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Disputes Digest

Introduction

Welcome to our Spring edition of Disputes Digest. In this edition, we look back at 2016 and summarise the key litigation and arbitration cases of 2016 for corporate counsel to be aware of. We also take a look at illegality, following the Patel v Mirza decision, cybercrime and ransom demands, and the Singapore International Arbitration Centre investment arbitration rules, which came into effect on 1 January 2017. We consider third party funding, and the extent to which third party funders may be liable for costs awarded against their funded litigant, and the new professional standards in force for tax professionals.

This edition marks our last edition before CMS, Nabarro and Olswang combine on 1 May 2017. The merger will create a bigger disputes practice for CMS in the UK, with more specialists across more sectors and disciplines than ever before.

You can read Disputes Digest in electronic magazine format or via the 'download publication' button.

If you would like to discuss any of the issues in this edition or wish to provide any feedback, please get in touch with me, the authors, or your usual contact at CMS. I hope you find this edition of Disputes Digest interesting and thought provoking.

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Corporate counsel's guide to the key cases of 2016 (litigation)

Pre-contractual relations

The Court of Appeal held that parties were bound by an **unsigned agreement**, notwithstanding that the agreement contained a provision requiring the parties to sign that agreement in order for it to be legally binding. The Appellant had amended a draft agreement and then signed and returned it to the Respondent. The Appellant later claimed that no contract had been formed because the Respondent had failed to sign it. The Court held that, irrespective of the agreement's signature requirement, the Respondent had accepted the terms of the amended agreement by its conduct and had waived the requirement to sign.

Reveille Independent LLC v Anotech International (UK) Limited [2016] EWCA Civ 443

The Court of Appeal provided further guidance on what will amount to a **frustrating event** in the context of a services agreement. In determining that the contract in question had not been frustrated, the Court held that a frustrating event must be a '*supervening outside event*' which the parties could not reasonably be thought to have foreseen as a real possibility.

The Court also observed that whether any given event is a frustrating event is, once the facts allegedly constituting the event are established, a question of law. The fact that the parties might not immediately treat the event as such does not alter that position. However, the parties' actions after that event may serve as an indication of whether the event was, in fact, a frustrating one: in this instance, it was 'striking' that the Appellant had not treated the contract as frustrated until approximately five months after the event.

Armchair Answercall Ltd v People in Mind Ltd [2016] EWCA Civ 1039 *(For more on this case, please see our Law-Now)*

The Court of Appeal held that a Court cannot **imply terms** into an agreement where to do so would transform an incomplete bargain into a legally binding contract.

The seller of several flats and an estate agent had failed to reach a binding agreement as the parties had failed to agree the conditions upon which the estate agent would be entitled to commission, which the Court determined was an essential term. The Court held that it is not legitimate, under the guise of implying terms, to make a contract for the parties. To do so would amount to putting '*the cart before the horse*.'

Wells v Devani [2016] EWCA Civ 1106

Jurisdiction

In refusing an application requiring the defendants to file a defence before their **challenge to jurisdiction** had been finally determined by the Supreme Court, the Commercial Court clarified that, in the absence of an important public interest, it will not ordinarily order a party to incur a substantial burden in progressing a case while a jurisdiction challenge is pending.

The Court observed that the particulars of claim ran to 85 pages and made detailed allegations of fraud. In such circumstances, it would be wrong to impose upon the defendants the substantial burden of pleading their defence when that might prove to be unnecessary. The Court found that a delay of a few months to allow for the Supreme Court to consider the appeal did not justify ordering the defendants to submit their defence before the jurisdiction challenge was determined.

Arcadia Energy (Suisse) SA v Attock Oil International Ltd (unreported) - 11 October 2016 *(For more on this case, please see our Law-Now)*

The Court of Appeal, in finding that the Court did not have jurisdiction under Article 5(1)(b) of the 2001 Brussels Regulation to hear a claim arising out of a contract for services, set out the principles which should apply in determining the **place of performance of a contract** for jurisdiction purposes.

The Court of Appeal emphasised that the burden of showing a good arguable case that the English Courts have jurisdiction rests on the claimant and that '*good arguable case*' in that context means that the claimant has a 'much better argument' than the defendant.

JEB Recoveries LLP v Binstock [2016] EWCA 1008 - 19 October 2016 *(For more on this case, please see our Law-Now)*

Directors' Liability

The Court of Appeal dismissed an appeal by a claimant in respect of a **contribution claim** under section 1(1) of the *Civil Liability (Contribution) Act 1978* for misappropriated funds, specifically dividend payments, from a company in which the claimant and the defendant had both been directors and shareholders.

The Court held that as the claimant had misappropriated the funds from the company for his own exclusive benefit, it was not '*just and equitable*' under section 2(1) of the 1978 Act that the defendant should pay a share of what the claimant owed to the company.

Stephen Dawson v Laura Bell [2016] EWCA Civ 96 - 19 February 2016 *(For more on this case, please see our Law-Now)*

The Supreme Court held, by a majority of 3:2, that a company director is not personally liable for failing to obtain compulsory **employers' liability insurance**.

Every employer is required to have insurance against injury or disease suffered by its employees pursuant to the *Employers' Liability (Compulsory Insurance) Act 1969*. An employee, who injured himself at work, brought proceedings against the employer's director (for breach of duty under the 1969 Act) rather than against the employer as it had gone into insolvency. The Supreme Court, in finding for the director, held that it was only possible to pierce the corporate veil to impose liability on the director if it is expressly or impliedly justified by the statute.

Campbell v Gordon [2016] UKSC 38 - 6 July 2016 (For more on this case, please see our Law-Now)

The High Court held that liquidators and administrators cannot recover their own costs and **expenses of investigating a wrongful trading claim**, even following a finding of wrongful trading under section 214 of the *Insolvency Act 1986*.

Whilst insolvency office-holders may be under a positive duty to defend or bring litigation, there was no exception to the general rule that expenses of litigation must be recovered through costs orders. The Court held that those sums could not, for example, be recovered by way of damages for tort or breach of contract and there was no obvious basis for distinguishing a claim under section 214 (or any other insolvency claim) in that regard.

Ralls Builders Ltd (In Liquidation), Re [2016] EWHC 1812 *(Ch) (For more on this case, please see our Law-Now)*

Warranties

Notice provisions for warranty claims that impose a contractual time limit are a form of exclusion clause, and so will be construed narrowly where there is any ambiguity.

In a contract requiring notice of a claim '*as soon as reasonably practicable and in any event within 20 Business Days after becoming aware of the matter*', this means notice should be given when the buyer became '*aware of the claim*'.

The Court held that the requirement to notify is triggered when there is awareness of a '*proper basis*' for a claim, not when there is merely awareness of the facts or that there may be a claim.

Ensuring compliance with the notice provisions contained in an agreement is always important – parties should check the wording to see what level of '*awareness*' is needed before notification is required.

Nobahar-Cookson & Ors v The Hut Group Limited [2016] EWCA Civ 128

Proper compliance with **contractual notice requirements is** not a technical or trivial matter. The commercial purpose of a warranty notification clause includes ensuring the other side knows, in sufficiently formal terms, that a claim is to be made, so that financial provision can be made for it, or alternatively what it must do to put things right.

The underlying purpose of such notices is commercial certainty. This means that the notice must specify that a claim is being made and, where 'reasonable detail' is required, is likely to require reference to the relevant warranty that has allegedly been breached.

The notice should also say whether the claim is based on an actual or contingent liability and give some indication as to the factual basis on which it can reasonably be said that contingency will mature.

The precise requirements for warranty claims will always depend upon the wording of the relevant contract. Notices should contain sufficient detail without restricting the claimant's ability to bring any potential claim.

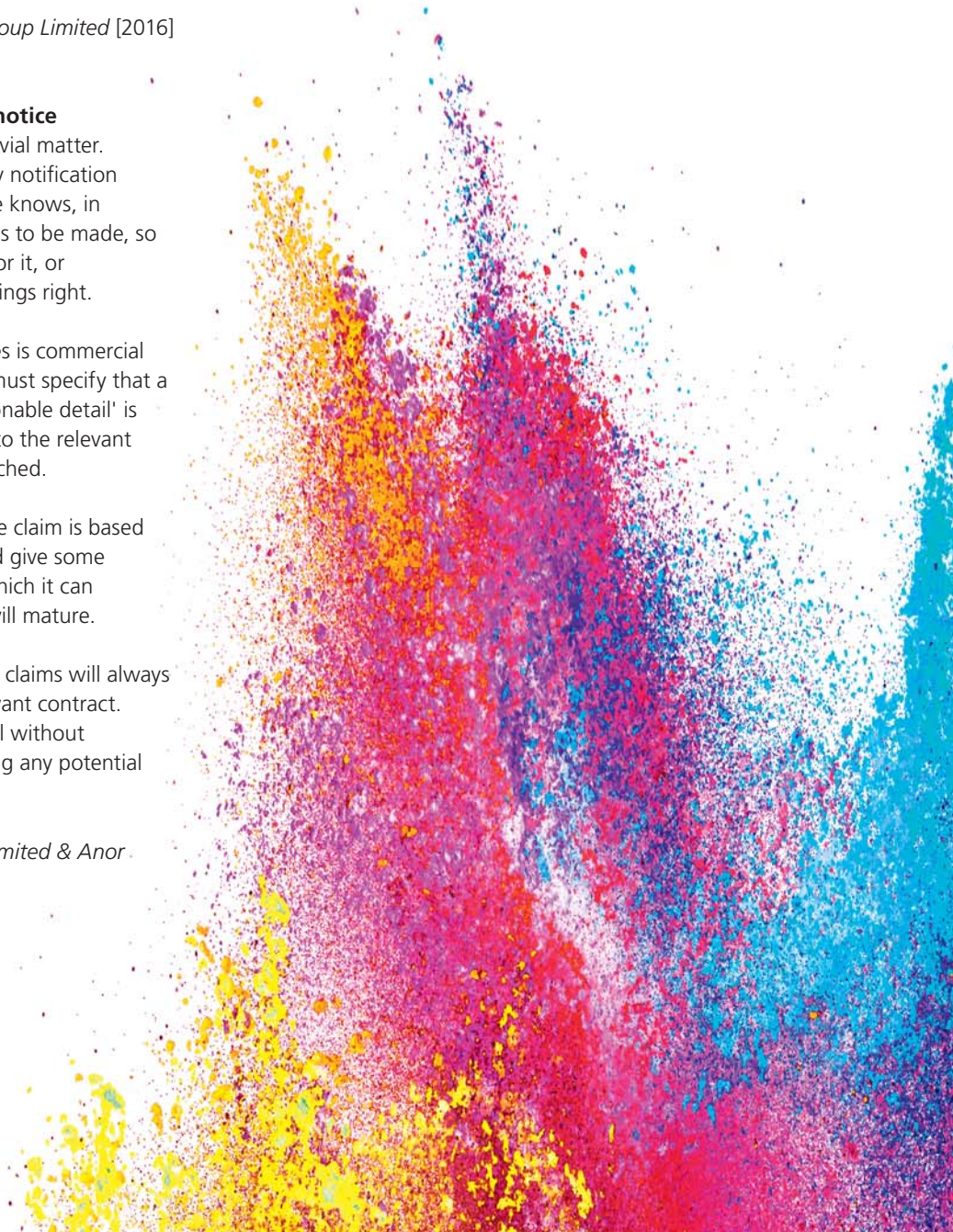
Teoco UK Limited v Aircom Jersey 4 Limited & Anor [2015] EWHC (CH)

Warranties do not, unless specifically stated otherwise, **equate to a statement or representation**. In this case, the buyer alleged that certain matters warranted under the SPA were not true on the date of its signing.

However, the SPA contained provisions limiting the liability of the sellers in relation to, inter alia, warranty claims brought after a certain period; the buyer found that it was contractually barred from raising warranty claims against the sellers and instead claimed damages for misrepresentation in tort.

In the absence of clear drafting that specifically imports representations into the SPA, this case suggests that English law will not generally interpret warranties as amounting to representations.

Idemitsu Kosan Co. Ltd v Sumitomo Corporation [2016] EWHC 1909 (Comm). *(For more information on this case, please see our Law-Now)*



Settlement

In circumstances in which a party suspects (but has not proven) fraud and is induced to enter into a settlement, it is possible for the **settlement** to be unravelled if **fraud** can later be established.

In order to have the settlement set aside, the claimant does not have to show that it believed the misrepresentations were true, however, a claimant would need to establish that the fraudulent misrepresentations materially caused it to enter into the settlement.

This decision is of particular importance to insurers and those who regularly settle claims not because they believe a claim to be genuine, but because there is a risk that the Judge hearing the claim may believe the defendant. A mere suspicion that a claim was fraudulent should not preclude the unravelling of a settlement if fraud can be subsequently established.

Hayward v Zurich Insurance Company plc [2016] UKSC 48 *(For more on this case, please see our Law-Now)*

Where a defendant reaches a **settlement** with the claimant but not its co-defendants, it is still possible for the co-defendants to seek a **contribution** from it in the event the claimant successfully establishes liability.

This is so even in the case of fraud, as there can be orders for equitable contribution between fraudsters, especially if one of them has benefited more than the other.

This case is an important reminder that if no global settlement is reached, and absent appropriate indemnity wording in the settlement agreement, defendants may be at risk of being brought back into proceedings if contribution is sought by co-defendants who are found to be liable.

Kazakhstan Kagazy Plc & Ors v Zhunus & Ors [2016] EWCA Civ 1036 *(For more information on this case, please see our Law-Now)*

The Court considered whether, by settling an earlier action for breach of contract with one defendant, the claimant had fixed the full measure of his loss or whether he was still able to recover loss from the other defendants for a separate cause of action relating to the same contract. Based on the earlier case of *Jameson v CEGB [2000] 1 AC 455*, the defendants argued that in the case of joint or concurrent tortfeasors, where there is a settlement in full and final satisfaction of the claimant's claim against one of them, this will bar future claims against any other tortfeasor for the same damage.

