

Financial institutions  
Energy  
Infrastructure, mining and commodities  
Transport  
Technology and innovation  
Life sciences and healthcare

# Corporate and commercial disputes review

Issue 06 | March 2018

## In this issue:

After the deal: recent cases and trends in M&A disputes	03
When can a company be liable for the actions of its subsidiary?	07
Recent developments in respect of scope of duty and causation of loss in professional negligence	10
When does “litigation” become sufficient to trigger litigation privilege?	13
First principles of contract formation	18
Protecting shareholder information: the balance between public interest and commercial exploitation	21
Exclusive jurisdiction agreements and anti-suit injunctions	23
Using fast track arbitration for resolving commercial disputes	25

## Contents

After the deal: recent cases and trends in M&A disputes	03
When can a company be liable for the actions of its subsidiary?	07
Recent developments in respect of scope of duty and causation of loss in professional negligence	10
When does “litigation” become sufficient to trigger litigation privilege?	13
First principles of contract formation	18
Protecting shareholder information: the balance between public interest and commercial exploitation	21
Exclusive jurisdiction agreements and anti-suit injunctions	23
Using fast track arbitration for resolving commercial disputes	25

## From the editor

Welcome to the latest edition of *Corporate and commercial disputes review*.

In this edition, we feature several emerging trends which are of key interest to our corporate clients in all industries. We focus on M&A disputes, claims against parent companies for the actions of their subsidiaries and the latest developments in relation to legal professional privilege.

A further, and perhaps surprising, trend is the recent run of cases concerning intention to create legal relations. We look at attempts to argue that binding contracts have been entered into in informal settings and lessons that this may have for the conduct of business.

We also review three recent Supreme Court decisions on the scope of professional negligence liability.

We examine the balance between public interest and commercial exploitation in the context of protecting shareholder information.

Finally, we examine new procedures for expedited arbitrations and the extent to which they will be appropriate for corporate disputes, and consider the topic of anti-suit injunctions.



**Antony Corsi**

**Partner, London**

Tel +44 20 7444 5863

[antony.corsi@nortonrosefulbright.com](mailto:antony.corsi@nortonrosefulbright.com)

# After the deal: recent cases and trends in M&A disputes

For some years, the sense has been that a significant proportion of the Commercial and Chancery Division's time has been taken up by disputes arising from private M&A transactions. This is a broad category, covering not only breach of warranty, indemnity and price adjustment issues, but also claims involving tax covenants, fraud and other matters. Until recently, however, there has been little or no quantitative data on the incidence of this type of dispute.

In March 2017, one of the biggest warranty and indemnity (W&I) insurers globally, AIG, published its study on the incidence of claims notifications under policies that it had issued. A now well-established feature of M&A deals, W&I insurance provides cover to buyers and sellers for claims arising from breaches of representations and warranties given in the sale and purchase agreement (SPA). The results of AIG's study with the latest edition due to be released in the coming months— now in its third year – are revealing. In the period covered by the study (policies issued from 2011 to 2015) the overall claims frequency was 18 per cent, up from 14 per cent, with claims being made under approximately one in four of policies issued for deals worth over US\$1 billion. As these figures only reflect AIG's (primarily) breach of warranty claims experience, it is not too much of a stretch to conclude that, annually, there must be large numbers of M&A disputes which are settled pre-action or when proceedings are on foot.

However, frequency of claims is only part of the story; it is also instructive to consider the types of issue which the Courts are being asked to consider. In this article, we attempt to do just that, by reviewing the reported cases in this area in the past two years.

## Price adjustment disputes

Arguably the most high profile cases have concerned deferred consideration mechanisms. In the first such case, *Starbev GP Ltd v Interbrew Central European Holdings BV* [2016] EWCA Civ 449, the question was whether the seller was entitled to a proportion of the profit realised by the buyer, when the business was sold on within a period of three years. The answer to this question had very considerable financial consequences: whereas the original sale price had been €1.475 billion, the on-sale price was €2.65 billion, with the seller claiming approximately €129 million of the difference. In addition to a number of clauses providing how the seller's "Contingent Value Right" was to be calculated, the SPA contained

an anti-avoidance clause. The buyer structured €500 million of the consideration due to the on-purchaser in the form of a Convertible Note, which it subsequently drew down on when the three year period had expired. The Court of Appeal confirmed that this transaction was caught by the anti-avoidance clause on the basis it applied where the dominant purpose of the transaction was to reduce the seller's Contingent Value Right.

In the same area, *Team Y&R Holdings Hong Kong Ltd & Ors v Ghossoub* [2017] EWHC 2401 (Comm) concerned an SPA provision whereby, post-completion, any seller whose employment with the target company was terminated for acts of gross misconduct, or who engaged in a competing business, would lose his right to deferred consideration and be compelled to sell his retained shares to the buyer at a substantial discount (the "Defaulting Shareholder Clauses"). While this judgment concerned jurisdictional issues, the enforceability of the Defaulting Shareholder Clauses had already been considered by the Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67. In that case, the other seller in the same transaction had argued that the Defaulting Shareholder Clauses were void and unenforceable as penalties. Having re-cast the law on penalties, the Supreme Court held that neither clause was a penalty (being neither a secondary provision nor intended to punish the seller).

## Indemnities

Moving on to indemnities, *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 is another M&A dispute to have reached the Supreme Court, due to an argument by the buyer that the Court of Appeal had wrongly applied the recent Supreme Court guidance on contractual interpretation, falling into error by placing too much emphasis on the words of the SPA while giving insufficient weight to the factual matrix. The case is now cited as a leading contract law case, but the central issue was whether “an opaque provision which ... could have been drafted more clearly” required the seller to indemnify the buyer for compensation which, post-completion, the FSA (as it was) required the target company to pay customers who may have been mis-sold insurance products. The other possibility, contended for by the buyer, was that only actual complaints triggered the indemnity. Having carefully examined the language used in the SPA, the Supreme Court found for the seller. Notably, Lord Hodge also observed that, in addition to the indemnity, the buyer had the benefit of time-limited warranties that the target company had complied with its regulatory obligations, which the buyer might have relied on but – for whatever reason – did not.

In *First Names (Jersey) Limited & Anor v IFG Group Plc* [2017] EWHC 3014 (Comm), the question was again whether an indemnity had been triggered. In contrast to *Wood*, the construction of the indemnity clause was not in issue: it was a straightforward indemnity in respect of litigation and other proceedings arising from facts, matters or circumstances existing prior to completion. Instead, the main issue was whether the buyer had complied with (1) the notice requirements and (2) the time limit for starting proceedings after the

contingent liability for which it was claiming became actual. The Court found for the buyer. However, on the breach of warranty side, there are a number of examples of buyers falling foul of similar notice clauses.

### Breach of warranty

#### Notice issues

Where claims for breach of warranty are concerned, most – if not all – SPAs provide that claims must be notified within a specified period after completion, and that the notice must furnish the seller with enough information to understand the basis of the claim. There is also usually a further requirement that the buyer initiates court proceedings within a prescribed period after notification (typically a number of months). The judicially recognised commercial purpose of such clauses is to give the seller certainty not only that a claim may be brought, but of the grounds on which the claim is to be based. Strict compliance with contractual notice requirements is also not a trivial or technical matter, and the Courts give little latitude to buyers who serve a non-compliant notice, or fail to serve the notice in accordance with the SPA.

In 2015, in *Ipsos S.A. v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm), the Court ruled – for the first time in a while – that an effective claim notice had not been served. This has now been followed by two further examples of buyers getting it wrong: in 2016, in *Teoco UK Ltd v Aircom Jersey 4 Ltd & Anor* [2018] EWCA Civ 23, and in 2017, in *Zayo Group International Ltd v Ainger & Ors* [2017] EWHC 2542 (Comm). In *Teoco*, the buyer’s notices were invalid because they did not purport to make a claim; rather, they indicated that the buyer had or may have claims which it might make in the future (a fine, but important, distinction). They also did not identify the warranties that had been breached.

In *Zayo*, by contrast, the buyer’s notices were found to be defective because they did not give a reasonable estimate of the amount claimed (as the notice clause required). The particular problem with the notices was that the sums claimed did not reflect the correct measure of loss for breaches of warranty (i.e. the diminution in value of the shares). The judge emphasised that this was not a technical point: a clear warning to those responsible for drafting claim notices that simply identifying the sums paid out, on a pound-for-pound basis, without referring to the proper measure of loss may cause serious difficulty.

It is also a common feature of notice clauses that they require the buyer to give notice “as soon as reasonably practicable” upon becoming aware that it has a claim, and sometimes within a specified period of days. This type of provision was addressed in both *Nobahar-Cookson & Ors v The Hut Group Ltd* [2016] EWCA Civ 128 and *Teoco*. In *Nobahar*, the Court of Appeal stressed that a notification clause which imposes a contractual time limit is a species of exclusion clause, and therefore to be construed narrowly if ambiguous. It went on to decide (in favour of the buyer) that a clause requiring notice to be given “within 20 Days after becoming aware of the matter” meant that the buyer had to be aware of the claim itself, as opposed to the underlying facts. In *Teoco*, the Court applied the approach in *Nobahar* to find that the buyer – in addition to the invalidity of its notices – had failed to make its claims for various tax warranty breaches as soon as reasonably practicable after becoming aware of them.

In *Zayo*, however, there was a further issue arising from the manner in which the buyer had attempted to effect service on one of the Management Vendors. There, the SPA provided that

none of the Management Vendors would have any liability “except in circumstances where the Purchaser gives notice to the Management Vendors before the date that is eighteen months of [sic] Completion.” When a courier tasked with delivering the notice to one of the Management Vendors on the last possible date for delivery, at the address given in the SPA, was told that the Management Vendor had moved, he opted not to deliver it. The Court rejected the buyer’s argument that, in such circumstances, the SPA contained an implied term that the buyer discharged its obligation by attempting to effect delivery, holding that the courier should have left the notice at the address in order to comply with the SPA’s service provisions. The Court also found that the buyers’ claims against the other Management Vendors (who had been served) were compromised, because the clause required all Management Vendors to be notified. While the result may seem harsh, it does very clearly demonstrate the rigour with which the Courts construe and apply notice clauses.

