SLAUGHTER AND MAY/

# DISPUTES BRIEFCASE

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

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## / 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. Our previous (October 2023) edition of Disputes Briefcase is available here. The Disputes Briefcase team would welcome any thoughts and feedback.

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# SUPPLY CHAIN RISK: LIMBU V DYSON

## HIGH COURT DECLINES JURISDICTION IN MIGRANT WORKERS CLAIM AGAINST DYSON GROUP COMPANIES FOR ALLEGED WRONGDOING BY A MALAYSIAN SUPPLIER

The English courts have become a leading destination for group claims against UK-based multinational corporations for the alleged wrongdoing of their foreign subsidiaries and, increasingly, third-party overseas supply chains. Claims have typically relied on EU rules requiring the English courts to take jurisdiction over UK 'anchor' defendants even where the disputes had little connection with England. However, post-Brexit rule changes mean that the English courts now have discretion whether to hear claims against UK defendants. The High Court's decision in *Limbu v Dyson* suggests that, as a result of these rule changes, the English courts may now refuse to hear claims with a foreign focus where they decide England is not the appropriate forum.

### The claims

The claims were brought by migrant workers who argued they had suffered forced labour and exploitative working and living conditions when working for a Malaysian manufacturer and supplier to the Dyson Group. The workers relied on Dyson policies and standards to argue that the defendants (English and Malaysian companies in the Dyson Group) owed them a duty of care as the defendants exerted a high degree of control over the supplier's operations.

The High Court refused jurisdiction holding that England was not the appropriate forum to hear the claims. Applying the well-established two-stage test, the High Court held:

### Stage 1 – Malaysia is the "clearly and distinctly more appropriate" forum

The Court weighed up factors connecting the claims to England and Malaysia including: the location of the parties and witnesses; the use of remote hearings to enable the workers to give evidence; the availability of a common language; the location of documents; and the risk of multiple proceedings and irreconcilable judgments. The Court decided that Malaysia was the "centre of gravity" for the dispute as it was the place where the core alleged harms underlying the claims took place. In addition, as the claims were governed by Malaysian law, there were good policy reasons for the Malaysian courts to determine the novel points of law being raised, rather than letting the English courts "second guess" what they might decide.

### Stage 2 – There is no real risk claimants cannot obtain "substantial justice" in Malaysia

The Court considered if there were special circumstances which meant that justice required the claims to be heard in England. The Court found there was no real risk the claimants would not be able to access substantial justice in Malaysia. Substantial justice did not require the claimants to receive a "Tesla type service". There was no real risk the claimants would not find suitability qualified legal representation in Malaysia acting on a partial contingency fee basis.

### What this means for corporates

The decision indicates that it is now easier for UK-based defendants to argue that England is not the appropriate venue for foreign-focussed claims against overseas subsidiaries and third-party overseas supply-chains. However, that does not prevent proceedings being brought elsewhere and in this case the defendants offered extensive undertakings, including submitting to the Malaysian courts and offering to pay some of the claimants' costs, to persuade the Court that the claims could proceed in Malaysia.

Read more in our briefing.

# LITIGATION FUNDING UPDATE

**FOLLOWING THE SUPREME COURT'S DECISION IN *PACCAR*, WHICH SENT SHOCKWAVES THROUGH THE LITIGATION FUNDING MARKET, A NEW DECISION FROM THE COMPETITION APPEAL TRIBUNAL WILL GIVE FUNDERS AND THEIR CLIENTS HOPE IN SOME CASES, BUT ANY BROADER RESOLUTION DEPENDS ON PARLIAMENT LEGISLATING**

Litigation finance has become an important part of the English legal landscape. In large part its growth reflects the profit funders can make if the claims they back are successful. Until recently, many litigation funding agreements provided that the funder's profit would be calculated as a percentage of whatever damages a claimant recovered. But as we reported in the last Disputes Briefcase, in *PACCAR* the Supreme Court surprised the market last July by deciding that percentage-based agreements fell within the definition of damages-based agreements. DBAs are unenforceable unless they comply with specific rules. These rules are ill-adapted to funders, making compliance difficult in practice. The Court's decision threatened to invalidate many existing funding arrangements. Its implications were even more drastic for class actions for breaches of competition law (which are invariably dependent on backing from funders). The Competition Appeal Tribunal will not allow these so-called collective proceedings to be continued unless the funding arrangements are valid. And DBAs (even if compliant with the rules) are banned outright in opt-out collective proceedings.