However, the Court held that it would be unfair and unjust to the claimant to preclude him from pursuing his second claim because he had settled his earlier claim, taking into account that it was for a different cause of action and there was no clear language in the settlement agreement barring him from doing so.

The default position is that a **settlement agreement** between a claimant and a defendant will not affect a claimant's rights to sue a third party, unless the claimant specifically agrees to forgo or waive its rights as against that third party, or that third party is able to enforce the settlement agreement directly.

Anthony McGill v The Sports and Entertainment Media Group & Ors [2016] EWCA Civ 1063

Part 36 offers to settle

Where a claimant's recovery in damages exceeds any valid Part 36 offer (even if only by a 'near-miss'), the default position is that it is entitled to its costs following expiry of the relevant offer.

The Court of Appeal set aside a costs order which had wrongly penalised the claimant for unreasonable conduct in its costs assessment for failing to win certain points of its argument, pursuing 'exaggerated' costs and for not accepting an offer to settle. The Court of Appeal confirmed that more weight should be given to a litigant's success. When assessing misconduct or unreasonable behaviour, the question for the Courts is whether the claim '*exceeded the bounds of permissible optimism*'.

Parties often make 'without prejudice' offers of settlement during proceedings, some of which may be made under Part 36, in order to benefit from the specific costs protections provided. In order to achieve maximum tactical benefit, such offers will need to be pitched to represent an amount the recipient may not beat at trial.

Sugar Hut Group Limited & Ors v A J Insurance Service [2016] EWCA Civ 46

When considering an offer made under Part 36, the Court has discretion to make issue-based or proportionate costs orders. However, a successful claimant (i.e. one who has obtained judgment that is at least as advantageous as its Part 36 offer) will be entitled to all of its costs on an indemnity basis after the effective date and the Court may only deprive such a claimant of all or part of its costs if the Court considers that the costs outcome would otherwise be unjust in all the circumstances of the case.

That a claimant does not succeed on all allegations does not automatically make it unjust for the claimant to recover all or part of its costs.

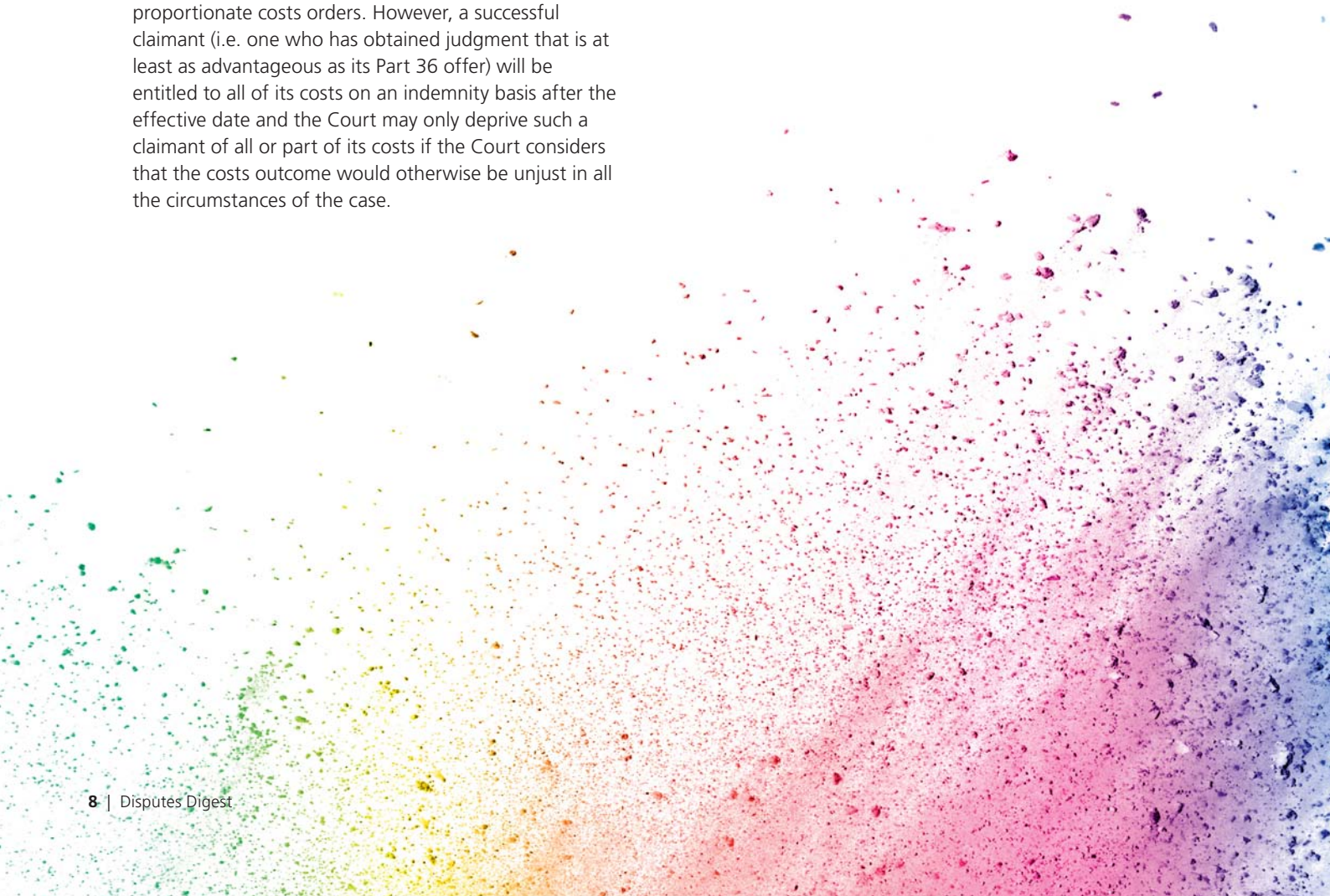
The key determining factor in cases such as these is always likely to be that the unsuccessful defendant could and should have avoided the costs of trial by accepting the claimant's Part 36 offer. This reinforces the point that careful consideration will need to be given to the level of any offer made.

Miss Courtney Webb v Liverpool Women's NHS Foundation Trust [2016] EWCA Civ 365

Part 36 offers that are pitched very high (offering either only a small discount or an outcome that would not be available in the litigation due to the 'all or nothing' nature of the issues in dispute) may still be valid under Part 36.

Notwithstanding the recent rule that the Court must have regard to whether the offer is a genuine attempt to settle the claim, the Court acknowledged in this case that disputes are frequently settled on the basis of an assessment of risk which combines both the risk of failure of the claim and the uncertainty as to its true value.

Jockey Club Racecourse Limited v Willmott Dixon Construction Limited [2016] EWHC 167 (TCC)



Disclosure and Privilege

The Court of Appeal has confirmed that admissions made in a meeting with the other side's lawyer should not have been disclosed to the Court during trial. The decision illustrates the breadth of 'without prejudice' privilege and the English Court's wide application of the rule.

At first instance, the judge held that the meeting between the claimant and the defendant's lawyer was not a 'without prejudice' meeting as he found it was not for the purpose of a genuine attempt to compromise a dispute between the parties. The Court of Appeal reached the opposite conclusion and held that the claimant was entitled to rely on 'without prejudice' privilege, as the true question of whether 'without prejudice' privilege should be applied is whether the discussions were or ought to have been seen by both parties as '**negotiations genuinely aimed at settlement**'. The Court of Appeal accordingly ordered that those admissions made by the claimant in the meeting in question were inadmissible, effectively requiring a re-trial.

Sang kook Suh and anr v Mace (UK) Limited [2016] EWCA Civ 4 (For more information on this case, please see our Law-Now)

The High Court ordered AZ to provide further evidence in order to **substantiate** its claim to **privilege** over various documents withheld from disclosure.

Specifically, the Court ordered that a 'proper officer' of AZ support and explain its claim to privilege in a further witness statement, as the disclosure statement and witness statement previously provided by AZ's legal advisors were deemed insufficient to establish privilege. Although it may have been conventional at one time to state that documents are '*by their nature privileged*', the Court said that such a statement has '*no place in modern litigation, let alone litigation of very real complexity*'. In this case, the Court considered that AZ's approach to claiming privilege had been unsatisfactory, attempts to provide clarity had not been successful and the basis for claims to legal advice privilege and litigation privilege were either not made out or found to be incorrect. Lastly, the volume of documents over which privilege was claimed was not so large to make the proposed order disproportionate. In the circumstances, the disclosure order sought was warranted.

Astex Therapeutics Limited v AstraZeneca AB [2016] EWHC 2759 (Ch) (For more information on this case, please see our Law-Now)

RBS claimed legal advice privilege over notes from interviews conducted by or on behalf of the Bank by its in-house and external lawyers with employees and ex-employees as part of an investigation and withheld them from disclosure on that basis.

The Court concluded that those notes were not covered by legal advice privilege as legal advice privilege applies only to confidential communications between a client and the client's lawyer for the purpose of giving or receiving legal advice. The 'client' for the purposes of privilege consists only of those employees authorised to seek and receive legal advice from the lawyer, not all employees or former employees.

Care must always be taken with preparatory or fact gathering exercises carried out with a view to seeking legal advice by individuals that are not the 'client', since the work product of such exercises is unlikely to attract legal advice privilege. For corporations who must act through their officers and employees, this decision appears unsatisfactory and means that the question of privilege protection remains a concern.

Re the RBS Rights Issue Litigation [2016] EWHC 3161 (Ch) (For more information on this case, please see our Law-Now)

Third Party Funding

In what the Judge referred to as '*something of a test case for whether third party funders can remain anonymous*', the Court, found that there was an inherent power in CPR 25.14 (the rule empowering the Court to order security for costs other than from the claimant) to order a claimant to **identify** his **third party funders**.

The judgment enables the defendant to pursue applications for security for costs against those third party funders, something that previously it could not do because it did not know their identities. Those direct applications will bring into play the question of whether security should be ordered when a claimant benefits from ATE insurance (on which see more below).

Stuart Barrie Wall v RBS (For more information on this case, please see our Law-Now)

In an important judgment, the High Court tackled the question of whether an impecunious claimant can defeat a defendant's application for security for costs on the basis that it has **ATE insurance** in place. On the one hand, impecunious claimants should not be denied access to justice simply because of their want of funds. On the other hand, defendants should not be dragged through litigation where there is reason to believe that they will not be able to recover their costs if they win.

The High Court refused the defendants' applications because the claimants had ATE insurance in place and there was no reason to believe that insurance would not respond as/when necessary. The judgment highlighted '*the public interest in permitting ATE insurance… to provide access to justice for insolvent companies*'. Naturally, defendants will be disappointed to be left to 'wait and see' if claimants' ATE policies respond in due course. This judgment indicates that, absent specific concerns, defendants ought to be content to do so.

Premier Motorauctions Limited (in liquidation), Premier Motorauctions Leeds Limited (in liquidation) v PricewaterhouseCoopers LLP, Lloyds Bank plc (For more information on this case, please see our Law-Now)

The Court of Appeal upheld a judge's order imposing **indemnity costs** on **third-party funders**. The claimant used commercial third-party funding to pursue a claim of US$1.65 billion. The claims included allegations of personal dishonesty against a representative of one defendant. The claim was not only unsuccessful, but was characterised by the first-instance judge as '*speculative and opportunistic*', '*objectively hopeless*' and '*based on no sound foundation in fact or law*'.

Under the funding agreements, the funders stood to gain up to seven times the value of their funding if the claimant had been successful. The judge at first instance had been justified in ordering them to pay indemnity costs, taking into account the character of the claim, its size and its effect on the defendants. The Court of Appeal further commented that a commercial funder seeks to derive financial benefit from the claim and cannot distance himself from the conduct of the claimant he has chosen to back and on whom he relies to make a return on his investment.

Excalibur Ventures LLC v Texas Keystone Inc & Others (For more information on this case, please see our Law-Now)

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Corporate counsel's guide to the key cases of 2016 (arbitration)

Anti-suit injunction/jurisdiction

The requirements of Article 25.3 of the LCIA Rules only apply to the types of interim measures set out in section 44 of the *Arbitration Act 1996*. Article 25.3 of the LCIA Rules appears first to require tribunal authorisation. The English Court granted the claimant's anti-suit injunction in support of LCIA arbitration proceedings in London to prevent parallel arbitration proceedings in Russia which it did without the tribunal first authorising this action. Section 44 of the Arbitration Act 1996 expressly states that the Court has the power to grant interim measures 'unless otherwise agreed by the parties'. Yet it would seem that the parties had agreed that the Court should only grant interim measures if the arbitrators had authorised this and clearly in this case they had not.

However, the judge decided that the Court could grant an anti-suit injunction under section 37 of the Senior Courts Act 1981 which provides that 'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so'.

Mace (Russia) Ltd v Retansel Enterprises Ltd & Anor (For more information on this case, please read our Law-Now)

In obiter comments, the Commercial Court suggested that **asymmetrical jurisdiction clauses** will be afforded the protection of Article 31(2) of the Recast Brussels Regulation, i.e. the 'anti-torpedo' provision.

An asymmetrical jurisdiction clause provides that one party must commence proceedings in a particular jurisdiction but that the other party may sue in other jurisdictions if convenient.

Article 31(2) attempts to diffuse 'torpedo' actions by providing that, where the court upon which jurisdiction is conferred by an exclusive jurisdiction clause is seised, any court of another Member State must stay proceedings until that court declines jurisdiction. The Court observed that asymmetrical jurisdiction clauses would fall within the definition of 'exclusive' for the purposes of article 31(2) and would therefore provide protection to parties against a 'torpedo' action.