### Substantive issues

While notice clauses may have been prominent, substantive breach of warranty issues have also featured. Perhaps the best recent example is *Kitcatt and others v MMS UK Holdings Ltd & Anor* [2017] EWHC 675 (Comm). There, the acquisition had been structured as an “earn-out”, meaning that the overall consideration to be paid to the sellers was linked to the performance of the target company (an advertising agency) post-completion. The buyer also gave certain warranties to the sellers confirming that they were unaware of any matters – including issues with customers – that might have a material adverse impact on the revenue of the business into which the target company would be merged (on which the earn-out thus depended). After the sale, the amount of work

which the merged agency obtained from a major client reduced to such an extent that no deferred consideration was payable. The buyer sued the sellers, successfully overcoming a defence that the warranty was too uncertain to be enforceable. The Court also found that the breach of warranty was irrelevant, because a subsequent agreement had been reached that a specific amount would be paid to the sellers by way of deferred consideration, varying the SPA.

In addition to the issues already discussed, *Zayo* considered the effect of an exclusion on the Management Vendors’ liability “to the extent that provision or reserve in respect of the liability or other matter giving rise to the claim in question was made in the Accounts.” The seller’s position was that the exclusion applied regardless of whether the provision was or was not adequate. Perhaps surprisingly, the Court agreed, finding that the words “to the extent that” did not entail that the Management Vendors’ liability was reduced by the amount of the provision; a conclusion which possibly owed more to considerations of business common sense than to the words actually used.

At this point, we should also briefly revisit the AIG study which gives a helpful breakdown as to the type of breaches of warranty relied on in the notifications AIG has received, the four main categories being: Financial Statements (20 per cent); Compliance with Laws (15 per cent); Material Contracts (14 per cent); and Tax (14 per cent). The far more limited number of breach of warranty cases covered in this article all fall into these categories: Financial Statements (*Nobahar, Zayo*), Tax (*Teoco*) and Material Contracts (*Kitcatt* – just about). Historically, Financial Statements warranties have been a particularly prominent feature of reported breach of warranty cases,

and the recent claims experience – from AIG, more usefully, but also from the Courts – would suggest this trend is likely to continue.

### Tax covenants

Two tax covenant cases gave rise to Court judgments in 2017: *Atheer Telecom Iraq Limited v Orascom Telecom Iraq Corp Limited* [2017] EWHC 279 (Comm), which went the distance, and *Takeda Pharmaceutical Ltd v Fougera Sweden Holding 2 AB* [2017] EWHC 1402 (Ch), which was an application for an expedited trial or preliminary issue.

In *Atheer*, the SPA contained a covenant by the seller to pay any tax liability incurred by the target company – a telecommunications business – arising “on or before Closing”. Some years after the deal, the Iraq tax authority issued a number of tax demands and, while there was some doubt as to whether the assessments were properly made, the fact that they related to pre-Closing earnings meant that the covenant was engaged. Under the covenant, the seller was also required to pay tax demands for which the target company was “finally liable”, but the facts that (1) no tax had yet been paid and (2) the tax authority was not pressing for payment were held not to matter. There was also a question whether the buyer’s admitted dishonesty in related proceedings in Iraq engaged certain exclusions in the SPA. However, as the dishonesty came after the tax demands – and so had no causative effect – it was irrelevant.

As for *Takeda*, the situation at the time of the hearing (May 2017) was that the Danish tax authority had referred certain questions to the CJEU which could result in the target company facing a significant withholding tax liability. However, the tax covenant in the SPA was due to expire in September 2017 and, in order to

reach an accommodation with the tax authority before that date, the buyer required certain information from the seller. The buyer was therefore pressing for the extent of the seller's duties to provide information to be decided on an expedited basis or as a preliminary issue. The Court ordered the latter.

### Trends and possibilities

As these cases show, in recent times the Courts have seen a good number of M&A disputes, on a wide range of issues. There are also others which have not been considered here: for example *CPL Ltd v CPL Opco (Trinidad) Ltd & Anor* [2017] EWHC 3399 (Ch) (concerning an alleged collateral contract, and whether it was caught by the SPA's entire agreement clause) and *Philp & Anor v Cook* [2017] EWHC 3023 (QB) (where a buyer tried to circumvent a notice clause by alleging a breach of warranty by way of set-off). All of these cases demonstrate that private M&A transactions continue to provide fertile ground for disputes, and for the development of English contract law (referring, in particular, to *Cavendish* and *Wood*).

As our corporate colleagues reported recently<sup>1</sup>, despite considerable geopolitical and economic uncertainty, 2016 recorded one of the highest aggregate annual deal values in recent years. As for 2017, the statistics for the first nine months were less positive, but with variations in activity regionally and by sector, and M&A into the UK as high as it has ever been. With all of this activity, the historical experience suggests that 2018 will be another busy year for M&A disputes – perhaps more so as third party funding becomes an increasingly regular and familiar feature of the litigation landscape.

As for the types of dispute that we may see, in addition to the typically wide range of issues that is likely to emerge, it is possible that cyber exposures could become the next area of focus. Recent English case law has brought into focus the possibility of companies incurring substantial liabilities as a result of adverse cyber incidents. In 2016, *Vidal-Hall v Google, Inc.* [2015] EWCA Civ 311 established that tort claims for misuse of private information and claims under the Data Protection Act may be brought even in circumstances where claimants have not suffered any pecuniary loss. More recently, in December 2017 the High Court found (in *Various Claimants v WM Morrisons Supermarket plc*, [2017] EWHC 3113 (QB)) that a company can be held vicariously liable for data breaches caused by malicious employees in a broad range of circumstances (although time will tell whether this decision will survive the appeals process). Cyber incidents leading to liabilities of this nature may not be known to the parties – or their implications may not be fully understood – at the time of an acquisition. This makes them potential fodder for M&A disputes once the deal has gone through and the implications of a cyber incident start to emerge. Disputes of this nature may centre around breaches of warranty or indemnity claims (to the extent specific warranties or indemnities are given in an SPA related to cyber risk or data security) or around consideration adjustments – recent high-profile data breaches at listed companies, for example, have demonstrated that cyber issues can have a significant impact on a company's market valuation.

---

### For more information contact:



**Ffion Flockart**  
Partner, London  
Tel +44 20 7444 2545  
ffion.flockhart@nortonrosefulbright.com



**Charlie Weston-Simons**  
Senior associate, London  
Tel +44 20 7444 2261  
charlie.weston-simons@nortonrosefulbright.com



**Steven Hadwin**  
Head of operations – risk advisory  
and cyber security  
Tel +44 20 7444 2290  
steven.hadwin@nortonrosefulbright.com

---

<sup>1</sup> *M&A Outlook*, Norton Rose Fulbright LLP, January 2018

# When can a company be liable for the actions of its subsidiary?

The Court of Appeal's decisions in the cases against Vedanta and Royal Dutch Shell highlight important points about parent company liability – *Okpabi and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191; and *Lungowe and others v Vedanta and KCM* [2017] EWCA Civ 1528

## Summary

Two recent Court of Appeal cases have answered important questions about when a parent company can be liable alongside its non-UK subsidiary for harm occurring abroad, but left open the possibility that a parent company could be liable to communities affected by the operations of its subsidiary.

In October 2017, the Court of Appeal held that 1,826 Zambian villagers could bring a claim in the English courts against UK-based Vedanta Resources Plc (Vedanta) and its Zambian subsidiary Konkola Copper Mines Plc (KCM).

Separately, in February 2018, the majority of the Court of Appeal (Sales LJ dissenting) held in favour of English-incorporated Royal Dutch Shell Plc (RDS) and its Nigerian operating subsidiary, Shell Petroleum Development Company of Nigeria Ltd (SPDC), refusing residents of the Niger Delta region the ability to bring a claim in the UK on the basis that the claimants had failed to put forward a good arguable case that RDS owed them a duty of care.

Both cases are likely to be appealed to the Supreme Court.

## Background

In *Vedanta*, residents of the Zambian city of Chingola brought civil proceedings against Vedanta, a UK incorporated parent company, and KCM, its Zambian subsidiary, claiming that waste discharged from the mine – owned and operated by KCM – had polluted the local waterways, causing personal injury to the local residents, as well as damage to property and loss of income. The claims were founded in negligence, although the allegations against the subsidiary also related to breaches of applicable Zambian environmental laws. Despite the fact that the alleged tort and harm occurred in Zambia, where both the claimants and KCM are domiciled, the High Court held that the claimants could bring their case in England. The defendants appealed this decision on the grounds that: (a) the English courts did not have jurisdiction to hear the claims against Vedanta; and (b) that the appropriate place to bring the claims against KCM was Zambia. However, in October 2017, the majority of the Court

of Appeal dismissed the defendants' appeal and held that the claimants' case could proceed before the English courts.

In *Okpabi*, residents of the Niger Delta brought a claim in negligence against English-incorporated RDS and its Nigerian operating subsidiary SPDC, claiming that they had been victims of oil leaks from the pipelines operated by a joint venture which was owned in part by SPDC. In January 2017, the High Court decided in favour of the defendants on the basis that the claimants had failed to present a properly arguable case that RDS owed them a duty of care. On February 14, 2018, the majority of the Court of Appeal dismissed the appeal on the grounds that the claimants had not demonstrated a good arguable case that RDS owed them a duty of care.

## A “real issue” between the claimants and the parent company

In both cases the Court of Appeal addressed whether it is possible for a duty of care to be found between the parent company and those affected by the actions of its subsidiary, such that there was a real issue to be tried between the claimants and the parent.

In answering this question, the Court of Appeal examined a number of cases which applied the classic three-part test for establishing a duty of care set out in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (the three stages being: (i) proximity; (ii) foreseeability; and (iii) reasonableness) and concluded that a parent company could owe a duty of care to those directly affected by its subsidiary if the claimant could demonstrate “additional circumstances”, for example, that the parent company took direct responsibility for drafting and devising the policies the adequacy of which was the subject of the claim; or the parent company controlled the operations which give rise to the claim. In both cases the Court cited

- *Chandler v Cape Plc* [2012] EWCA (Civ) 525, in which the parent company was found to have assumed a duty of care towards the employees of its subsidiary (who had been exposed to asbestos) because of the parent company’s “state of knowledge” about the factory in which these employees worked and “its superior knowledge about the nature and management of asbestos risks” associated with its subsidiary’s operations.
- *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635, in which no duty of care was found between the parent company and the employees of its subsidiary, as there was no evidence that the parent carried on any business apart from holding shares in its subsidiaries, and so it was not “better placed because of its superior knowledge or expertise, to protect the employees of subsidiary companies”.