Faced with a potentially existential challenge to their business model, funders (and their clients) have adopted a two-pronged approach:

## A change in the law?

First, they have lobbied for a change to the law. The Government's initial response was to propose removing the prohibition on DBAs in opt-out collective proceedings by way of new section 126 of the Digital Markets, Competition and Consumers Bill, currently going through the House of Lords. For many funders this misses the point: their objection is not to the limited circumstances in which DBAs can be used, it is that they don't think litigation funding agreements should be classed as DBAs at all. The issue has now shot up the political agenda after sub-postmasters who relied on funding to challenge their prosecution by the Post Office claimed the Supreme Court's decision would have prevented them from accessing funding; the Justice Secretary said in response that the Government would seek to reverse "damaging effects" of the judgment at the "first legislative opportunity", but as yet there is no indication of what that means in practice.

## CAT approves revised litigation funding agreements

Second, funders have been amending the terms of their existing arrangements to try to take them outside the scope of the DBA regime. A common approach has been to calculate a return as a multiple of their investment, rather than a percentage of damages. This arrangement has been approved by the CAT in two recent decisions: *Sony* (November 2023) and *Mastercard* (January 2024). In both, the CAT held that revised litigation funding agreements were not DBAs, meaning they were not a barrier to certification of collective proceedings. Contingent provisions allowing a reversion to a percentage-based recovery in the event the law changed were also permitted by the CAT. In *Mastercard*, the Tribunal added that a clause capping the funder's payment at the amount available for distribution did not bring the agreement within the scope of the DBA regime.

## What happens next

The judgments are clearly helpful for funded parties in competition collective proceedings, but they are not the end of the story: the CAT has given permission to appeal the *Sony* decision, recognising that only a decision from the Court of Appeal can end the uncertainty in this area. Nor is it clear that the CAT's decisions will have any read-across to funded claims in the High Court: a key part of the CAT's reasoning related to its own power to regulate the amounts ultimately paid to litigation funders, provisions that have no equivalent outside the competition sphere.

# NO END IN SIGHT FOR PPI CLAIMS: (1) SMITH V RBS AND (2) CANADA SQUARE V POTTER

## SUPREME COURT ADOPTS CLAIMANT-FRIENDLY APPROACH TO LIMITATION FOR PPI MIS-SELLING CLAIMS

*Smith* and *Potter* arose out of the 'PPI mis-selling scandal'. Lenders encouraged customers to take out Payment Protection Insurance (PPI) alongside credit cards or loan agreements, while failing to disclose they were keeping most of the premium as commission for arranging the PPI. Where lenders have failed to disclose the existence and amount of the commission, customers can bring a claim under the Consumer Credit Act 1974, provided they bring their claim within the six-year limitation period.

The Supreme Court has now confirmed (i) when the clock starts ticking on that six-year deadline and (ii) what a claimant needs to prove to rely on **s32 Limitation Act 1980**, which postpones when the clock starts ticking in cases where there has been deliberate concealment.

### Key takeaways from *Smith*

The Supreme Court took a claimant-friendly approach to limitation, clarifying that:

1. Where there is an ongoing credit relationship between the lender and customer, the point in time at which unfairness will be assessed is as at the date of trial.

2. Where there is no longer a credit relationship, the limitation clock will start ticking from the date the credit relationship ended (not when the last payment for the PPI policy was made).

This means that customers that have ongoing relationships with lenders that mis-sold PPI to them (or who had a relationship with those institutions up until six years ago) are still able to bring claims under the Consumer Credit Act, even though they stopped making PPI payments many years ago.

### Key takeaways from *Potter*

1. The Supreme Court took a claimant-friendly approach by confirming the word "concealed" in s32(1)(b) (*deliberate concealment of a fact relevant to a right of action*) is to be construed broadly. It means to keep something secret, either by taking active steps to hide it, or by withholding information. There is no need for the claimant to prove that the defendant was under a duty to disclose the commission.

2. This claimant-friendly approach to concealment is tempered by the more restrained approach taken to the meaning of "deliberate" (*used in both s32(1)(b) and in s32(2) (deliberate commission of a breach of duty in circumstances where the breach is unlikely to be discovered for some time*)). "Deliberate" involves knowledge or intention on the part of the defendant. Awareness of risk is not sufficient.

3. Given the breadth of s32 (which can be relied on in all cases involving deliberate concealment), this case is likely to have ramifications beyond only the PPI context.

4. Potter was a test case. Twenty-six thousand claims of a "similar nature" have been filed with the courts. It is likely that some claimants will now seek to progress their claims by relying on the most claimant-friendly aspects of *Potter*.

### What this means

Following these decisions, we expect to see an increase in PPI mis-selling claims, as claims previously thought to be time-barred may now be brought.

However, lenders can take some comfort from the Supreme Court's comments in *Smith* that unfairness will be assessed "as a whole" and because of the highly discretionary nature of remedial orders under the Consumer Credit Act.

Read more in our **briefing**.

