SLAUGHTER AND MAY/

DISPUTES BRIEFCASE

Need-to-know disputes updates for General Counsel and their teams

JULY 2025

/ INTRODUCTION

Welcome to Slaughter and May's Disputes Briefcase, a regular digest of key developments in litigation and arbitration, produced by members of our market-leading disputes team. Previous editions of Disputes Briefcase are available here. If you would like to receive future editions of Disputes Briefcase, and other insights from our Disputes and Investigations team, please email our Editorial team.

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HAGUE JUDGMENTS CONVENTION COMES IN FORCE

New agreement will facilitate enforcement of English court judgments in the EU and vice versa, but the benefits will take some time to be felt

The 2019 Hague Judgments Convention entered into force for the UK on 1 July. The Convention will make it easier to enforce a wide range of English court judgments in 28 countries, including all bar one of the EU's member states (Denmark). It complements the 2005 Hague Convention on Choice of Court Agreements, which allows the reciprocal enforcement of judgments in cases founded on exclusive jurisdiction clauses. UK participation restores a level of reciprocal enforcement with the EU not known since the end of the Brexit transition period.

BACKGROUND

The ability to enforce a judgment across borders quickly and easily is commercially valuable. For UK corporates dealing with EU counterparties, it has become slower and often more expensive since Brexit. Rules that made intra-EU enforcement a straightforward process ceased to apply to the UK from 1 January 2021.

The Judgments Convention establishes an international framework for the enforcement of judgments, open to all countries. While less sophisticated than the European rules, the Convention is still a game-changer: it could become a litigation equivalent of the 1958 New York Convention which provides for the cross-border enforcement of arbitral awards in c170 countries.

WHICH COUNTRIES ARE PARTY TO THE CONVENTION?

The EU member states, except Denmark, became subject to the Convention on 1 September 2023, along with Ukraine. It applies to Uruguay from 1 October 2024. It took effect in the UK on 1 July 2025. Albania, Montenegro and Andorra will become bound in 2026.

These dates are important, because the Convention only applies to judgments given in cases begun when it is force for both the state in which the judgment is given and the state in which enforcement is sought. In other words, insofar as the UK is concerned, the Convention will only facilitate enforcement of judgments given in proceedings that were started on or after 1 July 2025.

HOW DOES THE CONVENTION WORK?

The Convention defines the judgments to which it applies, sets out the bases on which they will be eligible for enforcement, and specifies the limited circumstances in which enforcement can be resisted.

In summary, a judgment can be enforced if a qualifying connection can be shown between the country whose court gave the judgment, and the defendant or the claim. These connections are listed exhaustively in the Convention and include cases where the judgment debtor was resident in the state whose courts gave judgment, or where the debtor submitted to that court. Importantly, it includes cases where the parties had entered into a non-exclusive jurisdiction agreement. This complements the 2005 Hague Convention, already applicable to the UK and the EU, which allows for the enforcement of judgments based on exclusive jurisdiction agreements.

A court may refuse to enforce an otherwise eligible judgment if one or more of seven grounds in the Convention is met. Broadly, these relate to breaches of natural justice and public policy considerations in the state of enforcement.

WHAT IS THE PROCEDURE FOR ENFORCEMENT?

Subject to overarching obligations set out in the Convention, which include an obligation on courts to act expeditiously, each contracting state sets its own rules for enforcement.

In England, a party will need to make an application to the High Court for registration of the judgment. They must persuade the court that the Convention's requirements are satisfied for that judgment. The judgment debtor is not permitted to object at this stage. Once registered, a judgment will be enforceable in England as if it were a judgment of the English court. But the judgment debtor has a right to apply to court to set aside registration on the basis that the judgment does not, in fact, meet the criteria set out in the Convention.

Read more in our briefing on the Convention.