Perella Weinberg Partners UK LLP v Codere SA [2016] EWHC 1182 (Comm)

The Supreme Court held that the Court should decline to rule on jurisdiction where the claimant is able to commence arbitration proceedings, and should thereby leave the **arbitral tribunal** to rule on **jurisdictional issues**. English courts have a history of respecting the arbitral process and its jurisdiction. According to the judge, although the English courts have jurisdiction to grant the requested declaratory relief, it should not grant it if there is a binding arbitration agreement, the claimant's claim can be litigated by way of arbitration and the claimant can clearly commence an arbitration to pursue that claim.

HC Trading Malta Ltd v Tradeland Commodities S.L. [2016] EWHC 1279 (Comm)

Emergency procedures
The Court's consideration of the **relationship** between the **Emergency Procedures** contained within the LCIA Rules (2014), and the **Court's powers** to make orders in respect of arbitral proceedings, suggests that in order for a party to succeed with an application under section 44 of the *Arbitration Act 1996*, it will need to demonstrate that the Emergency Procedures under the LCIA Rules (or other institutional rules) do not provide an adequate solution. The Court noted that, in applying for a freezing injunction, the first requirement was for the claimant to show that it had a 'good arguable case.' The Court considered the claims advanced by the claimant and concluded that it was unable to satisfy this requirement: the application for a freezing injunction was not successful.

For parties facing the threat of a freezing order, this case also illustrates the importance of considering what might reasonably be promised by way of an undertaking, since timely undertakings may mitigate any arguments that assets might otherwise be dissipated, and could potentially neutralise a freezing order application.

Gerald Metals SA v Timis [2016] EWHC 2327 (Ch)
(For more information on this case, please read our Law-Now)

Arbitration clauses
The Privy Council held that the words 'may submit' in an arbitration clause allowed either party to **submit the dispute to arbitration** if a dispute arose, but did not prevent either party from initially submitting the dispute to the competent courts instead. If court proceedings were commenced by A, the clause gave B the right to apply for a stay of those proceedings to compel A to arbitrate.

Anzen Ltd v Hermes One Ltd [2016] UKPC 1

Funding
The arbitrator in this case ordered Essar to **pay** the **third party funding fee** incurred by Norscot of £1.94m. The English High Court confirmed that the costs of third party funding are recoverable in principle under both the English Arbitration Act 1996 and the ICC Rules – Essar had employed all available means to exert financial and commercial pressure on Norscot. As a consequence, Norscot had no choice but to enter into a funding agreement, and in those circumstances it was appropriate to compel Essar to pay the resulting fee.

Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)

Arbitrator apparent bias
An English High Court judge ruled that there are 'weaknesses' in the **2014 IBA Guidelines** on conflict of interest. The Court found no **apparent bias** in Mr David Haigh QC of Canadian law firm Burnet, Duckworth & Palmer LLP acting as sole arbitrator in a dispute despite his firm providing substantial legal services to a company affiliated with the defendant during the course of the arbitration. According to Mr Haigh, he had no knowledge of the conflict which falls into the IBA Non-Waivable Red List, a non-exhaustive list of circumstances which sets different disclosure requirements and consequences for each. In such circumstances, the IBA Guidelines recommend that an arbitrator decline the appointment.

Although the judge acknowledged that the circumstances did fall into the 'non-waivable' list in the IBA Guidelines, he ruled that this did not bind the Court and the guidelines are not a statement of English law. The judge dismissed the application for the award to be set aside on the basis that a fair minded and informed observer would not conclude that the arbitrator was biased as there was no real possibility that Mr Haigh QC lacked impartiality under English law.

W Ltd v M SDN BHD [2016] EWHC 422 (Comm)

Challenge to award based on ss.67-68 Arbitration Act 1996

The Commercial Court dismissed a challenge to an award under sections 67 and 68 of the Arbitration Act 1996, finding that the **separability of an arbitration agreement** was governed by English law, even though the governing law of the underlying contract was Iranian law. Further, as a matter of English law the arbitration clause was separable from the underlying contract and was, therefore, unaffected by allegations of corruption and bribery in the procurement of the underlying contract.

National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor [2016] EWHC 510 (Comm)

Extension of time

The Commercial Court granted a retroactive **extension of time** to apply for a **corrected award** under Article 27 of the LCIA Rules pursuant to its powers under section 79 of the Arbitration Act 1996. Article 27 requires that an application to correct an award be made within 30 days of the publication of the award but as the recognition proceedings in China took more than four years to come to a conclusion, the deadline had passed by the time the claimants were aware that they needed to apply under Article 27. The judge acknowledged that the time limit under Article 27 would almost always expire before the outcome of a contested attempt was known and was satisfied that a substantial injustice would otherwise be done if the extension were not granted.

Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd [2016] EWHC 2022 (Comm)

Public policy
The High Court rejected an application to set aside an order **enforcing** a Swiss **award** on the ground that enforcement would be contrary to **public policy**.

The underlying contract contained a penalty clause, and was governed by Swiss law. Following an award by the Court of Arbitration for Sport, and upheld by the Swiss Supreme Court, the English Court allowed enforcement of the award.

The Court held that the policy in favour of enforcing international arbitration awards outweighed the English public policy of refusing to enforce penalty clauses. Provided that the contract in question did not offend Swiss law, the fact that English law might take a different view of it did not mean that the English courts should refuse to enforce an award arising out of that contract.

Pencil Hill Ltd v US Citta di Palermo Spa (Case BA40MA109) (unreported)

State immunity from enforcement of arbitral award
The Commercial Court set aside a **charging order** made against state-owned premises which were used for the performance of consular activities (such as passport and visa applications).

It held that the premises were immune from enforcement by execution for the purposes of the State Immunity Act 1978, even though the premises had been leased to a privately owned company which carried out the relevant consular activities on the state's behalf.

L R Avionics Technologies Ltd v The Federal Republic of Nigeria & Anor [2016] EWHC 1761 (Comm)

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Singapore targets efficiency in investment arbitration proceedings

The Singapore International Arbitration Centre ('**SIAC**') has published the first edition of its investment arbitration rules (the '**IA Rules**'), which came into effect on 1 January 2017.[1] The publication follows several months of consultation with stakeholders, including law firms and in-house counsel in more than ten jurisdictions, on the content of the specialised set of procedures for investment arbitrations.[2]

The overarching theme of the IA Rules is efficiency: they introduce strict time limits and new mechanisms designed to streamline procedures and speed up the proceedings. This is a key concern for parties and practitioners working under existing investment arbitration rules, such as the ICSID Arbitration Rules 2006 (the '**ICSID Rules**'), where proceedings can take over three years to conclude. Although the IA Rules draw on existing investment arbitration rules, they go further in certain key respects, incorporating some of the recently-introduced and innovative provisions in the SIAC's rules for commercial arbitration (the '**Commercial Rules**').[3]

We consider the key elements of the IA Rules below, highlighting some of the key differences between the IA Rules and the ICSID Rules (also summarised in table format). States and investors may wish to take the various differences into account when deciding which rules to apply to their disputes (either in an arbitration agreement expressed in contracts, treaties, statutes or other instruments or, where there is no pre-existing agreement/the agreement is silent, by agreeing the application of certain rules once a dispute has arisen), now that SIAC has presented the parties with a new alternative.

Increasing efficiency and reducing delay tactics

Emergency arbitrator provisions

An increasing number of the leading arbitral institutions, including the ICC, LCIA and SCC, now provide for the appointment of emergency arbitrators in their rules governing commercial arbitration. SIAC has now joined the SCC in including such provisions in its investment arbitration rules.[4] Under IA Rule 27.4, a party in need of emergency relief may apply for the appointment of an emergency arbitrator prior to constitution of the tribunal, provided that the parties have expressly agreed to the application of the emergency arbitrator provisions (i.e. they have 'opted-in').

The inclusion of this mechanism, which requires the emergency arbitrator to make an award within 14 days of the appointment, responds to a clear call from arbitration users: in a recent survey, 93% of respondents favoured the inclusion of emergency arbitrator provisions in institutional rules.[5] The use of these provisions ensures that parties are not required to wait until the constitution of the tribunal to request interim measures, such as injunctions, for which they sometimes cannot afford to wait. However, given the timescales and complexity associated with investment arbitrations, it could be considered overly ambitious to expect

[1] The IA Rules are available here: http://www.siac.org.sg/our-rules/rules/siac-ia-rules-2017

[2] Gary Born, President of the SIAC Court and Chair of the SIAC Rules Revision Executive Committee, was involved in the drafting of the rules with his colleagues Jonathan Lim and Dharshini Prasad, all of Wilmer Cutler Pickering Hale and Dorr LLP. They provide the above information about the consultation respondents in their article 'New SIAC Investment Arbitration Rules' dated 25 January 2017, which we recommend for further reading on this topic.

[3] The latest edition of the Commercial Rules came into effect on 1 August 2016.

[4] The SCC Rules (the latest version of which came into force on 1 January 2017), contain provisions relating to emergency arbitrators at Appendix II and investment treaty disputes at Appendix III.

[5] Queen Mary University of London and White & Case, 2015 International Arbitration Survey. The survey sought views from in-house counsel, private practitioners, arbitrators, academics, experts, institutional staff and third-party funders.

emergency arbitrators to produce meaningful orders or awards a mere 14 days after their appointment.

Constitution of the tribunal

The IA Rules seek to avoid false starts to proceedings, whereby one party uses delay tactics to prevent the efficient constitution of the tribunal. Strict time limits are imposed on the appointment of the arbitrators: 42 days for agreement on a sole arbitrator, or 35 days from receipt of one party's nomination for the other party to nominate its own arbitrator (IA Rules 6.2 and 7.2). The SIAC Court also plays an active role in the appointment of arbitrators in certain situations, requiring the parties to set out their views on the requisite qualifications of the arbitrator(s) and then rank the Court's candidates by order of preference (although the Court will not be bound by those preferences). This 'list procedure' approach ensures that the parties take a pro-active role in constituting the tribunal.

Challenges to arbitrators

The emphasis on efficiency in the IA Rules is also apparent in the provisions on arbitrator challenges. Under IA Rule 11, any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if an arbitrator does not possess a requisite qualification on which the parties have agreed. Such challenges must be made within 28 days of the notice of appointment of the arbitrator or of the date on which the challenging party became aware of the circumstances giving rise to challenge. That is more stringent than the position in the ICSID Rules, which only requires challenges to be made '*promptly*', but does not go as far as the SCC Rules or the UNCITRAL Arbitration Rules 2013 (the '**UNCITRAL Rules**'), which require challenges to be made within 15 days. Also by contrast to the position under the ICSID Rules, the proceedings will not be suspended pending the outcome of the challenge. Under IA Rule 12.4, the Registrar *may* order a suspension of the proceedings, but the challenged arbitrator is otherwise entitled to continue in the arbitration until the SIAC Court makes a decision.

Early dismissal procedure

The IA Rules draw on the ICSID Rules and jurisprudence in providing for the early dismissal of a claim on the grounds that it is i) manifestly without legal merit; ii) manifestly outside the jurisdiction of the tribunal; or iii) manifestly inadmissible (Rule 26). However, the IA Rules go further than the ICSID Rules in also allowing for the early dismissal of *defences* (mirroring the Commercial Rules). Unlike the ICSID Rules (which impose no time limit), the IA Rules also impose a time limit of 90 days on tribunals to make an order or award on any application for early dismissal (unless the time is extended by the Registrar in exceptional circumstances). This time limit is longer than the 60 days in the Commercial Rules, likely recognising the additional complexity of investment dispute claims, but still reducing the risk of early dismissal applications being abused by parties substantially to delay proceedings and/or rack up costs for their opponents.

Early jurisdictional objections

Prior to the constitution of the tribunal, the parties may raise jurisdictional objections to the Registrar regarding the existence or validity of the arbitration agreement, the applicability of the IA Rules or the competence of the SIAC (IA Rule 25). The Registrar will vet such

objections, referring the less clear-cut objections to the SIAC Court for a ruling, which in turn may make a *prima facie* ruling without prejudice to the tribunal's power to rule on its own jurisdiction. This procedure provides an additional layer of scrutiny to such objections compared with the similar procedure under the ICSID Convention (which involves only the Secretary General and the tribunal) and may therefore reduce the number of manifestly inadmissible claims taking up tribunal time. Such objections must be raised no later than in a Counter-Memorial or Rejoinder or an equivalent stage of proceedings (determined by the tribunal).

Timing of the Award

At the end of the proceedings, the efficiency burden shifts from the parties to the tribunal. Under IA Rule 30.3 the tribunal shall issue a draft award to the Registrar for scrutiny within 90 days from the close of proceedings. The Registrar may suggest modifications '*as soon as practicable*', arguably allowing some room for delay depending on the workload of the Registrar. This compares with the requirement under the ICSID Rules for the tribunal to draw up and sign the award within 120 days, which the tribunal may extend by a further 60 days if it would otherwise be unable to draw up the award. As awards in investment arbitrations can often run to hundreds of pages, producing them within 90 days is likely to be a very considerable undertaking for some tribunals (if not impossible). This particular time limit may also call into focus another key concern regarding investment arbitrations – that the pool of qualified arbitrators is overstretched and does not have the capacity to produce awards in line with parties' expectations.

Improving transparency

Third party funding

The IA Rules have made SIAC the first leading arbitral institution to deal with the issue of disclosure of third-party funding, recognising calls from arbitration users for more transparency in this area.[6] Under IA Rule 24(l), tribunals have the power to order the disclosure of the existence of a third-party funding arrangement and/or the identity of the third-party funder. The tribunal may also take into account the existence of third-party funding arrangements, including any after-the-event insurance taken out by the third party funder, in apportioning the costs of the arbitration (IA Rule 33.1).

Publication of details of the proceedings

The IA Rules allow for the publication of certain information without the parties' consent, including the nationality of the parties and the treaty or other instrument under which the arbitration has been commenced. With the parties' consent, SIAC can also publish more specific information including the identity of the parties, the sector to which the dispute relates and the value of the dispute (Rule 38). This two tiered approach formalises the balance between confidentiality and transparency and mirrors the approach that the ICSID Secretariat takes in practice, despite it not being formalised in the ICSID Rules.