### **Vedanta**

In *Vedanta*, although the parent argued it neither owned the mine licence nor controlled the “material operation” of the mine, it was held that the

claimants’ case on duty of care was arguable on the basis that Vedanta had

- Published a sustainability report which emphasised how the Board of the parent company had oversight over its subsidiaries.
- Entered into a management and shareholders agreement under which it was obligated to provide various services to KCM, including employee training.
- Provided health, safety and environmental training across its group companies.
- Provided financial support to KCM.
- Released various public statements emphasising its commitment to address environmental risks and technical shortcomings in KCM’s mining infrastructure.
- Exercised control over KCM, as evidenced by the witness evidence of a former employee.

In *Vedanta*, the Court of Appeal stressed that it would not engage in a mini-trial on duty of care. This leaves open the possibility that during the trial on the substantive issues, the Court may find that Vedanta did not owe a duty of care to the claimants. Nonetheless, the case (which is still at an early stage) is an example of an English court finding that there is a real issue to be tried between non-UK claimants and a parent company at an early stage.

### **Okpabi**

By contrast, in *Okpabi* the majority of the Court of Appeal held that the English court lacked jurisdiction to try the claims against SPDC because there was no real issue between the claimants and RDS. The majority held that none of the “Vedanta factors” (listed above) were present in *Okpabi* and that the evidence

presented at this stage was insufficient to establish a good arguable case on duty of care against the “anchor” defendant (RDS). While Vedanta had a majority 80 per cent shareholding in KCM, the subsidiary that operated the mine which caused the damage, RDS was further removed from the pipeline from which the damage allegedly emanated. On the facts, the *Okpabi* pipeline is owned by a joint venture in which SPDC is only a minority stakeholder.

### **Majority decision of Simon LJ and Sir Geoffrey Vos**

Although there was no dispute that the foreseeability limb of *Caparo* was likely to be satisfied, the majority of the Court of Appeal ruled that

- The claimants had failed to demonstrate the necessary degree of proximity between themselves and RDS.
- That it would not be fair, just and reasonable to impose a duty of care on RDS.

In relation to proximity, the claimants argued five main points to demonstrate RDS’s arguable control of SPDC’s operations

- The issue of mandatory policies, standards and manuals which applied to SPDC.
- The imposition of mandatory design and engineering practices.
- The imposition of a system of supervision and oversight of the implementation of RDS’s standards which bore directly on the pleaded allegations of negligence.
- The imposition of financial control over SPDC in respect of spending, which, again, was directly relevant to the allegations of negligence.

- A high degree in the direction and oversight of SPDC's operations. The Court of Appeal stressed that for a duty of care to arise it would be necessary to establish that the parent had taken control or joint control of the relevant operations: issuing mandatory policies and standards which are intended to apply throughout a group of companies was not in itself sufficient evidence of such control, particularly as there was no evidence that RDS sought to enforce these policies and standards and SPDC was left to operate the system of supervision and oversight that RDS had devised.

The Court also rejected the claimant's argument that it would be fair, just and reasonable to impose a duty of care on RDS on the basis that it was unlikely that an international parent such as RDS would undertake a duty of care to all of those affected by the operations of all of its subsidiaries.

### Dissenting opinion of Sales LJ

Sales LJ disagreed with the majority, and would have allowed the appeal. In the event that the Supreme Court accepts an appeal in *Vedanta* and *Okpabi* it is worth noting his reasons.

Sales LJ thought that the claimants had a good arguable case that RDS had assumed a material degree of responsibility in relation to the management of the pipeline and facilities and so could be found to owe the claimants a duty of care. He disagreed with the trial judge's conclusions, stating that it is irrelevant that RDS did not own shares in SPDC and is not a member of the joint venture that holds the pipelines as it could still be shown to exercise material control over the conduct of SPDC in managing the pipeline. He also disagreed with the trial judge's view that the recognition of a duty of care on the part of RDS would potentially

impose "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class". Sales LJ posited instead that whether RDS owes a duty of care in relation to the operations of subsidiaries will depend upon whether the operations of those subsidiaries arise in the context of affecting a foreseeable and proximate class of claimants (such as neighbouring property owners affected by oil spills) and whether on the facts RDS has assumed a material degree of responsibility for how the relevant operations of any particular subsidiary are carried out.

### Lessons

The judgments in *Vedanta* and *Okpabi* provide guidance to companies on when the English courts may be willing to accept jurisdiction for claims by non-UK claimants relating to the operations of non-UK subsidiaries.

*Vedanta* highlights the need for multinational companies to be aware of the possibility that non-UK claimants may be able to bring claims against them in the English courts arising from the operations of foreign subsidiaries, as well as the possibility that the scope of the potential class of claimants will be broad enough to include communities affected by the operations of a local subsidiary. *Okpabi* clarifies this point by demonstrating that the English court will only accept jurisdiction in cases where the parent anchor defendant can be said to have assumed a material degree of responsibility for the operations of its subsidiary. This requires more than just the issue of mandatory policies and standards across the group, but rather, active supervision and oversight of the enforcement of these policies and standards in the operations of the subsidiary. Both cases are likely to be appealed to the Supreme Court and so we can expect welcome authoritative precedent on these points.

### For more information contact:



**Ruth Cowley**  
Partner, London  
Tel +44 20 7444 3396  
[ruth.cowley@nortonrosefulbright.com](mailto:ruth.cowley@nortonrosefulbright.com)



**Stuart Neely**  
Senior associate, London  
Tel +44 20 7444 3289  
[stuart.neely@nortonrosefulbright.com](mailto:stuart.neely@nortonrosefulbright.com)



**Maria Kennedy**  
Associate, London  
Tel +44 20 7444 5024  
[maria.kennedy@nortonrosefulbright.com](mailto:maria.kennedy@nortonrosefulbright.com)

# Recent developments in respect of scope of duty and causation of loss in professional negligence

Before embarking on potentially lengthy and costly litigation, a claimant in a professional negligence action will need to consider carefully whether, in addition to proving a breach of duty, it will be able to establish that it has suffered a loss which is legally recoverable from the potential defendant.

This is not as straightforward as it might initially appear in the light of the requirement, following *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (SAAMCO), that when deciding whether to award compensation, a court has to be satisfied both that

- The loss was reasonably foreseeable and not the result of some intervening cause.
- The damage fell within the scope (or extent) of the defendant's duty of care.

The appellate courts have had to consider some difficult issues in this context this year, as illustrated by three recent decisions of the Supreme Court.

In the first case, *BPE Solicitors v Hughes-Holland* [2017] UKSC 21, the Supreme Court had to determine on the basis of some unusual facts whether the loss suffered by the claimant fell within the scope of the defendant solicitors' duty in the sense established by SAAMCO.

In the second case, *Swynson v Lowick Rose* [2017] UKSC 32, the Court had to consider whether related transactions which effectively extinguished the claimant's loss should be taken into account or should be ignored on the basis that they were *res inter alios acta*.

In the third case, *Tiuta International Limited (in liquidation) v De Villiers Surveyors Limited* [2017] UKSC 77, the Supreme Court considered how the "but for" test for causation is to be applied as between an allegedly negligent valuer and lender in a re-financing situation.

## *BPE Solicitors v Hughes-Holland*

The claimant lent an acquaintance £200,000 to be used, he erroneously believed, to redevelop a property. The claimant understood that the loan was to be repaid in full after 18 months, together with a return of £70,000. In fact, however, the loan was used to refinance the property, which was never redeveloped. Eventually the property was sold and the claimant only recovered £8,000.

The claimant brought proceedings against the firm of solicitors who acted for him in respect of the loan transaction on the basis that they were negligent for failing to make clear what the true purpose of the loan was. He claimed all his losses arising from the transaction on the basis that he would not have entered into the loan if he had known its true purpose (a "no transaction" scenario).

Whilst the judge at first instance found in the claimant's favour and awarded him damages of circa £192,000 (the amount of the original loan less the £8000 recovered), this was reversed by the Court of Appeal on the basis that the losses claimed did not fall within the scope of the defendant's duty (or were not caused by breaches of that duty).

The Supreme Court upheld the Court of Appeal's decision. Following the approach adopted by Lord Hoffman in SAAMCO, it was held that the solicitors had not assumed responsibility for the claimant's decision to lend, which the claimant had resolved to do prior to instructing them, and which would always have led to the loss. Lord Sumption reiterated the distinction between an "advice" case, where the professional owes a duty to advise on all aspects relevant to the decision to enter into the transaction and may therefore be liable for all losses flowing

from having entered into it, and an “information” case, where the professional is only responsible for supplying an element of the material relevant to the decision (even if that element is critical to the decision, so may lead to a “no transaction” scenario). In this respect their lordships specifically overruled the decision of Chadwick J in *Bristol & West Building Society v Steggle Palmer* [1997] that the solicitors in that case were liable for all the consequences of the loan just because the claimant would not have lent the money but for the breach of duty.

Lord Sumption stated at paragraph 35: “... where the contribution of the defendant is to supply material which the client will take into account in making his own decision on the basis of a broader assessment of his risk, the defendant has no legal responsibility for his decision”. The question in such an “information” case is whether the loss claimed “flowed from ... the particular feature of the defendant’s conduct which made it wrongful”. Accordingly it was not sufficient that the claimant would not have lent the money but for the solicitors’ breach of duty, as the loss did not flow directly from a breach of the specific duty they owed (i.e. the loss did not flow from how the loan was used, as the money would never have been sufficient to carry out the works required to enhance the value of the property in any event).

Accordingly it appears that a claimant seeking damages for breach of duty, even in a “no-transaction scenario”, will need to establish that the loss it seeks either flows directly from a breach of the specific duty owed by the defendant (i.e. directly from the inaccuracy of the material supplied by the defendant to assist the decision making process) or that the defendant has accepted responsibility for all

losses arising from the transaction because the defendant has effectively advised the claimant to enter into the transaction (i.e. an “advice” case), and not merely provided material to assist the decision.

