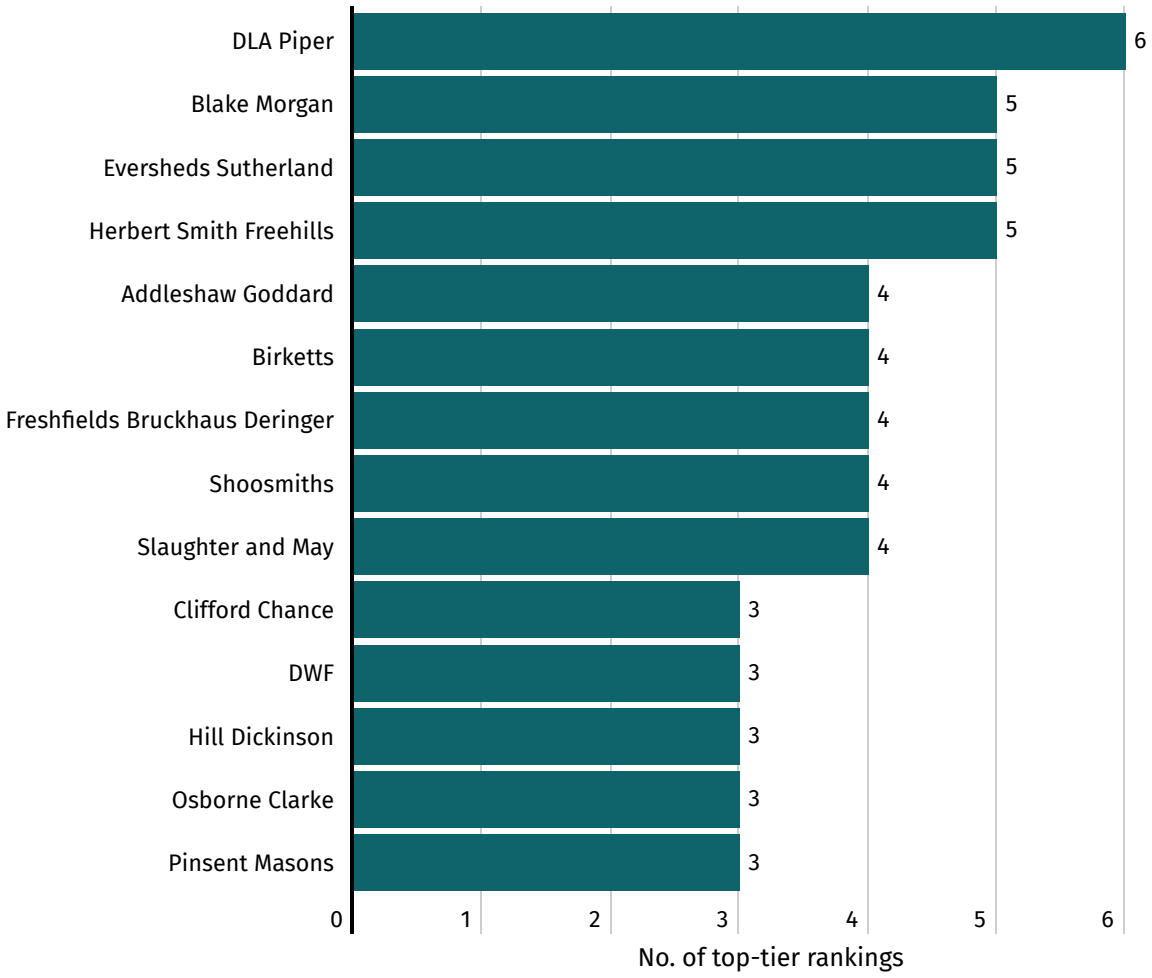
DLA Piper: UK-wide rankings breakdown



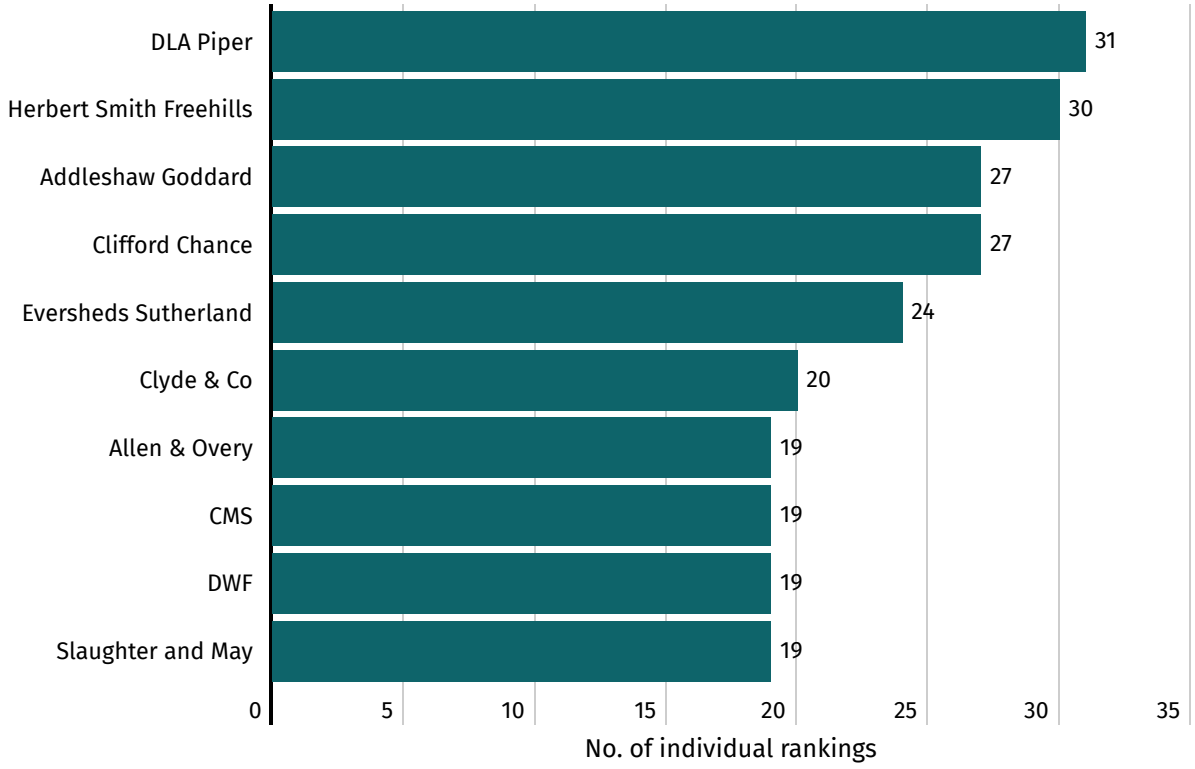
Shoosmiths: UK-wide rankings breakdown



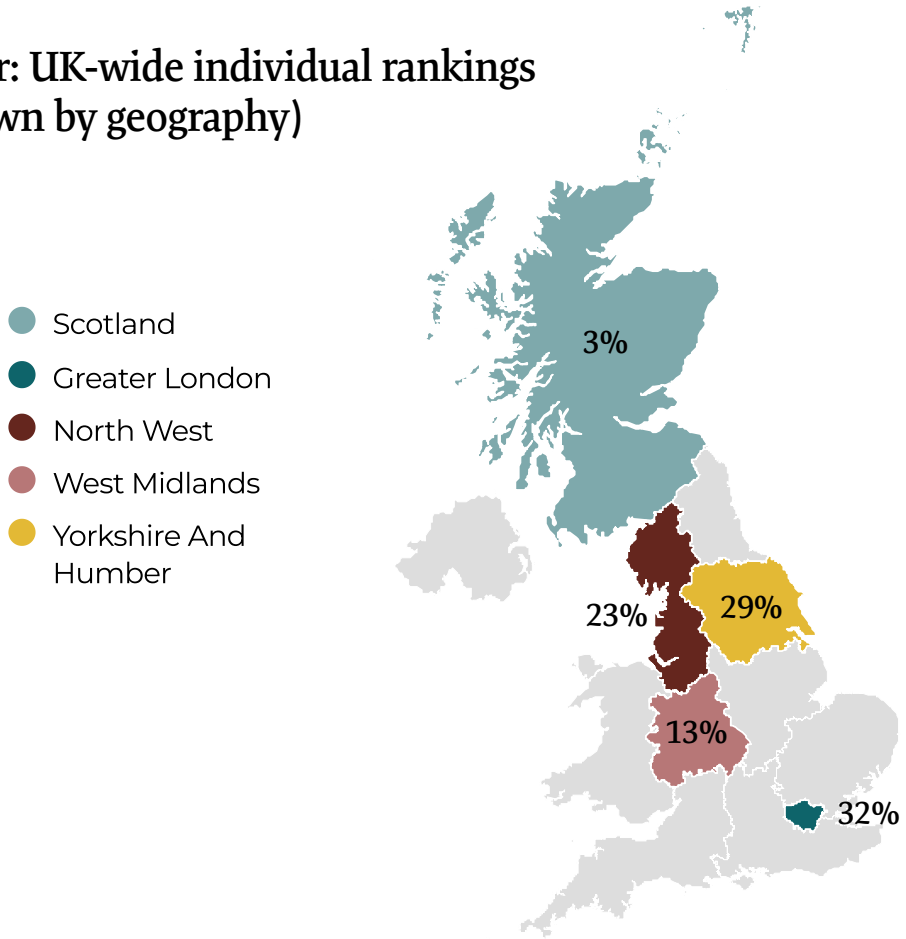
Firms with the most top-tier rankings: UK wide



