BRIEFING

TRAVERS SMITH

Dispute Resolution round-up

February 2021

FOREWORD

Welcome to the third edition of our quarterly disputes newsletter, which covers key developments in the dispute resolution sphere over the last three months or so.

With the post-Brexit transition period drawing to a close at the end of last year, and the EU and UK having agreed the shape of their future trading relationship, we finally have some clarity as to how English courts and EU courts will co-operate with each other in the new, post-Brexit world. The previous pan-European regime governing allocation of jurisdiction as between different national courts, and the recognition and enforcement of judgments in cross-border civil disputes, no longer applies to or in the UK. Instead, a different international regime, the 2005 Hague Convention, will now step in in many cases to determine which national court should hear a dispute, and whether overseas judgments should be recognised and enforced. The Hague Convention is at present relatively untried and untested, and we wait with interest to see how it will operate in practice. However, the general expectation is that in most cases, things will very largely proceed as they did before, with perhaps the odd new procedural bump built in.

On the domestic front, it is full steam ahead with new reforms to witness evidence - which have been mooted for some time - now in force as from 6 April 2021. It is to be hoped that the reforms will refocus the minds of parties to English litigation on the real purpose of a witness statement – to set out the factual evidence that the witness would give if they were giving oral evidence-in-chief at trial – and go some way to avoiding the lengthy and over-lawyered statements that the judiciary have complained of much of late.

And we have seen a lot of activity on the case law front, too. Notwithstanding Brexit, London continues to be a pre-eminent centre for international arbitrations, and we have recently seen the Supreme Court hand down two important decisions in this area, in *Enka v Chubb* and *Halliburton v Chubb*, concerning the test for determining the proper law of an arbitration agreement and an arbitrator's duty of disclosure where they are instructed on multiple overlapping matters respectively. We have also potentially seen the first small signs of the anticipated wave of litigation which many believe will inevitably arise from the Covid-19 pandemic, with the courts starting to grapple with force majeure issues in *Travelport v Wex* and *Fibula Air Travel v Just-Us-Air*, alongside of course the Supreme Court's seminal decision in *FCA v Arch* concerning Business Interruption insurance coverage. Finally, we have also seen a couple of interesting litigation funding decisions in the last few months, in *Zuberi v Lexlaw* and *Rowe v Ingenious*, as courts continual to grapple with the limits of what is acceptable practice for this relatively new industry. All of these decisions are explored further in our "Cases" section below.

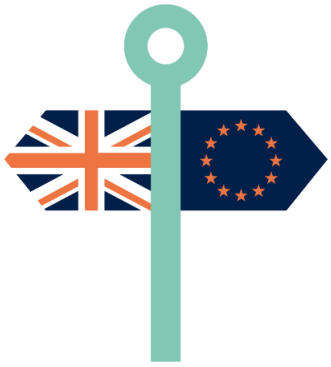
We hope that you continue to enjoy reading this round-up, whether a litigator by trade or a generalist, and whether in-house or in private practice, and that you will share it with any of your colleagues who may also find it useful. In the meantime, please stay safe.

Rob Fell

Head of Dispute Resolution

1 NEWS

BREXIT



BREXIT: END OF TRANSITION PERIOD USHERS IN NEW REGIME ON CIVIL JUDICIAL CO-OPERATION

The end of the post-Brexit transition period has brought with it some changes to the ways in which the English courts and courts in EU member states co-operate with each other.

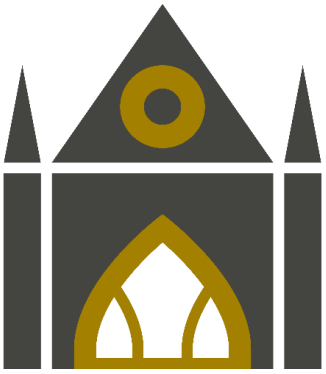
Previously, the UK was part of a pan-European regime, the Recast Brussels Regulation, which governed allocation of jurisdiction as between the English courts and EU member state courts in civil proceedings with a cross-border element. That regime effectively determined which court should take jurisdiction over any given dispute, and prevented parallel proceedings before multiple different national courts. It also ensured that both the English courts and EU member state courts would recognise and enforce each others' judgments in this context, via a relatively quick and user-friendly process.

