BRIEFING

TRAVERS SMITH

Dispute Resolution round-up

July 2024

1 Introduction

Welcome to the latest edition of our quarterly disputes newsletter, which covers key developments in the dispute resolution world over the last few months.

The media landscape this month has been dominated by the change of government, which has also had an immediate impact in the dispute resolution sphere. Both the Litigation Funding Agreements (Enforceability) Bill and the Arbitration Bill fell away when parliament was dissolved. The Arbitration Bill has since been picked back up by the new government but it remains to be seen what will happen in the litigation funding space. Happily, the previous government was able to ratify the 2019 Hague Convention in the run up to the election, an important step in smoothing the path to greater mutual recognition and enforcement of civil and commercial court judgments as between the UK and the EU.

Setting the election aside, other matters continue to move apace. We have seen both the judiciary and practitioners start to grapple with the use of AI in dispute resolution. Moves are also afoot to grant third parties much more sweeping access than before to documents connected to litigation, bringing into sharp relief the need to balance a policy of open justice with protecting the interests of individual parties.

We also have the usual spread of key court judgments for you to consider, ranging from the first few settlements of collective proceedings in the Competition Appeal Tribunal (**CAT**), to litigation generated by the UK's Russian sanctions regime, to commentary on the Part 36 regime from none other than Hugh Grant himself.

We hope that you continue to enjoy reading this round-up, whether you are 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.

Heather Gagen

Head of Dispute Resolution

2 News

Litigation funding: general election leads to limbo

Prior to the general election, the previous government announced measures to combat the impact of the Supreme Court's decision in *PACCAR* on the litigation funding industry. However, the draft legislation failed to make it through the wash-up period before parliament was dissolved in the run-up to the election, and has not been included in the new government's first King's Speech.

PACCAR held that litigation funding agreements (**LFAs**) which provided for funders to receive a percentage share of any damages award were "Damages Based Agreements" (**DBAs**) under s.58AA of the Courts and Legal Services Act 1990 (**CLSA 1990**), rendering many commercial LFAs unenforceable (for more information on the decision, see our August 2023 Round-up). The ramifications of the decision have been playing out in the lower courts ever since, with many funding agreements (including those amended to try to escape the implications of *PACCAR*) being challenged. The effect has been felt particularly acutely in the collective actions regime in the CAT, where there are multiple appeals on funding issues outstanding (some of which are likely to be heard together), impeding the progress of cases.

The Litigation Funding Agreements (Enforceability) Bill was introduced to Parliament on 19 March 2024. This short piece of legislation sought to amend s.58AA of the CLSA 1990 (i.e. the legislation which defines a DBA), so that an agreement is not a DBA if it is a "litigation funding agreement". An LFA is defined as an agreement where a funder pays a litigant's legal fees in return for some form of payment to the funder. The legislation was intended to be retrospective and therefore would have removed all existing LFAs from the definition of DBA – thus ensuring that they are enforceable.

The failure of the legislation to pass before the change in government puts the several appeals pending determination by the Court of Appeal (which must be heard by December 2024) into an unsatisfactory position, as the question of enforceability would have become academic if the Bill had become law. While it is a relatively simple and uncontroversial bill, it may not be high on the list of the government's legislative priorities and therefore it is not clear when or even whether equivalent legislation will be passed, and whether the Court of Appeal will need to decide on the appeals beforehand.

Separately, the former Justice Minister requested that the Civil Justice Council (**CJC**) undertake a wider review of the litigation funding sector (which is currently self-regulated), in particular as to whether further regulation or safeguards are needed to "*ensure that claimants can get the best deal*". This follows long-running concerns that (particularly in class actions) claimants can receive very small sums, whilst funders can pocket potentially hundreds of millions of pounds. The CJC review, which will proceed notwithstanding the change in government, will consider whether the current arrangements for commercial litigation funding are delivering effective access to justice and then make recommendations as to whether litigation funding should be regulated, whether funders' returns should be capped, and the role that the courts themselves can play in ensuring that claimants are protected. It will also consider the relationship between litigation funding and litigation costs more generally, and the conflicts of interests that are inherent in the sector (i.e. between funders, lawyers, and funded litigants). The CJC has committed to providing an interim report on the issue by summer 2024 and a full report by summer 2025. Stakeholders eagerly await the recommendations, which will have significant implications for the future of litigation funding in this jurisdiction, and therefore for its future as an international centre for resolving disputes, in particular for high-value class actions.