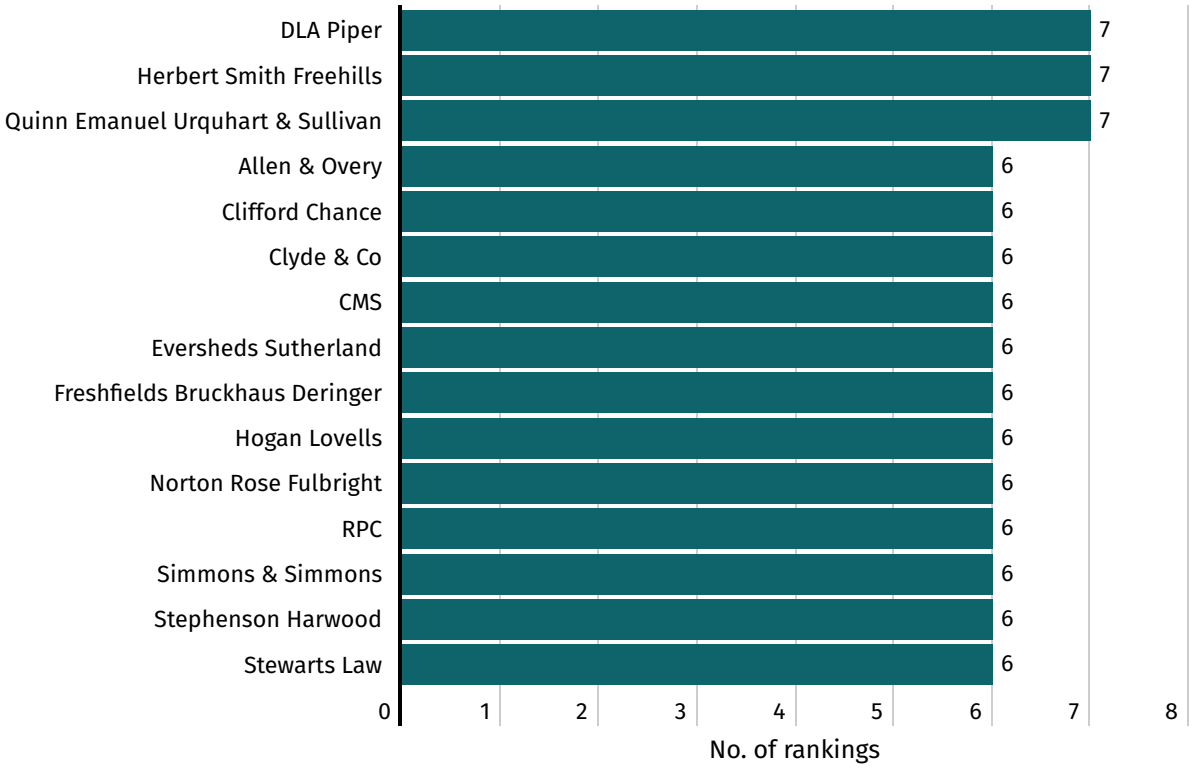
Firms with the most individual rankings: UK wide



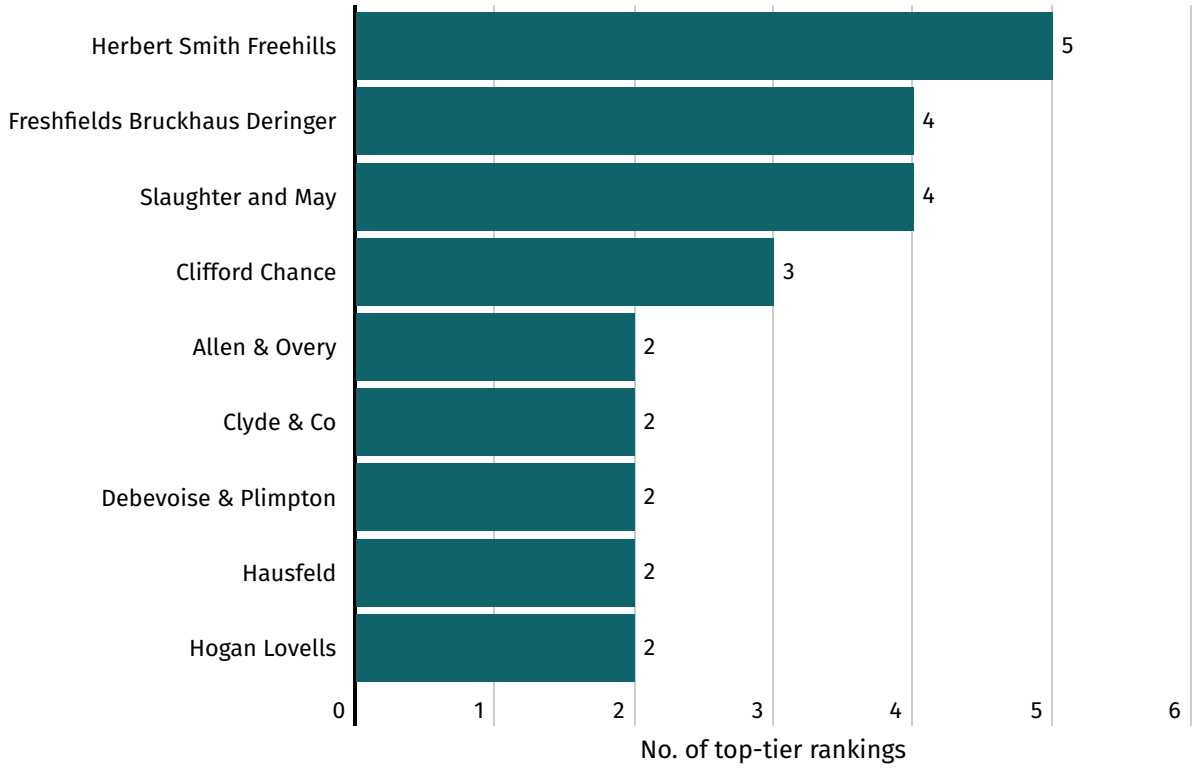
DLA Piper: UK-wide individual rankings (breakdown by geography)



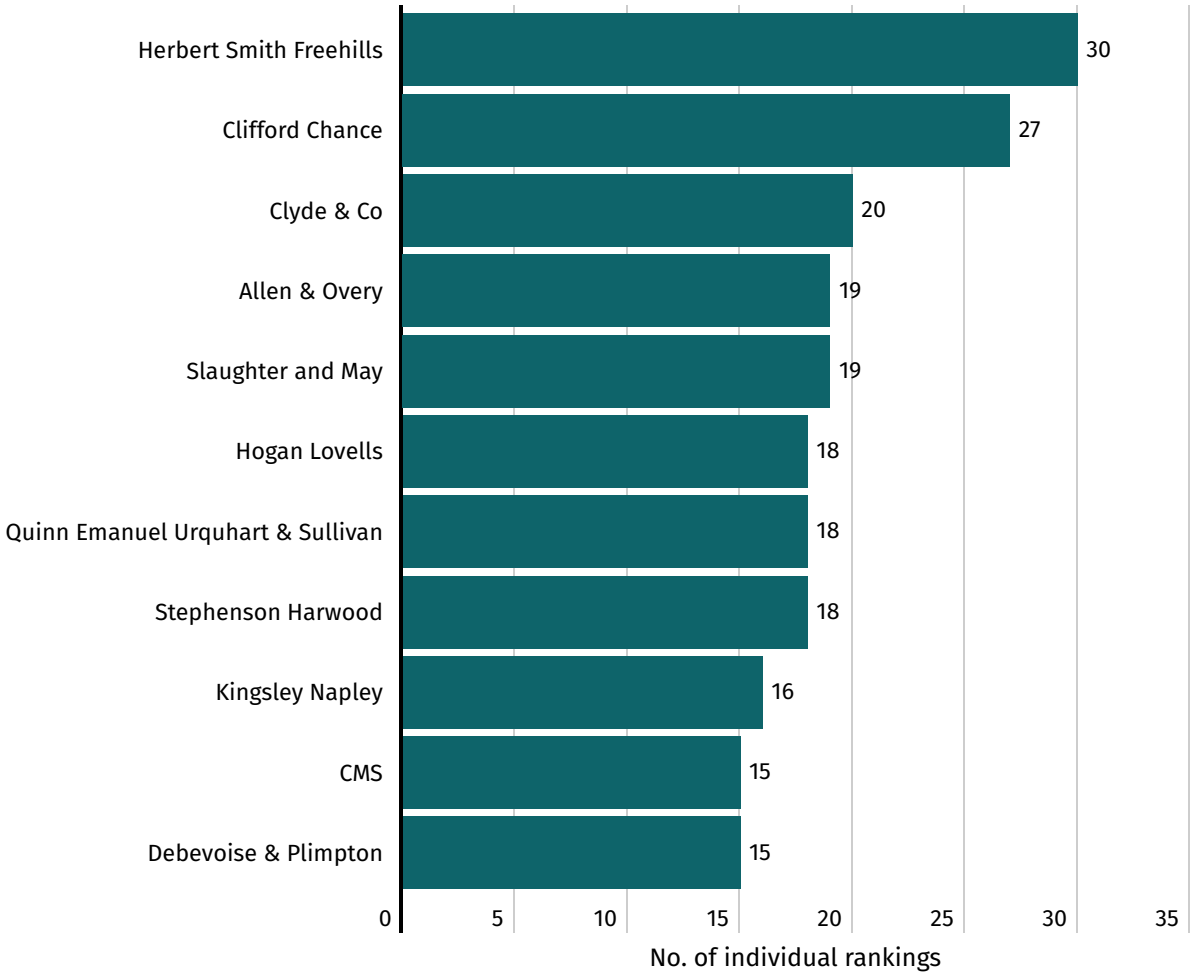
Firms with the most rankings: London



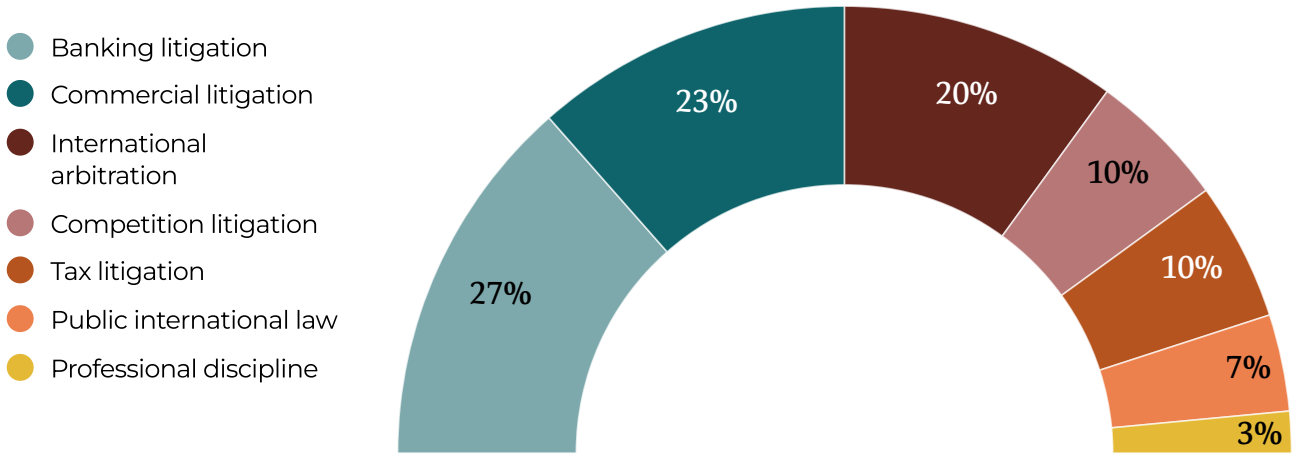
Firms with the most top-tier rankings: London



Firms with the most individual rankings: London



Herbert Smith Freehills individual rankings: breakdown by practice



Splitting the tab: allocating transaction costs in M&A deals as a topic in tax litigation in Switzerland

Lenz & Staehelin looks at the complex issue of allocation of transaction costs in Swiss deals

M&A transactions entail significant transaction costs, such as fees for investment bankers, legal or tax advisers, due diligence costs and project management expenses. In practice, the question of whether transaction costs should be borne by the target company or its shareholders is regularly a contentious issue. This question gains significance if the acquirer is a holding company without any operational income. In such cases, any transaction costs borne by the acquirer are not tax-effective, given that these expenses cannot be offset against taxable income. The answer to the question of who ultimately bears the transaction costs – the shareholder(s) or the target company – is thus not only relevant concerning Swiss tax and criminal tax law, but can also have a real financial impact.