Other important considerations

Scope and jurisdiction

The IA Rules will apply wherever the parties have agreed to refer a dispute to arbitration in accordance with the IA Rules, whether by agreement in a contract, treaty, statute or other instrument, or an offer in the same that is subsequently accepted by the other party by the commencement of arbitration (IA Rule 1). It will be important for parties to ensure they refer to the IA Rules specifically, so to avoid confusion with the Commercial Rules or other investment arbitration rules.

Unlike the position under Article 25(1) of the ICSID Convention, a SIAC tribunal's jurisdiction will not be limited to disputes '*arising out of an investment*' and involving a '*national of another Contracting State*'. That may be welcomed by investors and states alike, given the extent of costly and complex jurisprudence that has arisen out of the interpretation of Article 25(1), including whether the notion of 'investment' is to be determined objectively or by the parties. The IA Rules may instead be agreed and applied in any type of arbitration. However, the absence of additional jurisdiction criteria in the IA Rules does not prevent the parties from including such criteria in their underlying contracts, treaties or other instruments.

Third party involvement

Consistent with the position under other investment arbitration rules, the IA Rules provide for third parties to make written submissions to the tribunal where they are relevant to the dispute (Rule 29). There are two categories of submissions that may be made, and only the latter requires the permission of the tribunal: i) submissions regarding the interpretation of the treaty or contract underlying the dispute; and ii) submissions regarding matters within the scope of the dispute where the submissions would assist the tribunal in determining a relevant factual or legal issue by offering a new perspective different to that of the parties. The Tribunal may also hold a hearing for the third parties to elaborate, or be examined on, its written submissions.

[6] Queen Mary University of London and White & Case, 2015 International Arbitration Survey. Respondents supported the disclosure of information on the use of third-party funding (76%) and the identity of the funder (63%).

Comment

The adoption of the IA Rules is further evidence of SIAC's ambitions. With a record number of new cases filed in 2015, SIAC is currently the fourth most popular international arbitral institution, trailing only the ICC, the Hong Kong International Arbitration Centre and the LCIA by number of new cases filed.[7] SIAC will be hoping the IA Rules appeal not only to Southeast Asian parties, but more broadly, drawing international investors and states away from the traditional rules and venues for investment arbitrations. However, the IA Rules will only be used if parties consider they represent a credible alternative to the rules of those institutions.

The SIAC drafters have sought to achieve this by taking heed of the criticisms made of investment arbitration proceedings and making the IA Rules a hybrid of the existing investment arbitration rules and SIAC's Commercial Rules. It is likely that the time limits and other mechanisms in the IA Rules will go some way in achieving the much sought-after efficiency, although the effectiveness of the IA Rules could be hindered by the inevitable factual and legal complexity of investment arbitrations, which is one of the contributing factors to delay in ICSID and other investment proceedings.

Overall, the IA Rules are full of good intentions and send a clear message that SIAC intends its investment treaty arbitrations to be conducted in accordance with a set of streamlined and efficient procedures. However, the next few years will be key for SIAC in showing that it (and its arbitrators) can put the innovative theory of the IA Rules into practice, if it wishes to establish Singapore's reputation as a leading, international arbitral centre.

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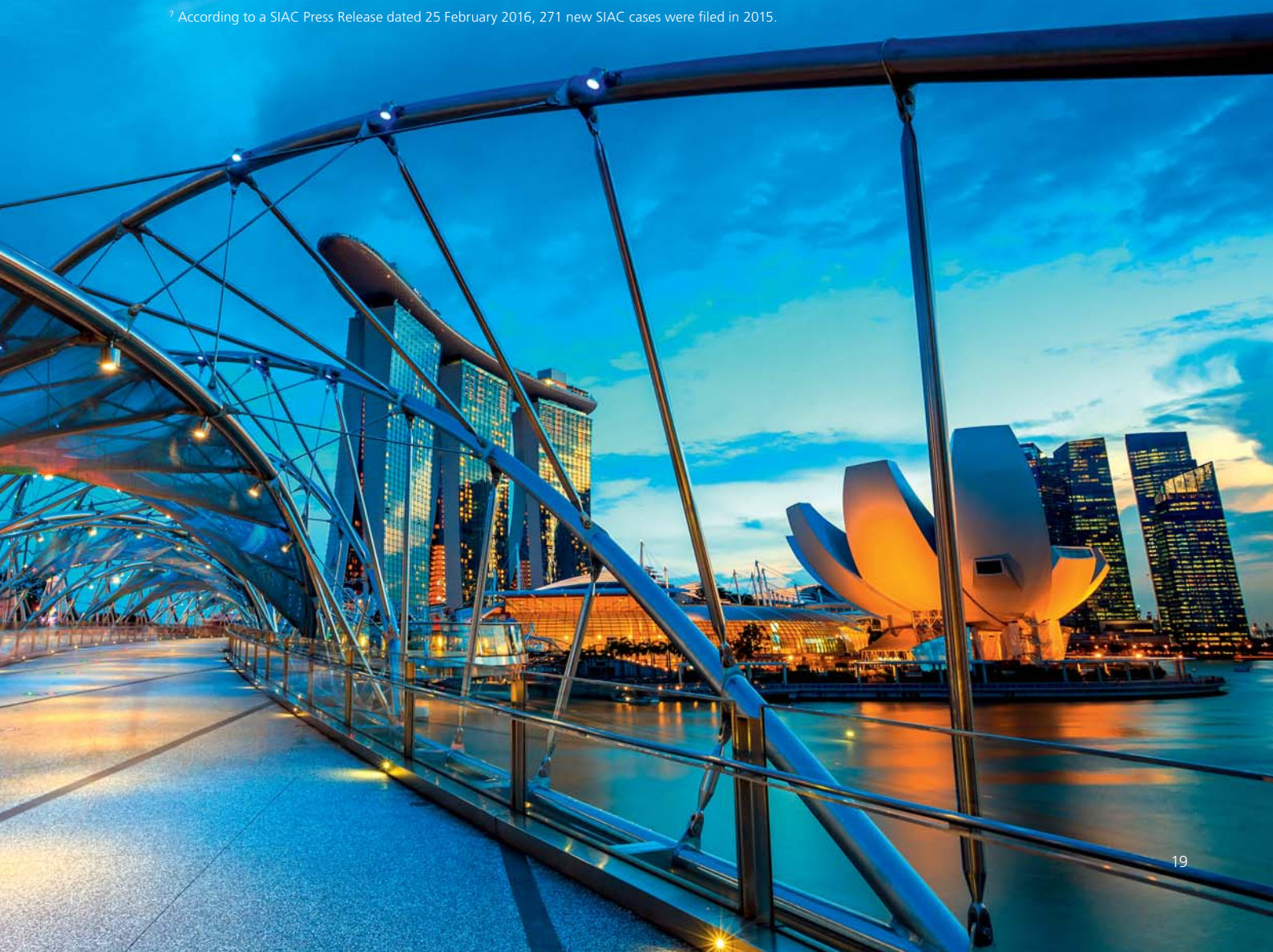
[7] According to a SIAC Press Release dated 25 February 2016, 271 new SIAC cases were filed in 2015.



Issue	SIAC Investment Arbitration Rules	ICSID Rules / ICSID Convention
Scope and jurisdiction	*IA Rules 1.1 and 1.2* The IA Rules will apply wherever the parties have agreed to refer a dispute to arbitration in accordance with the IA Rules, whether by agreement in a contract, treaty, statute or other instrument, or an offer in such instrument that is subsequently accepted by the other party by the commencement of arbitration.	*Article 25(1) ICSID Convention* ICSID jurisdiction shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.
Early jurisdictional objections	*IA Rule 25.1* The Registrar shall determine if a party's jurisdictional objection shall be referred to the Court, which shall decide if it is prima facie satisfied that the arbitration shall proceed. The tribunal shall have the power to rule on its own jurisdiction.	*Article 36(1) ICSID Convention* The Secretary General shall register the request for arbitration unless he finds that the dispute is manifestly outside the jurisdiction of the Centre. *Article 41(2) ICSID Convention* Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre shall be considered by the tribunal.
Early dismissal procedure	*IA Rule 26.1* A party may apply to the tribunal for the early dismissal of a claim or defence on the basis that a claim or defence: a. is manifestly without legal merit; b. is manifestly outside the jurisdiction of the tribunal; or c. is manifestly inadmissible.	*Rule 41(5) ICSID Rules* A party may, no later than 30 days after the constitution of the tribunal, and in any event before the first session of the tribunal, file an objection that a claim is manifestly without legal merit.
Constitution of the tribunal (in the absence of agreement)	*IA Rules 6,7 and 8* If a party fails to nominate its arbitrator(s) within 42 days (35 days for multiple arbitrators) after receipt of the other party's nomination of its arbitrator(s), or within the period otherwise agreed by the parties or set by the Registrar, the Court shall proceed to appoint the arbitrator(s) on its behalf. The Court shall use the list procedure set out in IA Rule 8.	*Rule 4(1) ICSID Rules* If the tribunal has not been appointed within 90 days after registration of the arbitration by the Secretary General, either party may request that the Chairman of the Administrative Council make the appointment/s.
Challenges to arbitrators	*IA Rule 11.1* Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed.	*Rule 9(1) ICSID Rules / Articles 14 and 57 ICSID Convention* Challenges may be brought where an appointed arbitrator manifestly lacks any of the qualities set out in Article 14 (including having high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment).

Issue	SIAC Investment Arbitration Rules	ICSID Rules / ICSID Convention
Timing of the Award	*IA Rule 30.3* The tribunal shall submit the draft Award to the Registrar not later than 90 days from the date on which the tribunal declares the proceedings closed.	*Rule 46 ICSID Rules* The award shall be drawn up and signed within 120 days after closure of the proceedings. The tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.
Third party funding	*IA Rule 24(l)* The tribunal may order disclosure of third party funding arrangements, including the identity of the funder, its interest in the outcome of proceedings and/or whether the funder has committed to undertake adverse costs liability. *IA Rules 33.1 and 35* The tribunal may take into account any third party funding arrangements when apportioning the costs of the arbitration.	No provisions.
Emergency Arbitrator Provisions	*IA Rule 27.4* A party in need of emergency interim relief prior to the constitution of the tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.	No provisions.
Publication of details of the proceedings	*IA Rule 38.2 and 38.3* SIAC may publish limited details of the arbitration without the parties' consent, including the nationality of the parties, identity and nationality of the arbitrators, the legal instrument under which the arbitration was commenced and whether proceedings are ongoing or have been terminated. With the parties' consent, SIAC may publish the identity of the parties, the contract under which the arbitration has been commenced, if any, the identity of the parties' counsel, the economic sector and industry to which the dispute relates, the total sum in dispute, details of any procedural steps that have been taken in the proceedings and any orders, directions, decisions and Awards issued in the proceedings.	No provisions, but in practice the ICSID Secretariat publishes the names of the parties and other brief details with the parties' consent.

Issue	SIAC Investment Arbitration Rules	ICSID Rules / ICSID Convention
Third party involvement	*IA Rule 29.1* Third parties may make written submissions regarding interpretation of the treaty or contract. *IA Rule 29.2* Third parties may apply to the tribunal to make written submissions provided that the third party (i) would assist the tribunal in the determination of a relevant factual or legal issue by bringing a perspective, particular knowledge or insight that is different from that of the parties; (ii) would address a matter within the scope of the dispute; (iii) has a sufficient interest in the proceedings; and (iv) would not violate the parties' right to confidentiality.	*Rule 37.2 ICSID Rules* The tribunal may allow a third party to file a written submission regarding a matter within the scope of the dispute. The tribunal will consider whether the third party would (i) assist the tribunal in the determination of a relevant factual or legal issue by bringing a perspective, particular knowledge or insight that is different from that of the parties; (ii) would address a matter within the scope of the dispute; (iii) have a sufficient interest in the proceedings.

Does the MasterCard class action mark the dawn of a new era in UK litigation?

In a landmark case, MasterCard is facing a £14 billion pound consumer claim, the largest legal claim in British history, arising from interchange fees imposed on retailers in the UK between 1992 and 2008.

The former Chief Ombudsman of the Financial Ombudsman Service, Walter Merricks CBE, has filed one of the first class actions under the Consumer Rights Act 2015 (the '**CRA**') based on a decision in 2014 that MasterCard had infringed EU law over its use of interchange fees on cross-border card transactions. It is alleged that over a 16 year period MasterCard imposed unlawful fees, the cost of which retailers passed on to consumers through higher prices, so that consumers in the UK purchasing goods or services from a business that accepted MasterCard cards in that period were consequently overcharged.

The Consumer Rights Act 2015

Class actions have long been a feature of the US legal landscape. While representative actions or Group Litigation Orders previously may have been ordered by the Court under CPR Part 19, until October 2015 there was no similar 'class action' style procedure in the UK. This was changed by the introduction, in the CRA, of collective proceedings that can be brought in the Competition Appeal Tribunal ('**CAT**') by representatives of consumers or businesses.

Previously the UK had 'opt-in' group litigation orders, which were effectively a means of organising litigation in which large numbers of claimants were pursuing the same/similar claims. In the 'opt-out' proceedings envisaged by the CRA, anyone resident in the UK who is within a particular defined class is now automatically included in an action unless they opt out. There is no need for the class representatives to identify all of the members or to specify their losses. If the claim is successful, aggregate damages will be awarded to the group of claimants, rather than being individually assessed.

In the MasterCard case, the claimant group would be formed (with certain exceptions) of over 40 million people who, between 1992 and 2008, were both (1) a resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over, as they are alleged to have paid higher prices as a result of MasterCard's unlawful conduct.

If successful the claim would net each class member around £400, but is too small for any individual consumer to bring by themselves. The CRA now allows for those claims to be aggregated and brought on a collective basis in order that UK consumers can be compensated.