Enforcement of judgments: UK ratifies 2019 Hague Convention

On 27 June 2024, the UK ratified the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (**Hague 2019**), a framework of rules facilitating the recognition and enforcement of civil and commercial court judgments between contracting states. The contracting states to Hague 2019 are currently all of the EU member states except Denmark, plus Ukraine and Uruguay. Now that the UK has ratified Hague 2019, it will come into force as between those states and the UK on 1 July 2025, provided none of them raise an objection in the interim to it doing so.

The most important benefit of Hague 2019 is that it will, although by no means universal, apply to a wide range of English civil and commercial court judgments. As such, it improves on the position under the 2005 Hague Convention on Choice of Court Agreements, which only assists as regards recognition and enforcement of judgments arising from contractual disputes, and even then, only those governed by exclusive jurisdiction clauses. Hague 2019 will therefore allow UK parties more easily to enforce many more judgments in contracting states, as well as to agree non-exclusive or asymmetric English jurisdiction clauses in contracts with parties from other contracting states, in the knowledge that qualifying English court judgments arising from those clauses should generally be enforceable in those states – including, importantly, in all EU member states (except Denmark).

It is also worth noting that the application of Hague 2019 does not depend on when a relevant jurisdiction clause was entered into – it will apply to proceedings started after Hague 2019 entered into force for both the state in which a judgment originated and the state in which that judgment needs to be enforced, regardless of when the jurisdiction clause was concluded.

For a reminder of the general position as regards jurisdiction clauses and enforcement of judgments post-Brexit, see here.

CPR 5.4C: sweeping expansion proposed of third parties' ability to obtain court documents

The Civil Procedure Rules Committee (**CPRC**) has recently consulted on expanding the scope of CPR 5.4C, which sets out the circumstances in which third parties can obtain from the court documents connected with litigation. The consultation forms part of the Lady Chief Justice's plans to promote open justice.

The current CPR 5.4C allows third parties to obtain copies of pleadings as of right (provided that all acknowledgements of service or defences have been filed), and also copies of orders and judgments made in public. To obtain other documents connected with the litigation, the third party must make an application, the prospects of success of which are linked to their reason for requesting the documents and the stage the proceedings have reached (documents will generally not be available unless they have been deployed at a hearing).

As part of the consultation, the CPRC put forward a proposed new CPR 5.4C which would significantly expand the types of documents that would be available to third parties as of right (i.e. without having to make an application), to include skeleton arguments, witness statements and affidavits (but not their exhibits or annexures), and most expert reports. The proposed new rule would appear to operate with retrospective effect. As currently drafted, it raises interesting questions as to whether key evidence being made easily available to the public earlier in the litigation process could operate to dissuade individuals from giving certain factual or expert evidence, or have an effect on parties' calculations as to the best time to settle. It also raises practical considerations in relation to the administrative burden it

will place upon both solicitors and the courts in relation to handling the requests for documents.

However, having consulted on the proposed new rule, and having received a large number of "*very high quality*" submissions in relation to it, the CPRC has temporarily paused its plans to implement it, to enable the Lady Chief Justice's Transparency and Open Justice Board (chaired by Mr. Justice Nicklin) to conduct its first phase of work. It therefore remains to be seen whether the new rule will take effect in its current form, or something close to it.