Case-by-case assessment necessary

From a Swiss tax law perspective, the relevant criterion for determining whether transaction costs can be borne by a target company is whether such costs are incurred primarily in the interest of the shareholder or primarily in the interest of the target company. If transaction costs are primarily in the interest of the shareholder, such costs must be borne by the shareholder. Conversely, if the costs are primarily in the interest of the target company, they may be recharged to the target company and are corporate income tax deductible at that level. Transaction costs are in the interest of the target company and may thus be qualified as commercially justified if these costs have a sufficient connection with the company's business operations or are directly related to its profit-making activities.

As a further point of reference, the OECD Transfer Pricing Guidelines can be consulted to determine whether transaction costs may be borne by the target company, ie, whether such costs are (i) not for shareholder activities, (ii) confer a benefit to the target company, and (iii) are not duplicative.

With this in mind, let us now examine different types of transaction costs incurred during the sale of a company, including vendor and purchaser due diligence (legal and tax), costs for support during contract negotiations and the preparation of a shareholders' agreement.

Vendor due diligence costs, depending on the specifics of the case, could be partially recharged to the target company. For instance, if existing contracts are reviewed and renewed as part of the due diligence process, or if the target company catches up on corporate housekeeping activities during this time, such costs may be borne by the target company to the extent they serve its interest. In contrast, purchaser due diligence costs are generally in the interest of the purchaser and, therefore, should not be borne by the target company. Similarly, costs incurred in connection with contract negotiations should not be recharged to the target company, given that a favourable shareholders' agreement or sale and purchase agreement primarily benefits the shareholders involved, rather than the target company itself.

Undesirable tax consequences for target…

A target company bearing transaction costs that are not in its interest may trigger serious tax consequences and even criminal tax consequences not only for the target and its shareholder(s) but potentially also for its advisers.

A target company bearing transaction costs for the benefit of its shareholders is deemed to make a constructive dividend for Swiss tax purposes. The respective transaction costs are thus not corporate income tax deductible at the level of the target company and subject to the 35% Swiss dividend withholding tax.

… shareholder(s)…

For Swiss resident shareholders, the constructive dividend resulting from an incorrect allocation of transaction costs to the target company is subject to income or corporate income tax. Qualifying corporate shareholders may however benefit from an (conceptually full) exemption under the Swiss participation relief regime.


Jean-Blaise Eckert


Lukas Aebi

Furthermore, dividend withholding tax consequences are to be expected. As mentioned above, a constructive dividend is subject to the 35% Swiss dividend withholding tax. Under Swiss withholding tax law, the company making a (constructive) dividend, is required to transfer the incidence of the withholding tax to the recipient of a dividend. Accordingly, the target company has a statutory indemnity claim against the respective recipient of a constructive dividend for payment of the Swiss withholding tax. After paying Swiss withholding tax, the shareholder may be entitled to a full or partial refund of the withholding tax, provided certain requirements as set-out in the Swiss Withholding Tax Act or an applicable double taxation treaty are met.

… and criminal tax law consequences

The accounting of transaction costs that are not commercially justified at the level of the target company may also lead to criminal tax consequences for all involved parties. If the target company has not taken a clear filing position in its corporate income tax return, criminal tax proceedings may be initiated against it and potentially its corporate bodies as well. The typical sanction is a fine, the amount of which can range from a third to three times the amount of corporate income tax evaded, depending on the culpability of the company and its officials.

Constructive dividends may also trigger withholding tax penalties, usually in the form of fines. Under the applicable sanctions regime, only individuals instigating the constructive dividend (typically board members) and not the target company itself are subject to punishment. Practice shows that Swiss authorities tend to be more and more strict in the application of criminal consequences in this respect.

Advisers, such as lawyers, may face criminal tax law consequences as well. They should under no circumstances allow themselves to be persuaded to invoice the company for services provided to the shareholder. If they invoice the target company for services rendered to the shareholder, they may be considered complicit in tax evasion.

Conclusion

The allocation of transaction costs in M&A transactions is a complex issue, which may give rise to significant Swiss tax and criminal tax implications if not correctly handled. It is therefore not surprising that this topic is often discussed between tax administrations and tax advisers and may result in tax litigation. Careful planning and the timely involvement of experts are thus recommended.

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Riddle of applicable application fee in enforcing foreign judgments

Gün + Partners on the need to clarify the issue of application fees

Under Turkish law, the rules governing the collection of trial fees are regulated by the Law of Fees No. 492 (Law no. 492) and the applicable fees are under Tariff 1 of the Law no. 492. Article 4 of Law no. 492 also explicitly refers to Tariff 1 in terms of the fees applicable in the actions for enforcement of foreign judgments stating that the applicable fee will be determined according to the value, type and nature of the verdict.

The general rule under Tariff 1 is when the claim is a monetary one and a judgment is made on the merits of the case, a proportional court fee (judgment fee) which is calculated over the total amount subject to the dispute applies. The judgment fee is 6.831% of the total amount in dispute and ¼ of the judgment fee is required to be deposited in advance when filing the case (application fee).

Article 4 of Law no. 492 and the nature of the actions for enforcement of foreign judgments, which allows an examination merely on the existence of the conditions sought for enforcement, make the applicable application fee controversial in practice. While some scholars argue that Article 4 of Law no. 492 requires the application fee be proportionate and an adverse practice cannot be allowed unless the said provision is amended, others defend that actions for enforcement of foreign judgments are declaratory actions with no judgment on the merits and should be subject to fixed application fee. This controversy does not stay at academic level only; courts (of all levels) do not have a unified practice either. This riddle closely concerns the official attorney fees to be ruled in favour of the winning party as well because whether it will be a fixed or proportionate one depends on the solution of the very same controversy.

> A missing application fee can appear as an appeal ground or the Regional Appellate Court can *ex officio* decide that the missing portion must be deposited.

This ambiguity justifies a wait-and-see approach when initiating the action before the first instance court. That means the case can be filed by depositing the fixed fee only. If the court disagrees, it may, either *ex officio* or upon the objection of the defendant, order the plaintiff to deposit the missing portion of the application fee and grant a definite period for that. After this point, it is required to comply with the court's order. Otherwise, the case file will be shelved first and unless renewed within three months, be deemed as non-filed.

If the first instance court also opines that the applicable fee should be the fixed one, the plaintiff can save its money during the first instance stage. Yet, a missing application fee can appear as an appeal ground or, depending on which chamber is assigned to the case, the Regional Appellate Court can *ex officio* decide that the missing portion must be deposited. Yes, there is not a unified practice between the appellate courts of different regions or the chambers within the same region either! When the decisions of the Istanbul Regional Appellate Courts in the last two years are reviewed, we see that the 16th, 17th and 44th Chambers ruled that the enforcement actions are declaratory actions and should be subject to fixed application fee whereas the 6th, 12th, 13th, 14th and 15th Chambers ruled in favour of a proportionate application fee pointing out Article 4 of Law no. 492. We also see conflicting decisions between the 22nd Chamber ruling for a proportionate application fee and the 31st Chamber of Ankara Regional Appellate Court ruling for a fixed application fee whereas one decision from the 17th Chamber of Izmir Regional Appellate Court favours the proportionate application fee.

Not surprisingly, the same divergence also exists between the different chambers of the Court of Cassation. It is almost the settled practice of the 11th Chamber of the Court of Cassation, which is the chamber with expertise in commercial law and is assigned for disputes concerning the Turkish Commercial Code, insurance and banking law, to rule in favour of the fixed application fee in enforcement actions pointing out the declaratory nature of the case and also in defence of right to access to court. The 11th Chamber has maintained the same approach in its precedents of the last two years except a decision in 2021 where it approved the decision of the 14th Chamber of the Istanbul Regional Appellate Court *ex officio* ruling in favour of a proportionate application fee. This decision stands as a unique one in between the decisions of the 11th


Aysel Korkmaz Yatkın


Beril Yayla Sapan


Asena Aytuğ Keser

Chamber. In fact, it does not even discuss the applicable fee and seems not like a conscient decision.

The 6th Chamber of the Court of Cassation, with expertise mainly in contracts of work, construction contracts on land share or flat basis, adopts the same approach as the 11th Chamber whereas the 7th Chamber, with its expertise in property law, and some other chambers, mostly experienced in inheritance and family law, rule in favour of the proportionate application fee.

This riddle creates an uncertainty in terms of the costs that a party seeking to enforce a foreign judgment would encounter during the entire trial period. Besides, one of the possible scenarios results in a reiteration of similar costs that the plaintiff covered when initiating its main claim in the first place in the relevant jurisdiction. This is one of the arguments that the supporters of the fixed application fee rightly rely on as the contrary case significantly hinders the right to access to court. Yet, it is also correct that Article 4 of Law no. 492 clearly refers to the value of the verdict in determination of the applicable fee, allowing the collection of the proportionate application fee. For this reason, even those favouring the application of the fixed application fee criticise the decisions of the 11th Chamber of the Court of Cassation deeming them contrary to the clear provision of the law. Precedents are dynamic and one is not binding on another. As long as the law allows, the practice of the chambers favouring the fixed application fee can also change. It is therefore crucial also for legal certainty for the lawmaker to address this issue with an amendment to Article 4 of Law no. 492.

This partly happened for enforcement of foreign arbitral awards when the relevant section of Tariff 1 was amended in July 2016, stating that proportionate fee would not apply for arbitration proceedings. The amendment was not specific to enforcement actions, but to arbitration proceedings that require the courts' involvement, and this also has caused different interpretations as some courts and chambers of the Regional Appellate Court and Court of Cassation avoided applying the fixed fee because the amendment did not concern the enforcement actions. After the decision of the General Assembly of Civil Chambers of the Court of Cassation in 2019, ruling that the 2016 amendment requires the fixed application fee, the practice of the courts in enforcement of foreign arbitral awards has become more settled in favour of the fixed fee. Yet, adverse practices, especially among the chambers of the Regional Appellate Courts, still exist as we see in the last two years' decisions. This demonstrates the need for the lawmaker to take actions with clear legal provisions removing this ever-lasting riddle. The more settled practice of a fixed application fee in enforcement of foreign arbitral awards is another reason to clarify the issue in terms of enforcement of foreign judgments as adopting different rules for these very similar enforcement procedures is purposeless.

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BANKIM THANKI KC

'I still regard this whole thing as extended work experience to see if this might be the right career for me' – top-tier commercial silk Bankim Thanki KC on epic trials, great movies and clients doing a runner

WORDS: ALEX RYAN

I still don't regard myself as a proper 'lawyer' as such. Despite 35 years in practice at the Bar, 21 of which have been in silk, I still regard this whole thing as extended work experience to see if this might be the right career for me.