Class representation

In January 2017 the CAT in London heard whether the case can progress as a collective action. The CAT will assess:

1. The Collective Proceedings Order Application, to determine that the claims sought to be included in the collective proceedings:
    i. are brought on behalf of an identifiable class of persons;
    ii. raise common issues; and
    iii. are suitable to be brought in collective proceedings.

2. Whether Mr Merricks is the appropriate representative for the action. As the proposed class representative, Mr Merricks would conduct the claim against MasterCard on behalf of all class members, except for those who opt-out of the class. In doing so, he would instruct the lawyers and experts, make decisions on the conduct of the claim, and, in particular, would decide whether to present any offer of settlement that MasterCard may make to the Tribunal for its approval.

If given the go-ahead, it is likely the trial would take place in 2018.

Chances of success

Assessing the relative merits of the claim brought against MasterCard is complex. Mr Merricks asserts that as MasterCard's fees have already been found to be unlawful, the class action need only prove that consumers suffered loss as a result of MasterCard's anti-competitive behaviour.

On the other hand, MasterCard claims that similar cases in the US have been rejected. Furthermore, there is both the recent decision in *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and others*, and the judgment in ten High Court actions brought against MasterCard for its use of intercharge fees by UK high street retailers to consider.

In *Sainsburys v MasterCard*, Sainsbury's sought damages for loss suffered due to MasterCard's infringement of competition law through the setting of interchange rates. On 14 July 2016, the CAT awarded Sainsbury's £68.5 million plus interest, ruling that MasterCard had in fact restricted competition by imposing interchange fees in the UK. MasterCard sought a reduction in the damages award by arguing exactly what is now alleged against it: that Sainsbury's had passed these costs on o its customers. However, the CAT ruled that '*no identifiable increase in retail price has been established, still less one that is causally connected to the UK MIF. Nor can MasterCard identify any purchaser or class of purchasers of Sainsbury's to whom the overcharge has been passed who would be in a position to claim damages*'. MasterCard will presumably now be seeking to rely heavily upon the judgment against it in this case.

The actions brought against MasterCard by the UK high street retailers were heard together. In a judgment of 30 January 2017, the High Court found that the Multilateral Interchange Fees ('**MIFs**') set by MasterCard in the UK and Ireland, broadly from 2006 to 2015, were not a restriction on competition, but rather objectively necessary for the operation of MasterCard's payment card scheme. Without them, the scheme would have entered into a 'death spiral' and collapsed. In addition, although MasterCard's intra-EEA MIFs were found to have been restrictive of competition, they were in large part exempt and therefore not in breach of EU law. Accordingly, subject to an appeal, the vast majority of the retailers' total claims (potentially amounting to £437 million) have been dismissed. This decision is significant and appears already to have prompted most of the retailers in the parallel proceedings against Visa to settle their claims.

The role of litigation funding

To bring a class action of any scale, let alone on behalf of 40 million people, requires vast financial resources. This is largely due to the logistical difficulties of managing a claim with so many parties, necessitating not just more work but closer oversight by the Court – typically through regular Case Management Conferences – all of which serve to increase costs exponentially when compared to the expense of typical two-party litigation.

Absent any individual able or willing to fund such litigation, litigation funders represent a practical solution in ensuring a proposed class need not pay anything to be a part of the claim, or have any financial risk in relation to it. While initially the Government's intention for the CRA was to exclude funders, law firms or special purpose vehicles from acting as representatives for either consumers or businesses in collective proceedings, ultimately no such provision was incorporated into the legislation or the CAT rules, and it is difficult to conceive in practical terms of how else these claims could be brought.

If it progresses, the MasterCard claim will be funded by Gerchen Keller Capital, who have reportedly made a sum of up to £43 million available for the purpose. This figure is said to include a sum of £10 million to cover MasterCard's costs in the event the claim is ultimately unsuccessful.

Of course, it is not just bringing such a claim that is expensive; defending a claim of this scale is extremely costly too. This could have a significant impact upon the pockets of insurers of companies subject to a collective action claim. In MasterCard's statement confirming they will defend this claim, they stressed their belief that all too frequently law firms are the only 'real' winners in class actions. Certainly, there is some compelling evidence based on the outcomes of class actions in the US to suggest that class actions are often of limited financial benefit to the qualifying class members.

While everyone who is part of the collective action would be able to claim a share of any compensation, quite how this money would be claimed has not yet been worked out, and it is likely that a time limit on claiming the money would be imposed. It has been suggested that any unclaimed monies would be paid to the Access to Justice Foundation.

Impact of the CRA on UK litigation

The introduction in the UK of 'opt-out' class actions is controversial. There is a perceived risk that such actions will give rise to a US-style litigation culture which is driven by entrepreneurial funders and law firms seeking to certify large classes in the hopes of generating similarly large returns, rather than from any genuine desire to redress the balance for those they purport to represent. On the other hand, without an effective collective redress regime, individual consumers lack both the incentives and the resources required to enable them to pursue legitimate claims.

Wider repercussions?

MasterCard was not alone in charging interchange fees to retailers. If the claim against them is successful, it may well herald the launch of several similar cases, with litigation funders and law firms leading the way.

As the new CRA regime has retrospective effect, it stands to reason that collective proceedings can be expected in respect of other competition law infringements which have historically been identified by the UK and/or EU competition authorities too. Mr Merrick has already cited mortgage endowment miss-selling, bank default charges, precipice bonds and PPI as financial 'disgraces' which, one assumes, could be 'rectified' through class actions seeking financial redress for consumers.

It is not surprising then, that this is being reported as a 'gate-way' case, with Visa current favourite as the next target. With multiple potential claims in the billions, those operating in financial markets, including insurers, will all be watching the outcome of this case closely.

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Credit: UK Supreme Court

Illegality after *Patel v Mirza*

An established principle of English law is that a person cannot pursue a legal remedy that arises in connection with his own illegal acts. Also known as the doctrine of ex turpi causa, this principle derives from Lord Mansfield's judgment in *Holman v Johnson*[1] in which he found, for reasons of public policy, that '*[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.*'

The principle has the potential to provide a defence to a wide variety of civil claims, including cases relating to contracts, property, tort and unjust enrichment.

Whilst it appears to be a simple principle, the English court's application of it has proven problematic, resulting in myriad inconsistent decisions. This is partly because the application of this principle in an inflexible manner inevitably leads to unfair outcomes. In certain instances, the English courts have sought to avoid an unfair outcome, resulting in inconsistent decisions. For example, *Holman v Johnson* involved a claim for the price of goods which the plaintiff sold to the defendant, knowing that the defendant intended to smuggle the goods into England. However, the illegality defence failed on the basis that the plaintiff was not himself involved in the smuggling. This may be contrasted with *Pearce v Brooks*,[2] a claim brought by a coachbuilder against a prostitute in respect of a contract for the hire of a carriage. In that case, the claim failed due to illegality on the basis that the coach was hired for the purposes of prostitution and the coachbuilder was aware of that illicit purpose. As the Supreme Court acknowledged, the difference between these two judgments had a good deal to do with the type of goods supplied!

In the recent decision of *Patel v Mirza*,[3] the Supreme Court, by a majority of 6:3, considered how the illegality defence should be applied. Whilst the case concerned unjust enrichment, the Supreme Court set out a revised framework for the application of the principle.

Recognising that a one-size-fits-all approach produces unfair outcomes when applying the illegality defence, the Supreme Court set aside the 'reliance rule' applied by the House of Lords in *Tinsley v Milligan*[4] in favour of a more flexible 'range of factors' approach. The decision further exposed fundamental differences within the judiciary regarding the extent and effect of the doctrine.

Tinsley v Milligan

Prior to *Tinsley v Milligan*, the illegality defence was applied by way of the 'public conscience' test, whereby the defence would succeed where it would be '*an affront to the public conscience*' to grant the relief claimed.[5] However, in *Tinsley v Milligan*, the House of Lords set aside the discretionary 'public conscience' test in favour of a more rigid reliance-based test.

In that case, Miss Tinsley and Miss Milligan each contributed to the purchase of a home on the understanding that they were both joint-beneficial owners. However, the property was put in Miss Tinsley's sole name in order to assist Miss Milligan to make false benefit claims from the Department of Social Security (DSS), which she did over a number of years. Ultimately, Miss Milligan confessed to the DSS but the parties fell out. Miss Tinsley gave Miss Milligan notice to quit and brought a claim against her for possession. Miss Milligan counterclaimed for a declaration that the property was held by Miss Tinsley on trust for the parties in equal shares.

[1] *Holman v Johnson* (1775) 1 Cowp 341, 343
[2] *Pearce v Brooks* (1866) LR 1 Ex 213.
[3] *Patel v Mirza* [2016] UKSC 42.
[4] *Tinsley v Milligan* [1994] 1 A.C. 340.
[5] *Thackwell v Barclays Bank Plc* [1986] 1 All E.R. 676.

The House of Lords unanimously rejected the 'public conscience' test, holding that it was inherently uncertain in its application and that it had replaced a system of rules ultimately derived from *Holman v Johnson* with a balancing operation.[6] By a majority of 3:2, the House of Lords applied a 'reliance rule,' whereby Miss Milligan was entitled to her share in the property as she did not have to rely upon her own illegality in order to establish the elements of her claim.

Post-Tinsley v Milligan

The reliance rule derived from *Tinsley v Milligan* received significant criticism. By focusing upon whether a claimant was forced to rely upon their own illegality, the application of the principle became largely dependent on procedural matters (such as the way in which a particular case was pleaded) and was capable of producing arbitrary, if not harsh results. The decision lead to the Law Commission producing no fewer than four reports on the issue between 1999 and 2010, the first two of which proposed that the principle should be governed by a structured statutory discretion.[7]

Patel v Mirza was the fourth in a series of Supreme Court decisions between 2014 and 2016 which highlighted differences of opinion as to how the illegality defence should be applied by the courts:[8] on the one hand, a more flexible approach was favoured, focusing on the policies underlying the doctrine to decide whether they militated in favour of the defence (taking into account a range of potentially relevant factors); on the other hand, a strict rule-based approach was considered more appropriate.

Those divisions were illustrated in *Les Laboratoires Servier v Apotex Inc*,[9] in which the Supreme Court rejected the Court of Appeal's determination that the court was able to take into account a '*wide range of considerations*' to ensure that the illegality defence only applied where '*it is just and proportionate to the illegality involved in the light of the policy considerations underlying it*'.[10]

Lord Sumption (with whom Lords Neuberger and Clarke agreed) held that the Court of Appeal's approach was wrong because it was '*discretionary in all but name*'. Dissenting, Lord Toulson stated that he would make no criticism of the Court of Appeal's approach. The law was at a crossroads and in 2015, Lord Neuberger concluded in *Jetivia SA and another v Bilta (UK) Limited (in liquidation) and others*[11] that the issue needed to be addressed by the Supreme Court (with a panel of seven or nine Justices) '*as soon as appropriately possible*'. That opportunity arose in *Patel v Mirza*.

The facts of *Patel v Mirza*

The facts of the claim are straightforward. Mr Patel (the Respondent) transferred sums totalling £620,000 to Mr Mirza (the Appellant) in order for him to bet on the price of RBS shares with the benefit of insider information which Mr Mirza expected to receive from a contact within RBS regarding an anticipated Government announcement.

The parties' agreement amounted to conspiracy to commit an offence of insider dealing under section 52 of the Criminal Justice Act 1993. Ultimately, the expected Government announcement did not occur and Mr Mirza failed to repay the money to Mr Patel, despite promises to do so. Consequently, Mr Patel brought a claim for unjust enrichment.

Route to the Supreme Court

The High Court

At first instance, the court applied the reliance rule derived from *Tinsley v Milligan* and determined that Mr Patel's claim was unenforceable because he had to rely on his own illegality to establish it. Further, Mr Patel could not rely upon the *locus poenitentiae* exception (which enables a claimant to recover money paid under an illegal contract if he has withdrawn from it before it is put into effect) because Mr Patel had not voluntarily withdrawn from the scheme.

The Court of Appeal

In the Court of Appeal, all three judges allowed Mr Patel's appeal, although for different reasons. The majority agreed with the High Court that Mr Patel had to rely on his own illegality to establish his claim but determined that the fact that Mr Patel's withdrawal was involuntary did not preclude him from relying upon the *locus poenitentiae* exception. However, Gloster LJ adopted a different approach, rejecting the view that the reliance rule must apply in all circumstances and determining that the court must have regard for whether the policy underlying the rule which made the contract illegal would be stultified by allowing the claim.

[6] Pages 345 and 363.
[7] Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts* (CP 154, 1999); *The Illegality Defence in Tort* (CP 160, 2001).
[8] *Hounga v Allen* [2014] UKSC 47; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23.
[9] [2014] UKSC 55.
[10] *Les Laboratoires Servier and another v Apotex Inc and others* [2012] EWCA Civ 593.
[11] [2015] UKSC 23.

The Supreme Court's ruling

The Supreme Court unanimously dismissed Mr Mirza's appeal and held that the funds should be returned to Mr Patel. However, the justices' reasoning differed by a 6:3 split.

The majority

Lord Toulson (with whom Lady Hale and Lords Kerr, Wilson and Hodge agreed)

Now finding himself in the majority following *Les Laboratoires Servier v Apotex Inc*, Lord Toulson delivered the leading judgment, decisively rejecting the reliance rule in favour of a more flexible 'range of factors' approach. Lord Toulson held that the essential rationale of the illegality defence is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system.

In assessing whether the public interest would be harmed in that way, Lord Toulson identified a 'trio of considerations' which are as follows:

i. the underlying purpose of the law which has been breached by the conduct, and whether that purpose is enhanced by denying the civil claim;
ii. the impact on any other relevant public policy if the claim is denied; and
iii. whether denying the claim is a proportionate response to the illegality, bearing in mind that punishment remains the reserve of the criminal courts.