### *Swynson v Lowick Rose*

Swynson, a company owned by Mr Hunt, made a loan to a third party in reliance on due diligence carried out by the defendant accountants. The borrower got into difficulties and eventually the loan was restructured by Mr Hunt (personally) lending the borrower sufficient funds to repay the loan to Swynson. The loan to Mr Hunt was never repaid. Both Swynson and Mr Hunt brought proceedings against the accountants in respect of their alleged negligent advice.

At first instance the judge found that the accountants did not owe a duty of care to Mr Hunt personally but only to Swynson. Nevertheless as both the judge and subsequently the Court of Appeal considered that the restructuring of the arrangements with Mr Hunt were *res inter alios acta* (“a thing done between others”) and should therefore be ignored, they considered that Swynson was able to claim its losses flowing from the original loan even though that loan had technically been repaid by Mr Hunt.

However, the Supreme Court disagreed on the basis that the restructuring had specifically provided that the loan by Mr Hunt should be used to repay the borrowers’ indebtedness to Swynson, so its losses had been made good, and this could not be ignored. The Supreme Court also considered that Mr Hunt’s other arguments based on the principle of transferred loss and equitable subrogation failed, and ultimately concluded that neither Mr Hunt nor his company, Swynson, could recover any loss from the negligent accountants.

### *Tiuta International Limited (in liquidation) v De Villiers Surveyors Limited*

The claimant lender had originally lent approximately £2.5 million to the borrower in reliance on the defendant’s valuation of the underlying property securing the loan of £2.3 million in its present state and £4.5 million when the development was complete. Ten months later the claimant restructured the arrangements by advancing a new loan to the borrower of approximately £2.8 million in reliance on a further valuation by the defendant, valuing the security at £3.5 million in its present state. It was intended that the original loan would be redeemed from the new loan, leaving a balance of approximately £300,000 available to help fund the development. The borrower subsequently defaulted on the new loan and it is anticipated that the sale of the security will not be sufficient to redeem the loan in full, giving rise to a loss. The claimant sought damages in respect of the whole loss arising from the new loan. It was alleged that the second valuation was negligent, although no such suggestion was made in respect of the first valuation.

At first instance the defendant valuer successfully applied for summary judgment effectively striking out the claim for the majority of the loss on the basis that the loss was not caused by the alleged negligence, as the loss failed the “but for” test as the claimant had already advanced £2.5 million in reliance on the earlier, non-negligent, valuation which it would not have recovered in any event.

However, by a two to one majority, the Court of Appeal allowed the claimant’s appeal. Lord Justice Moore Bick ruled that, based on certain assumptions made during the appeal (including that the new loan was indeed used to repay



the earlier loan), the correct application of the “but for” test would mean that the defendant was liable for the loss, because the transaction was structured as an entirely new loan in reliance on the updated valuation and the purpose to which that loan was to be put was irrelevant.

This seemed a surprising outcome because the reality was that had the remortgage not proceeded as a result of the non-negligent valuation the claimant would not have recovered its initial loan of £2.5 million in any event, so it was difficult to see how the negligence can be said to have caused the loss of that sum, a point made in McCombe LJ’s dissent in the Court of Appeal and in the first instance decision.

The Supreme Court allowed the surveyors’ appeal and restored the decision at first instance to strike out that part of the lender’s claim based on its initial advance, thereby limiting the claim to the loss of the circa £300,000. Lord Sumption clearly felt that the Court of Appeal were wrong to have strayed away from the “basic comparison” espoused by Lord Nicholls in *Nykredit Mortgage Bank plc v Edward*

*Erdman Group Ltd* [1971] 1 WLR 1627, which simply requires a comparison between what the claimant’s position would have been (a) if the defendant had fulfilled its duty of care and (b) its actual position.

In the case of a “no transaction” scenario the comparison is therefore between

- The amount of money lent by the claimant, which he would still have had in the absence of the loan transaction, plus interest at the proper rate.
- The value of the rights acquired, namely the borrower’s covenant and the true value of the overvalued property.

Lord Sumption also dismissed a further argument of the lenders that the benefit of repayment of the original loan should be disregarded as collateral under the *res inter alios acta* principle. On the facts he considered that firstly, on the “basic comparison” analysis, the repayment did not confer a benefit on the lenders and in any event arose as an intrinsic part of the refinancing.

## Conclusion

As can be seen from the above cases it is not always easy to predict how the courts will apply the principles of scope of duty and causation of loss to the particular facts of a claim and this aspect will benefit from early and detailed consideration. In particular the last two cases illustrate that the Courts will take into consideration the precise terms and structure of transactions. However the reassertion of the common sense “but for” test by the Supreme Court in *Tiuta* is welcome and will help lawyers advise claimants about the scope of their potentially recoverable losses with greater certainty.

---

For more information contact:



**David Stevens**  
Partner, London

Tel +44 20 7444 3597  
david.stevens@nortonrosefulbright.com

# When does “litigation” become sufficient to trigger litigation privilege?

The point at which an investigation becomes sufficiently adversarial to constitute “litigation” for litigation privilege purposes has long been a grey area under English law.

In *SFO v ENRC*<sup>1</sup>, the English High Court has handed down an important decision on the scope of litigation privilege in the context of investigations, providing an illustration of what constitutes “litigation” and when it can be said to be reasonably anticipated for the purposes of litigation privilege particularly in the criminal context.<sup>2</sup> Going forward, corporates will need to bear in mind that, where legal advice privilege does not apply, documents produced during the course of compliance due diligence, an internal investigation and/or cooperation with the SFO – including interview notes and accountants’ books and records reports – are unlikely to be protected by litigation privilege until the point at which the corporate reasonably anticipates prosecution, which is a high bar.

This article sets out the background and rationale for the court’s latest finding on privilege as well as a number of key takeaways. It also considers the subsequent case of *Bilta (in liquidation) v RBS* [2017] EWHC 3535 (Ch), in which the court considered one aspect of the *ENRC* decision, the question

of dominant purpose in the context of litigation privilege, and took a noticeably different approach.

## Background

An internal investigation was launched following whistleblower allegations of fraud, bribery and corruption. Lawyers were engaged in early 2011 to carry out a fact-finding investigation, followed by forensic accountants a few months later.

The SFO initiated discussions with the company some months after the lawyers started work following a press report. In April 2013 the SFO began a criminal investigation. As part of its investigation, the SFO sought disclosure of certain documents generated during the internal investigation, which had continued in the interim period. The company claimed that these documents were privileged, and the SFO sought a declaration from the English court that they were not.

## Requested documents

There were four categories of documents in respect of which privileged was claimed

- Notes taken by external lawyers of interviews with employees, former employees and officers of the company and its subsidiaries, suppliers and others third parties in relation to the matters being investigated. It was claimed that these documents were protected by litigation privilege on the basis that the dominant purpose of the interviews was to enable its lawyers to obtain relevant information and instructions and to provide advice in connection with anticipated adversarial criminal litigation. Alternatively it was claimed that the notes were protected by legal advice privilege on the basis that they constituted lawyers’ work product, revealing the trend of the legal advice being provided. Legal advice privilege over the notes was not claimed on any other grounds, presumably recognising the difficulties in doing so given the narrow definition of who is the

<sup>1</sup> *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).

<sup>2</sup> Note that the company was granted permission to appeal in October 2017. The appeal is due to be heard in July 2018

“client” following *Three Rivers No. 5*<sup>3</sup> as confirmed in December 2016 by the *RBS Rights Issue Litigation* case (the RBS litigation)<sup>4</sup>.

- Materials generated by the accountants as part of “books and records” reviews carried out to identify controls and systems weaknesses and potential improvements and in respect of which litigation privilege was claimed.
- Documents indicating or containing the factual evidence of a partner of the law firm engaged to advise the Nomination and Corporate Governance Committee and/or the Board of the company – both legal advice privilege and litigation privilege were claimed in respect of these documents.
- 17 documents referred to in a letter sent to the SFO by the company’s legal advisors. The majority of these documents were or reflected the accountants’ reports (to be treated in the same way as (b) above). Two of these documents were internal email communications between a senior executive and the then Head of Mergers and Acquisitions (a qualified lawyer who had previously acted as the company’s General Counsel); legal advice privilege was claimed in respect of this category.

### Legal advice privilege

Although the question of who is the client was not directly at issue in this case, the judge confirmed that the narrow definition of “client” adopted in the RBS litigation on the basis of *Three Rivers No. 5* was “plainly right”, adding that any change would have to be made by the

Supreme Court or Parliament<sup>5</sup>. Only communications between lawyers and those individuals at the corporate client authorised to seek and receive legal advice on behalf of the corporate would be protected by legal advice privilege.

With regard to lawyers’ working papers, the judge repeated the position taken in the RBS litigation – namely that legal advice privilege protection over lawyers’ working papers will only be justified if the working papers would betray the tenor of the legal advice. Otherwise, a note by a lawyer of an interview with a witness who does not constitute the “client” for legal advice privilege purposes will not be privileged simply by virtue of the fact that the lawyer (rather than the client or other third party) had carried out the interview instead.

On the above basis, the interview notes were held not to be protected by legal advice privilege. There was no evidence that any of the individuals interviewed fell within the definition of “client”. Nor did the fact that the notes were made by lawyers strengthen the claim for legal advice privilege as these were merely notes of what the lawyers were told by the witnesses, and, on the evidence provided, did not betray the trend of the legal advice to the company.

The documents indicating or containing factual evidence of the legal adviser to the committee/board were found to be protected by legal advice privilege both in terms of the legal advice and the factual findings of the investigation which they provided. Although the SFO had argued that the factual findings were not privileged, the judge held that these findings were part

and parcel of the confidential solicitor-client communication and therefore privileged. The judge additionally found that the documents fell within the ambit of the protection of lawyers’ working papers.

The emails with the Head of Mergers and Acquisitions were held not to be privileged even where legal advice was being sought and provided because, on the basis of the contemporaneous documents, the individual was engaged by the company at the time not as a lawyer but as a “man of business”. This confirms the need for a lawyer, *acting in the role of lawyer*, in the relevant communications for legal advice privilege to attach.