3 Cases

ESG Disputes

Alame & Ors v Shell plc & Anor [2023] EWHC 2961 (**Alame 1**) and [2024] EWHC 510 (**Alame 2**)

These two decisions relate to case management issues arising in claims brought by c.14,000 residents of the Bille and Ogale regions in Nigeria, alleging losses caused by oil spills in those regions. Pipelines in the area are operated by Shell Petroleum Development Company of Nigeria Limited, a subsidiary of the UK-domiciled Royal Dutch Shell plc (together, "**Shell**"). Together, the decisions shed light on how the English courts will approach and manage claims of this nature.

By the time of the relevant hearings, only five claimants in the group had been able to identify the particular oil spill or other event leading to the contamination alleged to have caused them loss. The remaining claimants had identified a number of oil spillages, and described the damage suffered as a result of consequential contamination of the land and waterways, without pleading any causal nexus between each oil spill and the damage suffered by each individual claimant.

In Alame 1, the court agreed with Shell that the claims could only proceed on a "global claim" basis. Global claims, most commonly seen in a construction context, essentially represent an "all-or-nothing" approach whereby the claimant will recover nothing if it is established that a factor for which the defendant is not liable made a significant contribution to the damage.

In Alame 2, the claimants contended that the claims should proceed by reference to the need to select appropriate "lead claimants", who would then be used to determine issues that were common to groups of other claimants. However, the court rejected that approach as inappropriate for the resolution of global claims. Instead, it directed that the claims should proceed on the basis that it would be necessary to examine all oil contamination of the relevant area within the relevant period (2011–2013), with a view to determining whether Shell could be said to be liable for all relevant loss arising from that contamination. Disclosure, witness evidence and expert evidence would all also be required to proceed on that basis.

Taken together, the decisions are likely to present a significant problem to the claimants in establishing causation for their alleged loss. Shell may be able to avoid liability if it can demonstrate that oil spills for which it was not responsible made a significant contribution to the contamination – and consequent damage – in the relevant area and during the relevant period. We would therefore expect the claimants to seek to replead their case on causation in due course, if they are able to obtain further particulars as a result of disclosure and evidence.

Read the judgments for Alame 1 and Alame 2. To read our longer briefing on this case click here.

KlimaSeniorinnen v Switzerland 53600/20

This landmark decision by the European Court of Human Rights (**ECtHR**) in the KlimaSeniorinnen (Swiss Senior Women) case considers whether human rights can be violated by climate change inaction. The case centred around a complaint brought by four individual Swiss women and an association whose aim was to promote and implement climate protection on behalf of its members, alleging that the Swiss authorities had failed to mitigate climate change.

Due to the ECtHR's strict procedural rules on standing, the claims of the four individual women were ruled inadmissible. However, the association was found to have standing on the basis that climate change was a common concern of humankind.

The ECtHR found that the Swiss government's inadequate efforts to combat climate change, including a failure to quantify (through a carbon budget or otherwise) national greenhouse gas emissions limitations, had infringed human rights. The Article 8 right under the European Convention of Human Rights (the **Convention**) (a right to a private and family life) was deemed by the ECtHR to encompass *"a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life"*. This recognition of a right to a healthy environment within human rights represents a novel precedent in climate change litigation, recognising an alternative route to redress beyond the tortious and corporate governance routes activists have recently been using to seek to influence future action on climate change.

While this decision is not directly enforceable in the UK, UK courts will be required to take account of it when determining any similar claims under the Convention. The decision will undoubtedly also have a ripple effect on businesses, with the ECtHR indicating that the obligation of states to recognise and protect human rights through climate action does not just lie with governments, stating that *"[d]ecarbonisation of the economies and ways of life can only be achieved through a comprehensive and profound transformation in various sectors. Such "green transitions" necessarily require a very complex and wide-ranging set of coordinated actions, policies and investments involving both the public and the private sectors"*.

The judgment contained a notable dissent from Judge Eicke (the UK judge), who opined that the majority had gone beyond what was permissible in unnecessarily expanding the concept of standing. He further cautioned that the majority decision may in fact be counter-productive, in part due to the risk that governments will now be tied up in litigation about whatever regulations they have adopted or how those regulations have been applied in practice.

Read the judgment here. To read our longer briefing on the case click here.