Relevant factors in the application of this framework might, therefore, include seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a difference in the blameworthiness attributed to the parties. The effect of the revised approach is to relegate the issue of reliance to one of many considerations within the above framework. Lord Toulson commented, however, that it would be a mistake to suggest that the court is free to decide a case in an undisciplined way: the public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

The fact that Mr Patel paid money for an illegal purpose was not sufficient justification to prevent its recovery in the absence of other compelling factors. Lord Toulson did not consider that any special circumstances arose in this case which would mean that Mr Patel's illegal conduct prevented recovery under civil law.

Further, Lord Toulson considered that a claimant who satisfies the ordinary requirements of a claim in unjust enrichment will not *prima facie* be barred from recovering money paid or property transferred by reason of the fact that the consideration which has failed was unlawful. However, Lord Toulson recognised that there may still be particular reasons for the court to refuse to assist a claimant in such circumstances (contracts in respect of drug trafficking and murder were given as two possible examples). The corollary of this is that the illegality defence will now only succeed in claims for unjust enrichment in the rarest of circumstances.

In formulating the range of factors approach, Lord Toulson responded to criticism regarding its perceived lack of certainty by stating that the reliance rule had similarly failed to provide certainty. However, Lord Toulson further stated that the principle is not capable of being determined '*mechanistically*' and criticised the reliance rule's requirement for courts to focus on procedural matters, thereby preventing the courts from considering the policies justifying the defence. Accordingly, the rule was capable of producing results which appeared '*arbitrary, unjust or disproportionate*' and, further, led to confusion over what exactly amounted to 'reliance.'

Lord Neuberger

Whilst Lord Neuberger's reasoning ultimately sided with that of the majority, his judgment provides something of bridge between the two sides. Lord Neuberger determined that, prima facie, restitution should be ordered where a defendant has received money as part of an illegal transaction and the illegal activity is not ultimately proceeded with owing to matters beyond the control of either party, which he termed 'the Rule'. The Rule is consistent with the reasoning of Lord Toulson in respect of claims for unjust enrichment. However, Lord Neuberger went so far as to state that if a party paid a sum to another party to commit a crime, '*such as a murder or a robbery*', that party should ordinarily be able to recover that sum, '*irrespective of whether the defendant had committed, or even attempted to commit, the crime*'. Lord Neuberger's comments reflect the view that it is for the criminal courts to punish and enforce the law and that the effect of restitution in such circumstances is to unwind the transaction, and thereby unravel the illegality. Further, the Rule reflects a desire to gain clarity and certainty in a notoriously complex area of law.

However, Lord Neuberger recognised that the application of the Rule is not absolute and that there may be '*good reasons*' for not applying the Rule in certain circumstances. In such circumstances, Lord Neuberger determined that Lord Toulson's range of factors approach provided '*as reliable and helpful guidance as it is possible to give in this difficult field*'. In doing so, Lord Neuberger, in effect, changed his position from that in *Les Laboratoires Servier v Apotex Inc*.

The minority (Lords Sumption, Mance and Clarke)

In essence, Lords Sumption, Clarke and Mance agreed with Lord Neuberger that the law should allow a party to an illegal scheme to recover monies paid under it, if and to the extent, rescission remains possible. However, in contrast to Lord Neuberger, the minority determined that the reliance test should be maintained and were highly critical of the majority's 'range of factors' approach on the basis that it was far too broad, effectively converting a legal principle '*into an exercise of judicial discretion*'. In particular, Lord Mance stated that under the revised framework the court would be required to make a '*value judgment, by reference to a widely spread mélange of ingredients, about the overall 'merits' or strengths, in a highly unspecific non-legal sense, of the respective claims of the public interest and of each of the parties*'.

Whilst Lord Sumption acknowledged that in the past the law of illegality had been a mess, he asserted that the court would be doing a disservice to the development of the law if the court were to simply substitute a new mess for the old one. In support of the reliance rule, Lord Sumption asserted that the test had the merits of:

i. giving effect to the principle that a person may not derive a legal right from his own illegal act;
ii. establishing a direct causal link between the illegality and the claim; and
iii. ensuring that the illegality principle applies no more widely than is necessary to give effect to its purpose of preventing legal rights from being derived from illegal acts.

Referring to the case of *Tinsley v Milligan*, Lord Sumption stated that the problem was not so much with the reliance test as the way in which it was applied, such that the principle depended on '*adventitious procedural matters, such as the rules of pleading, the incidence of the burden of proof and the various equitable presumptions*'. Lord Sumption went on to state that the '*true principle is that the application of the illegality principle depends on what facts the court must be satisfied about in order to find an intention giving rise to an equitable interest. It does not depend on how those facts are established. Ms Milligan was entitled to the interest which she claimed in the property because she paid half of the price and there was no intention to make a gift. That was all that the court needed to be satisfied about*'.

On the facts of *Patel v Mirza*, Lord Sumption was able to find in favour of Mr Patel on the basis that restitution was possible and there was no compelling reason not to order restitution. This approach is broadly similar to that adopted by Lord Toulson in respect of claims for unjust enrichment and, further, this way, Lord Sumption was able to avoid the problem of Mr Patel having to rely on his own illegality or to enforce a contract which had an illegal purpose.

Comment

Despite the polemic judgments in *Patel v Mirza*, commonality can be found between the justices' positions. It is repeatedly emphasised that the circumstances in which the illegality defence will succeed are rare and, to that end, the justices had little difficulty in finding that Mr Patel was entitled to the return of the monies paid to Mr Mirza. Similarly the justices acknowledged that punishment for wrongdoing is primarily the responsibility of the criminal courts.

Whilst the minority's concerns regarding the breadth of the range of factors approach are warranted, the decision is arguably a welcome one. In allowing the courts greater manoeuvrability, the 'range of factors' approach should reduce the potential for arbitrary, unjust or disproportionate results.

It is arguable that the effect of *Patel v Mirza* is, in fact, the converse of encouraging illegality and this ruling strengthens the integrity of the legal system. On the one hand this decision takes away a dissuasive factor from parties entering into contracts for illegal purposes because, for example, parties in a similar position to Mr Patel may consider the risk of not receiving their funds back from perpetrators like Mr Mirza to be reduced on the basis that they can seek a legal remedy if funds are not received. On the other hand, the moment such parties seek recourse from the civil court, they will be providing evidence of their illegality, which the law enforcement authorities could use to prosecute them.

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In for a penny, in for a pound: liability of third party funders for costs

The recent Court of Appeal judgment in *Excalibur Ventures v Texas Keystone and others*[1] has clarified the extent to which third party funders may be liable for costs awarded against their funded litigant

The case has been followed by funders and defendants alike ever since the judgment of the court at first instance making the third party funders liable for the substantial costs of a comprehensively defeated claim.[2]

In considering the appeal of that decision by those third parties and the intervening Association of Litigation Funders of England & Wales ('**ALF**'), the Court of Appeal unanimously dismissed the appeals of the funders on all grounds and upheld the lower court's ruling that they should pay the costs of the underlying action on an indemnity basis. Those costs were held to include the sum provided by the funders as security for costs in the claim and applied to those parties that were to receive the benefit of the litigation, even if they were not party to the funding agreement.

Although the funders in this case were unsuccessful in their appeal, those more experienced funders may take some comfort from the Court noting that third-party funding is firmly recognised as a mainstream feature of modern litigation practice and is a judicially sanctioned activity.

Background

The proceedings out of which this appeal arose began in December 2010.

Excalibur Ventures LLC ('**Excalibur**') began an action against Texas Keystone Inc ('**Texas**'), Gulf Keystone Petroleum Limited and other Gulf companies (together '**Gulf**'). Excalibur claimed that it was entitled to an interest in a number of potentially profitable oil fields in Kurdistan on the basis of an alleged collaboration agreement with Texas, on behalf of Gulf.

To pursue the claim, Excalibur entered into a conditional fee agreement with Clifford Chance LLP and third-party funding arrangements with four groups of funders, including a UK based entity called Psari Holdings, controlled by Greek shipping magnates Adonis and Filippos Lemos.

The action could not have been pursued without third-party funding as Excalibur itself was simply a shell company; it had no assets and was in no position to borrow.

Unusually, of the four groups of funders who became involved in the litigation and advanced a total of £31.75 million, none was a member of ALF and only one of them had any experience of litigation funding before.

At trial, the claim failed on every point; the Court found that Excalibur had no contract with Gulf and no grounds at all on which to claim under contract or tort.

In his costs judgment,[3] the judge described the claim as '*essentially speculative and opportunistic*', stating that the litigation was '*based on no sound foundation in fact or law and… has met with a resounding, indeed catastrophic, defeat*.'

[1] *Excalibur Ventures v Texas Keystone and others* [2016] EWCA Civ 1144.
[2] *Excalibur Ventures v Texas Keystone and others* [2014] EWHC 3436 (Comm)
[3] *Excalibur Ventures v Texas Keystone* [2013] EWHC 4278 (Comm)

He reminded the parties that, as stated in a previous case (*JP Morgan Chase v Springwell*[4]), '*[a] party who chooses to litigate on such a wide and extravagant canvas takes the risk that if unsuccessful it may have to pay costs on an indemnity basis*.' He then ordered Excalibur to pay the Defendants' costs on the indemnity basis. As a result, the security which had been furnished was inadequate to cover the costs order (it having been calculated based on costs assessed on the standard basis). The court was then required to consider whether costs orders should also be made against the funders on an indemnity basis.

In the costs judgment, the judge concluded that this should be the case and, in addition, the money provided to Excalibur to enable it to provide security for costs was also an investment in the claim and should count towards the Arkin cap (a principle, arising from the case of *Arkin v Borchard Lines*[5] in 2005, which provided that funders should only be liable to the extent of their own contribution).

Before the Court of Appeal, the funders argued that they should not have to '*follow the fortunes*' of Excalibur and should merely pay costs on the lower, standard basis, because they were not themselves guilty of discreditable conduct. In addition, they argued that the inclusion within the Arkin cap of funds advanced to provide for security of costs would increase the costs of funding claims so as to restrict access to justice. They also argued that it was wrong of the first instance judge to order that companies who put some of the funders in funds should be jointly and severally liable with those funders.

ALF as intervener, also made a number of suggestions regarding treatment of funders, including that a consequence of the decision on appeal would be that funders would have to exercise greater control over proceedings in order to avoid being fixed with the conduct of the funded party, running the risk of champerty.[6]

Judgment

The Court of Appeal dismissed the appeals of the funders on all grounds.

In relation to the payment of costs on the indemnity basis, Lord Justice Tomlinson (who gave the lead judgment) stated that:

'*The argument for the funders boiled down in essence to the proposition that it is not appropriate to direct them to pay costs on the indemnity basis if they have themselves been guilty of no discreditable conduct or conduct which can be criticised… This argument suffers from two fatal defects, both of which were identified by the judge. First, it overlooks that the conduct of the parties is but one factor to be taken into account in the overall evaluation. Second, it looks at the question from only one point of view, that of the funder. As the judge pointed out… it ignores the character of the action which the funder has funded and its effect on the Defendant.*'

Tomlinson LJ further noted that claimant litigants might be ordered to pay costs on the indemnity basis simply on account of the conduct of those whom they had chosen to engage, such as lawyers or experts. However, that was a risk taken by the funders and, accordingly, the Court held that '*The funder is seeking to derive financial benefit from pursuit of the claim just as much as is the funded claimant litigant, and there can be no principled reason to draw a distinction between them in this regard.*'

The Court also highlighted that there was also a broader principle of justice at stake; there was no '*principled basis upon which the funder can dissociate himself from the conduct of those whom he has enabled to conduct the litigation and upon whom he relies to make a return on his investment.*'

Further, the Court held that funds advanced to provide security could be included in the Arkin cap. The Court did not consider that this would increase the costs of funding claims so as to restrict access to justice. Rather, the Court agreed with the arguments made by Texas and Gulf's Counsel that:

'*Funding in the form of putting up security for costs will ordinarily not materially increase a funder's exposure to adverse costs, as the funding itself will generally cover those costs. It is only in cases involving indemnity costs that there is likely to be a meaningful shortfall. If proper due diligence is carried out, the risk of indemnity costs can be virtually eliminated and, if necessary residual risk insured. The additional cost charged by a funder for this remote exposure is therefore likely to be negligible.*'

[4] *JP Morgan Chase v Springwell* [2008] EWCH 2848 (Comm)
[5] *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655
[6] A champertous agreement is one in which a third party supports litigation in which it otherwise has no legitimate interest in return for a share of the proceeds. This may still be treated as contrary to public policy and so unlawful.

Finally, the Court rejected the argument that the first instance judge had been wrong to order parent companies who put some of the funders in funds jointly and severally liable in costs. The Court held that it was not necessary for those parent companies to be party to the contractual funding agreement as, otherwise, this would enable funders to avoid exposure by using special purpose vehicles. The Court also dismissed the ALF's concerns regarding champerty as unrealistic; rigorous review of a case was expected of a responsible funder and could not of itself be champertous.

Comment

This case clarifies the extent of the liability for costs of third party funders, with particular regard to the conduct of the proceedings and risks arising from a lack of oversight and inadequate due diligence undertaken by funders before agreeing to fund a claim.

In particular, funders cannot dissociate themselves from the conduct of the parties they fund. It is therefore for the funders to undertake the necessary due diligence to reduce the risks of an adverse (indemnity) costs order against them.