LITIGATION FINANCE REFORM PROPOSALS

New report recommends mandatory "light touch" regulation of third party funding market, new rules to control funded group litigation, and reforms to contingent fee arrangements

The Civil Justice Council has proposed sweeping reforms to the regulation of litigation finance in England. The most eye-catching is a proposal to replace the current system of self-regulation for third party funding with a mandatory regime focussed on consumer protection. But this is only one element of a broader package which, if implemented, would create a new unitary framework governing all arrangements by which third parties (including lawyers) give financial assistance to a litigant in exchange for a success-based return. Alongside new rules to protect consumers, there are sweeteners for funders and lawyers, including the removal of caps on returns in some cases. The Government has not yet responded to the report but lobbying by all interested parties has begun in earnest.

BACKGROUND

Beginning in the 1990s, a concern to promote access to justice in the face of legal aid cuts led to a loosening of rules prohibiting most third party litigation funding. Most of these changes came through case law, rather than in statute, leading to uncertainty and complexity. A 2009 report on litigation costs was supportive of third party funding, but recognised the need for controls. Anxious not to hobble a still young market, it proposed a system of voluntary self-regulation. Since then, the market has grown ten-fold, with over £2bn in assets under management in 2021. The rapid growth of funder-backed group litigation and the perception that funders' returns can come at the expense of claimants, pushed the Government to commission this new report from the CJC.

THE CJC REPORT

The report's 58 recommendations include:

A new statute should reverse the Supreme Court's decision in PACCAR, meaning funders would once again be able to agree a return calculated as a percentage of any damages award. Some funders had already planned for this by including clauses that would allow a reversion to percentage-based recovery if the law changed. The Court of Appeal decided in July (in the context of an appeal on funding agreements) that this kind of contingent clause was permissible.

The system of voluntary self-regulation for funders should be replaced with a new, mandatory regime, supervised by Government (and not, at this stage, the FCA). In all cases, funders would need to declare to the court that they were adequately capitalised and would be subject to AML regulation. The fact of funding would have to be disclosed to the court and opponents at the outset. In addition, where the funded litigant is a consumer or a party to group litigation, they would have to take out ATE insurance to ensure defendants could recover their costs if the claim failed. The terms of funding agreements – including the funder's return – would also need to be approved by the court.

To control the costs of litigation, court rules should make costs budgeting mandatory in all funded group litigation. Claimants would also have to justify any failure to use available out-of-court redress mechanisms. Current rules on damages-based agreements and conditional fee agreements should be simplified and replaced by a single statutory regime. Caps on lawyer returns would be abolished where the client is a commercial party.

There should be greater scrutiny of portfolio funding, the practice by which funders finance law firms directly to pursue a range of different cases. There have been high-profile examples of law firm collapses that have left claimants on the hook for costs.

WHAT HAPPENS NOW?

The CJC's proposals would need primary legislation and much of the detail remains to be worked out. By contrast, the proposal to reverse the PACCAR decision could be implemented quickly. But many parties, including corporate defendants, will be keen to avoid an outcome which benefits funders immediately and leaves protection for them (and consumers) still on the horizon. In the meantime, funder returns continue to be a contentious topic – see "Funder returns will continue to be a focal point for the CAT" below.

MASTERCARD SETTLEMENT IN THE CAT

The Competition Appeal Tribunal has approved settlement in the long-running interchange fees dispute – *Merricks v Mastercard*

In May, the CAT **formally approved** a £200 million settlement proposed by Merricks and Mastercard. This was despite objections from the funder (Innsworth), which argued that the settlement was "too low" and "premature". Although the CAT was keen to stress the highly fact-specific nature of the decision, it made several comments of potentially broader application.

The crux of the claim was that Mastercard's involvement in setting unlawful interchange fees on cross-border Mastercard credit card transactions within the EEA had a causative influence on the level of interchange fees charged in the UK. It was alleged that these fees were then passed on by retailers to consumers in the form of increased prices.

SETTLEMENT AND ITS ALLOCATION

Although the claim was originally valued at £14 billion, the CAT approved settlement at £200 million. This was largely due to a 2024 **judgment on factual causation** which dramatically reduced the value of the claim.