Since the end of the transition period, the previous pan-European regime has fallen away. It has been replaced by a combination of: (i) a different, less comprehensive international regime, the 2005 Hague Convention; and (ii) where the 2005 Hague Convention does not apply, the local rules in each individual jurisdiction. It is worth being aware that the 2005 Hague Convention only applies to disputes governed by exclusive jurisdiction clauses, and to any judgments arising from those disputes.

In most cases, this new patchwork of different rules should have relatively little impact on the circumstances in which the English courts will be prepared to take jurisdiction over a matter, and to recognise and enforce judgments emanating from the EU. Equally, we expect most European courts to take a relatively similar stance in most circumstances to that which they did previously. However, there are circumstances where the new regime may give rise to a slightly bumpier procedural ride, and to some increased costs.

To read more about the impact of the changes, please click here for a more detailed briefing by Jan-Jaap Baer and Alyce Lynch, Partner and Associate respectively in our Dispute Resolution department.

CIVIL PROCEDURE



CIVIL PROCEDURE: NEW RULES ON WITNESS EVIDENCE IMMINENT

Much anticipated new rules on witness evidence in this jurisdiction, contained in a new Practice Direction 57AC (see Schedule 3 of the hyper-linked document), are now due to come into force from 6 April 2021, and to apply to witness statements concluded on or after that date.

The new rules are aimed at bringing witness statements back to their core purpose – setting

out the factual evidence that a witness would give orally at trial as their evidence-in-chief – and to row back from what many members of the judiciary see as a trend towards over-lengthy, over-lawyered statements which are effectively used as vehicles for parties to put forward argument and "spin".

Amongst other changes, the new rules require witnesses to state how good their recollection is of the matters they are putting forward, and to list the documents to which they have referred or been referred for the purposes of creating the statement. They also require witnesses to sign an enhanced statement of truth, and their legal advisors to sign a new "certificate of compliance", in each case intended to focus minds on whether compliance with the rules has been achieved at the point at which the statement is completed.

CIVIL PROCEDURE: CIVIL JUSTICE COUNCIL LAUNCHES CONSULTATION ON PRE-ACTION PROTOCOLS

On 27 October 2020, the Civil Justice Council ("**CJC**") launched a *review* of the pre-action protocols contained in the Civil Procedure Rules. The purpose of the protocols is essentially to require parties to exchange enough information about their respective cases that they can understand each other's position, prior to any court proceedings being commenced, thereby increasing opportunities for early settlement and avoiding spurious litigation. However, there have also been grumbles that the protocols can increase costs and lead to delay in matters being resolved.

The review therefore aims to determine whether the protocols are working effectively in practice, and whether any reforms to them are required. Issues to be considered include whether the protocols should be made mandatory (which is not presently the case), and what the sanctions for non-compliance should be.

CIVIL PROCEDURE: CIVIL JUSTICE COUNCIL LAUNCHES CONSULTATION ON GUIDELINE HOURLY RATES

On 8 January 2021, the Civil Justice Council published a *draft report* proposing modest upward revisions to the guideline hourly rates currently used for assessment of costs, which were last updated in 2010. The publication of the report has triggered a short consultation period which will conclude on 31 March 2021.

ARBITRATION

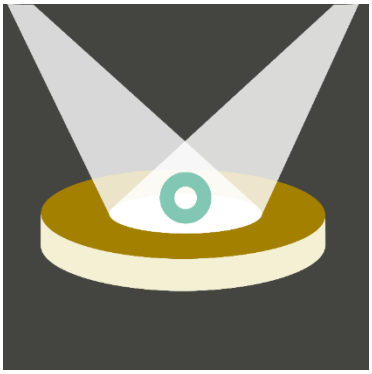
ARBITRATION: NEW ICC RULES IN FORCE

On 1 January 2021, *new ICC Rules* came into force and will apply to cases filed as from that date. The new rules are relatively similar to those in force previously, but do include various useful practical changes, including provision for virtual hearings and a shift away from hard copy filings, a new requirement that certain third party funding arrangements must be disclosed, and new provisions relating to consolidation and joinder of additional parties.