More generally, the judgment needs to be considered in the context of the Court's broader recognition and endorsement of third party funding as a feature of modern litigation. Funded claims are beginning to generate momentum of their own and third-party funding is helping to allow and even give rise to litigation that, previously, would not have been launched. This is especially so when legal costs and court fees are rising as demonstrated in this case and others such as *Alexander v West Bromwich Mortgage Co*[7] (where a consortium of interested parties funded this leading legal case challenging standard terms of the mortgage facilities). Accordingly, consideration of the strategic approach to funded claims (as distinct from non-funded claims) is an important early exercise. For instance:

a. From the potential claimants' perspective, they should be aware that funding may be available to pursue litigation which previously may not have been possible and, in addition to offering access to justice, will often allow an 'equality of arms' when litigating against institutions (albeit at a price). Commercial funders will be seeking commercial returns out of any damages awards and looking for profile-raising victories to increase their standing in the competitive funding market; and

b. From the defendants' perspective (especially those institutional defendants) they should be aware that claimants are often driven by the funding behind them. This may change the dynamic of a dispute, particularly where those claimants feel 'protected' against adverse costs orders for which their funders may be liable. Defendants should, therefore, be prepared to use the levers they have, particularly with regard to costs as in this case and/or applications for security for costs. We have recently seen the courts willing to support the exercise of such levers by identifying otherwise hidden third-party funders (*Wall v Royal Bank of Scotland plc*[8]) and, in this case, awarding indemnity costs against the parties standing to gain from the litigation.

Parties to any dispute would be well advised to consider potential third party funding of claims and how this may shape their approach to any litigation strategy.

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[7] *Alexander v West Bromwich Mortgage Co* [2016] EWCA Civ 496
[8] *Wall v Royal Bank of Scotland plc* [2016] EWHC 2460 (Comm)

Business Rates Revaluation 2017

Check, Challenge, Appeal – one bite at the cherry

Many businesses are facing unprecedented increases to their business rates liabilities from 1 April 2017. Any challenge to an increase in rateable value will also have to be made under the proposed new Check, Challenge, Appeal regime. The regime will be front-loaded, heavily prescribed, procedurally burdensome and risky, and generally weighted against businesses. It is completely untested and a business will only have one opportunity to Challenge its rateable value. Many in the real estate industry have expressed concern that access to justice may be compromised if new evidence is restricted. The final procedures are awaited. Here we summarise the draft regulations in this new appeal process

Check

The Check stage involves the checking of factual information held by the Valuation Office Agency ('**VOA**'). A business has to initiate the process by making a request for the information. The VOA then provides the information and the business reviews and confirms it as either accurate or inaccurate.

If a business confirms that information is inaccurate, the VOA must alter the list to correct the inaccuracy. Although the procedure appears to require the VOA to accept the accuracy of information provided by a business, and the VOA has been indicating informally to the industry over the last few weeks that it will be working on a presumption in favour of information supplied by businesses, we are doubtful that the VOA will correct the list without questioning the information first.

The nature and level of detail of information that will be subject to the Check stage is not yet known but is expected to be quite extensive. Examples given to us informally by the VOA include lifts, air conditioning, refurbishment date, plant and machinery and rent.

The timescales for a Check will depend entirely on how quickly the VOA takes to respond.

Challenge

The Challenge stage is an amended form of the current 'proposal' procedure. A Challenge will still have to be made in the form of a proposal by a business to the VOA to amend the list. Under the new procedure a proposal can only be made after the conclusion of the Check stage, and within a four month window.

The end of the Check stage will be when the VOA has amended the list or, where there is disagreement with or inaction by the VOA, after twelve months from when the Check stage began. The fact that the 'non-determination' period is as long as twelve months indicates that the Check stage is not expected to be straightforward or quick.

A key difference between the new and old Challenge procedures is that a proposal under the new procedure must include a statement setting out the grounds of the proposal, including particulars of the grounds, evidence to support the grounds and a statement as to how the evidence supports the grounds. This means that the full,

detailed case now needs to be submitted to the VOA at the beginning of the Challenge stage, whereas before it would not be needed until the case reached the Valuation Tribunals ('**VT**'). The current procedure allows a business simply to seek a reduction without any supporting evidence or argument.

There are new powers for the VOA to refuse an incomplete proposal, which replace current provisions that allow a business to appeal where a VOA finds a proposal to be invalid. There is no right of appeal to the VT against a refusal of an incomplete proposal, but a business can submit a new proposal within the four month period after the completion of the initial Check stage.

The only substantive obligations on the VOA to respond during the Challenge stage are to provide further information that it holds or comes into the possession of in response to the particulars of the grounds in the proposal. Note that the VOA's duty in the draft Regulations is limited to 'information' and is not expressed as evidence or arguments, albeit that the Government's response to the consultation refers to 'tailored information and evidence'. The VOA's duty is also limited to what the VOA considers to be reasonable. The approach appears to be very one-sided in favour of the VOA and raises potential issues of procedural unfairness.

A business then has an opportunity to submit further evidence in response to the VOA's further information. The business also has additional, limited rights to submit further evidence relating to its grounds if the evidence was not known and could not have been known to the business when the proposal was made, or otherwise with the VOA's agreement. These very limited rights to submit new evidence emphasise the front-loaded, single bite of the cherry nature of the new procedure.

There are new financial penalties where a business knowingly, recklessly or carelessly provides false information to the VOA. There is a right of appeal against a penalty.

There remain provisions for withdrawing a proposal, and for agreeing with the VOA an alteration to the list following the making of a proposal but differing from the alteration contained in the proposals. These are largely unchanged by the reforms. However, it is unclear what discretion an individual VOA officer will have to continue to negotiate with a business during and in parallel with the formal Check procedure.

Where the VOA finds that a proposal is well-founded, it must alter the list. However, when considered alongside the new appeal rights, the VOA is not required to alter the list where it finds that a proposal is well-founded but the difference in rateable value is within the 'bounds of reasonable professional judgement'. This is generally considered to be +/- 10% (but in some contexts can be greater) and is a significant and controversial aspect of the reforms. There are still rumours that it may not be introduced. If it is introduced, we expect there to be litigation as to the meaning of 'reasonable professional judgement' and/or whether these regulations are ultra vires in light of the duty to maintain an accurate list.

Where the VOA finds that the proposal is not well-founded it must issue a decision notice containing a statement that the VOA will either not alter the list or alter the list otherwise than in accordance with the proposal. The decision notice must include reasons, a statement of the evidence used to make the decision and a statement in relation to each of the grounds setting out why a ground is not made out, including a summary of any particulars of the reasons.

Appeal

A business has a right of appeal on the grounds that the VOA has not altered the list or altered the list otherwise than in accordance with the proposal. However, as indicated above, an appeal on either ground can only be made where the difference in rateable value is outside the bounds of reasonable professional judgement.

An appeal can also be made where a decision has not been made within 18 months after the date that the proposal was made.

An appeal must be made within 4 months after the decision or the expiry of the 18 month non-determination period referred to above.

A fee will be payable on making an appeal.

The procedure for an appeal to the VT is largely unchanged, save for a new limitation on the introduction of new evidence. New evidence will only be permitted where it was not known and could not have been known before the right to appeal arose. There is a corresponding right for other parties to respond to new evidence.

There are similar restrictions on the VT to issue a summons to a person to be a witness only in relation to evidence provided during the Challenge stage or where the evidence could not have been known before the right of appeal arose.

The VT must not take into account matters that did not form part of the proposal at the Challenge stage or were not introduced in accordance with the correct procedure as matters that could not have been known before the proposal was made or the right of appeal arose. Again, this demonstrates the emphasis on a

business presenting its case in full at the outset of a Challenge, as well as being inconsistent with most other tribunal procedures where information up to the decision may be taken into account.

There are currently no proposals to restrict the right of onward appeal to the Upper Tribunal to a point of law only, as was tabled in the consultation. Therefore, the right of appeal against a VT decision is expected to remain as on both points of fact and law

There are many areas in the new procedure that require clarification. As currently proposed it seems highly likely that there will be many legal challenges to test the rules and regulations to ensure rating appeals are dealt with fairly. Given the new procedure was designed to reduce the number of appeals, it seems that satellite litigation will instead fill the gap.

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EU Moves Towards A Multilateral Investment Court

Investor-State dispute settlement reform continues to attract the attention of cross-border investment policy-makers in the EU and beyond. At the end of 2016, the European Commission launched a public consultation (open until 15 March 2017) aimed at gathering views regarding the EU's current policy on investor-State dispute resolution and possible options for multilateral reform, including the establishment of a permanent Multilateral Investment Court. The creation of such an entity would be a novelty in international investment law, which is founded on a system of ad-hoc tribunals charged with adjudicating a particular dispute.

The path to reform

After the entry into force of the Lisbon Treaty in 2009, the EU embarked on a reform policy to include in each EU trade and investment agreement an institutionalised procedural framework for resolving investor-State disputes. EU Member States have concluded around 1,400 bilateral investment treaties with third countries, representing more than 40% of all such treaties existing worldwide. These investment treaties enable investors to bring claims directly against host States before *ad-hoc* arbitral tribunals that are disbanded when the final award is issued.

Amid growing concerns regarding the perceived lack of predictability, consistency and transparency of the current investor-State dispute settlement system, the EU started implementing its reform agenda on a bilateral basis. The Comprehensive Economic and Trade Agreement with Canada ('**CETA**') and the EU-Vietnam Free Trade Agreement ('**FTA**'), concluded at the beginning of 2016, set the rules for the establishment of an investment court system with permanent judges to be appointed by the EU and its trade and/or investment agreement partners. The investment court system features in the ongoing and planned trade and investment agreement negotiations of the EU with partners such as Australia, China, Indonesia, Japan, Mexico and the US.

The next level

Recognising that there are certain limits to what can be achieved through reforms done at a bilateral level as regards consistency, efficiency and costs, the EU held a public consultation on its proposed approach to investment protection and investment dispute resolution as part of its ongoing trade and investment partnership negotiations with the US in 2014. The consultation revealed that stakeholder concerns in relation to the accountability, legitimacy and independence of the current investor-State dispute settlement system would be more effectively addressed through multilateral rather than bilateral reforms.

An EU concept paper addressing the path of the reform agenda, which was published on 5 May 2015, concluded that establishing a separate permanent court for each individual EU agreement '*presents obvious, technical and organizational challenges. Therefore, the EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system. The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organization.*'[1]

[1] Concept Paper, Investment in TTIP and beyond –the path for reform, Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, retrieved on 12 January 2017 from trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF,p.11

Both the CETA and the EU-Vietnam FTA anticipate the transition from a bilateral investment court system to a permanent Multilateral Investment Court and the EU is expected to propose similar transitional provisions in its other trade and investment negotiations.

Following its Concept Paper, on 1 August 2016 the European Commission published an Inception Impact Assessment in which it anticipated for the third quarter of 2017 a likely proposal for a Council Decision authorising the Commission to negotiate a Convention to establish a multilateral court on investment on behalf of the EU. In relation to the expected economic impact of a Multilateral Investment Court, the Commission noted that '*[i]nvestors and states would benefit from increased predictability and from having a single procedural framework for adjudicating disputes. There would also be a benefit from lower costs due to the streamlining of procedures and from the fact that the judges in the Multilateral Investment Court, plus their support structure, would be expected to be financed through transfer contributions from the states that are members of the Court*.'The Commission anticipates completing its impact assessment in 2017.

In its pending public consultation, the EU seeks views on a permanent Multilateral Investment Court comprising both a First Instance Tribunal and an Appeal Tribunal. The Court would be open to all countries, including non-EU Member States, interested in joining. According to the EU, the individual members of both the First Instance and the Appeal Instance would be appointed for fixed terms and would be required to have comparable qualifications to members of other international tribunals.

One of the challenges facing the EU on its reform path towards a Multilateral Investment Court is the question of how to address the parallel existence of the current investor-State dispute settlement system embedded in numerous bilateral treaties and the proposed investment court system. The EU is considering following the model set by the UN Mauritius Convention on Transparency for Investor-State Dispute Settlement, namely, by conferring jurisdiction on the Multilateral Investment Court through a system of opt-ins whereby countries agree in the legal instrument establishing the single Multilateral Investment Court to subject their investment treaties to the jurisdiction of the Court. The single Multilateral Investment Court would effectively supersede the current investor-State dispute settlement provisions included in investment treaties of EU Member States with third countries or in investment treaties in force between third countries. It would also replace the bilateral investment court system that would have been included in EU-level agreements with third countries.

The consultation also gauges the public's views on whether developing countries and small and medium-sized enterprises should receive any special assistance, considering the high costs and complexities associated with investor-State disputes.

The EU is considering adopting an enforcement mechanism for the decisions of the Multilateral Investment Court which is modelled after the World Bank's ICSID Convention, i.e. the enforcement of pecuniary awards would be mandatory in the domestic courts of each contracting State without recourse to domestic appeal mechanisms.

Conclusion

The EU has adopted a reform agenda that is likely to result in a streamlined procedural framework for the settlement of investor-State disputes in the near future. The establishment of a Multilateral Investment Court will assist in shaping a uniform, consistent and predictable jurisprudence in the long term. The announced reforms can also help to address legitimate concerns regarding the efficiency and costs of the dispute resolution process. The challenge lies in managing what may be a long transitional period during which parallel systems of dispute resolution will co-exist. The Multilateral Investment Court system will also need to allay concerns that the lack of investor participation in the formation of the panels may lead to the appointment of judges beholden to host States. As a major economic block, the EU is likely to attract the buy-in of a sufficient number of non-EU Member States so as to dramatically alter the current landscape of the investor-State dispute settlement system through the establishment of a permanent Multilateral Investment Court, which would constitute a watershed development in international investment law and adjudication.

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Cybercrime and ransom demands: is it a crime to pay?

In 2015, the Office of National Statistics ('**ONS**') for the first time included cybercrime in the annual Crime Survey for England and Wales. It estimated that there were 2.46 million cyber incidents and 2.11 million victims of cybercrime in the UK in 2015.

In July 2016, the National Crime Agency ('**NCA**') published its Cyber Crime Assessment, which called for stronger law enforcement and business partnership to fight cybercrime. It estimated that the cost of cybercrime to the UK economy is now billions of pounds per annum.

Current trends

There has been an increased trend for cyber criminals to focus their efforts on corporate entities because the potential rewards are far greater. Threats such as Distribution Denial of Service ('**DDoS**') and ransomware attacks have amplified in frequency in recent years as criminals gain a better understanding of the potential for profit. Cyber criminals have become the pirates of the modern age, holding businesses to ransom with the threat of releasing their all-important customer data or launching a cyber-attack on operating systems.