### Litigation privilege

This decision is perhaps of greater interest for the discussion on litigation privilege in the context of investigations – something which was not pleaded in the recent RBS litigation (dealing with the scope of legal advice privilege).

It was common ground that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation attract litigation privilege so long as:

- The litigation is adversarial, not investigative or inquisitorial.
- Litigation is in progress or reasonably in contemplation.
- The communications are made with the sole or dominant purpose of conducting the anticipated litigation.

---

<sup>5</sup> Somewhat reassuringly, the judge did not express any view on the further observations in the RBS litigation suggesting that only individuals singly or together constituting part of the directing mind and will of the corporation can be treated for the purposes of legal advice privilege as being, or being a qualifying emanation of, the “client”, which could, if adopted, give rise to further complex preliminary issues on who is the client for legal advice privilege purposes.

---

<sup>3</sup> *Three Rivers District Council and others v Governor and Company of the Bank of England* (No 5) [2003] QB 1556.

<sup>4</sup> *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

### **Adversarial litigation**

The company argued that a criminal investigation by the SFO should be treated as adversarial litigation for litigation privilege purposes. The judge, however, rejected this argument as misconceived. The SFO has a dual function as investigator and prosecutor. An SFO investigation is only a preliminary step to uncover relevant facts before any decision to prosecute. At the investigation stage the process cannot be said to be adversarial. In the judge’s view, “[t]he policy that justifies litigation privilege does not extend to enabling a party to protect itself from having to disclose documents to an investigator”. There was even less reason for the court to hold that documents prepared as part of the internal investigation, before the SFO commenced its own investigation, could be protected by litigation privilege, since there was no evidence of the company expecting to find any incriminating material and it had previously promised to provide these to the SFO in the spirit of cooperation.

### **Litigation in contemplation**

The judge recognised that the test as to when litigation can be said to be anticipated is “notoriously difficult to express in words”, but noted that the person seeking to claim litigation privilege must establish that it was aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility. The reasonable contemplation or onset of a criminal investigation by the SFO (which the judge held did not constitute adversarial litigation for litigation privilege purposes) did not necessarily equate to the reasonable contemplation of a prosecution: “[t]he investigation and the inception of a prosecution cannot be characterised as part and parcel of one continuous amorphous process ... so that the reasonable expectation of the one necessarily involves the reasonable contemplation of the other”.

Even where allegations of criminal conduct were being investigated, prosecution only becomes a real possibility once it is discovered that there is some truth in the allegations. Here, there was no evidence that anyone at the company was ever aware – either before or after the SFO’s criminal investigation began – that a criminal offence had been committed. It could not therefore be said that anyone at the company reasonably contemplated litigation as a real likelihood rather than a mere possibility while the fact finding continued. A fear of prosecution on a “worst case scenario” was not enough to trigger litigation privilege.

The reasoning of Andrews J as to when a criminal prosecution can be said to be in reasonable contemplation was specifically endorsed by the Court of Appeal in the subsequent case of *R v Jukes* [2018] EWCA Crim 176.

### **Dominant purpose test**

The judge went on to find that even if criminal proceedings were in reasonable contemplation, none of the documents in question were created for the dominant purpose of using in, or obtaining legal advice relating to the conduct of, such anticipated criminal proceedings. While the company argued that the dominant purpose of the documents was the obtaining of legal advice pertaining to the conduct of the anticipated criminal litigation, the judge was not persuaded that this was even a subsidiary purpose of the creation of the documents, let alone the dominant purpose.

In the judge’s view, the primary purpose of the investigation was to find out if there was any truth in the allegations and then to decide what to do about it if there was. The dominant purpose of the accountants’ reports was to meet compliance requirements or to obtain accountancy advice on remedial steps as part and parcel of a comprehensive books and records review. On the evidence, the

accountants’ engagement had little or nothing to do with the preparation of a defence to, or obtaining legal advice in respect of, prospective criminal litigation.

The judge also noted that any legal advice which was sought based on the outcome of the internal investigation would have been on how to minimise or avoid the risk of prosecution by the SFO, as opposed to on how to conduct a defence to a criminal investigation, and that avoidance of a criminal prosecution cannot be equated with the conduct of a defence to a criminal prosecution for litigation privilege purposes.

Although the judge conceded that it may be possible for documents to be generated for the dual purpose of assisting a company to persuade the SFO not to prosecute and also to help the company mount a defence to criminal proceedings if that failed, the judge held that the evidence in this case did not establish such a dual purpose, let alone that the latter purpose was the dominant one. The judge also added that documents created with the specific purpose or intention of showing them to the potential adversary in litigation are not subject to litigation privilege. Given that the company had committed to share the results of its internal investigation with the SFO, it could not, at the same time, claim litigation privilege over these materials.

For all of these reasons, the judge held that the claim to litigation privilege failed on all counts.

A seemingly broader approach to the question of dominant purpose was taken in the subsequent case of *Bilta (in liquidation) v RBS* [2017] EWHC 3535 (Ch). In that case, the claimants sought documents relating to an internal investigation carried out by external lawyers. The claimants did not dispute that litigation was in contemplation.



(i.e. a threatened assessment by HMRC in respect of over-claimed VAT). However, the issue was whether the internal investigation documents sought were created for the dominant purpose of use in the litigation (i.e. the HMRC assessment).

The claimants argued that the internal investigation documents were not covered by litigation privilege on the basis of a statement in correspondence from the bank's lawyers that the purpose of the investigation had been to provide a full and detailed account of the relevant facts. The bank successfully argued that the dominant purpose in producing the documents was to defend HMRC's claim. The court noted that a key point in the chronology was a March 2012 letter from HMRC stating that it had decided (after two years of investigating) to make an assessment but was prepared to wait to consider the bank's comments before it did so – and it was at this stage that the bank instructed external lawyers. The fact that the bank tried to cooperate with, and met with HMRC on several occasions did not preclude the internal investigation being conducted for the dominant purpose of expected litigation. It was held that the

documents were brought into being for the dominant purpose of expected litigation and were therefore privileged.

In addition, the Chancellor considered that dicta in *ENRC* suggesting that privilege cannot attach to documents created for the purposes of trying to avoid litigation did not give rise to a general legal principle and did not reflect the commercial reality of the present case (although he did not expressly criticise the conclusion that attempts to settle prevented the litigation from being the dominant purpose on the facts of *ENRC*). Moreover, he stated that it is clear from the authorities that it is necessary “to take a realistic, indeed commercial view of the facts ... [the bank] was not spending large sums on legal fees here in the hope that HMRC would be dissuaded from issuing an assessment. If that is properly to be regarded as a purpose of the investigation at all, it was obviously a very subsidiary purpose”.

#### Key takeaways

This case provides a number of key takeaways for parties when embarking on compliance due diligence, an internal investigation and/or cooperation with the SFO.

- Be aware that the bar for litigation privilege to trigger now appears to be higher in the criminal context than in the civil context. Civil proceedings can be commenced based on limited evidence – and therefore anticipated for litigation privilege purposes – albeit challenged later. Criminal proceedings, on the other hand, cannot be commenced unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test has been met. Criminal proceedings cannot, therefore, be reasonably contemplated for litigation privilege purposes unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a “good chance” of securing a conviction. It would be prudent to ensure that the grounds for belief going to litigation privilege are clearly and contemporaneously recorded.
- Where an internal or external investigation is being carried out for fact-finding purposes to ascertain whether or not any wrongdoing

has been committed, the extent to which material generated during the course of the investigation will be privileged will depend not only on whether litigation can be said to be reasonably contemplated but what kind of litigation is contemplated: civil or criminal, applying the appropriate tests in each case. If no civil proceedings are reasonably contemplated, however, and the only risk is of criminal prosecution, it cannot be said that the individual or entity being investigated reasonably contemplates litigation unless, on the facts, it can be shown that they were aware of circumstances that, once discovered, made a prosecution likely. Do not assume, therefore, that litigation privilege will attach just because you are carrying out an internal investigation into alleged criminal activity, or even once the SFO commences a formal criminal investigation. Unless there is an awareness of any criminal conduct having taken place on the part of those investigating, the scope for arguing that litigation was reasonably contemplated will be limited. Ensure that the grounds for such awareness are immediately recorded for the purpose of privilege.

- Even where adversarial litigation can be said to be reasonably contemplated, the dominant purpose test for litigation privilege purposes would still need to be met. Whether civil or criminal proceedings are contemplated, the material in question would have to be prepared for the dominant purpose of preparing a defence to, or obtaining legal advice in respect of, the prospective litigation, as opposed to any other purpose.
- Do not, therefore, assume that notes of interviews with potential witnesses and/or the advice or

reports of non-legal professionals, such as forensic accountants, engaged on compliance engagements or internal and/or external investigations will be protected by litigation privilege. Not only will this depend on the extent to which the client reasonably anticipates litigation and, if so, what type (civil or criminal), but also on whether or not the material satisfies the dominant purpose test (rather than being prepared for any other dominant purpose, such as compliance due diligence and/or remediation). Again, clearly record any conclusions contemporaneously.

- Remember that the narrow definition of “client” for the purposes of legal advice privilege still stands. Lawyers’ notes of interviews with witnesses who do not constitute the client will not be privileged unless litigation privilege applies. They may also be protected as lawyers’ working papers but only to the extent that they betray the tenor of the legal advice to the client. Evidence in this regard is crucial – for example, the lawyer’s assessment of the witness evidence, any thoughts about its importance or relevance to the inquiry, or indications of further areas of investigation in consequence of what the witness has said. Lawyers’ factual findings which are part and parcel of the confidential solicitor-client communication will, however, be protected by legal advice privilege.
- In assessing whether or not privilege applies, the court will consider the nature, quality and content of the evidence supporting the claim for privilege very carefully. Where possible, therefore, secure evidence from the individual(s) ultimately responsible for the coming into existence of the document(s) in question, supported by any contemporaneous documents, as

it is their motivation and state of mind which will be relevant to why legal advice was sought or litigation contemplated. Evidence from anyone else – including lawyers – will be of secondary value.