Competition Disputes

McLaren v MOL (Europe Africa) Ltd & Others [2023] CAT 75 and *Gutmann v First MTR South Western Ltd & Anor* [2024] CAT 32

The CAT has now approved two collective settlements – one in December 2023 in the context of a follow-on action against several shipping firms (**RoRo**) and one in May 2024 involving a stand-alone claim alleging abuse of dominant position against two companies in the passenger rail service market (**Trains**). In both cases, the CAT was satisfied that the proposed settlements between the class representative and the relevant settling defendant were *"just and reasonable"* as required under section 49A of the Competition Act and Rule 94 of the CAT Rules.

While it took eight years for the first settlement to come before the CAT for approval (the collective proceedings regime having been introduced in 2015), it is clear that the issue of settlement approval is one of the big-ticket items on the CAT's agenda for the coming years. The RoRo and Trains decisions provide useful insight into the many and varied difficult questions that the CAT, parties and practitioners will need to grapple with in the context of the collective settlement approval process.

In RoRo the settlement involved a relatively small settlement sum of £1.5m (said to reflect the settling defendant's 1.7% market share), and the CAT and the parties were prepared to take a pragmatic approach to the settlement. Accordingly, the CAT took the view that a number of thorny issues such as distribution (i.e. how the money will make its way into the hands of the class members) and the reverter mechanism (namely, what happens to any unclaimed amounts of the settlement and whether they should "revert back" to the settling defendant) ought to be determined at a later date. The relatively small sums at stake also meant that the parties were able to agree the terms of a "barring order" preventing the non-settling defendants from seeking contribution from the settling defendant in future – something which may not have been possible had more significant sums been at stake.

In contrast, the Trains settlement did include a (fairly elaborate) distribution plan, in which the settlement sum was allocated to three pots with differing evidential thresholds. The CAT was not initially satisfied with this plan and required the parties to revise it in order to address the CAT's concerns regarding "take up" of the settlement sum by members of the class. This involved reducing the evidential requirements for "pot 3" claims and ensuring that any undistributed damages in "pot 2" could be paid into "pot 3" (and *vice versa*), through the implementation of a waterfall mechanism. The CAT was clearly concerned about barriers to compensation and likely take up rates, and indeed noted that in future cases it would expect more direct empirical evidence of the likely take-up rate of the class. As a practical matter, settling parties will therefore need to be nimble to meet those concerns, in advance of and/or during a settlement approval hearing, in order to obtain settlement approval. Stepping back to consider whether the regime is delivering substantive justice, the CAT's concern with the prospect that very few of the class would actually claim the damages awarded under the settlement (echoing the US experience where common take-up rates are in the range of 10-20%, or even lower) resonates with the CJC review of litigation funding mentioned above.

Both judgments addressed the conflict of interest that exists between the parties seeking approval of the settlement (in particular, the class representative's lawyers/funders), and the class members – a perennial issue in the context of collective settlements. The CAT made its position clear in both decisions; it expects nothing short of full and frank disclosure of all relevant facts and documents by the settling parties, something which competition law practitioners will need to be particularly mindful of when making an application for settlement approval.

Read the judgments here (RoRo) and here (Trains). To read our longer briefings on the cases, click here (RoRo) and here (Trains).

Financial Markets Disputes

UniCredit Bank GmbH v RusChemAlliance LLC Case ID: 2024/0015

In April 2024, the Supreme Court upheld a decision of the Court of Appeal to grant an anti-suit injunction to restrain proceedings commenced by RusChemAlliance in Russia seeking payment under certain on demand bonds issued by UniCredit. The Supreme Court's decision confirms that the English courts may grant an anti-suit injunction where a dispute arises out of a contract containing an arbitration agreement that is governed by English law, even if the parties have chosen a foreign seat for their arbitration.