The CAT approved distribution as follows:

- **Pot 1**: £100 million, ring-fenced for the class.
- **Pot 2**: c. £45 million, to cover Innsworth's costs.
- **Pot 3**: c. £55 million, to be split into four tranches:
  Tranche 1: to cover costs incurred by Merricks not covered by the Litigation Funding Arrangement;
  Tranche 2: (c. £23 million), Innsworth's profit (bringing the total amount due to Innsworth to £68 million);
  Tranche 3: to top up Pot 1, if more class members than expected come forward;
  Tranche 4: (the remainder, estimated to be over £30 million) to go to the charity Access to Justice Foundation.

BROADER TAKEAWAYS

The CAT was keen to stress that its approach to settlement was heavily influenced by the "exceptional" circumstances of the case, whereby the settlement figure was an "extraordinarily low" proportion (1.5 %) of the initial claim value. The judgment is not a "guide" for future settlements. However, the CAT noted that:

- it will assess whether a settlement is just and reasonable from the perspective of the class, rather than other stakeholders (including funders);
- it will not concern itself with the negotiating strategy of the parties: its only concern is whether the terms of the settlement are just and reasonable;
- it will not shy away from ordering that costs be assessed for reasonableness by an independent third party;
- going forward, parties will need to proactively set out arguments that could be raised in opposition to the settlement;
- it will "ordinarily" expect an opinion from leading counsel setting out why the proposed settlement is in the reasonable interests of the class; and
- it needs sufficient time to consider settlement proposals. Parties that propose settlement shortly before trial run the risk of trial being adjourned. This could lead to difficulties in multi-party cases where only some parties are seeking to settle and the trial is required to go ahead for the remainder in any event.

Innsworth has filed an **application for permission** for judicial review of the CAT's decision on distribution and seeking to quash its decision on Pots 1 and 3.

Read more about the CAT's decision in our **briefing**.

JOINT BORROWERS AND UNDUE INFLUENCE

Lenders are 'on inquiry' for undue influence where part of a non-commercial joint loan is for the benefit of one borrower only – *Waller-Edwards v One Savings Bank Plc*

In **Waller-Edwards v One Savings Bank Plc**, the Supreme Court held that a lender has constructive notice of potential undue influence where more than a trivial element of a non-commercial loan serves to discharge the debts of one of the borrowers such that the transaction might not be to the financial advantage of the other. In these cases, the lender must follow the 'Etridge protocol' to guard against the risk of the transaction being set aside.

BACKGROUND

The appellant and her partner obtained a mortgage to repay an existing loan, with approximately 10% of the proceeds (as understood by the bank) also used to repay the partner's personal debts. The appellant did not receive independent legal advice before obtaining the mortgage. After the relationship ended, the appellant was left in a heavily mortgaged property. When the loan fell into arrears, the bank sought possession.

The issue before the court was the correct test for deciding when a lender is 'put on inquiry' for possible undue influence in situations where part of the loan benefits both borrowers, but part benefits only one borrower.

This situation is a 'hybrid' between a simple joint borrowing case where both borrowers benefit from the loan (e.g. to buy a home) and 'surety cases', where a guarantor gives security for a non-commercial loan, generally taken out by their spouse or partner (e.g. to help the borrower start a new business).

It is well-established that in surety cases the lender is on notice of potential undue influence, such that the bank must follow the 'Etridge protocol' to mitigate the risk of undue influence arising and therefore the risk of the security being unenforceable. The protective steps include, for example, a requirement on the lender to ensure that the guarantor receives independent legal advice.

The lower courts favoured an approach which requires looking at the hybrid transaction as a whole to determine whether it is, in substance and as a matter of fact and degree, from the lender's point of view, a surety case or a joint borrowing case.

THE SUPREME COURT'S DECISION

The Supreme Court confirmed that the test is actually a binary one: either there is an element of surety (i.e. part of the loan is for the benefit of one of the borrowers only - in which case the lender is put on inquiry for possible undue influence and the 'Etridge' protocol should be followed, unless the surety element is de minimis) or there is not (in which case, absent other red flags, the lender is not put on inquiry and the protocol need not be applied).