For more information contact:



**Ruth Cowley**  
Partner, London  
Tel +44 20 7444 3396  
ruth.cowley@nortonrosefulbright.com



**Neil O'May**  
Partner, London  
Tel +44 20 7444 3499  
neil.o'may@nortonrosefulbright.com



**Peter Scott**  
Partner, London  
Tel +44 20 7444 5682  
peter.scott@nortonrosefulbright.com



**Andrew Sheftel**  
Senior knowledge lawyer, London  
Tel +44 20 7444 5682  
andrew.sheftel@nortonrosefulbright.com

# First principles of contract formation

In business, there is great emphasis on building a network of contacts and developing those relationships. This often leads parties to discuss and negotiate potential deals and ventures in settings other than the boardroom. This article examines three cases that were heard in the course of 2017 that considered the basic principles of contract formation (and in particular the intention to create legal relations) in the context of informal discussions and meetings in social settings such as a restaurant or a public house.

Although oral contracts can be made, there is a risk associated with proceeding in this way and these cases highlight the uncertainty that can come with negotiating commercial contracts in informal surroundings, and of failing to evidence them in writing.

In summary, although these cases do not change the position under English law they nevertheless provide an important reminder of (i) the steps the courts will take when considering whether an oral contract has been formed, (ii) the challenges for a claimant in making such a claim and (iii) the practical steps parties should take to manage risks in circumstances where they may later need to rely on purported agreements concluded orally in an informal setting.

## Elements of contract formation

A legally binding agreement requires the four elements of

- Offer
- Acceptance
- Consideration and
- Intention to create legal relations

In determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, English law applies an objective test. There are a number of important principles relating to the intention of the parties to create legal relations, in particular

- Where there is an express agreement, in an ordinary commercial context, the burden of disproving an intention to create legal relations is a heavy one.
- Where there is no express agreement, the party claiming that a binding agreement has been made has to prove the intention.
- The degree, or lack, of precision in expressing the alleged agreement may be a relevant factor to the issue of contractual intention – the more vague and uncertain the alleged agreement is, the more likely the court will come to a conclusion that the parties did not reach any agreement at all.

## The cases

### ***MacInnes v Gross* [2017] EWHC 46 (QB)**

This case concerned a claim for €13.5 million pursuant to an oral contract alleged to have been made over dinner in a Mayfair restaurant on March 23, 2011. Mr MacInnes claimed that the parties agreed at dinner that he would leave his employment with an investment bank and would personally provide services to the defendant with the purpose of maximising the defendant's return on the sale of his business. In return, he would receive remuneration calculated by reference to a formula which gave him 15 per cent

of the difference between the “strike” (or target) price of the business and the actual sale price. Following the dinner, Mr MacInnes said in an email to Mr Gross, that there was an agreement “on headline terms” but crucial elements relating to Mr MacInnes’ remuneration had not been set out.

The Court held that there was no intention to create legal relations and therefore on this (and other grounds) no binding contract had been made over dinner.

The fact that the key discussion took place over dinner did not, of itself, prevent the making of a legally binding contract. Coulson LJ noted that “a contract can be made anywhere, in any circumstances”, but the fact that the alleged agreement was made in a highly informal and relaxed setting meant that the court should look closely at the claim that, despite the setting, there was an intention to create legal relations.

The following factors were relevant to the judge’s decision

- No agreement on the important issue as to the nature of Mr MacInnes’ remuneration: “the terms of the alleged contract were both too complex and too uncertain to be enforceable”.
- No binding agreement as to the relevant parties or the relevant scope.
- In this particular case, because the discussions took place in English, which was not the defendant’s first language, the Court noted that a “further note of caution” should be required when considering whether or not the discussion led to a binding agreement.

- Neither party had told anyone else they had reached a binding agreement and the claimant had not produced any written contract or draft, an omission that the court regarded as critical. Its absence was the final reason for the court’s decision on this issue.

**Blue v Ashley [2017] EWHC 1928 (Comm)**

The question that was considered by the court in *Blue v Ashley* was whether, as a result of a conversation in the Horse & Groom public house in central London, a contract was formed between the claimant, Mr Blue, a financial consultant, and the defendant, Mr Ashley. Mr Blue claimed that such a contract had arisen and as a consequence of the subsequent rise in the Sports Direct share price, Mr Ashley owed Mr Blue a £15 million bonus.

The judge outlined eight main reasons for concluding that, *objectively*, there was no intention to make a contract

- The meeting took place in the pub. Although a contract could theoretically be made in an informal setting, the judge said “an evening of drinking in a pub with three investment bankers is an unlikely setting in which to negotiate a contractual bonus arrangement with a consultant who was meeting them on behalf of the company”.
- The purpose of the occasion was to secure the services and enthusiastic support of a potential new corporate broker for Sports Direct rather than to discuss an incentive for Mr Blue.
- The nature and tone of the conversation was not serious but more akin to “banter”.
- The lack of commercial sense for Mr Ashley to offer to pay Mr Blue £15 million as an incentive to do work

aimed at increasing the Sports Direct share price.

- The incongruity with Mr Blue’s role in that it would have been an “inherently absurd” and “fanciful” idea that Mr Blue alone could just “get” the share price to double.
- The alleged offer was too vague for it to be seriously meant.
- The perceptions of the three witnesses was that the offer was not a serious one.
- Mr Blue probably did not perceive the agreement as serious as he did not think it necessary to make any written record and waited nearly a year before mentioning the agreement to Mr Ashley.

The Court concluded that no reasonable person would have thought the agreement was a serious one which intended to create a legally binding contract and no one who was actually present did in fact think so at the time.

Leggatt J commented at the end of his judgment: “They all thought it was a joke. The fact that Mr. Blue has since convinced himself that the offer was a serious one, and that a legally binding agreement was made, shows only that the human capacity for wishful thinking knows few bounds”.

**Wright v Rowlands and another [2017] EWHC 2478 (Comm)**

The case of *Wright v Rowland*, in which judgment was handed down in October 2017, also concerned a financial consultant claiming breach of an oral agreement although this time the setting for the alleged agreement was a rather more glamorous setting than a public house – a yacht.

Mr Wright provided consultancy services to various Rowland family



businesses. He alleged that in 2008, he was responsible for the introduction of the Rowlands to the former Chairman of Kaupthing Luxembourg (the distressed Luxembourg arm of the collapsed Icelandic banking group, Kaupthing Bank), and that he then worked as a senior member of their deal team to negotiate, structure and close an acquisition of the bank. The transaction involved the demerger of Kaupthing Luxembourg into a private bank called Banque Havilland S.A. (BH).

It was contended by Mr Wright that at a party on July 20, 2009 on board the Rowlands' yacht in the south of France, an oral agreement was reached between himself and the Rowlands that (amongst other things) granted him an option to purchase up to five per cent of the shares in BH for the same proportionate price that the Rowlands had paid to acquire the entire issued share capital of BH, i.e. €50 million. The Rowlands subsequently denied that they had made any such agreement with him.

The Court rejected the claim that money was due on the basis of an oral contract because there was no evidence of the parties' intention to create legal relations, as well as a lack of certainty in relation to certain other fundamental terms which militated against the existence of a binding contract.

Mr Christopher Butcher QC, sitting as a High Court judge, said he was "entirely unpersuaded that there was any commitment" given by the Rowlands to Mr Wright on the yacht and had "Mr Rowland said what Mr Wright alleges or something approximating to it, with a firm commitment on a series of points, I consider that it would have been documented. Had such words been spoken, I consider that it is likely that Mr Wright would have put them in an email, or at least to have made a contemporaneous note".

### Conclusion

These decisions highlight (i) the dangers of informality in contractual dealings especially when the subject matter is of considerable value to one of the parties and (ii) reaffirms the objective test to be applied when looking at whether there is an intention

to create legal relations.

It is clear from these cases that the courts will not lightly infer the existence of a contract unless they can conclude with confidence that the parties intended to create legal relations.

Practically speaking, without a written agreement, there is a heavy burden of proof on the party seeking to assert the existence of a contractual relationship. Parties should ensure that they have a written document/contract (or at the very least a contemporaneous note of the discussions) to accurately reflect the parties' positions to avoid disputes arising later.

---

For more information contact:



**Nadia Evans**  
Associate, London  
Tel +44 20 7444 3748  
nadia.evans@nortonrosefulbright.com

# Protecting shareholder information: the balance between public interest and commercial exploitation

## *Richard Charles Fox-Davies v Burberry Plc* [2017] EWCA Civ 1129

There has always been a fine balance to be struck between the public interest in understanding who owns and runs companies and protection of the personal information of those who do.

The Companies Act 2006 (CA 2006) provides a mechanism to obtain a copy of a company's register of members. However, in an age where information is an asset of increasing value, individuals or entities who are hoping to benefit from the use of such details will find the courts ready to police their efforts and consider whether the information is being requested for a proper purpose.

What constitutes a proper purpose (such as to allow access to the register) can be a matter of some contention, particularly since there is very little judicial guidance and no statutory definition. In *Fox-Davies v Burberry plc* the Court of Appeal recently considered the issue for only the second time.

### Rights of access

Every company with a share capital must keep a register of its members, including their addresses, under s113 CA 2006. Prior to the Companies Act 1985, a shareholder's right to access the register of members was treated as incidental to his ownership of shares.

After 1985, the court had a discretion to allow inspection, but the grounds for exercise of this discretion were clarified under s116 CA 2006 as it had become clear that there were some only too willing to abuse the rights of access in order to advertise or solicit customers.

Pursuant to s116 CA 2006, that register of members is open to inspection by any person who makes a request in the prescribed format and pays the necessary fee, provided that they state the purpose for which the information is to be used and identify any other person to whom the information will be disclosed (i.e. the extent of the proposed dissemination of the information).

A company which receives such a request must then act swiftly. Within five working days of receipt of a technically valid request, the company must either comply or apply to the court under s117 CA 2006 for a direction that it need not comply because the information is not being sought for a "proper purpose".

If the company refuses a valid request to inspect without such a court order, it will be committing a criminal offence under s118 CA 2006; if it accedes to an improper request, it may be at risk of a claim by a shareholder of his data protection rights have been infringed. Equally, where a

request for a copy of the register is knowingly or recklessly misleading or false, the requestor will attract criminal liability under s119 CA 2006.