The Supreme Court has not yet published the detailed reasons for its decision, but it is anticipated that it will have applied the principles in *Enka v Chubb* to determine that the arbitration agreement at issue was governed by English law, bringing the request for an anti-suit injunction within a jurisdictional gateway (i.e. conferring jurisdiction on the English courts to deal with it). Although the Supreme Court will presumably have been satisfied that the Court of Appeal was correct in its findings regarding (i) the arbitral agreement being governed by English law and (ii) England being the proper place in which to bring the claim, it remains to be seen whether its reasoning will differ in any material way from that of the Court of Appeal.

The previous government's draft Arbitration Bill would have replaced the test for working out the law of an arbitration agreement set out in *Enka v Chubb* (which will generally result in the law of the arbitration agreement following the law of the underlying contract, not the seat, where the parties have failed to make an express choice) with a rule to the effect that unless the parties expressly agree the governing law of the arbitration agreement, it will follow the law of the seat. That Bill has now been resurrected by the new Labour government. If that rule had been in place and applied here, it would have had the effect of making the governing law of the arbitration agreement French law, depriving the English courts of jurisdiction to grant the anti-suit injunction.

Watch the Supreme Court's brief initial decision here. Read more about these issues in our 2024 DR Yearbook, here.

Zephyrus Capital Aviation Partners 1D Ltd & Ors v Fidelis Underwriting Ltd & Ors [2024] EWHC 734 (Comm)

In this decision, the High Court held that claims against reinsurers by owners of aircraft leased to Russian airlines, under policies containing exclusive jurisdiction clauses in favour of the Russian courts, could proceed before the English courts. This was on the basis that the claimants were unlikely to receive a fair trial in Russia. The decision represents a rare illustration of the (exceptional) circumstances in which the English courts will decline to uphold an exclusive jurisdiction clause in favour of a foreign court.

The claimants were airline leasing companies incorporated in Ireland, the United States and Bermuda, who had agreed to lease aircraft to Russian airlines. Under the terms of the relevant lease agreements, the airlines were obliged to insure the aircraft in respect of "hull all risks" and "war risks". Additionally, unless the primary insurers were themselves part of the London or international market, the airlines were further required to obtain and maintain reinsurance on the same terms as the underlying insurance policies and provide for the leasing companies to bring claims directly against the reinsurers. Both the primary and reinsurance contracts contained exclusive jurisdiction clauses in favour of the Russian courts.

Following Russia's invasion of Ukraine, sanctions were imposed on Russia prohibiting the leasing of aircraft to Russian airlines, as well as the underwriting of Russian insurance and reinsurance policies. Russia also introduced countermeasures that prevented the claimants from recovering their aircraft from the Russian airlines without a permit. The claimants brough claims in the English courts against the reinsurers for the loss of the aircraft. The defendants challenged the jurisdiction of the English courts based on the exclusive jurisdiction clauses in the reinsurance contracts and applied to stay the proceedings.

The High Court refused the defendants' application for a stay, concluding that:

1. it was unlikely that the claimants had foreseen that a dispute under the contract in question would engage state or other interests, raising the risk of an unfair trial. The defendants' arguments that this risk had been priced in therefore had little force;
2. for multiple reasons (including Russian state exposure via the involvement of the Russian National Reinsurance Company and the Russian courts' likely lack of objectivity when determining whether the alleged losses were caused by war or invasion), the claimants were unlikely to receive a fair trial in Russia;
3. the likelihood of the claimants not receiving a fair trial was a strong reason to refuse to give effect to an exclusive jurisdiction clause and hear proceedings in the English courts; and
4. the claimants' pursuit of their claims in Russia would give rise to an undesirable multiplicity of proceedings and the risk of inconsistent judgments, as well as an element of personal risk to individuals who would ordinarily attend trial.

Read the full judgment here. To read our longer briefing on the case, click here.

Civil Procedure and Privilege

Commission Recovery Ltd v Marks & Clerk LLP [2024] EWCA Civ 9

In this eagerly anticipated decision, the Court of Appeal has provided further guidance on the use of representative actions. A representative action is a mechanism under CPR 19.8 via which a mass claim can brought on an "opt out" basis, provided that all claimants have the "*same interest*" in the claim. In 2021, the Supreme Court placed, in certain respects, a significant limitation on the use of representative actions when it handed down a judgment in the well-known *Lloyd v Google* case to the effect that a group of claimants will not necessarily have the "*same interest*" in a claim where the assessment of their loss would be highly individualised.