I was on the verge of starting a doctorate in History at Oxford, when my brilliant and very perceptive tutor at Balliol, Oswyn Murray, told me frankly that he just didn't think I would enjoy a lonely three (or more) years in dusty archives which the completion of a D. Phil would require, nor the years of penury which would follow if I pursued the academic career I hoped for. It was Oswyn who suggested that the Bar might be a better alternative to academia – just as intellectually stimulating, but with more financial security and more variety. I thought I would give it a try.

> Halfway through my oration, I heard a scuffle at the back of the court – my client had jumped over the rail of the dock and had done a runner.

When I started in practice at Fountain Court, new members were sent off to spend three months in a criminal set to gain advocacy experience. After a week following an established criminal barrister, we were let loose on actual cases. One of my first outings involved a plea for mitigation in the Crown Court. Halfway through my oration, I heard a scuffle at the back of the court – my client had jumped over the rail of the dock and had done a runner, possibly displaying less than complete confidence in my advocacy on his behalf.

My career hasn't involved any warfare or even minor hostilities on my part. There are better ways of winning (or trying to win) cases without unnecessary friction. Certainly my single worst experience was being repeatedly shouted at by an angry judge in the Admin Court who hated my client's case. We obviously went down in flames. We did win on appeal though.

Since 2016 I have led Ukraine's defence of a claim brought on behalf of the Russian Federation in respect of the first tranche of a $15bn loan programme by way of a bond issue, which Ukraine asserts was induced by duress prior to the Russian invasion of Crimea in 2014. We lost at first instance, but we won in the Court of Appeal and, eventually, in the Supreme Court. The case involved frequent trips to Kyiv to see my marvellous Ukrainian clients at the Ministry of Finance, before the dark days when this became impossible after the outrageous 2022 invasion. Commercial litigation is hardly ever black and white in terms of the morality of the litigants, but this is a case where I really do feel that we are on the side of the angels. Alex Gerbi at Quinn Emanuel has handled a really difficult case with great dexterity and dedication to the cause, despite the huge practical difficulties the case has thrown up.

I was also involved for over a decade acting for the Bank of England in the monumental *Three Rivers* litigation. I started the case as the baby junior in a large team assembled by Freshfields and ended the case as a silk. The case collapsed when the liquidators unexpectedly threw in the towel midway through the course of a trial which had already lasted two years, including the longest opening speeches in English legal history, and several interlocutory trips to the Court of Appeal and House of Lords along the way. The widespread allegations of systemic dishonesty said to have infected the Bank of England's supervision of BCCI were without merit, but aggressively pursued over many years. Mr Justice Tomlinson's eventual judgment vindicating the Bank of England's conduct was a very gratifying read.

Most recently I led for the DAF parties in the *PACCAR* case on litigation funding. Having lost twice at first instance and on appeal, I was not hugely optimistic when we showed up at the Supreme Court. The successful outcome there (by a 4-1 majority) was a very welcome surprise, but has made me very unpopular in certain quarters. The outcome was (I think) analytically correct as a matter of statutory interpretation, but against the settled market understanding of many years. Throughout, Travers Smith (Huw Jenkin and Caroline Edwards) remained true

believers and persuaded the clients to carry on the fight. The government has said it plans to reverse the outcome though legislation, but regulation of the litigation funding sector may be the price it has to pay — which may be no bad thing, if properly done.

Normally barristers don't really have to manage anything, but I was head of chambers of Fountain Court between 2018 and 2023, having been deputy head between 2013 and 2018. We concentrate quite a lot of responsibility in the office of head of chambers at Fountain Court and my colleagues would probably say I was at the more autocratic end of the spectrum – perhaps, at best, a benign dictatorship! My time in chambers before then had taught me, over many years, that attempts at more democratic engagement in a large set (now with more than a hundred members) tended to disintegrate into a cacophony — where any unifying consensus was more or less impossible. This is compounded by the fact that barristers have a short attention span for management and administration depending on how busy they are running their own practices at any given time. I was head of chambers during the Covid years, which required a bit of dexterity and imagination to keep chambers ticking over and eventually to coax people back into chambers. My management style nowadays, such as it is, is to be the passive recipient of management by others without any attempt at backseat driving — finally to enjoy focusing on my own practice while my eminent successor runs the show!

> My colleagues would probably say I was at the more autocratic end of the spectrum – perhaps, at best, a benign dictatorship!

How would my team describe me? Frankly, I dare not ask, so I am not entirely sure. Possibly 'high maintenance, but appreciative'.

It can be quite gruelling to last the course in heavy commercial work. The more senior you get the less easy the work becomes. In the early days of *Three Rivers* I was led by the late great Sam Stamler QC at the tail end of his long and illustrious career. He invited me to tea at One Essex when I was first instructed, which came as a surprise for the most junior barrister on the team, but he was genuinely interested to hear my take on the case with a fresh set of eyes. While we were chatting his senior clerk brought in a new set of papers for him. Brandishing his scissors, Sam said he still felt a thrill of excitement when he cut the pink tape on new instructions with brand new facts. I have never forgotten that sense of effervescent joy in his work. Perennial gloom merchants tend not to thrive at the Bar. So, ultimately, leaving aside all the obvious attributes around intellect and advocacy, I would say it takes curiosity, positivity, and stamina.

I don't see any great changes on the horizon for claimant litigation. Claimant work may go through a period of flux while the funding sector sorts itself out after *PACCAR*, but otherwise I see no dark clouds gathering (words I may come to regret).

Outside of work, I spend my time on food, wine, cinema, and friends. As a family, we love adventurous holidays, our best-ever trip being an extended journey around Alaska in 2018. I still read a lot of history books, my latest being *The Restless Republic* by Anna Keay, about the interregnum between Charles I and Charles II – a period about which I knew only a little, and the book was, surprisingly, a real page turner.

We used to ask pupillage candidates to name their favourite film, but gave up when virtually everyone said *The Shawshank Redemption*. This is undoubtedly a great film but not my favourite. My answer would vary depending on when I'm asked, but if I had to pick one film it is (possibly out of nostalgia and at the risk of cancellation) Woody Allen's *Play It Again, Sam*, a very clever and funny take on another great film, *Casablanca*. Naming a favourite book is very hard. A shortlist would include *Middlemarch*, *The Remains of the Day*, and *War and Peace*. Ultimately, I think Tolstoy shades it.

My biggest inspiration within the law was my first pupil master – the late Trevor Philipson QC, simply the most stylish advocate I have ever seen in action. He made advocacy look effortless, but this was all backed up by prodigious preparation beforehand.

Outside the law and in every other realm, my biggest inspiration is my beloved late wife Catherine, about whom I think every day and try to imagine what she would have advised we do about any situation. She was invariably right.

My biggest achievement is raising four lovely and rather interesting children, who are never boring. They had to manage without their mother during some of their formative years, but they are all stumbling along in life in a vaguely straight line. I am quite proud of that.

Bankim Thanki KC is a silk and served as head of chambers from 2018 to 2023 at Fountain Court Chambers.


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COURT

Q&A: Mayora & Mayora

Mayora & Mayora on Honduras' legal market and its current trends

What are the key legal frameworks and regulations governing dispute resolution in Honduras?

At the heart of the Honduran legal framework lies our Constitution. This foundational document defines the boundaries within which disputes are adjudicated and resolved.

Complementing this bedrock are other legislative pillars such as the Civil, Civil Procedure, and Commercial Codes. A thorough understanding of these instruments, allows us to navigate through the litigation pathway, ensuring that our clients' interests are safeguarded with utmost diligence.

Other rules related to business are the provisions in the Labour and Tax Codes, meticulously crafted to address the nuances of employment and tax disputes, respectively.

But our legal tools extend beyond mere litigation. The Arbitration Act provides a robust framework, granting the parties expediency in resolving complex commercial disputes, as well as providing the possibility for professional associations and chambers of commerce to organise their own arbitration centres.

Also, Honduras' commitment to international law adds another layer of complexity to our practice, should we navigate the web of treaties to which Honduras is a signatory.

Can you provide an overview of the current landscape of the disputes legal market in Honduras, including major law firms and key players?

The legal disputes landscape in Honduras has evolved mirroring the country's economic growth. Litigators have accumulated expertise in oral judicial and arbitration proceedings since the beginning of this century.

Among others, Arias and its distinguished specialist Fanny Rodríguez, stand out for their effective handling of complex commercial disputes. Juan José Alcerro Milla and Enrique Rodríguez Burchard, from Aguilar Castillo Love, have proven to be experts in the area, garnering legitimate recognition. Consortium's Gustavo León-Gómez, Rafael Rivera Ferrari and Ulises Mejía have positioned themselves as a prestigious team also.

In parallel, boutique law firms, such as those under the leadership of Leonidas Rosa Suazo, Carlos Fortín, Aldo Cocenza, Fabian Villeda and Eugenia Taixes, deserve acknowledgement.

The gradual development of these firms has contributed to spread the culture of arbitration, instilling confidence in the business community.

Some individual practitioners who cater to diverse types of clients and matters before the courts include Maribel Espinoza, Félix Irías Rodezno, Marcio Barahona, and Max Salgado.

Emphasising specialisation, strategic argumentation, and adaptability, these firms and sole practitioners collectively sculpt the Honduran litigation atmosphere.

How is alternative dispute resolution (ADR), such as arbitration and mediation, commonly utilised in Honduras? Are there any recent trends or developments in this area?

Arbitration and mediation in Honduras have emerged as the preferred means for resolving local or international commercial disputes. Consistent with the principles developed by UNCITRAL, arbitration is particularly conspicuous for business transactions.

The joint efforts of the Chamber of Commerce and Industry of Tegucigalpa (capital city) and that of Cortés (industrial capital city), have significantly promoted arbitration. Proceedings are supervised by each of their arbitration centres (Cortés has recently updated its rules). It is very important to note that the voidance of an arbitral award in Honduras can be submitted to a new arbitral tribunal.

What are the primary types of disputes that businesses and individuals typically encounter in Honduras, and how are these disputes usually addressed through the legal system?

The most common disputes encountered include energy, construction, health, tourism industries, and international trade. All these require sophisticated analysis, prompting tailored counselling to address the unique challenges faced by clients.

The practice of dispute resolution is proportionate to the complexity and economic importance of investments. Compliance, antitrust, insurance, labour and tax matters are usual as well. The crisis on the international transportation of people, cargo, goods, and merchandise, has naturally increased civil and commercial conflicts.

Lastly, as regards to the distribution of imported products, they often lead to disputes over grounds for termination, alongside damages compensation.


Odín Guillén Leiva


Iván Flores Hercules


Pedro Canales

What role does technology play in the disputes legal market in Honduras? Are there any advancements or innovations that are shaping the way disputes are handled?

In Honduras, technology plays an insignificant role in litigation, despite gradual improvements following the pandemic.

Collective willingness to embrace technological advances in dispute resolution and adapt traditional practices to meet the imperatives of the digital age, certainly represents an opportunity to increase justice efficiency and accessibility.