### The question of proper purpose

The requirement to deal with a s116 request swiftly and the potential criminal sanctions are fairly draconian.

If a request does not comply with the "technical" requirements of s116 (i.e. it does not set out all the information required by that section, including the identity of any persons to whom the information is to be disclosed), it will not be valid and the company can resist it. More difficult is determining whether the request has been made for a proper purpose; the burden of proof in demonstrating (on the balance of probabilities) that a request is for an improper purpose is on the company.

The law in this area has been left to develop on a case by case basis.

Given the lack of clarification within the CA 2006 as to what constitutes a "proper purpose" in relation to a s116 request, in January 2014 the Institute of Chartered Secretaries & Administrators (ICSA) produced a guidance note including examples of proper and improper purposes.

For example, a shareholder or indirect investor wanting to contact other shareholders about matters relating to the company, their shareholding or a related exercise of rights would, according to the ICSA guidance, have a proper purpose. However, requests from agencies which “specialise in identifying and recovering unclaimed assets for [their] own commercial gain by then contacting and extracting commission or fees from the beneficiaries” would not have a proper purpose “where the company is not satisfied that such activity is in the interests of shareholders”.

That guidance has been relied upon by the judiciary but it remains non-exhaustive and non-binding. Indeed the Court of Appeal has now held that a proper purpose need not be one which is “in the interests of shareholders”.

### Recent decisions

The first time the Court of Appeal considered the s116 provisions was in 2014 in *Burry & Knight Limited & Another v Knight* [2014] EWCA Civ 604.

In that case the applicant, a minority shareholder in two family companies, made a request for a copy of their registers for three purposes: to study current shareholders, to write to them detailing long-standing concerns about the past conduct of the company directors and to raise concerns about the proposed method of share valuation of the companies. Only the third purpose was found to be proper at first instance, with the result that the court directed the companies not to comply with the request.

The Court of Appeal held that the words “proper purpose” should be given their “ordinary and natural meaning” and confirmed that, where multiple purposes have been set out, a s116 request will fail if any of those purposes are improper. The Court will not make a distinction between the purpose of a request and the manner in which it is to be effected but will consider whether the overall purpose is proper.

In *Fox-Davies v Burberry Plc*, the issue came for consideration before the Court of Appeal again.

The appellant in that case operated a business of tracing lost members of companies and, for a fee or commission, reuniting them with their shares. In furtherance of this business, he requested a copy of the Burberry register of members pursuant to s116 CA 2006. This was refused by Burberry, who applied under s117 CA 2006 for a direction that it should not comply.

At first instance, Burberry’s application was granted and this decision was upheld by the Court of Appeal (albeit for different reasons), which approved the decision in *Burry & Knight* and gave further guidance on the question of proper purpose and how the court should assess it.

The Court of Appeal held that first, the court must make a finding of fact as to what the requestor’s true purpose is, based on the evidence before it. Secondly, the Court must make an evaluative, objective judgment as to whether that purpose is proper.

The Court of Appeal confirmed that whether a purpose is proper or improper does not depend upon whether it is in the interests of shareholders overall, and there is no clear distinction to be made between whether a request is made by a member or non-member (save that a non-member must pay a fee for access). A proper purpose does not have to be confined to one relating to shareholder democracy (for example, in order to communicate regarding matters relevant to the company).

Interestingly, the Court of Appeal had mixed views on the question of whether commercial exploitation of the information was proper. Lord Justice David Richards held that the fact that the applicant wished to extract a fee from traced lost members before ultimately disclosing the asset to which

they were entitled rendered his purpose improper – i.e. because his purpose in using the statutory machinery was to gain financial advantage.

Sir Patrick Elias, however, found that it was not the fact of making a commercial profit which made the purpose improper, but that the applicant had not provided information about what commercial charges he intended to impose. This failure left the Court unable to be satisfied that there was no risk the shareholder might be exploited in a manner which would render the purpose improper.

### Conclusion

The state of the law in this area remains unsatisfactory as reported cases are scarce and the jurisprudence thus undeveloped. The ICSA guidance provides useful examples of potential improper purposes but even these do not answer the question before the courts as to whether any stated purpose is the true one; moreover, the courts have not been afraid to disagree with that guidance.

In the meantime, companies need to remain alert to the possibility of a s116 request being submitted and to the need to respond urgently.

---

### For more information contact:



**Jane Park-Weir**

**Of counsel, London**

Tel +44 20 7444 5554

[jane.park-weir@nortonrosefulbright.com](mailto:jane.park-weir@nortonrosefulbright.com)

# Exclusive jurisdiction agreements and anti-suit injunctions

The High Court decision in *Team Y&R Holdings Hong Kong Ltd v Ghossoub and Cavendish Square Holding BV v Ghossoub* [2017] EWHC 2401 (Comm) provides a useful reminder of the discretionary nature of anti-suit injunctions: notwithstanding that proceedings have been commenced in breach of an exclusive jurisdiction agreement, injunctive relief will not always be available.

Further, the case is the second recent decision which has grappled with how dispute resolution agreements impact on third parties.

## Background

The application for an anti-suit injunction arose following the purchase of a stake in Team Y&R Holdings Hong Kong Ltd (Y&R) by Cavendish Square Holding BV (Cavendish) from Mr Ghossoub. Mr Ghossoub retained a stake of 20 per cent in Y&R after completion of the sale and purchase agreement (the SPA) and had a service agreement with Y&R.

The SPA provided that the English courts had exclusive jurisdiction to settle any disputes arising out of it. Further, the SPA expressly excluded third party rights under the Contracts (Rights of Third Parties) Act 1999.

Mr Ghossoub brought a petition for unfair prejudice proceedings in Hong Kong against Y&R, Cavendish and two other companies (the WPP group companies). His complaints concerned, amongst other things, his alleged constructive dismissal from management of Y&R and the failure of Y&R to declare dividends. However, the grounds for the petition depended

substantially on breaches of the SPA and Mr Ghossoub's service agreement.

The claimants brought two actions in England: one seeking an anti-suit injunction restraining the Hong Kong proceedings; and the other seeking an order requiring Mr Ghossoub to transfer his shares pursuant to shareholder default provisions in the SPA.

The High Court also considered whether third parties were bound by an exclusive English jurisdiction clause in the SPA given that of the respondents to the Hong Kong petition, only Cavendish was a party to the SPA.

## Judgment Anti-suit injunction

The Court refused to grant an anti-suit injunction.

On the scope of the exclusive jurisdiction clause, the judge considered that absent clear language to the contrary, it was unlikely that the parties would have intended to submit to the English

jurisdiction for disputes in which the English courts would not be in a position to resolve, or grant a remedy. The present case, which concerned a petition by a shareholder alleging that the affairs of a Hong Kong company had been conducted unfairly, was such an example. However, because the underlying disputes encapsulated by the unfair prejudice petition heavily involved alleged breaches of the SPA, Mr Ghossoub was nevertheless in breach of the exclusive jurisdiction clause in commencing the Hong Kong proceedings.

In conclusion, considering previous authority under English law that an injunction should be granted unless there were strong reasons for the foreign proceedings to continue, the judge accepted there was strong reason why an injunction should not be granted in the present case. In particular, the judge found it impossible to separate the issues that the English courts could exclusively consider (especially as non-SPA-contracting parties were respondents to the petition in Hong Kong). If parts of the wider dispute were heard in England there would be a possibility of conflicting judgments. Such reasoning is consistent with a general desire to avoid parallel proceedings or inconsistent decisions.

On balance, the judge preferred an outcome whereby the Court in Hong Kong deciding the unfair prejudice decision should be able to base its findings on the evidence that it itself had heard, as opposed to being directed by any such opinion of the English courts. This factor was important because the existence of unfair prejudice was to be determined

by the courts of Hong Kong and any appropriate remedy was also solely within the Hong Kong court's remit.

### Third parties

The question also arose as to whether such breach of the jurisdiction agreement also extended to claims against parties that were not party to the SPA. In the judge's view, the absence of an express provision in a jurisdiction agreement relating to third parties indicated such third parties were not bound by the exclusive jurisdiction clause; the absence of plain language to the contrary meant contracting parties neither intended to benefit nor prejudice non-contracting third parties. In the present case, the exclusion of third party rights generally (indicating the parties had considered third parties) led the judge to conclude the jurisdiction clause did not extend to claims against non-contracting parties, and therefore did not extend to the Hong Kong petition.

The judge concluded that if any claim relating to the subject of the contract, brought by or against a non-contracting party, should be subject to the jurisdiction clause then clear words should be used to demonstrate this intention. In the present case, and in the absence of such words, no breach arose by the bringing of the Hong Kong petition to the extent that it was brought against persons that were not party to the SPA.

It is notable that this is the second recent decision on the applicability of jurisdiction clauses to third parties. In *Dell Emerging Markets (EMEA) Ltd v IB Maroc.com SA* [2017] EWHC 2397 (Comm) (which was not cited in *Ghossoub*), the Court accepted that a jurisdiction clause was applicable to a company not party to the agreement containing the clause. While neither judgment refers to the other, a clear difference between the two cases was that in *Dell*, the third parties had been mentioned elsewhere in the contract and the court was able to conclude that the parties had envisaged that the jurisdiction clause would apply to claims against affiliates. In both cases, the question was approached as one of contractual

interpretation. Indeed, in *Ghossoub*, the judge set out various principles that apply to this question including

- When determining whether a party is obliged to bring claims against non-contracting parties in the chosen forum, the contract as a whole should be considered "including not just the language used in the exclusive jurisdiction clause but also all other terms in the contract that may shed light on what the parties are likely to have intended".
- "Whist it is well established that the language of an exclusive jurisdiction clause is to be interpreted in a wide and generous manner, the starting position in considering whether disputes involving a non-contracting third party might come within the scope of the clause must be that, absent plain language to the contrary, the contracting parties are likely to have intended neither to benefit nor prejudice non-contracting third parties."
- Where the parties have made clear in the contract that they have addressed whether third parties are to benefit or bear the burden of rights and obligations in the contract, "the absence of any express language in the exclusive jurisdiction clause that provides for the application of that term in relation to claims brought by or against third parties may be an indication that the clause was not intended either to benefit or prejudice such third parties".
- In summary, "where contracting parties intend that any claim relating to the contract be subject to the exclusive jurisdiction clause even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected and, if relevant, the manner in which submission of any non-contracting parties to the jurisdiction of the chosen court is to be ensured".