TAKEAWAYS

The Supreme Court's decision expands the range of loan and mortgage agreements involving joint borrowers in non-commercial relationships that should be treated (or should have been treated) as surety transactions and therefore which put lenders on inquiry for potential undue influence. Lenders will need to review existing underwriting procedures to ensure that the additional steps required by the Etridge protocol are taken in all joint borrowing cases where part of the loan is for the benefit of one borrower only. However, the decision removes the need for lenders to make value judgments or case-by-case assessments of whether they are 'on notice' in hybrid transactions. In that sense, the Court's binary or 'bright line' test brings certainty, albeit also potentially a greater administrative burden, on lenders in following the protocol in such transactions.

CHALLENGING UNVIABLE MASS MIS-SELLING CLAIMS

A bank's novel claim against a mass claims company for bringing 'reckless' claims against the bank can proceed to trial – *Vanquis Bank v TMS Legal*

In a welcome decision for financial institutions, the High Court in **Vanquis Bank v TMS Legal** has refused applications to strike out or obtain summary judgment against claims brought by a bank against a claims management company for the tort of causing loss by unlawful means. The bank argues that the CMC has brought large numbers of irresponsible lending (mis-selling) complaints against the bank, which the bank alleges have been made recklessly and indiscriminately and in breach of the CMC's obligations to its clients.

Whilst this is only a preliminary decision, the judgment indicates that in 'egregious' cases it may be arguable that mass claims firms are liable for losses suffered by defendants because of bringing unviable volume claims against them.

BACKGROUND

The bank offers 'second chance' lending to individuals with low or adverse credit histories. The CMC specialises in bringing volume 'no win no fee' irresponsible lending claims. The CMC submitted around 33,000 irresponsible lending complaints to the bank and the Financial Ombudsman Service, alleging that the bank did not undertake adequate checks before issuing credit.

The bank brought claims against the CMC for the tort of causing loss by unlawful means, arguing that the CMC had breached contractual and regulatory obligations to its clients by making complaints without sufficient information or properly assessing their viability. The bank also argues that the CMC made misleading representations to its clients about the viability of their claims and did not advise them of the consequences of bringing complaints (in particular, the suspension of credit). As a result, the bank argues that its relationships with its customers have been interfered with and the bank has suffered loss including the costs of engaging additional staff and wasted management time dealing with unviable complaints, lost profits and FOS fees.

COURT'S DECISION

The judge dismissed the CMC's applications. In reaching his decision, the judge considered each of the four essential elements of the tort: (i) the existence of unlawful acts against and independently actionable by a third party; (ii) interference with the actions of the third party in which the claimant has an economic interest; (iii) intention to cause loss to the claimant by unlawful means; and (iv) actual loss.

The judge considered that whilst the facts of the case are novel, the bank's claim applies well-established legal principles to a new fact pattern. The judge was also not persuaded by the CMC's argument that regulatory frameworks overseen by the Solicitors Regulation Authority, Financial Conduct Authority and FOS precluded a private law remedy, particularly where the regulatory schemes afforded no route to compensation for the bank. The case can therefore proceed to trial.

TAKEAWAYS

The mass claims market is a burgeoning sector. But there has been growing concern about the conduct of some claimant firms that undertake these types of claims, particularly in the context of high-volume financial service claims. For example, last year, the **SRA issued a warning notice** threatening disciplinary action against firms operating in this area that failed to comply with their regulatory obligations when undertaking such activities.

The judge in this case stressed that he expressed no view as to whether the bank's case is right, which will be a matter for trial. However, the decision indicates that financial institutions may have a new route to challenge – and be compensated for – blanket volume claims made recklessly against them. It remains to be seen whether similar challenges may be brought in the relation to mass claims outside the financial services sector.

AGREEMENTS TO AGREE AND IMPLIED TERMS

Court of Appeal finds that term providing for price to be fixed at a later date is enforceable – *KSY Juice Blends v Citrosuco*

The Court of Appeal in **KSY Juice Blends v Citrosuco** has found that a term providing for a price to be fixed by parties at a later date was enforceable. In doing so, the Court of Appeal has overturned the High Court which had found that the term was an unenforceable agreement to agree.