COVID-19: RESTRICTIONS ON WINDING-UP PETITIONS AND ORDERS EXTENDED

The temporary restrictions on the presentation of winding-up petitions, and on the making of winding-up orders, imposed by the Corporate Insolvency and Governance Act 2020 in response to the Covid-19 pandemic, have now been extended for a second time. The restrictions will now expire on 31 March 2021. The restrictions essentially prevent creditors from presenting a petition unless they have reasonable grounds to believe that the pandemic has not had a financial effect on the debtor, or that the debtor would have been unable to pay its debts in any event, notwithstanding the pandemic.

2 CASES UNDER THE SPOTLIGHT



COVID-19

FINANCIAL CONDUCT AUTHORITY V ARCH INSURANCE UK LTD & ORS [2021] UKSC 1

By this decision, the Supreme Court handed down its judgment in the high-profile test case brought by the FCA last year against various insurers, in relation to coverage under Business Interruption (BI) Disease and Prevention of Access policy extensions for COVID-19 related losses. The judgment brings to an end a six month legal process started by the FCA to facilitate the prompt payment of valid claims by insurers.

The Supreme Court substantially granted the FCA's appeals on behalf of policyholders, holding that, in addition to the coverage found by the court at first instance, coverage may also be available for partial closure of a business or its premises. The court also held that valid claims should not be reduced either by pre-trigger COVID-19 losses or because the insured would have suffered loss in any event as a result of the pandemic. The judgment is expected to greatly increase the number of claims paid.

To read the judgment, please click *here*.

TRAVELPORT & ORS V WEX INC [2020] EWHC 2670

This judgment concerning the interpretation of a Material Adverse Effect ("**MAE**") clause under a Share Purchase Agreement ("**SPA**") represents an as-yet rare example of consideration by the English courts of the appropriate construction of such clauses, and of litigation specifically arising as a result of the COVID-19 pandemic.

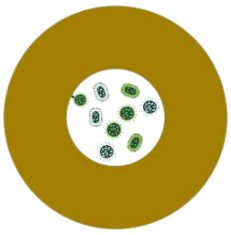
The claimant sellers' business involved issuing virtual credit card account numbers which functioned like physical credit cards for business-to-business payments, primarily to customers in the travel industry. The proceedings concerned a transaction in which the defendant agreed to acquire shares in the claimants' parent company by way of a SPA in January 2020. The SPA's complex MAE clause stated that a pandemic would not be treated as an MAE unless it could be shown to have caused a "disproportionate effect" on either of the sellers, as compared to other participants in the industries in which they operated. In April 2020, the defendant advised one of the claimants that the Covid-19 pandemic constituted a MAE and that accordingly it was not obliged to complete the transaction under the SPA. The claimants issued proceedings seeking: (1) a declaration that there had been no MAE; and (2) an order for specific performance.

The primary issue was whether the Covid-19 pandemic had had a "disproportionate effect" on the claimants' business as compared to other participants in the industry in which the claimants operated. The claimants argued that they operated in the "travel payments industry", and that the Covid-19 pandemic restrictions had not had a "disproportionate effect" on their business when compared to others in that industry. By contrast, the defendant argued that the relevant industry was the (much broader) "payments industry", and that the Covid-19 restrictions did have such a disproportionate effect when compared to that industry.

After close analysis of the SPA and relevant background, the court found that there was insufficient evidence of the existence of a specific "travel payments industry", that the effect of the Covid-19 pandemic on the claimants' business must instead be determined by reference to the broader payments industry, and that when compared to that industry the Covid-19 pandemic did indeed have a "disproportionate effect" on the claimants' business. Accordingly, a MAE had occurred and the defendant was entitled to avoid its further obligations under the SPA.