### Comment

The case provides a useful reminder that notwithstanding breach of an exclusive jurisdiction agreement, the English court will not always grant an anti-suit injunction, even where it has power to do so.

Moreover, the case also provides a good illustration of the approach on interpretation of jurisdiction agreements: both in terms of what disputes are covered by such a clause and also the extent to which such a clause covers claims involving third parties. While it may be purely coincidental that two cases involving dispute resolution clauses and third parties have been decided in quick succession, they nevertheless emphasise the need for careful drafting of dispute resolution clauses and a consideration not just of claims between the immediate parties but also the potential or likelihood of claims involving third parties as well.

---

### For more information contact:



**Nicola Birney**  
Senior associate, London  
Tel +44 20 7444 5667  
nicola.birney@nortonrosefulbright.com



**Andrew Sheftel**  
Senior knowledge lawyer, London  
Tel +44 20 7444 5682  
andrew.sheftel@nortonrosefulbright.com

# Using fast track arbitration for resolving commercial disputes

International arbitration, which initially developed as an efficient and flexible form of dispute resolution, is no longer considered to be a faster and cheaper alternative to court proceedings. Paradoxically, according to a recent PWC survey, almost a quarter of their respondents (22 per cent) across all industry sectors stated that arbitration was more costly than other methods of dispute resolution and almost a fifth of respondents (17 per cent) found that the arbitration often took longer than the available alternatives.

There are many reasons for cost and delay in arbitration. One view is that arbitration has fallen victim to its own success. Common reasons quoted as causing delays in arbitration include the parties' tendency to recreate the procedural steps typical for court proceedings (including disclosure, post-hearing briefs, separate cost submissions) and the compensation scheme for arbitrators which encourages a more thorough approach by arbitral tribunals.

To address the need for time and cost-efficient dispute resolution, most arbitral institutions have adopted a fast track option in their arbitration rules. The first expedited arbitration procedure was introduced in 1992 by the Geneva Chamber of Commerce in its Arbitration Rules (which are now a part of the Swiss Arbitration Rules). Since then, many other international arbitration institutions have followed suit including the American Arbitration

Association (AAA), Stockholm Chamber of Commerce (SCC), Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) and most recently, the International Chamber of Commerce (ICC), which introduced an expedited procedure in January 2017.

The London Court of International Arbitration (LCIA) does not have separate rules for fast track arbitration. The LCIA Rules can be easily adapted to achieve an expedited process but this is rarely done in practice.

## Expedited procedure under various arbitration rules

The main difference between the different sets of rules for expedited procedure is the monetary threshold to qualify a dispute for fast track schemes and whether expedited procedure rules apply automatically or by election of the parties.

Expedited procedure is normally reserved to small value claims. However, the understanding of what constitutes a small claim and the corresponding monetary threshold vary significantly from institution to institution. Under the ICC Rules, expedited procedural rules automatically apply to disputes worth US\$2 million or less if the arbitration agreement was made after March 1, 2017 and the parties did not specifically opt out of the expedited procedure in their agreement. For claims under the ICC Rules which are higher than US\$2 million, parties have an option to adopt the expedited procedure. In that respect, the mandatory nature of the ICC expedited procedure is unique, as under most other institutional rules the expedited procedure can be implemented only upon the parties' agreement, which normally forms part of the arbitration clause.

In HKIAC and SIAC cases the threshold for fast track is higher – US\$3 million at HKIAC and US\$4 million at SIAC. In contrast, the threshold for expedited procedure is much lower under the Rules of the International Centre for Dispute Resolution (ICDR), being just US\$250,000.

In expedited arbitrations speed is achieved principally by simplifying the procedure and imposing strict deadlines on the parties and tribunal. The parties normally have to limit



their submissions and forgo certain stages in the process. In the SCC expedited procedure, for example, the request for arbitration must also be the statement of claim and the answer has to constitute the defence. In the ICC expedited procedure, the arbitrator has discretion to decide the case on documents only without examination of witnesses and experts and without an oral hearing.

Fast track cases are usually decided by a sole arbitrator. This helps to save cost and avoid delays, which are often associated with taking collegiate decisions. The SIAC Rules, for instance, vest the Court President with the power to appoint a sole arbitrator if the case is subject to the expedited procedure rules. The ICDR Rules specifically require a case to be referred to a sole arbitrator when the expedited procedure applies. In claims which automatically qualify for an expedited procedure under the ICC rules, the parties' agreement to use three arbitrators will not be valid and the case will be referred to a sole arbitrator if the parties specifically did not opt out of expedited procedure route.

Since it is often very time-consuming for a tribunal to draft, approve and submit an award, the whole process is streamlined to ensure that the final award is issued within a strict timeframe. Under the ICC expedited procedure rules, the final award should be made within six months of the case management conference – and the intention is to adhere to this deadline (it has to be noted, however, that under the ICC Rules, regular and almost automatic extensions of time by the ICC Secretariat for issuance of the final award are fairly common). Similar deadlines apply under the HKIAC and SIAC expedited procedures, where the final award must be issued within six months after the tribunal is constituted (SIAC) or after the tribunal received the file (HKIAC). The SCC and ICDR impose even more stringent cut-off dates – the final award must be rendered three months after the case was referred to the arbitrator (SCC) or 30 days after the oral hearing (ICDR).

#### **Advantages of fast track arbitration**

Clearly, one of the main advantages of fast track arbitration is resolving the dispute and getting the final award within months rather than years.

Rendering an award within three to six months from the beginning of the proceedings is in sharp contrast to the duration of arbitration under standard procedural rules where a typical dispute lasts about 12-18 months from commencement to the final hearing. When both parties are cooperative, it is possible to achieve results even faster. We know of fast track cases where the award was made within two and a half months from the request for arbitration and two and a half weeks of the formation of an arbitral tribunal.

Another advantage attributed to arbitration under expedited procedure rules is lower cost. The absence of oral hearings, a more efficient procedure, shorter submissions and focusing on the key points in dispute supposedly lead to less expenditure from both parties. So far, however, there are no reliable statistics which would support this assumption.

#### **Disadvantages of expedited procedure**

Despite the seemingly obvious advantages offered by fast track arbitration, parties must consider carefully whether their case is suitable to be heard under expedited procedures

and whether they want their dispute to be resolved under them.

In certain cases, it could be extremely challenging for the parties to present their case fully under the simplified procedure if certain stages in the process are omitted. The disposal of the claim without actual hearing and with limited submissions can in certain cases (especially those where the facts are in dispute) be counterproductive. A hearing normally provides the opportunity for the tribunal to ask witnesses questions to clarify issues in dispute. If the arbitrator has to make her/his decision based on the documents alone or on the written witness statements, this may require more time and effort for the tribunal to accurately assess the facts and make an objective decision. Without a hearing, the parties are also deprived of the opportunity to test the accuracy of evidence through cross-examination of witnesses.

Due to the procedural limitations and stringent timeframes in fast track arbitration, there is a possible concern that arbitrators might be inclined to lower the required level of proof in pursuit of simplicity. Given the fact that in order to achieve speed in rendering an award, some arbitral institutions also allow tribunals not to provide reasons for their decision, it is very likely that the losing party may try to set aside the award by arguing that it was denied its fundamental right to present the case and there was a lack of due process. Such claims will not only add time and cost to the dispute resolution procedure but may also make the award unenforceable, especially if the seat is not arbitration friendly.

For the same reasons, parties need to think carefully before they decide to refer their case to a sole arbitrator.

The likelihood that the losing party will attempt to challenge the award in circumstances when a sole arbitrator rushed through the proceedings to determine factual and legal issues is high. In fact, statistics show that when parties are given a choice, they are less inclined to appoint a sole arbitrator. In 2016, in 63 per cent of LCIA cases, parties appointed three or two arbitrators which is probably indicative of the higher level of trust to collegiate decisions in arbitration.

The cost saving aspect of expedited procedures is rather complex. A fast track arbitration with short deadlines, entails very considerable preparation, whereby documents have to be collected and verified rapidly and witness statements drafted even before the commencement of proceedings. In expedited arbitration, legal counsel may need to be retained on a full-time basis for the whole duration of the case. The intense schedule of the arbitration procedure often also requires significant amounts of management. All of this may impact the parties' legal costs.

When opting for expedited procedure, parties also have to consider the availability of arbitrators as expedited arbitration is quite intensive, whilst usually low-fee, and not all arbitrators will agree to take it on.

### Practical recommendations

Arbitration clauses are crucial in determining procedural aspects of arbitration in case a dispute arises. Although at the drafting stage it is often impossible to foresee whether any dispute arising under the contract would be suitable for fast track arbitration or not, it is advisable to tailor arbitration clauses as much as possible to the specifics of each individual case rather than viewing them as a boiler plate clause.

Generally, fast track arbitration will not be suitable for complex disputes or multi-party proceedings. In order to assess the suitability of their dispute for expedited procedure, parties should be cautious about using the "small claim" thresholds adopted by many arbitral institutions as a yardstick. A threshold set at US\$2 million or even US\$250,000 may be too high for small and medium companies and for parties whose business is based in the developing countries. Further, the value of the claim often may not reflect the complexity of the issues in dispute.

Expedited procedures would best suit those cases where the need to resolve disputes quickly outweighs the parties' need to present their case in scrupulous detail, and there are no major factual disagreements. If determination of the factual issues requires an expert's involvement or detailed witness statements, then fast track is best avoided. Amongst other areas, fast track arbitration may be an acceptable option for construction disputes, disputes concerning the termination of M&A contracts, and capital market disputes in relation to derivatives contracts.

For more information contact:



**Irina Tymczyszyn**  
Partner, London

Tel +44 20 7444 2028  
irina.tymczyszyn@nortonrosefulbright.com

## Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

---

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see [nortonrosefulbright.com/legal-notices](https://nortonrosefulbright.com/legal-notices).

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.