BACKGROUND

The parties had entered a three-year contract for the sale of orange juice pulp wash used to make orange-flavoured drinks. The contract provided a fixed price for one-third of the quantity to be supplied, while leaving the remaining two-thirds of the quantity to be supplied at an "open price to be fixed" at a later date.

The **High Court considered** that where a contract exists, the starting point is to seek to give effect to the parties' bargain. However, the court will not be troubled to find there is no agreement where that undermines a part (but not all) of the bargain. Applying these principles, the High Court held that the agreement for the quantity to be supplied at an "open price" was an unenforceable agreement to agree.

COURT OF APPEAL DECISION

In a unanimous decision, the **Court of Appeal disagreed**. The Court of Appeal accepted that the contract envisaged that the parties would seek to fix the price by agreement. In the Court of Appeal's view, however, that did not preclude the implication of a term that, in the absence of reaching agreement, the price would be a reasonable or market price. The Court of Appeal did not accept that the court should be less concerned with seeking to uphold a bargain simply because there is a binding agreement as to part of the subject matter (i.e. the quantity for which a fixed price was agreed). Instead, the Court of Appeal found that the case for seeking to avoid the contract failing as to two-thirds of the quantity to be supplied was compelling.

The parties had agreed or at least provided mechanisms for determining most elements of their agreement. The agreement included mechanisms to determine the overall price to be paid, the minimum quantity of the product to be supplied each year, and the duration of the agreement, and it addressed matters relating to the timing and methods of delivery, product quality and payment. Except for the price of the additional quantity, the agreement did not contemplate that any part of the agreement, such as the overall volume to be supplied, would be renegotiated. This was therefore an agreement which the court would strive to uphold.

Although the Court of Appeal acknowledged difficulties in identifying a reasonable or market price in this context, it did not consider that these precluded the parties from having intended to conclude a binding contract on the basis that the "open price" would be fixed by reference to an objectively reasonable price or market price in the absence of agreement. Such a term was therefore implied to that effect.

TAKEAWAYS

Whilst each case turns on its own facts, the Court of Appeal's decision is a reminder that the courts will strive to uphold commercial agreements where it is clear the parties intended to be bound. There remains, however, a risk that agreements to agree lack sufficient certainty to be enforceable. Permission to appeal has been sought from the Supreme Court.

OTHER RECENT DEVELOPMENTS AND WHAT TO WATCH OUT FOR

SUPREME COURT MOTOR FINANCE DECISION DUE ON 1 AUGUST

The Supreme Court has announced that it will hand-down its decision in the landmark case of **Hopcraft and another v Close Brothers and FirstRand** on 1 August. The Supreme Court has been asked to determine the nature of the duties owed by car dealers who arrange car finance on behalf of their customers and the circumstances in which lenders can be liable as a result of undisclosed commissions. The Supreme Court's judgment follows a fast-tracked appeal from the **Court of Appeal's decision** last year and will have significant implications for lenders in the motor finance industry. Slaughter and May act for Close Brothers in the appeals.

SHAREHOLDER RULE 'UNCLOTHED'

The Privy Council has held in **Jardine Strategic v Oasis Investments** that the 'shareholder rule' is and always has been "a rule without justification". The shareholder rule is a longstanding principle of English law that a company cannot assert privilege against its own shareholder (except in relation to documents created for the dominant purpose of hostile litigation against that shareholder). However, the Privy Council has found that "[l]ike the emperor wearing no clothes in the folktale, it is time to recognise and declare that the Rule is altogether unclothed." Last year, the English Commercial Court in **Aabar v Glencore** similarly found that the shareholder rule should no longer apply, but that decision is on appeal and due to be heard by the Court of Appeal in January 2026. Whilst Jardine v Oasis related to Bermudan law, significantly, the Privy Council directed (under the Willers v Joyce principle) that their decision be regarded by the English courts as abrogating the shareholder rule in English court litigation. The Privy Council's judgment therefore puts to bed what has been a live issue before the English courts.