How does the legal market in Honduras handle cross-border disputes, and what mechanisms or agreements are in place to facilitate international dispute resolution?

Cross-border litigation in Honduras is managed under several international instruments to which Honduras is a signatory, such as the New York and the Singapore Conventions, in addition to applicable domestic law.

The Arbitration Act of Honduras clearly gives the parties to a cross-border transaction the freedom to submit to international commercial arbitration and to the substantive law of the parties' choice (not contrary to public order).

Are there specific industry sectors in Honduras that are more prone to disputes, and what unique legal considerations should businesses in those sectors be aware of?

On the side of investment arbitration, as noted above, the energy sector has seen the most cases recently. Regarding commercial arbitration, in our experience, we have noticed a relevant number of disputes related to the construction industry too. Conflicts resulting from private property limits are also constant.

Increase in judicial backlog due to Covid-19 lockdown, discourages its use, thereby evading the search for truth and justice through court or arbitration.

The combination of the above is deemed serious since it may lead to the continuous and unmarked violation of the law or the unfair resolution of disputes, should businesses lean on *pacta sunt servanda* as the saviour principle of all legal relationships within Honduras.

In light of recent global events or changes in the political and economic landscape, what impact, if any, has there been on the disputes legal market in Honduras?

Globalisation allows that, despite certain weaknesses on the institutional and business environments in Honduras, the country is still the recipient of local and foreign investments.

The biggest investors in Honduras still come from the US and Spain, as well as a few other European and Latin-American countries. Perhaps, Chinese investments are on the horizon, after the recent start of diplomatic bilateral relationships.

Honduras' legal uncertainty has prompted political turmoil, and the business community is very concerned with this situation.

In the end, litigation demands a confluence of expertise, experience, dedication, and finesse, we must persistently push back and hold the line as lawyers, for the sanctity of justice and the rule of law in Honduras.

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MAYORA
MAYORA
Est. 1966

Q&A: Clyde & Co – Garza Tello

Clyde & Co – Garza Tello on Mexico's legal market and its current trends

What are the current trends and developments in the disputes legal market in Mexico, and how do they impact legal practitioners?

During the last decades, the dispute legal market has been in constant growth in Mexico. The nearshoring phenomenon has caused Mexico to become the biggest commercial partner for the US, and foreign companies settling in Mexico are in constant need of more sophisticated legal services. This has caused many foreign firms to acquire or merge with firms in Mexico, providing legal services subject to a more rigorous competition every day.

Even with these changes, Mexico is not increasing its ethical environment, particularly in the field of litigation, where multimillion-dollar disputes are commonly hostage of courts that are unduly influenced. Succeeding in this environment demands highly technical skills, and in high-stakes litigation, to challenge arbitrary decisions up to the final instances, including the Supreme Court of Justice.

Can you provide an overview of the key regulations and legal frameworks that govern dispute resolution in Mexico?

Commercial disputes in Mexico are governed by the Commercial Code, which includes the rules for oral commercial trials, written commercial trials (the exception), summary commercial trials and other special proceedings, including those for the assistance and supervision of commercial arbitration. In the absence of express provisions, the Federal Code for Civil Procedures applies and, ultimately, the respective local code for civil procedures.

All judicial proceedings are subject to a last-instance recourse called 'amparo'. Amparo is a constitutional recourse intended to protect human rights and due process and is available for individuals and companies. Most practitioners are of the opinion that this last recourse is necessary to ameliorate the effects of trial courts that are generally susceptible to undue influences; however, they create a substantial layer of delays and costs that need to be considered when companies are faced with the choice between arbitration and judicial proceedings.

How has the demand for dispute resolution services evolved in Mexico in recent years, and what factors contribute to this change?

International firms are acquiring or merging with smaller local firms to reach a wider range of clients worldwide. In addition, many boutique litigation firms are constantly emerging. Firms are faced with the challenge of attracting talented attorneys and keeping them as part of their teams.

What are the common types of disputes that legal professionals in Mexico are currently handling, and are there any emerging areas of contention?

It is common for boutique firms to specialise in certain areas of the law, but one of the many trends in the market is the existence of interdisciplinary litigation with cross-border effects involving high-stakes disputes, which require a 'complex litigation' team. These cases require a high degree of legal expertise and meticulous management.

Another trend has been caused by the political environment in Mexico. The current president in Mexico does not have the qualified majority of Congress necessary to amend the Constitution and reverse many of the liberal reforms of his predecessors. When faced with this reality, the current administration along with the favouring fraction of the legislative branch, have enacted dozens of federal statutes that contradict the Mexican Constitution. This has caused a new type of specialised litigation for our firm: amparo recourses against legal reforms that contradict the Constitution and, in some cases, reforms that pass without following the legislative process. In this type of litigation, obtaining injunctive relief becomes vital for the survival of certain companies.

How do cultural and regional factors influence the approach to dispute resolution in Mexico, and how do legal practitioners navigate these dynamics?

Mexico is a civil law country immersed in a formalistic approach to evidence, aiming to avoid bad faith conducts (unlike other countries, that are based on assuming that everybody acts in good faith). The trend, however, is to create more flexible procedures where good faith is considered, and also, where trials are handled orally and there is a more immediate approach to the legal truth. This has been an influence from the common law system of our northern neighbour. An example, during the pandemic, the litigation migrated from a system where submissions were made

and filed in hard copy, to a system that operates electronically. This has ameliorated the formalisms, as electronic documents – that need to be sworn to be truth – are now considered as originals, unless they are objected to by one of the parties or unless the court exceptionally orders the parties to submit them in hard copy.

Are there any notable challenges or obstacles faced by legal professionals in the disputes market in Mexico, and how are they addressing them?

Corruption and lack of preparation have been historic obstacles in our judiciary, particularly in state courts. There is still a lot to grow in this area, and at least the policy of the judicial committees is to show zero tolerance to corrupt public servants. Legal professionals facing this kind of trouble may resort to administrative complaints against judges and/or their personnel (something unusual in most countries). In parallel, the proper use of amparo recourses generally resolves the deficiencies that may be observed during a trial.

With respect to ADR, although arbitration and mediation have seen a continued growth, they still face challenges. Mediation has not permeated the business culture. And in arbitration, arbitrators with heavy loads of work, even when they have a good reputation, tend to be superficial when analysing and resolving the cases. Choosing the right arbitrator is of the utmost importance when commencing an arbitration.

What role do alternative dispute resolution methods, such as arbitration and mediation, play in the Mexican legal landscape, and how have they evolved over time?

Alternative dispute resolution methods are developing widely in Mexico, nevertheless they have not permeated enough within underlying agreements among national companies, while almost all transnational contracts include arbitration clauses. One exception is maritime agreements, particularly charter agreements, which include arbitration clauses by default. However, the problem in maritime arbitrations is that they are regularly seated in the US or the UK, even in cases where both parties are Mexican companies. This situation increases the costs of arbitration procedures and in many cases complicates the enforcement of provisional measures (for example, arbitrators' measures are not enforceable in Mexico if they are issued in an arbitration with a foreign seat).

How are advancements in technology impacting the disputes legal market in Mexico, particularly in terms of case management, evidence gathering, and communication?

To this moment, most international firms have adopted a form of case management platforms; for example, to automatically review and follow-up the dockets of federal and local courts. Likewise, there are new tools to assist in the organisation and selection of documents during an arbitration or litigation case, that help to minimise costs. Also, during and after the pandemic, other technologies like videoconferencing and serving the parties via e-mail (which has been used in arbitration for a long time) have been implemented in judicial proceedings, something that has significantly reduced times and costs, and more importantly, are friendly to the environment as they avoid paper waste.

In our consideration, artificial intelligence has still not impacted the dispute practice in Mexico. The challenge is to implement AI tools that do not expose sensitive data of the cases and clients. Our firm is currently working in developing AI tools that respect clients' data and will cause efficiencies in favour of our clients.

Can you discuss any recent landmark cases or legal precedents in Mexico that have significantly shaped the disputes legal market?

As explained above, the legal reforms proposed by our current President have triggered various amparo recourses. We have successfully obtained federal judgments declaring the unconstitutionality of those laws, in the maritime, scholarly research and mining sectors, as well as in some pro-bono cases defending the confiscation of trusts that were created in benefit of the public servants from the federal judiciary.

In these sectors, the firm has secured dozens of favourable Amparo resolutions as well as stays to protect the mining and marine companies' rights and is representing on a pro-bono basis over 100 researchers and personnel of the judiciary to protect their rights. This new area in the firm has emerged from the current political situation of our country.

How are law firms in Mexico adapting their strategies and services to meet the changing needs of clients in the disputes legal market, and what competitive trends are emerging in the industry?

As explained in the first question, the current trend is for attorneys to become more specialised and sophisticated. Competitive firms are hiring top talents that fulfil these expectations and adapting programmes of continued education for both junior and senior associates. As technology is changing the face of litigation and arbitration, the attorneys must also evolve.

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GARZA TELLO - CLYDE&CO MEXICO

SHERINA PETIT

'I was always sure that I wanted to pursue law – have clients hang on to my every word like they did with my father' – Stewarts arbitration head Sherina Petit on tackling bad behaviour, following in her father's footsteps, and saving the stray dogs of Mumbai

WORDS: BETHANY BURNS

I am the third generation in my family to have taken up law, following in the footsteps of my grandfather and father. My father was a partner at one of the top law firms in Mumbai and some of my best memories are of sitting in his office during school summer holidays, listening to him advising clients and watching with awe as they would listen. In my eyes no-one was smarter than my father, who clearly had the attention of every client.

I do not think there was ever any doubt in my mind of what career path I wanted to take. Perhaps, there was a flinching moment when I toyed with the idea of journalism or of veterinary science – but that was just a passing phase. I was always sure that I wanted to pursue law – have clients hang on to my every word like they did with my father.

> I was suddenly a law student with one of the largest clienteles in Mumbai.

The first day of law school also coincided with the first day of joining my father as an intern. At the time he was doing an interesting case which was the largest Indian bank scam of that time. That's when I fell in love with disputes. I would be tasked with the important job of carrying the papers to the court every day, but that is where I watched some of the greatest intellectual minds arguing and cross-examining witnesses. It was thrilling to say the least. Hence when I came to London to pursue my LL.M, one of my main subjects was international arbitration.

If not for law, I probably would have been a travel and food journalist. I could have combined my love for travelling with my storytelling skills. I am passionate about writing, especially poetry. I love to explore new places, experience varied cultures, and taste different cuisines. I was lucky enough to take a month-long sabbatical to Antarctica in December 2023 which was the trip of a lifetime, and something that I am writing about. Luckily, with international arbitration one gets a chance to travel to different destinations and make friends all over the world.