At first instance in this case, the High Court had held that certain aspects of claims brought by and on behalf of clients of a firm of patent / trademark attorneys in respect of the payments of (allegedly) undisclosed commission by the firm to a third party *could* proceed by way of representative action. This meant that the claimant could pursue the claims not only on its own behalf, but also on behalf of others who may be affected.

The Court of Appeal agreed, holding that there may be discrete issues in the proceedings where claimants would have the "*same interest*", even if on others (e.g. the assessment of damages) they might not.

This follows the acknowledgement in *Lloyd v Google* that issues in a case may be "bifurcated" in such a way that some may be dealt with by way of a representative action, whereas others which do not satisfy the same interest test can be resolved on an individual basis. Which issues are capable of being resolved by way of a representative action will be highly fact-specific, but a key question will be whether they are likely to give rise to conflicts between class members; it is not important that some class members may be less interested in certain issues than others.

Although, at first blush, it might appear that the Court of Appeal has pushed the limits of the same interest test established in *Lloyd v Google*, in many respects its decision chimes with the Supreme Court's stance in that representative actions should be treated as "*a flexible tool of convenience in the administration of justice*". The Supreme Court has refused permission for a further appeal in *Marks & Clerk* on the basis that the Court of Appeal's decision does not raise an arguable question of law. However, the Court of Appeal has acknowledged that assessing damages (as opposed to determining certain issues of liability) will normally involve individualised assessments, the implication being that the ability to use the representative action procedure as a fully "opt-out" mass claim process from start to finish is likely to remain challenging. It will be interesting to see if and how claimant representatives might overcome that challenge in future cases, or whether parliament will intervene to facilitate the bringing of opt-out mass claims outside the competition law sphere (which has its own separate group litigation regime).

Read the judgment here.

Abfa Commodities Trading v Petraco Oil [2024] EWHC 706 (Comm)

Part 36 offers have been the unlikely subject of the news of late, with Hugh Grant having accepted "*an enormous sum*" to settle his phone-tapping claim against The Sun. Bemoaning his decision to accept the offer, Grant neatly summarised the Part 36 regime as follows: "*the rules around civil litigation mean that if I proceed to trial and the court awards me damages that are even a penny less than the settlement offer, I would have to pay the legal costs of both sides*".

In this slightly less glamorous case, Petraco, which was an intervener in the proceedings, made a Part 36 settlement offer to ABFA worth around $24m, which was rejected. The court later made an award in Petraco's favour worth over $27m, although the judge found that Petraco had provided dishonest evidence in relation to a specific issue in dispute. Rejecting ABFA's invitation to the court to make an award in its favour in relation to the costs of that issue, the judge instead made a reduced costs award of only 40% in Petraco's favour in relation to the costs of the issue in order "*to reflect the causative effect of the dishonesty on the length and cost of the trial*".

The judgment confirms that the Part 36 regime applies even when the successful party has engaged in misconduct in the proceedings. That will not go unpunished, though; the misconduct will be reflected by a reduced costs award.

Read the judgment here.

Corporate Disputes

Drax Smart Generation Holdco Ltd v Scottish Power Retail Holdings Ltd [2024] EWCA Civ 477

In this decision, the Court of Appeal considered the sufficiency of a notice of claim made under a notice of claim clause in a Sale and Purchase Agreement (**SPA**). In doing so, it allowed an appeal by the buyer, Drax, against the first instance decision that the requirements of the relevant clause had not been met (considered in our January 2024 Round-up). It also cautioned against notice of claim clauses becoming "*technical minefields[s]*" that are "*divorced from the underlying merits of*