CLIMATE LITIGATION SNAPSHOT

In its recently released **2025 snapshot of global trends in climate change litigation**, the Grantham Institute on Climate Change reports that climate litigation continues to evolve and mature, and remains a global phenomenon. At least 226 new climate cases were filed in 2024 across almost 60 countries, with 20% of those cases targeting companies, or their directors and officers. The range of sectors targeted for corporate strategic litigation also continues to expand, including against professional services firms and the agricultural sector. Read more in our **blog post**.

In recent months we have continued to see significant climate decisions from domestic and international courts. For example:

- In May, the European Free Trade Association Court issued an **advisory opinion** declaring that under EU/EEA law, oil and gas projects must not be approved without first assessing Scope 3 greenhouse gas emissions. This opinion is among a growing body of decisions on the requirement to assess Scope 3 emissions, including the landmark decision from the UK Supreme Court in **R(Finch) v Surrey County Council**. Read our **blog post**.

- The same month, a German appeals court in **Lliuya v RWE** dismissed a claim against the parent company of a multinational energy group, whilst finding that a company may, in principle, be liable for climate-related harms. Read our **blog post**.

- In July, two leading international courts issued advisory opinions on the obligations of states in relation to climate change. The UN International Court of Justice, the world's highest court, released its highly anticipated **advisory opinion** finding that states are obliged to protect the environment from GHG emissions. To fulfil this obligation, states are required to cooperate and to undertake due diligence, including regulating the activities of private actors to limit their emissions. States will incur legal responsibility if they breach their obligations and may be required to cease, and provide assurances they will not repeat, the wrongful conduct, and make reparations to injured states. For background on the opinion, read our **blog post** from earlier this year. Earlier the same month, the Inter-American Court of Human Rights issued an **advisory opinion** finding that under the American Convention on Human Rights there is a human right to a stable and safe climate. International courts are increasingly being drawn into climate change issues. Last year, the International Tribunal for the Law of the Sea **confirmed** that states must reduce marine pollution from greenhouse gas emissions. An advisory opinion has also been sought from the African Court on Human and People's Rights. Whilst the opinions concern the international law obligations of states, they could have important implications for companies by moulding climate legal frameworks and influencing future litigation.

Further cases also continue to be brought. In July, for example, an environmental NGO and two individuals filed a complaint with the European Court of Human Rights arguing that the UK government's climate adaptation plan breaches the European Convention of Human Rights, which is enshrined in domestic law through the Human Rights Act 1998.

FIRST SS90/90A SECURITIES LITIGATION QUANTUM JUDGMENT

On 22 July, Mr Justice Hildyard handed down his **judgment** on quantum in long-running proceedings brought by Hewlett-Packard against Mike Lynch and Sushovan Hussain, relating to HP's acquisition of Autonomy. The judgment, delayed by the tragic death of Dr Lynch and others in August last year, is the first decision on quantum in claims brought under section 90 and section 90A/schedule 10A of FSMA. Dr Lynch's estate was ordered to pay damages of in excess of £700 million. The judgment follows further exchanges of evidence and submission in the wake of Hildyard J's **decision on liability** in May 2022. In assessing the losses that flowed from the wrongs the judge had identified in his 2022 judgment, he started from the premise that an award of compensation under the relevant provisions of FSMA should seek to put the injured party in the same position as it would have been in but for the wrongs it had sustained. That meant it was necessary to devise a counterfactual scenario that took account of all relevant factors. The establishment and detailed analysis of that counterfactual is the subject of much of the 200-page judgment and will be closely studied in the coming weeks.

ENGLISH ARBITRATION ACT REFORMS IN FORCE FROM 1 AUGUST

We reported **previously** that the **Arbitration Act 2025** (amending the **Arbitration Act 1996**) received royal asset in February. Commencement **regulations** have now been published providing that the substantive reforms being brought in by the Arbitration Act 2025 will enter into force on 1 August 2025. Among the most significant of the changes is a new default rule on the law applicable to arbitration agreements, which provides that, unless the parties expressly agree otherwise, the law applicable to their arbitration agreement will be the law of the seat of arbitration. For more information about this and other reforms being brought in by the Arbitration Act 2025, see the **May edition of Briefcase**.