Although I have been lucky to have been involved in some of the largest and most complex litigations and international arbitrations over the years, the most memorable case that stands out to me was saving the stray dogs of Mumbai. I was in law school when newspapers exposed the inhumane way stray dogs were being killed in Mumbai. I still had not got my practising certificate, but a colleague and I managed to convince an animal rights organisation to let us assist them without any charge in approaching the courts to stop the merciless killing. Other animal organisations also joined the movement. I was suddenly a law student with one of the largest clienteles in Mumbai. I spent days, weeks, and years working through weekends, spending my spare time drafting pleadings and approaching junior and senior barristers in Mumbai to appear for us in court. The case went all the way to the Supreme Court of India, and we were successful. The sense of achievement I got from saving innocent lives was second to none. The case taught me to pursue what I believed in, and to face challenges head on.

My managerial style is to empower and support my team to perform at its best, whilst also fostering trust, collaboration, innovation, and a positive, friendly, and open work culture. I try to involve the team in decision making since it fosters a sense of ownership and a commitment to a common vision. I am intolerant of bad behaviour – it undermines trust and a healthy culture. Ultimately, I have learnt that being intolerant of bad behaviour but providing mentoring, empathy, constructive feedback, and recognising individual contributions makes everyone feel valued and this is key in getting the best results.

What does it take to make a great disputes lawyer? Hard work! Hard work! Hard work! That is the mantra, and there is absolutely no substitute. Besides hard work, one also requires a combination of legal knowledge, analytical and communication skills, attention to detail, and a strategic mind. One needs to always maintain a high ethical standard and integrity. Disputes can be emotionally and mentally taxing so one needs to have the patience and resilience to manage pressure including a lot of late nights. Most

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importantly, one needs to have a mentor, without which it is exceedingly difficult to succeed.

The legal disputes industry is likely to become more dynamic, driven by technological innovation, changing societal expectations, and emerging legal challenges. Given the globalisation of businesses, we will see an increase in the complexity of cross-border disputes. There will be greater demand for lawyers specialising in niche areas such as international arbitration and a growing emphasis on ADR methods to save time, costs, and resources.

When I'm not at work, I'm travelling, cooking, trying out different cuisines and restaurants and sharing a glass or two of wine with family and friends.

My biggest inspirations within the law are my father and my husband and outside the law, my mother. Together but in different ways they are my north, my south, my east and west, my working week and my Sunday rest. I could not ask for a better friend, philosopher and guide and I owe them everything.

Sherina Petit, head of international arbitration and head of India practice, Stewarts

Taking an important case to trial: jury research

MoloLamken's Steven Molo and Sara Margolis outline the process and benefits of jury research

Last year, we spoke with MoloLamken partners Steven Molo, one of America's leading trial lawyers, and Sara Margolis, a rising courtroom star, to learn how a party in a high-stakes trial might improve its chances of success.

We spoke with Steven and Sara again about a critical step in preparing for high-stakes trials: jury research.

What do you mean by jury research?

Steven: We work with a consultant – usually a psychologist – to identify the key issues in the case and understand juror attitudes toward them, by presenting evidence and arguments to mock jurors.

Sara: Research also helps us develop effective graphics and assess juror reactions to witnesses.

How does jury research work?

Steven: Research usually has two to four phases. It might start with a survey of potential jurors that's designed to reveal the beliefs that jurors will likely bring to their evaluation of the case. Next, we might move to a focus group that helps us understand how potential jurors would react to the particular facts and arguments. That may be a day-long exercise. Finally, we might move on to summary arguments or mock trials, where we present more developed arguments and evidence to the mock jury. These exercises might occur over two days.

Sara: Jurors complete questionnaires asking about their backgrounds and attitudes toward issues relevant to the case. They do this before, during and at the end of exercises in which they are presented evidence and arguments. Eventually they deliberate and following the deliberations the consultant moderates a discussion among them.

Is it realistic to think you can get valuable information in a one- or two-day exercise for a case that may take three or four weeks to try?

Sara: Yes. We are not trying the entire case to the mock jurors. Usually there will be modules that address specific topics – for example, damages or a particular defence. A day-long focus group may have five or six modules.

> Usually there will be modules that address specific topics – for example, damages or a particular defence. A day-long focus group may have five or six modules.

Who are the mock jurors?

Steven: Consultants recruit people in the venue who more or less represent the basic demographics found there. For example, race, gender, education, income level. The mock jurors look like the actual jury pool. The consultant pays them a daily fee that varies by venue.

Is the research confidential; can an opponent obtain it through discovery?

Sara: Jurors sign a confidentiality agreement. The work is protected by the work product doctrine and is not discoverable. In the highly unlikely event that a mock juror was called to serve on the actual jury, they would be excused for cause.

When should you conduct research?

Steven: Certainly, when you have a solid picture of what the evidence may be – likely once there's a summary judgment ruling.

Sara: But earlier research is often quite helpful. Surveys or focus groups done once a complaint survives a motion to dismiss can help focus discovery and develop themes.


Steven Molo


Sara Margolis

You mentioned graphics. How does jury research help develop graphics?

Steven: Graphics are tremendously important. Some studies show 85% of communication is non-verbal, and more than 80% of people identify as 'visual learners'. People's brains receive and process information and form beliefs quickly – through displays of information, not just spoken words.

Sara: We present graphics to the mock jurors. We ask them for feedback and use that feedback to hone our messages and themes. It takes time to reach a final product that best communicates a point.

> Jury research can provide a reality check to a client with an overly optimistic or pessimistic view.

Does jury research differ based on the venue?

Sara: To a degree. The general approach to jury research doesn't change but, of course, the jury pool will. It can be advantageous to have a consultant with deep knowledge of a venue but methodology is what's most important.

You also mentioned trial presentation. How does jury research help with that?

Sara: Jury research can also help assess witness credibility. In civil cases depositions are almost always videotaped so it's easy to select a short representative excerpt. We can also do a short video of mock testimony. We can play these and learn how jurors react to specific witnesses. Their reactions and advice from the consultant can be useful in improving a witness's communication skills.

Can jury research help inform settlement?

Steven: It helps both a lawyer and a client understand how jurors are likely to react to the case. It might embolden a client to move forward to trial or settle within a given range. It can provide a reality check to a client with an overly optimistic or pessimistic view. Sometimes sharing a favourable research outcome – on a confidential basis – with an opponent can be useful in negotiations.

What are some common mistakes to avoid?

Steven: Ignoring bad evidence. You want to see how jurors respond to your opponent's best evidence and arguments.

Sara: Focusing too much on the outcomes instead of what you learn along the way. It's not about 'winning' the exercise. It's about gathering and analysing information that will help you build a persuasive case and avoid mistakes at trial.

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An overview of the Egyptian judicial system

Shalakany focus on dispute resolution mechanisms in Egypt

Overview of the Egyptian legal system

The Egyptian legal system is a civil law system influenced by the Napoleonic code. The Egyptian legal system constitutes a source of influence to other laws in the MENA region.

When regulating civil and commercial transactions, the Egyptian legislator left some room for the parties to regulate their own affairs in an agreed manner and, thus, the legal principle *pacta sunt servanda* plays an active role within the application of private laws. Beyond that circle of party autonomy, the Egyptian legislator laid out mandatory legal norms from which subjects cannot deviate through their agreements. Contrary to private law, administrative law is a hybrid of civil and common law elements as administrative court rulings enjoy the power of creating law in case of a lacuna in the applicable law.

The Egyptian legal system is comprised of various legislations of differing hierarchy. The highest source of legal norms is the Egyptian Constitution. Statutes come immediately after the Constitution, among which, one must mention the Civil Code of 1948 (as amended), the Procedural Law no.13 of 1968 (as amended), the Commercial Code no. 17 of 1999 (as amended), and the Companies Law no. 159 of 1981 (as amended).

Judicial authority

Judicial rulings have no binding power in Egypt. Nonetheless, the principles and rulings of the Supreme Administrative Court and the Court of Cassation have persuasive powers and are expected to be upheld by courts both practically and morally.

The Egyptian judiciary is the third autonomous authority of the Egyptian state and is comprised of (1) the Supreme Constitutional Court, which is the only court with the authority to rule on issues pertaining to the validity of laws and rules as well as conflicts of jurisdiction; (2) the State Council, which is comprised of (a) a judicial department (which includes administrative courts), (b) a legislative department (which provides opinion in relation to draft laws), and (c) an advisory department (which provides advice to administrative authorities, entities and bodies in relation to legal issues referred to said department by the body requesting advice; and (3) ordinary courts (including criminal courts, civil and commercial courts, economic courts, personal status and family courts, labour courts).

The Egyptian judicial system is comprised of several tiers: (a) the Court of First Instance; (b) the Court of Appeal; and (c) the Court of Cassation.

Jurisdictional issues and cases involving foreign entities

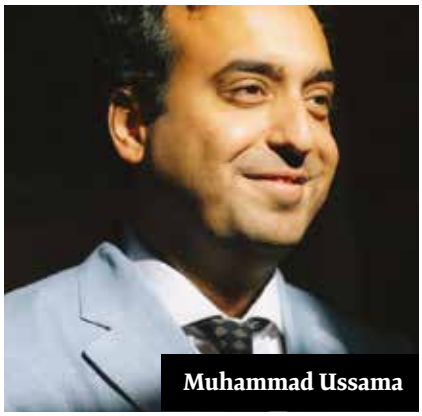
The Procedural Law has set out the cases where Egyptian courts have jurisdiction. In relation to cases involving a foreign respondent, Egyptian courts ensure first that the foreign respondent was notified of the case writ. Such notification is done through diplomatic channels. The Cassation Court has recently confirmed that the dispatch of the notice, is insufficient and that proof of delivery is a requisite for the validity of the notice.

In terms of the recognition and enforcement of foreign judgments, Egyptian courts ensure that the following requirements are met: (a) the foreign court that rendered the judgment has jurisdiction under its own rules; (b) the parties were duly informed and properly represented before said court; (c) the judgment is final and binding under the rules that apply to the foreign court's law; and (d) the foreign judgment is not in conflict with an earlier judgment rendered by Egyptian courts or against public policy.

Dispute resolution mechanisms

In Egypt, the legally recognised dispute resolution mechanism are as follows:

Mediation and conciliation: In practice, seeing that neither mediation nor conciliation leads to an enforceable outcome in the absence of the disputing parties' conclusion of a binding settlement agreement, we do not often see disputes being referred to either mechanism. On the contrary, disputing parties seem to give more weight to direct settlement negotiations that are conducted with the aid of counsel. In Egypt, court-related mediation programmes usually involve matters that are reviewed by familial or economic courts. Outside the court system, there exist mediation centres, including: (1) the Center for Arab Mediation (AMC); (2) the Investors Dispute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Resolution Center (associated with the General Authority for Investment and Free Zones); and (3) the Cairo Regional Centre for International Commercial Arbitration (CRCICA).

Litigation: Several initiatives are being undertaken to raise the Egyptian legal system's efficiency. For instance, The Egyptian legislator has considered the prospect of digitising many of the litigation processes in a proposed bill amending the Procedural Law. Further, the Cairo Economic Courts were established in 2008 with the intention of permitting the resolution of particular kinds of conflicts in front of judges who possess specialised business knowledge and experience. The process for filing a claim commences by filing a case writ with the competent court accompanied with supporting documents. The court bailiff is required to provide the respondent with a copy of the claim and notify the latter. Among the basic principles that govern the litigation process are due process, equal treatment of the disputing parties, and confrontation.