Here, the clause in question provided, in material part, that: "*In the case of the types of claim detailed below, the Seller shall not be liable* ***for a claim*** *unless the Buyer has notified the Seller of the claim, stating in reasonable detail the nature of the claim and* ***the amount claimed*** *(detailing the Buyer's calculation of the Loss thereby alleged to have been suffered) …*" (emphasis added). Drax's notice of claim had purported to comply with those requirements by providing loss estimate calculations, on the basis that relevant losses were yet to crystallise. It had also framed the relevant losses as losses suffered by the company Drax had acquired, rather than as losses suffered by Drax itself (with Drax clarifying much later via a pleading amendment that it was in fact seeking damages representing its own losses in the form of a diminution in the value of its shares in the acquired company).

The Court of Appeal held that Drax's failure to frame the losses correctly in the notice did not invalidate it, and that the estimate calculations that Drax had put forward in good faith at that time were sufficient.

We suspect that, notwithstanding this decision, notice issues in relation to warranty and indemnity claims by buyers will continue to be litigated by sellers given that they represent an opportunity to knock out such claims at an early stage, without the need to consider their substantive merits (not least because another recent Court of Appeal decision in this area, *Decision Inc Holdings Proprietary Ltd v Garbett* [2023] EWCA Civ 1284, did result in a notice of claim being held to be ineffective). This decision will, however, be prayed in aid by buyers challenged on whether they have given sufficient notice of their claims. It is also worth noting that the market for warranty and indemnity (**W&I**) insurance policies has grown significantly in recent years, such that buyers are increasingly seeking recourse from insurers rather than proceeding against sellers – and that insurers tend not to impose stringent notification requirements (or at least provide that such requirements cannot be utilised by the insurer to defeat a claim). Nor do insurers have onward recourse against sellers when they pay out under these policies, as they generally contain "no subrogation" clauses. As such, this decision might not have as much practical significance for the market as would first appear to be the case, likely applying only in circumstances where no W&I insurance is in place.

Read the judgment here. To read our longer briefing on the case click here.

Contract Law

RTI Ltd v Mur Shipping BV [2024] UKSC 18

This Supreme Court decision has important implications for the drafting and interpretation of force majeure clauses, both generally and in the context of disputes arising from the imposition of sanctions affecting a contractual counterparty.

The case concerned the shipment of minerals pursuant to a contract between MUR Shipping and RTI, where the amount of freight due was defined by reference to a price per metric tonne in USD. In April 2018, the USA applied sanctions to RTI's associated company, leading to difficulties for RTI in paying for the freight in USD. As an alternative, RTI proposed that it make payment in EUR which could be converted into USD as soon as it was received by MUR's bank. It also agreed to bear any additional costs or exchange rate losses in converting the euros into USD.

MUR rejected RTI's proposal and sought to invoke a force majeure clause in the contract to relieve it from the obligation to load the vessel. The question before the court was whether the force majeure clause did indeed relieve MUR of its contractual obligations, or whether a proviso in the clause to the effect that it could not be relied upon where the relevant state of affairs could be overcome by "*reasonable endeavours*" from the affected party operated to require MUR to accept the non-contractual performance (payment in EUR) which RTI had offered.

The Supreme Court held that, in the absence of clear wording to the contrary, the "*reasonable endeavours*" proviso did not operate to require MUR to accept alternative non-contractual performance. To hold otherwise would be to undermine the value of contractual rights, which extend to the freedom not to accept an offer of non-contractual performance. Parties that intend for a reasonable endeavours proviso in a force majeure clause to extend to requiring acceptance of offers of non-contractual performance would therefore be advised explicitly to say so.

Read the judgment here. To read our longer briefing on the case click here.

Insolvency Disputes

Re BHS Group Ltd [2024] EWHC 1417 (Ch)

In this high-profile case, the liquidators of various BHS companies were successful in arguing that former directors of those companies were liable for wrongful trading (albeit at the latest of six possible dates argued) and were also successful in bringing the first ever claim for "misfeasance trading".