LONDON AND ENGLISH LAW MAINTAIN GLOBAL POSITION IN LCIA AND ICC ARBITRATION

The London Court of International Arbitration has published its **2024 casework report** and the International Chamber of Commerce has similarly published its **2024 dispute resolution statistics**. The reports summarise trends in both institutions' respective workloads across the year. Notably, in 2024, London was the most frequently chosen seat and English law the most frequently chosen substantive law in new cases before both institutions. Some key figures from each report are set out below:

	LCIA	ICC
Referrals for institution administered arbitration	318	831
Top industry sectors	1. Transport and commodities (29%) 2. Banking and finance (17%) 3. Energy and resources (10%) 4. Construction and infrastructure (8%) 5. Technology (6%) 6. Healthcare and pharmaceuticals (5%) 7. Telecoms (4%)	1. Construction and engineering (23.2%) 2. Energy (20.5%) 3. Transportation (6.3%) 4. Financing and insurance (5.8%) 5. Telecoms and specialised technologies (5.8%) 6. Health, pharmaceuticals and cosmetics (4.8%) 7. Business services (4.6%)
Parties' nationalities	101 jurisdictions Top users: UK (15.0%), Kenya (7.7%), USA (6.3%), Switzerland (5.1%), UAE (4.2%)	136 jurisdictions Top users: USA (7.0%), Brazil (6.5%), Spain (5.7%), Mexico (4.4%), Italy (4.2%)
Seat	21 seats (15 jurisdictions) London chosen most frequently (89% of cases)	107 seats (62 jurisdictions) London chosen most frequently (13.4% of cases)
Applicable law	35 substantive laws (32 jurisdictions) English law chosen most frequently (78% of cases)	108 substantive laws English law chosen most frequently (15% of cases)

ARBITRATION CASE UPDATE

In **Energyen Corporation v HD Hyundai Heavy Industries**, the High Court dismissed challenges under **section 67** and **section 68** Arbitration Act in the context of a corporate restructuring under Korean law which led to a dispute over the correct claimant in the arbitration. The High Court found that contractual and arbitration rights had passed to the claimant successor entity, even though it was not a signatory to the arbitration agreement, and notwithstanding certain defects in the Request for Arbitration, the arbitration was validly commenced as the ICC Rules' requirements for Requests are not necessarily jurisdictional requirements. The High Court found that there was no requirement to give notice of the transfer before commencing arbitration.

In a recent decision on arbitration costs, the High Court in **Ravfox v Bexmoor** found that an arbitral tribunal which lacks jurisdiction can still award costs, but the English court cannot award costs if the tribunal declines to do so. Further, following a hearing in July in the high profile case of **P&ID v Nigeria**, we await judgment from the UK Supreme Court on the issue of when, if ever, an English court should make an award of costs in a foreign currency following Nigeria's successful application to set aside two arbitral awards.

A decision from the UKSC is also pending in the case of **Ridgebury November v King Crude Carriers & Ors**. The case concerns a **section 69 Arbitration Act** appeal on the question of whether a party can rely on the non-fulfilment of a condition precedent to a debt to avoid its obligation to pay where the non-fulfilment was due to its own breach of contract (the 'Mackay v Dick' principle). Further down the track, we can expect a decision from the UKSC in **Spain & Anr v London Steam-Ship** after it **granted in part** permission to appeal on the question of whether a tribunal can award equitable remedies against a state for breach of its equitable obligation to arbitrate. However, the UKSC has refused to hear appeals in **General Dynamics v Libya** and **Hulley & Ors v Russia**, both of which concern **exceptions to state immunity** in the context of enforcement of arbitral awards against states.

THE NEED FOR HONESTY IN S172 DIRECTORS' DUTY

The Court of Appeal in **Saxon Woods v Costa** has upheld a High Court decision that a shareholder suffered unfair prejudice when a company failed to comply with its contractual obligations to work in good faith towards an exit by means of the sale of the company or its assets by an agreed date.