The decision confirms that English courts will pay close attention to the strict wording of MAE clauses in order to determine the proper allocation of risk between the parties, and will not assume that the parties' intention was to insulate purchasers only from firm-specific risk if the language of the MAE clause indicates otherwise. Each agreement must be construed on its own terms.

To read the judgment please click here, and for a more detailed briefing produced by James Hulmes and Lucy Clifford, Senior Associate and Associate respectively in our Dispute Resolution department, please click here.



FIBULA AIR TRAVEL S.R.L. V JUST-US-AIR [2020] EWHC 3048

This decision considered the application of a force majeure clause in a wet lease agreement for the charter of an aircraft, in the context of the COVID-19 pandemic.

The charterer sought to terminate the agreement pursuant to the force majeure clause, citing problems associated with the pandemic, and thereby sought to avoid payment obligations under the lease. It argued that, as a result, it was entitled to the repayment of a deposit paid to the lessor. The lessor argued that it was entitled to retain the deposit on the basis that the charterer's case on its reliance on the force majeure clause was unsustainable. The judgment relates to an application made by the charterer to, in effect, freeze the deposit held by the lessor, on the basis that there was a real risk of the deposit being dissipated by the lessor (owing to the alleged improper conduct on the part of the lessor in refusing to return it).

The court refused the application, on the basis that the lessor had "perfectly reasonable arguments" to retain the deposit. Although the court did not conduct a full analysis at this stage of the proceedings of the extent to which the charterer could rely on the force majeure clause, it did give some consideration to the merits of the parties' respective cases on this point. In doing so, the court looked at the impact of the pandemic on the parties' contractual obligations and concluded that, on the facts of the case, the agreement could not be terminated for force majeure until the charterer had paid two initial instalments (at the earliest, if at all).

The judgment usefully illustrates that the English courts will closely scrutinise both the specific events that a party relies on when claiming that a force majeure event has arisen and how those events affect the parties' contractual obligations, together with the precise wording of the force majeure clause and the broader agreement.

For a more detailed briefing produced by Richard Roil and Adam Bradley, Senior Associate and Associate respectively in our Dispute Resolution department, please click here.

LITIGATION FUNDING

ZUBERI V LEXLAW LTD [2021] EWCA CIV 16

In this decision, the Court of Appeal considered the effect of the DBA Regulations 2013 (the "**Regulations**") on the enforceability of Damages Based Agreements ("**DBAs**").

In doing so, the court unanimously upheld the validity of a DBA under which a client was liable to pay its solicitors' costs in the event that the client terminated the agreement prematurely, allaying a widespread concern that such a provision was precluded under the Regulations.

The decision has therefore done much to resolve the considerable uncertainty created by the unclear drafting of the Regulations, which has historically contributed to the slow uptake of DBAs in practice. It may well give legal representatives greater confidence to take on more claims under DBAs in the future, thus giving effect to Parliament's intention behind the Regulations of promoting access to justice.

To read the judgment, please click *here*.

ROWE & ORS V INGENIOUS & ORS [2021] EWCA CIV 29

This Court of Appeal decision has significant ramifications for litigation funders, as well as for parties to funded litigation.

The court held that a cross-undertaking in damages should only be required as a condition of security for costs in "rare and exceptional circumstances", and in "even rarer and more exceptional cases" where a claimant benefits from litigation funding. In doing so, it explicitly overruled a number of first instance judgments, including Hotel Portfolio II v Ruhan [2020] EWHC 233, in which a security applicant was required to provide a fortified cross-undertaking in damages.

The court also expressed doubts about the current regime of self-regulation in the litigation funding industry. Lord Justices Popplewell, Henderson and Floyd explicitly called for a review of the effect of funding on civil litigation, and for any subsequent new practice in the industry to be governed by legislation. Funders would be wise to note the court's guidance that "a properly run commercial funder should rarely if ever need to be ordered to put up security".

To read the judgment, please click *here*.