The judgment is, amongst other things, a reminder to company directors to ensure that they have the necessary knowledge, skills and experience to enable them to act with the requisite care and circumspection in carrying out their duties. In particular, any limitations on the scope of a director's role should be documented and to the extent they encounter areas beyond their expertise, they need to obtain and carefully consider professional advice prior to any relevant decision making (rather than as a box-ticking exercise after the event). As is clear from the judge's remarks, acting honestly and with the best of intentions will not alone relieve directors of liability where they lack the necessary expertise to carry out their role in accordance with their duties and have breached those duties as a result. It is also no defence to a breach of duty claim if the general knowledge, skill and experience of the defendant director is lower than that of the reasonably diligent person discharging the same functions.

The judgment also engages an interesting public policy issue, making clear that the courts will not exercise their discretion to reduce the amount for which directors are declared liable for wrongful trading claims owing simply to inadequate insurance cover. To do so would be to send the wrong message to risk-taking directors that they could escape liability if they did not obtain adequate cover to indemnify themselves against wrongful trading. Similarly, the court will not shrink from imposing liability on a director to make a contribution to a company's assets where that liability is properly incurred even if to do so would be "*potentially ruinous*". The rationale is that creditors will receive no compensation if risk-taking directors will be able to escape liability if they can prove that they have no insurance and no personal assets to meet a claim for wrongful trading (or have been able protect them from attack by a liquidator).

Read the judgment here. To read our longer briefing on the case click here.

Sian Participation Corp (in liquidation) v Halimeda International Ltd [2024] UKPC 16

In a decision which will be welcomed by creditors, the Judicial Committee of the Privy Council (the **Board**) has decided that the courts should cease exercising a discretion to stay or dismiss a winding up petition on the ground that the debt founding the application is subject to an arbitration agreement and said to be disputed, without it being shown to be disputed on genuine and substantial grounds. In doing so, the Board overturned the Court of Appeal's long-standing decision in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575, which generally required a stay even for insubstantial disputes (for example, where the debt subject to an arbitration clause was merely not admitted).

Despite being a decision of the Privy Council, the decision is binding on the courts of England and Wales pursuant to the exercise of the power in *Willers v Joyce* [2016] UKSC 44.

Read the judgment here.

4 Department News

The Dispute Resolution Yearbook 2024

Following the success of our previous editions, we are thrilled to share the fourth edition of the Travers Smith Dispute Resolution Yearbook.

We hope you enjoy reading through the chapters and seeing the breadth and complexity of the work we do, whilst also getting a real sense of our firm's collaborative nature and, more specifically, our team's culture.

Promotions

We are delighted to announce the following promotions across our team, which took effect from 1 July.

Ingrid Hodgskiss has been promoted to partner. Ingrid has broad experience in acting for and advising clients on UK and EU competition law matters. She advises on UK, EU and multi-jurisdictional merger control matters, UK national security and foreign direct investment reviews, behavioural competition law matters and competition follow-on damages litigation. She is recognised in Legal 500 as a Rising Star in the EU and Competition section.

James Hulmes has been promoted to Senior Counsel. James has experience across a broad range of areas, including complex multi-jurisdictional commercial disputes, international arbitration, transnational mass tort claims and competition litigation. He acts for clients across a variety of sectors, including in the private equity, entertainment, technology, manufacturing and construction sectors. In 2016, James completed an eight-month secondment with the International Arbitration team of a preeminent Spanish firm.

Awards and Recognition for Travers Smith Dispute Resolution

Heather Gagen, Head of Dispute Resolution and ESG & Impact, was named as one of ten Distinguished Advisers by Financier Worldwide Magazine in their "Power Players: Environmental, Social and Governance 2024" Report.

Travers Smith was awarded "Litigation of the Year – Cartel Defence" at the annual Global Competition Review Awards in a ceremony held in Washington DC on 9 April 2024. The award, for creative, strategic and innovative litigation on behalf of a defendant in a private action for cartel damages, recognises the firm's work in acting for the successful appellants in the UK Supreme Court's *PACCAR* ruling, discussed further above.

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