Importantly, however, the Court of Appeal overturned the High Court's decision that a director had complied with their duty under **section 172 Companies Act 2006**. The section 172 duty requires a director to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In reaching its decision, the High Court relied on the director's subjective belief that they were acting in the best interests of the company and that the shareholders "will thank me in the long run".

The Court of Appeal disagreed. The Court of Appeal considered that the concept of 'good faith' requires honesty. Applying the test for honesty in **Ivey v Genting Casinos**, the Court of Appeal held that where a director's conduct falls below a minimum objective standard of honesty, a director cannot not rely on their subjective opinion of what would be in the best interests of the company. In this case, the Court of Appeal found that the director had acted dishonestly by misleading the board. As a result, the director had not acted in good faith and had breached their section 172 duty.

PUB OWNER NOT LIABLE FOR ACTIONS OF CONTRACTOR'S STAFF

The High Court in **JD Wetherspoon v Burger** has found that the owners of a pub were not vicariously liable for an assault on a customer carried out by door staff employed by a security company contracted to work for the pub. The security company was an independent contractor providing specialist services under a commercial arrangement, a relationship that did not satisfy the established test for vicarious liability. The decision confirms that, where a business genuinely engages an independent contractor, it is unlikely to be found to be vicariously liable for the actions of that contractor's staff.
The comprehensive details of the contractual relationship between the pub and the contractor were essential in convincing the High Court that there was a true independent contractor. Read more in our **Employment Bulletin**.

NON-PARTY ACCESS TO COURT DOCUMENTS

We have written previously about the greater push towards transparency in court proceedings (see **January** and **May** editions of Briefcase). This continues to be a live issue before the courts in the context of public (non-party) access to court documents. In July, for example, the High Court in the NOx ('dieselgate' emissions scandal) litigation **ruled** that interested third party NGOs could obtain unredacted copies of the parties' statements of case even though the defendants argued that the documents contain commercially confidential technical information about the alleged 'defeat devices' at the centre of the dispute.

The Civil Procedure Rule Committee, the body responsible for court rules, has **recently confirmed** that it will introduce a new pilot governing non-party access to certain court documents. The pilot will apply in the Commercial Court, the London Circuit Commercial Court and the Financial List for an initial two-year period. The pilot is expected to come into force on 1 October 2025. More detail is due to be published shortly.

CONSULTATION ON CHANGES TO RULES REGARDING SERVICE OF COURT DOCUMENTS

The CPRC is **consulting** on proposed changes to modernise the rules on the electronic service (formal delivery) of court documents. If implemented, lawyers that confirm they are authorised to accept service of court documents on their client's behalf will automatically be taken to have agreed to accept service via email. Separate confirmation will no longer be required. Responses are requested by 12 September 2025.

FUNDER RETURNS WILL CONTINUE TO BE A FOCAL POINT FOR THE CAT

In May 2024, the CAT **approved a £25 million settlement** between the class representative and Stagecoach in a long-running, multi-party dispute about boundary fares (**Gutmann v First MTR Southern Western Trains**). Only £200,000 has been claimed by the class. A stakeholder entitlement hearing has been scheduled for 10 September to discuss how the unallocated balance (circa £10 million) should be distributed. The lawyers, funders and insurers have been **given permission to intervene**. The Access to Justice Foundation (expected to receive a "substantial" amount) has been invited to make written representations.

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- **UK Supreme Court in Dolphin Drilling decides that the meaning of "incidental" depends on statutory context**
- **Joint Committee publishes its report on Forced Labour in UK Supply Chains**

RECENT AWARDS

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CONTACTS

If you would like to discuss any of the above in more detail, please contact your relationship partner or email one of our Disputes team.

Trusted to advise on our clients' most complex and strategically significant litigation and arbitration, we are recognised in particular for our expertise in heavyweight commercial litigation, major class actions and group litigation, banking disputes and competition damages actions.

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