Arbitration: Arbitration is regulated under (1) the Arbitration Act no. 27 of 1994 (which is influenced by the UNCITRAL Model Law on International Commercial Arbitration (1985)); and (2) the New York Convention (to which Egypt is a signatory). Egyptian courts have repeatedly confirmed that preference be given to the arbitration rules agreed on by the parties provided that there is no breach of a mandatory provision of the Arbitration Act or of Egyptian public order and morals. Egyptian courts have shown a steady tendency of respecting the legal effects of arbitration agreement and therefore issuing a ruling of inadmissibility provided that the arbitration agreement is not proven to have been (explicitly or implicitly) waived by the respondent after court proceedings are initiated by the claimant. The requirements for enforcement of awards include the following: (a) the subject-matter of the award must not have been the subject of a previous Egyptian ruling; (b) there must be no violation of Egyptian public policy considerations; and (c) the award must be validly notified.

Legal fees

In litigation cases, legal costs are governed under Law no. 90 of 1944 (as amended). The associated legal fees are usually a percentage of the value of the claim. If, however, the value of the claim is not determined, then the court fees would be a set amount, determined according to the nature of the claim. Moreover, there are legal costs associated with all procedures pertaining to a legal claim, rather than just the review of such claim by the court, meaning a party would bear legal costs for the notification of the parties, and for the enforcement of the judgement. Moreover, the losing party is the party that bears the court fees.

Documentary and evidence rules

Parties are permitted to provide evidence while filing a claim or defence. In this context, a party is not required to present any evidence that will strengthen the case of his opponent. Under Egyptian Law, parties to a litigation should submit original documents as any photocopies are dismissed if challenged by opposing parties.

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KATE DAVIES KC

'I found my calling and the rest is history' – Skadden's Kate Davies KC on dressage, taking calls on the loo, and why disputes lawyers need a sense of humour

WORDS: BETHANY BURNS

I didn't really decide to be a lawyer, the law chose me. I went to a wedding and sat next to a very nice man. He turned out to be a partner in a law firm and we talked career options all night. He gave me his business card and said to call him. I did, and was invited to meet some people. Entirely unbeknownst to me, it was a trainee selection day. I had no idea what I was doing, but I spent a day taking part in various team and individual exercises. At the end of the day the senior partner handed me a brown envelope. I asked what it was and he said, 'a training contract'. I had to phone a friend to ask what that was. I hadn't done a day of study in the law, but they paid for me to go to law school. I found my calling and the rest is history. Thank you, Miles.

If not for law, it would have been musical theatre, becoming an Olympic dressage rider or just being Mum. Growing up, I loved being on stage and I think it was my early training ground for being an advocate. I also studied theatre at A-Level.

Dressage was another huge passion of mine, and I pursued the 'Olympic dream', but my one horse sadly got the first-ever reported equine case of motor neurone disease and had to be put down. I couldn't afford to start again – so that was it. But I am a great believer in all things being for a reason. It was a chapter of my life I loved, I learnt a huge amount, including the value of hard work, and I got to move on to the next adventure.

The most embarrassing thing to have happened to me at work was – I was once called by a partner I was working with, on my mobile while on the loo and… I answered. I know – don't ask. It was a slightly awkward conversation – the partner I was talking to was adamant I was needed right away. There are two women out there who I hope will read this and fall off their chair laughing.

There are too many war stories to mention and most of them are unrepeatable. But they are the ones in which you find the very best of this job – camaraderie, kinship and lots and lots of laughs.

The most memorable case I've worked on was definitely the *Abyei* arbitration. I acted for what is now South Sudan in a boundary dispute which paved the way for South Sudan to secede. It was career defining. In terms of most interesting case, honestly, all my cases are interesting. It is one of the many things that makes this job such a privilege – you can never get bored.

When I first made counsel, I got upwards feedback in which some associates said I was a macro manager and some said I was a micro manager. I learnt to adapt my style to those I am working with and to develop a thick skin. I would like to think I am human, fair, and never ask more of others than I am willing to give myself. I want my teams to be collaborative, respectful, and strive to be the very best at all times. I also believe in it all being fun – otherwise what is the point. My team would describe me as too busy!

This will sound corny, but my biggest inspiration has been my Mum. She was brave, selfless, perfectly flawed and entirely her own person. She gave me the best of me. Inside the law, there are too many people over the years to single out just one. In general, my inspiration has come from the senior people who support the more junior people; the men who have looked out for the women; and the handful of brilliant advocates I have been privileged enough to work with and against.

My biggest achievement is easily being a Mum. Although, truth be told, my kids are awesome despite me, not because of me.

It takes humility, curiosity and a desire to listen and understand people to make a great disputes lawyer. And a healthy sense of humour!

When I'm not at work, I'm with my kids at one of their many national and international sailing events, come rain or shine. Otherwise, I'm just generally outside in the fresh air being active. I was not designed for an office job! Cooking, reading, music and trying to see my long-suffering friends, or walking my dog.

I have so many favourite films but if I absolutely had to choose, *The English Patient*. The most human and affecting book I have ever read is *Far from the Tree* by Andrew Solomon.

Kate Davies KC is head of Skadden's Europe international litigation and arbitration group.

> Entirely unbeknownst to me, it was a trainee selection day. I had no idea what I was doing. At the end of the day the senior partner handed me a brown envelope containing a training contract.

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Our team

The litigation and dispute resolution group of Villaraza & Angangco provides excellent and exceptional service, consistent with the standards it has developed over more than four decades of representing clients in complex disputes, offering unmatched expertise and experience in maintaining sustained, coordinated, and multi-pronged litigation campaigns. Its proven track record of successfully representing clients in their most challenging legal issues, complex multijurisdictional and cross-border disputes, and significant business transactions is renowned and respected by clients and peers alike. From breaking apart telecommunication monopolies; assisting in the rehabilitation of essential Philippine companies during the global financial crises; questioning the qualifications of electoral candidates and impeaching a sitting President and Supreme Court Justice; vindicating the Philippines' claim in the West Philippine Sea; to championing the entry of cheaper medicines in the Philippines, the firm has earned the distinction of being at the forefront of historic cases that shaped the future of the nation. Recognised and acclaimed for its consistent excellence, the firm has garnered awards from well-respected publications and has been consistently listed as a leading litigation and dispute resolution firm.

The firm

Founded in 1980, Villaraza & Angangco is a decorated full-service law firm with recognised expertise in the areas of litigation and dispute resolution, corporate and commercial law, and intellectual property law. Each of its departments and many of its lawyers have been recognised as among the best in their respective fields by well-respected publications. With decades of experience serving at the forefront of the ever-changing landscape of Philippine law, politics, commerce and everyday life, coupled with its drive to innovate and evolve to suit the reality of the times, the firm is well-equipped to continue its mission to provide excellent legal service that truly matters. The firm's top-drawer practice has attracted the Philippines' most consequential companies across different sectors, such as: Ayala Land, ABS-CBN, Banco de Oro, Manila Water, Petron and RCBC.

Our people

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Mr Navarro heads the firm's labour department. With over 33 years of experience in appearing before courts, including the Court of Appeals and Supreme Court, Mr Navarro is lauded for his sharp analytical mind and penchant for crafting precedent-setting legal strategies that solve the most intricate and complex conundrums faced by the firm's clientele. *Chambers and Partners*, *Asia Business Law Journal*, *Asialaw*, and *Benchmark Litigation Asia-Pacific* have recognised Mr Navarro as a leading individual, distinguished practitioner, and lawyer of the year. Mr. Navarro specialises in litigation and dispute resolution and arbitration. His fields of practice also include bank and securities law, election law, criminal and tax litigation, intra-corporate disputes, and mediation proceedings and negotiations for collective bargaining agreements. He has defended high-profile clients charged with non-bailable crimes, arising from intra-corporate and commercial disputes. He has appeared before the Singapore International Arbitration Centre on behalf of a foreign client embroiled in a cross-border commercial dispute with a US$1.5bn claim at stake.

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Mr San Pedro, a pillar in the firm's dispute resolution department, specialises in commercial disputes relating to joint ventures, banking and finance, restructuring and insolvency, insurance, product liability, commercial and corporate law, and competition law. He has over 33 years of experience in trial and appellate practice in Philippine courts and commercial arbitration. He is a founding member and former trustee of the Philippine Dispute Resolution Centre, Inc. A titan in the field of litigation and dispute resolution, Mr San Pedro has been recognised as lawyer of the year by *Benchmark Litigation Asia-Pacific* and a distinguished practitioner by *Asialaw*. He is consistently ranked as a top 100 lawyer in the Philippines by *Asia Business Law Journal* and as a band two practitioner in dispute resolution by *Chambers and Partners*.

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Mr Lopez was admitted to the Philippine Bar in 2007 and graduated from the Ateneo de Manila School of Law with Honours and received the Silver Medal for Best Thesis. As a student of the same university's prestigious management engineering programme, he was merit scholar and dean's lister. In the 2005 Philip C. Jessup International Moot Court Competition, he was the best oralist in the national rounds and among the top oralists in the international rounds. Among his many accolades, Mr Lopez has been recognised as a Leading Individual in dispute resolution by *The Legal 500 Asia-Pacific*. Mr Lopez specialises in commercial and intra-corporate disputes involving multibillion-peso companies, as well as banking, rehabilitation and restructuring, fraud litigation, estate disputes and white-collar crimes. Mr Lopez has handled cases involving the largest financial default (US$1.5bn), the largest tax claim (US$1bn) and the largest mass tort claim (with over 35,000 claimants) in Philippine history. He also secured the acquittal of financial officers for money laundering charges involving a US$81m cyberheist. Well-recognised for the depth of his knowledge across various fields of law, Mr Lopez was recently engaged by UNICEF to discuss estate and succession planning for high-net-worth individuals. Mr Lopez serves as director of the Integrated Bar of the Philippines – Makati Chapter and as head of the Legal Education Committee.

RUTH NICHOLE R. URETA
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Ms Ureta is a partner in the litigation and dispute resolution department and heads the arbitration practice group. Her fields of expertise include litigation on procurement contracts and intra-corporate disputes.

During her 17 years of legal practice, she has successfully prosecuted high-stakes criminal actions and obtained numerous favourable arbitral awards in favour of her clients.

Ms Ureta represents the Bangko Sentral ng Pilipinas, Rizal Commercial Banking Corporation, BDO Unibank, SM Development Corporation, and JTI International Philippines, Inc, among others.