From Banks to telecommunication providers to media businesses and online retailers, all have been targeted as cyber criminals look to increase their revenue streams. In response, corporate entities have sought to improve their cyber controls to protect themselves from attacks. Perhaps the greatest vulnerability for a business lies in targeted malware sent to staff. Staff are reminded of the need to keep a vigilant watch on anything that may appear suspicious when accessing emails and to report any unusual messages to compliance and their IT teams.

When a ransomware or DDoS attack takes place, corporates will be immediately fearful of losing confidential business information, and client details. Coupled with the EU's new General Data Protection Regulation, which is due to come into force in 2018, corporate concern has been magnified as the EU looks to fine companies up to €20m or 4% of their annual turnover, whichever is greater, for allowing any security breaches to compromise customer data. Companies may not only be a victim of an attack, with all the business disruption, reputational harm and financial loss that may cause, but may then also be fined for failing to prevent the attack on their business.

With the above in mind, when a corporate is the subject of cyber-attack, what offences, if any, are committed by cyber criminals, and even by victims when ransom demands are made?

Cyber criminals

Blackmail

The process of demanding money following a cyber-attack is likely to be done through threats; if a payment demand is not met by a set time, files could be erased, details of accounts released or third parties' financial information disclosed online. Such a demand will be caught by the blackmail provisions under section 21 of the Theft Act 1968.

Money laundering

On the receipt of a ransom, the Proceeds of Crime Act 2002 '(**POCA**') will apply to the sums held, which will be deemed criminal property; that is, property which is secured through criminal conduct. Cyber criminals, if their identity can be established, could be caught by one or more of the primary money laundering offences under sections 327 – 329 of POCA, i.e. concealing, acquiring, arranging, transferring, using or holding criminal property.

Victims

Prior to the 19th Century, the Ransom Act of 1782, which outlawed the payment of a ransom in respect of British ships taken by the King's enemies or persons

committing hostilities against the King's subjects, was the only guiding piece of legislation on the legality of ransom payments. Since its repeal by section 1 of the Naval Prize Acts Repeal Act 1864, legislators in the UK and further afield ventured no further into this territory. Indeed *The Benga Melati Dua* case in 2011,[1] highlighted the issue. In his judgment, Lord Justice Rix commented, '*there is no evidence of [ransom] payments being illegal anywhere in the world. This is despite the realisation that the payment of ransom, whatever it might achieve … itself encourages … the purposes of exacting more ransoms*'.

Counter terrorism

The Terrorism Act 2000 ('**TA**'), and to some extent the Counter-Terrorism and Security Act 2015 ('**CTSA**'), could put a ransom payer at risk of committing a criminal offence in certain circumstances, but they still fall short of placing any blanket rule on ransom payments, in the context of cyber-attacks.

Under section 17 TA, becoming concerned in an arrangement as a result of which money or other property is or is to be made available to another for the purposes of terrorism, is an offence. However, it must be established that a person knew or had reasonable cause to suspect that the funds would or may be used for the purposes of terrorism. So in the case of a DDoS or ransomware attack, unless the ransom-payer is aware or has reasonable cause to suspect that the ransom is to be paid to a designated terrorist organisation or to a group concerned with terrorism, it is highly unlikely that an offence will have been committed. Cyber-attacks tend to be perpetrated by faceless individuals and entities, without affiliation to a cause, political or otherwise. Therefore, it will be difficult, if not impossible, to identify those behind the attack: in this context, the risk that a ransom payer will be prosecuted under section 17 TA is unlikely.

Separately, under section 42 of the CTSA it is an offence for insurance companies to make a payment pursuant to an insurance contract in respect of any money or other property that has been, or is to be, handed over in response to a demand made wholly or partly for the purposes of terrorism. For the reasons set out above, unless the insurer (or a person authorising the payment on the insurer's behalf) knows or suspects that the money or other property has been, or is to be, handed over in response to a terrorist demand, the offence will not be made out.

Sanctions

Similarly, making payments, whether directly or indirectly, to 'designated' individuals or entities listed in the consolidated list of financial sanctions targets prepared by the Office of Financial Sanctions Implementation ('**OFSI**'), is a criminal offence. Again, if a ransom is paid following a cyber-attack, sanctions will only ever be breached if the identity of the cybercriminal can be established, and then only if that individual or group is on the OFSI's list.

[1] *Masefield A.G. v. Amlin Corporate Member Limited* [2011] EWCA Civ 24

As noted above, it will be rare for those involved in making cyber ransom demands to make themselves known to the victim. Anonymity is crucial if the perpetrator is to evade justice.

Money laundering

While ransoms received by cyber criminals may constitute the proceeds of crime under POCA, they only become criminal proceeds once they have been received as a ransom by the criminal. Assuming there was nothing about the funds used to pay the ransom that tainted them as criminal proceeds prior to the ransom payment, the act of making the payment would not be a money laundering offence. There had been some uncertainty on this point until *R. v. GH*,[2] which clarified that where otherwise clean money was paid to someone pursuant to a criminal offence, such that it became criminal proceeds in the hands of the receiver, the payment did not make the payer liable under section 328 of POCA for entering into, or becoming concerned in, an arrangement which the payer knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person. The rationale of the court was that the funds had to be criminal proceeds before the payment was made for the offence to be triggered.

Conspiracy

Another potential question is whether a payer can be held to have entered into a conspiracy with the person(s) making the demand when ransom monies are transferred. This argument is unlikely to succeed and, even if it might, it is unlikely to be in the public interest to prosecute (a key consideration to be satisfied before any prosecution can be brought).

This is because a conspiracy is an *agreement* with another that a course of conduct is to be pursued with a view to committing an offence. Payments of ransoms are not *agreements*, but instead are forced arrangements made following the unwarranted approach by the ransom demander.

Conclusion

Whilst there is legislation that can be used to tackle instances where demands are made by cyber criminals, there are limited circumstances in which a victim could be held criminally liable for complying with the ransom demand. The far greater risk posed by cyber criminals is loss of livelihood or business to the victim.

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[2] *R. v. GH* [2015] UKSC 24

New professional standards in force for tax professionals: HMRC's 'clamp down' on tax avoidance

HMRC's 'clamp down' on tax avoidance continues to make waves for investors and their professional advisers.

In this article, we look at a number of recent developments suggest that the pressure on advisers, and their insurers, is unlikely to decrease in the short term. The developments are:

1. The publication of professional standards for tax planning by professional bodies including the Chartered Institute of Taxation, the Institute of Chartered Accountants in England and Wales ('**ICAEW**') and other professional bodies responsible for setting and implementing standards for accounting and taxation.
2. The consequences of the Supreme Court's judgment in the *Eclipse* and *Ingenious* schemes being felt by substantial numbers of investors, who we understand have received tax demands in the form of Accelerated Payment Notices ('**APNs**'). The 90-day period for payment will be elapsing now, which may prompt related litigation against their former advisers.
3. HMRC has publicised its intention to continue with the APN scheme, against which there is no right of appeal, and in addition to which repeated 5% penalties may be levied if the sums are not paid on time.

New professional standards

In March 2015, HM Treasury and HMRC asked UK accountancy and tax bodies to '*take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good*'. As a result, revised guidelines have been published in the Professional Conduct in Relation to Taxation ('**PCRT**') by the Chartered Institute of Taxation, the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Scotland, the Association of Chartered Certified Accountants, the Association of Taxation Technicians, the Society of Trust and Estate Practitioners and the Association of Accounting Technicians.

The guidelines came into force on 1 March 2017.

The guiding principles of the PCRT have resulted in five new standards for tax planning which have been set by the professional bodies and agreed by HMRC. As well as confirming the standards one would expect to apply to a tax professional (such as ensuring that tax planning is specific to the client's circumstances, and acting lawfully and with integrity), the standards also set out specific expectations in relation to tax planning arrangements. These make it clear that professionals should not promote structures that are highly artificial or contrived, or endorse tax planning arrangements that set out to achieve results that are contrary to the clear intentions of Parliament.

Stricter regulatory environment

The seven professional bodies acknowledge that PCRT has long set out professional and ethical standards

which require more of their members than the letter of the law demands. The ICAEW, for example, makes it clear that compliance with the PCRT is a requirement of its members, and that complaints could be made to its Professional Conduct Department where a member is in breach.

The ICAEW has previously confirmed that it had commenced few disciplinary investigations relating to tax avoidance, but that may well change as the professional bodies show that they are willing to back the PCRT with sanctions, and particularly if HMRC makes referrals to the professional bodies when it discovers tax planning that was highly artificial, or where advisers did not take a reasonable or realistic view of the context. This represents a change in regulatory exposure for professionals advising in this field, and of course disciplinary investigations may lead to (or form unhelpful background to) claims by investors who have been refused tax relief.

Eclipse, Ingenious and the claims scenario for advisers

Investors have received tax demands as a result of the decision by the Supreme Court, in November 2016, not to hear an appeal of the judgment in *Eclipse Film Partners No. 35 LLP v The Commissioners For HMRC*[1].

By way of brief overview, Eclipse 35 was one of over 30 tax mitigation scheme partnerships promoted by Eclipse. It has been reported that over £635m of tax was sheltered through these vehicles, and over £117m in Eclipse 35 alone, representing relief claimed by Eclipse 35's 287 investors. After an investigation into the structure, HMRC issued closure notices in March 2009, determining that Eclipse 35 did not carry on a trade or business, and that it was an artificial scheme prepared solely for the purpose of claiming tax relief through a series of financial transactions in a complex structure. Eclipse argued that there was a genuine element of trade in film rights, one of the requirements for the scheme to permit investors to successfully clam tax relief. HMRC was successful at the Court of Appeal, and Eclipse was refused permission to appeal to the Supreme Court at a hearing in April 2016.

The Court of Appeal decision has wider significance than simply the rights of the Eclipse 35 investors to seek tax relief. It means that not only those investors, but substantial numbers of other Eclipse investors (who invested in schemes with similar structures), will face APNs demanding tax payable within 90 days, with interest, where tax relief was initially granted before the issue of the closure notice in 2009.

It was reported by the *Financial Times* in November 2016 that HMRC was preparing to issue APNs to the investors in all Eclipse schemes, approximately 780 in total. Their current advisers raised the prospect of bankruptcy on the part of the investors, whom HMRC stated would face 'life-changing' tax demands. Because APNs are payable within 90 days, tax demands sent in mid-November 2016 would have become due during February 2017.

Another test case was reported in August 2016, albeit one that has at present only reached the First Tier Tribunal ('**FTT**'): *Ingenious Games LLP & Ors v Revenue and Customs Commissioners*[2]. Neither HMRC nor the investors were entirely successful: again, the issue at stake was whether there was a genuine trade in film rights. The FTT decided that the LLPs were engaged in transactions that amounted to a trade, to the extent of their ~30% contribution towards the production budget and entitlement to ~30% of the income arising from the film, and their contribution could be taken into account in determining tax relief. We understand that HMRC has issued APNs to investors in Ingenious schemes, albeit we have seen reports that Ingenious intends to appeal the FTT's judgment.

Given the dire financial consequences for many investors, it would not be surprising for the investors to consider claims against their financial advisers and accountants. We have seen several claims of that nature over recent years, whether prompted by APNs or otherwise. Some claims management companies and claimant law firms are actively recruiting investors in order to bring large-scale litigation against advisers. Whilst limitation will be an issue which bears close consideration in relation to such claims, this remains an area of risk for the foreseeable future, not least given HMRC's stance in relation to APNs, as explained further below.

The future for APNs and tax avoidance

HMRC anticipated it would recover unpaid tax in the region of £7.5 billion when APNs were introduced in the Finance Act 2014. According to figures released by HMRC, the strategy has been highly successful, recovering over £886m in the year to March 2016, and nearly £500m in the previous financial year. Perhaps unsurprisingly HMRC recently re-stated its commitment to using this tool, and reissued its guidance on the use of the regime and the penalties to be applied.

Despite the original targets of the regime being largely met (the projected number of APNs was said by HMRC to be about 64,000; it confirmed last year that over

[1] *Eclipse Film Partners No. 35 LLP v The Commissioners for HMRC* [2015] EWCA

[2] *Ingenious Games LPP & OPrs v Revenue and Customs Commissioners* [2016] UKFTT 0521 (TC)

60,000 had been issued) it remains a powerful tool in HMRC's armoury, requiring prompt payment of unpaid tax, and then leaving the taxpayer to challenge HMRC in the courts if they wish to pursue a claim for relief. Again, in these circumstances investors may prefer to make claims against their advisers.

The strategy pursued by HMRC and HM Government is to make investment in tax avoidance schemes (as opposed to normal tax planning) unattractive. As part of this, a consultation document[3] has indicated that the likely approach to penalties for 'enablers' of tax avoidance (such as scheme promoters, but also professional advisers) might be similar to those implemented for offshore tax evasion in the Finance Act 2016, i.e. up to 100% of the tax avoided, albeit this now appears likely to be limited to 100% of the fee income received.

Conclusion

The political climate has changed since these tax reliefs were introduced. HM Government and all political parties are committed to reducing contrived tax avoidance both as a revenue-raising measure and as a matter of fairness in an age of reduced public spending. There is no prospect of a change in approach soon, if at all, and investors will need to consider carefully any tax-minimising measures they may put in place.

Structures such as Eclipse are based on tax reliefs introduced and withdrawn many years ago. It is to be hoped that the PCRT, together with legislation which targets advisers, will make clear to professional advisers the extent to which their clients can properly arrange their affairs. This is likely to lead to less 'loophole' tax planning, in line with the Government's aims. However, the United Kingdom has a complex tax structure, and there will always be companies and individuals seeking advice on how to reduce their tax liability. Professionals will need to take a good deal of care to ensure that they are on the right side of the line, as the consequences of a mis-judgment may be harsh: disciplinary investigations, fines and civil claims from investors can all be expected.

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[3] 'Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document': 17 August 2016

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