ARBITRATION

ENKA V CHUBB [2020] UKSC 38

In this decision, the Supreme Court clarified the principles to be applied to determine the proper law of an arbitration agreement, in particular where the governing law of the contract differs from the law of the seat of the arbitration.

The court unanimously rejected the Court of Appeal's reasoning that, other than in rare cases, an arbitration agreement will be governed by the law of the seat. However, the majority concluded that, as the relevant contract contained no express or implied choice of Russian law, the arbitration agreement was governed by the law of the seat of the arbitration, being the law with which it was most closely connected. As that seat was London, the majority dismissed the appeal brought by Chubb Russia and upheld the Court of Appeal's decision (but for different reasons) that English law governed the validity and scope of the arbitration agreement.

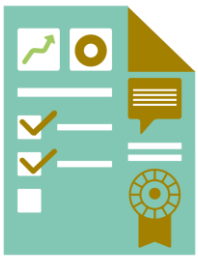
To read the judgment, please click *here*, and for a more detailed briefing produced by Anne Foster and Hannah Drury, Consultant and Associate respectively in our Dispute Resolution department, please click *here*.

HALLIBURTON COMPANY V CHUBB BERMUDA INSURANCE LIMITED [2020] UKSC 48

In another significant judgment for English-seated arbitrations, arising out of the Deepwater Horizon oil spill in 2010, the Supreme Court clarified here an arbitrator's duty to disclose their involvement in multiple arbitrations arising out of the same subject matter, where only one of the parties is involved in all of those arbitrations. The case is noteworthy for the intervention of the ICC, LCIA, CIArb, LMAA and GAFTA on this important issue. The judgment also clarifies various other issues relating to the determination of arbitrator impartiality.

To read the judgment, please click here, and for a more detailed briefing produced by Anne Foster and Adam Bradley, Consultant and Associate respectively in our Dispute Resolution department, please click here.

CONTRACTUAL INTERPRETATION



PRIMUS INTERNATIONAL HOLDING CO V TRIUMPH CONTROLS UK LTD [2020] EWCA CIV 1228

In this judgment, the Court of Appeal confirmed that, unless there are clear words to the contrary in a contract, the ordinary legal meaning of a particular term (in this case, "goodwill") will be preferred to an unusual or non-legal meaning.

The Court of Appeal found that: (i) contrary to the appellant's submissions, the ordinary legal meaning of goodwill is not the same as the accounting definition, and that the ordinary legal meaning is not synonymous with "value"; (ii) language should be assumed to have consistent meaning throughout an agreement; and (iii) "goodwill" in contracts for sale of a business refers to "a type of proprietary right representing the reputation, good name and connections of a business".

To read the judgment, please click here, and for a more detailed briefing produced by Lucy Alexander, Associate in our Dispute Resolution department, please click here.

JOANNE PROPERTIES LIMITED V MONEYTHING CAPITAL LIMITED [2020] EWCA CIV 1541

This decision of the Court of Appeal provides practitioners with a helpful reminder of the law relating to the use of the "subject to contract" label in settlement negotiations.

The parties had previously agreed a settlement and the issue for the court was whether they had concluded a further binding agreement as to how a ring-fenced sum of money was to be shared between them. The deputy judge found that a binding agreement had been reached, despite the use of the "subject to contract" label in the inter-solicitor correspondence on behalf of the parties. The Court of Appeal, overturning this decision, confirmed that if there is no express agreement between the parties that the "subject to contract" label has been removed, or such an agreement cannot be necessarily implied, the court will not imply an agreement that the label should be removed. The court will examine all the circumstances of the case and in this instance it was plainly contemplated by the parties that a consent order would be needed to embody the settlement. The court clarified that in "subject to contract" negotiations aimed at settling litigation, the consent order is the equivalent of the formal contract.

Counsel for Moneything also submitted that its purported Part 36 offer had "recalibrated" the settlement negotiations, so that they

subsequently proceeded on the basis of offers and counter-offers capable of acceptance. The court rejected this, confirming that a Part 36 offer is not the same as an offer in the ordinary law of contract and is capable of being accepted even after the offeree has made a different offer.