FRITZZIE LYN F. ESPAÑOL
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Ms Español is a partner in the firm's litigation and dispute resolution department. A highly regarded litigator, Ms Español specialises in complex commercial, criminal and tax litigation, including corporate rehabilitation and insolvency, banking,

securities, anti-money laundering, and trade disputes, among others. Ms Español has represented a consortium of creditors in a rehabilitation proceeding involving the largest default in Philippine corporate history and litigated the largest tax protest case. She has also defended the officers of a top financial institution in an anti-money laundering case and a petroleum company against multibillion-peso smuggling charges. Ms Español also represented a group engaged in financial services in a novel tax case before the Supreme Court, and led a team to simultaneously foreclose properties in various jurisdictions of a high-profile company with a multibillion-peso loan obligation.

RAQUEL WEALTH A. TAGUIAN
Senior partner/head of the litigation and dispute resolution department
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With over 20 years of litigation experience, Ms Taguian's practice focuses on international commercial and construction arbitration, cross-border executions, disputes involving public utilities and government infrastructures, intra-corporate disputes, corporate rehabilitation, and estate settlement. Ms Taguian was successful in overturning a Supreme Court decision by tempering imposed fines on Metro Manila water concessionaires. She has repeatedly secured favourable multimillion arbitral awards before the Construction Industry Arbitration Commission. She has appeared before the Singapore International Arbitration Centre to defend a client in a multibillion intra-corporate dispute over government projects. She is also a Philippine Dispute Resolution Center trained arbitrator. Ms Taguian's clients include Ayala Land, E. Zobel, Inc, Manila Water Company, Rizal Commercial Banking Corporation, Makati Development Corporation, MDC Buildplus and Alveo Land. She has contributed to several international publications on arbitration, labour law, and contracting agreements, and has partnered with UNICEF to provide lectures on substantive areas of law, such as estate and succession planning. Ms. Taguian is among *The Legal 500 Asia-Pacific* rankings' Recommended Lawyers for 2024.

LEAH GLENDA J. QUESADA
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Ms Quesada, a partner in the firm's litigation and dispute resolution department, is a highly experienced trial attorney

whose practice focuses on commercial disputes, white-collar crimes, and family law.

She has been sought by clients for disputes arising from international trade issues, intra-corporate controversies, tax assessments, and regulatory conflicts. She has counselled and defended captains of industry, multinational corporations, real estate corporations, domestic and foreign telecommunications companies, international aviation firms, and commodity importers.

Ms Quesada has broad experience in complex dissolutions of high-net-worth estates and of marital ties between Filipino citizens and foreign spouses involving cross-border litigation. She has navigated paternity and child custody disputes and the enforcement of spousal and child support orders, litigated cases of violence against women and their children, and mastered the drafting, negotiating and enforcement of prenuptial and postnuptial agreements.

DIANNE MARIE V. ROA-OARDE
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Ms Roa-Oarde, a partner in the firm's litigation and dispute resolution department, specialises in commercial, tax and civil matters. She is a member of the firm's arbitration practice group and a Philippine Dispute Resolution Center trained arbitrator. Among the notable cases and disputes she has handled are an intra-corporate dispute over the control of one of the country's largest healthcare corporations and its subsidiaries, insolvency proceedings for one of the country's largest foreign investors, and a series of multijurisdictional disputes relating to a cyber crime attack on banks in 2016. She regularly renders advisory work for clients and foreign counsel on issues relating to Philippine law on arbitration,

contractual breach, engineering and construction, and insurance, among others. Highly recognised for her skill in dispute resolution, Ms Roa-Oarde has been consistently named a future star in the field of litigation and dispute resolution.

RASHEL ANN C. POMOY
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Ms Pomoy is the deputy head of the firm's labour and employment practice group and a trained arbitrator with a decade of experience in litigation and dispute resolution. She has secured back-to-back multimillion-peso arbitral awards in domestic construction and international commercial arbitration, caused the dismissal of multiple cases filed against the firm's clients with the Office of the Ombudsman and the Sandiganbayan, appeared as counsel for an heir in arguably the largest estate settlement case in the Philippines, and worked with foreign counsel to secure the dismissal of a case filed in New York against one of the biggest Philippine banks. Besides litigating single and multi-plaintiff cases before the National Labour Relations Commission, she also renders advisory work on employment concerns of various multinational corporations and works closely with law firms in other jurisdictions. She has written a variety of legal publications and has conducted various seminars in labour and employment in the Philippines and abroad.

VIA MONINA C. VALDEPEÑAS
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Ms Valdepeñas is a partner in the firm's litigation department and a member of the firm's arbitration practice group. Her practice includes corporate rehabilitation and insolvency, intra-corporate disputes, construction arbitration, energy, and anti-graft and corruption laws.

She has appeared before multiple-level courts and quasi-judicial agencies, including the Tariff Commission, the National Police Commission, and the Construction Industry Arbitration Commission, where she won million-peso awards in various cases. She secured dismissals and acquittals in proceedings against high-ranking officials before the Ombudsman and the Sandiganbayan. In the Supreme Court, she was part of the team that obtained on appeal a decision in favour of a major banking institution client involving a multibillion-peso claim and another decision that significantly reduced the penalty imposed against a major public utility.

LEON MARIA ANGEL P. CAGUIOA
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Mr Caguioa's practice covers various disputes, ranging from criminal prosecution and defence, civil cases including family and estate matters, graft and corruption, and suits against the government.

He was a key contributor to the firm's victory in the first-ever case against the Philippine Competition Commission involving an unprecedented PHP69-billion merger deal. He helped secure the acquittal of several officers of a leading Philippine bank of money laundering charges in relation to an US$81m cyber heist, as well as the victory for another leading bank in the Philippines all the way up to the Supreme Court in relation to the collection of a longstanding multibillion-peso loan. He was instrumental in handling and securing a PHP 82-million arbitral award against the Philippine government.

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South Korea's take on international mediation: The next steps going forward

Yulchon LLC's insight on the Korean Commercial Arbitration Board's international mediation rules

Among its many endeavours in arduously promoting its many capabilities and qualifications in becoming the next hub for international dispute resolution in North-East Asia, as of 1 January 2024, the Korean Commercial Arbitration Board (KCAB) enacted and enforced its own International Mediation Rules (KCAB Rules or the Rules) with the help of Yulchon's international dispute resolution team members, namely Mr. Yun Jae Baek, Ms. Hyunah Park and Ms. Seyoung Choe.

The KCAB has been in charge of administering domestic mediation cases in South Korea, including early court-annexed mediations. In fact, 'early court-annexed mediation' was introduced by the Korean courts in 2010, allowing the courts to refer a civil dispute to a mediation institution in order to conduct a mediation for a short period of time before the commencement of the main trial. Since 3 May 2010, the KCAB was appointed as one of the mediation institutions in charge of administering domestic early court-annexed mediations. Furthermore, the KCAB established its own domestic mediation rules in 2012, and has been handling mediation cases for domestic users. Given the recent trends in increasing the need to attain friendly and efficient settlements of international disputes via mediation, the KCAB decided to expand its services on a global scale using its expertise, competency, and familiarity in handling mediation cases.

The KCAB prepared its Rules by benchmarking other successful international mediation institutions such as the Singapore International Mediation Centre, as well as by taking into account international trends and practices in handling international mediation cases. Moreover, it has also taken into consideration the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation (SCM) for ease of enforcing the settlement agreement reached via KCAB mediation.

In particular, the KCAB Rules comprise 11 articles in total, stipulating the application and procedure of the mediation rules. More precisely, under Article 1(2), the KCAB Rules apply to all mediations when:

i. there is an explicit agreement in writing between the parties to mediate the dispute under the KCAB Rules;

ii. one of the parties wishes to refer the dispute under the KCAB Rules when there is no prior agreement between the parties; and

iii. the parties have agreed in writing to mediate the dispute at the KCAB without designating any particular mediation rules and at least one of the parties to the dispute at the time of filing the request for mediation has its principal place of business or place of habitual residence in a jurisdiction other than South Korea.

Meanwhile, as a way to encourage parties to consider mediation even after the dispute arises, the KCAB Rules also details the procedure to follow in the commencement of mediation when there is no prior mediation agreement between the parties to mediate under Article 3. Moreover, in order to efficiently conduct the mediation in a cost-effective and expeditious manner while also reflecting the various technological advancements in communications technology, under Article 7(4), the mediator has the option to proceed with the mediation virtually.

It is also important to highlight that settlement agreements obtained through mediation under the KCAB Rules are enforceable. Therefore, in the case the parties reach a settlement agreement during mediation, they can either request the mediator to sign the mediation agreement or to issue an attestation confirming that a settlement was reached pursuant to Article 9(3) of the KCAB Rules. As a result, this attestation ensures the enforcement of the settlement agreement under the SCM.

Furthermore, as a measure to safeguard the impartiality and integrity of the mediation proceedings, the KCAB Rules provide that unless the parties agree otherwise, the mediator cannot act as an arbitrator, representative, counsel, expert, judge, witness or in any other capacity with respect to a dispute that is related to the present or past mediation proceedings. Also, the mediator


Mr. Yun Jae Baek


Ms. Jeonghye Sophie Ahn


Ms. Hyunah Park


Ms. Seyoung Choe

shall not be involved in any mediation proceedings for which the dispute arises out of or in connection with the same contract or legal relationship nor a related contract or legal relationship in accordance with Article 11(1) of the KCAB Rules.

With respect to the mediation fees and expenses, at the time of filing the request for mediation, the KCAB requires a filing fee of KRW 1,000,000 that must be remitted by the applicant party under Article 1 of Appendix A of the KCAB Rules. In addition, depending on the amount in dispute, Article 2 of Appendix A of the KCAB Rules provides a simple table breaking down the various ranges of administrative expenses, from a minimum of KRW 500,000 to a maximum of KRW 25,000,000. However, if the amount in dispute is undetermined from the commencement of the mediation, then in principle, the administrative expense shall be KRW 3,000,000. As for the mediator's fees and expenses, pursuant to Article 3 of Appendix A of the KCAB Rules, the mediator's fees are based on an hourly rate agreed by the parties and the mediator. With respect to the mediator's expenses, the KCAB will determine and fix what are deemed reasonable expenses incurred by the mediator.

In conclusion, it is important to emphasise that the purpose of the KCAB Rules is to efficiently settle disputes by providing a transparent and reliable framework for mediation that allows parties to focus on addressing and reconciling their respective underlying interests and concerns, with the end goal of facilitating and aiding the parties in mutually devising a practical solution. As such, the KCAB took this great initiative to promote international mediation.

With both arbitration and mediation at its disposal, the KCAB is better equipped with diverse tools to assist businesses resolve commercial disputes in an efficient and effective manner, making it a more attractive dispute resolution forum for both domestic and foreign businesses.

Yulchon LLC is a full-service international law firm headquartered in Seoul, South Korea. It employs more than 600 professionals, including more than 60 licensed in jurisdictions outside of Korea, and has offices in Shanghai, Hanoi, Ho Chi Minh City, Moscow, Jakarta, and Yangon. As one of Korea's premier law firms, Yulchon maintains its high standards of excellence by valuing a culture of collaborative problem-solving.

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