To read the judgment, please click *here*.

DAVID JOSEPH V DELOITTE NSE LLP [2020] EWCA CIV 1457

In this judgment the Court of Appeal considered the law relating to contractual implied terms. The dispute between the parties centred on the meaning of certain clauses in a partnership agreement. Mr Joseph had proposed that a term be implied into a clause which would have extended the time available for him to have challenged a notice of retirement issued to him by the partnership board. The court found that the implied term argued for on behalf of Mr Joseph conflicted with the express wording of the clause. Although the three justices had sympathy with Mr Joseph's position, the judgment makes it clear that the court will not imply a term into a commercial contract merely because it appears fair. "The role of the Court, whether in interpreting the terms the parties have expressly agreed, or considering what they have impliedly agreed, is not to make a better contract for the parties but to ascertain what their contract is."

To read the judgment, please click *here*.

TORT

STOFFEL & CO V GRONDONA [2020] UKSC 42

In this decision, the Supreme Court affirmed and applied the "trio of conditions" test for the defence of illegality, established by the Supreme Court in Patel v Mirza [2016] UKSC 42. The issue on appeal was whether the respondent should be refused relief for the appellant's negligence on the basis that the transaction in question relied upon illegal mortgage fraud. The decision confirms that courts will take a flexible approach to the defence that pays close attention to both policy considerations and the need to ensure proportionate outcomes for the parties.

To read the judgment, please click *here*.

PRIVILEGE

THE FINANCIAL REPORTING COUNCIL LTD V FRASERS GROUP PLC [2020] EWHC 2607 (CH)

This decision provides a useful reminder of the strict requirements for asserting litigation privilege. Nugee LJ reinforced the principle that, even where litigation is reasonably within contemplation at the time, a communication or document will only be protected by litigation privilege where it has been prepared for the sole or dominant purpose of the relevant litigation.

To read the judgment, please click *here*, and to read a more detailed briefing produced by Michele Cheng and Ibrahim Chaudhary, Senior Associate and Trainee respectively in our Dispute Resolution department, please click *here*.

CIVIL PROCEDURE

TELEFÓNICA UK LTD V OFFICE OF COMMUNICATIONS [2020] EWCA CIV 1374

In this decision, the Court of Appeal allowed the claimant's appeal against an order awarding it only two of the four specified forms of enhanced relief available under CPR 36.17(4) after having beaten its own Part 36 settlement offer at trial.

The Court confirmed that, provided a claimant is found to have made a genuine attempt at settlement and it would not otherwise be unjust to do so, if a claimant obtains judgment at trial that is at least as advantageous as its Part 36 offer, it will be entitled to the full range of enhanced relief set out at CPR 36.17(4).

To read the judgment, please click *here*, and to read a more detailed briefing produced by Alyssa Brathwaite, a Senior Associate in our Dispute Resolution department, please click *here*.

GROUP CLAIMS

JALLA V SHELL INTERNATIONAL TRADING [2021] EWCA CIV 63

In these proceedings, arising from a 2011 oil spill in Nigeria, a cause of action against a UK domiciled "anchor" defendant was deemed to have expired before it was added to the claim.

In 2017, claims were issued against two UK companies and a Nigerian domiciled company within the Shell group, relating to the spill. In 2018, the claimants added another UK domiciled anchor defendant, with the claims against the other UK defendants falling away. The claims against the new defendant were therefore "new claims". To avoid the limitation cut-off, the claimants argued that they suffered a "continuing" nuisance until the oil was cleaned up: they continued to suffer harm after the initial spill. This argument was rejected as the court considered that the relief sought by the claimants was inconsistent with the nature of continuing nuisance: the harm flowed from a single event.

The decision does not end the claims, and there will be a preliminary hearing later in the year to clarify the limitation (and therefore jurisdiction) position for all claimants, but this decision will certainly represent a significant barrier to them.

To read the judgment, please click *here*.

FOR FURTHER INFORMATION, PLEASE CONTACT

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