# ARBITRATION IN THE SPOTLIGHT

## ENGLISH COURTS CLARIFY THE TEST TO STAY COURT PROCEEDINGS IN FAVOUR OF AN ARBITRATION CLAUSE AND RAISE QUESTIONS OVER THE ARBITRATION PROCESS

In ***Mozambique v Privinvest***, the UK Supreme Court has for the first time provided guidance on when the English courts will stay court proceedings in favour of arbitration under **s9 Arbitration Act 1996**. The Supreme Court's guidance was subsequently applied by the High Court in ***Município de Mariana v BHP***.

Separately, the High Court in ***Nigeria v P&ID*** has overturned an $11bn arbitration award against the Republic of Nigeria and raised broader questions about the conduct of high-value arbitrations against states.

### s9 Arbitration Act challenges

Under s9 Arbitration Act, the court must stay court proceedings in respect of a "matter" that under an arbitration agreement is to be referred to arbitration, unless the agreement is null and void, inoperative or incapable of being performed.

The Supreme Court in ***Mozambique v Privinvest*** has distilled the test to determine a "matter" to be referred to arbitration into five principles:

- the court must identify the matters that have been or will foreseeably be raised in the court proceedings and determine if each matter falls within the scope of the arbitration agreement;
- a matter need not cover the whole of the dispute;
- a matter is a substantial issue, not an issue that is peripheral or tangential to the subject of the proceedings;
- a common-sense approach should be taken to evaluating the substance and relevance of a matter;
- the true nature of the matter must be considered as well as the relevant context.

The Supreme Court's guidance was subsequently applied in *Município de Mariana v BHP* in which Vale attempted to stay contribution claims brought against it by BHP. In both cases, the courts refused to stay court proceedings finding that the issues in the court proceedings fell outside the scope of the arbitration clauses.

The decisions are an important reminder for commercial parties that complex disputes involving factual and legal issues that extend beyond a contract containing an arbitration clause may find their way into the courts. Read more in our **briefing**.

**Slaughter and May acted for Credit Suisse, one of the defendants in the underlying *Mozambique v Privinvest* court proceedings.**

**Slaughter and May act for BHP Group Plc and BHP Group Ltd in the *Município de Mariana v BHP* court proceedings.**

### *Nigeria v P&ID*

The High Court has overturned and **refused** to send an arbitral award back to the tribunal for reconsideration finding there was "no real prospect of justice being done by the tribunal."

The award related to Nigeria's alleged failure to perform its obligations under a gas development contract with P&ID. Nigeria challenged the award for serious irregularity (**s68 Arbitration Act**) on the grounds that the contract had been obtained by bribery. The High Court was unable to make findings of corruption due to a lack of evidence. However, the judge found that P&ID had secured the award by the "most severe abuses of the arbitral process" including relying on knowingly falsified evidence, payment of bribes or corrupt payments during the arbitration process and improperly obtaining and using privileged legal advice provided to Nigeria by its lawyers.

Whilst the facts were "remarkable but very real", the Court's findings pose wider questions for the conduct of high-value arbitrations involving states. The judge made several observations to "provoke debate and reflection" including whether arbitrations involving states should be conducted more transparently to enable public or press scrutiny, the important role of document disclosure and the extent to which tribunals should be more interventionist in arbitral proceedings.

# WHAT TO WATCH OUT FOR IN 2024

Looking ahead here are some of the most significant developments to expect in litigation and arbitration in 2024:

## SECURITIES CLASS ACTIONS – A NEW FRONTIER?

Before Christmas, the High Court **thwarted** a novel attempt to bring a securities litigation claim as a "representative claim" – effectively, an opt-out class action. The claimant, seeking to represent shareholders in two UK-listed companies, had asked the court for declarations that the companies had made misleading statements or omissions in market announcements. Had the claimant succeeded, individual shareholders could have piggy-backed on the declarations to bring their own claims for compensation. The net effect would have been to reduce the up-front costs for claimants by allowing them to sit out the first stage of legal proceedings. Conversely, it would have front-loaded costs for listed company defendants. The decision can be contrasted with a **Court of Appeal judgment** (delivered a few weeks later) which took a more permissive approach to the use of representative actions in the context of claims against a patent attorney seeking repayment of secret commissions. The High Court's decision is being appealed and the outcome will be closely watched. It could open up a new front in the ongoing push by claimant lawyers and litigation funders to build a commercially attractive model for securities litigation in England.

## CROSS-BORDER ENFORCEMENT OF JUDGMENTS:

The UK will accede to a convention that facilitates cross-border enforcement of commercial judgments. The Government's announcement last November that the UK will join the **2019 Hague Judgments Convention** was welcomed by business. Because the EU is already a party to the Convention, accession will restore a level of UK-EU co-operation in this field not known since the end of the Brexit transition period. At the moment, the lack of a common framework means parties seeking to enforce English judgments in EU states (and vice versa) are reliant on a patchwork of national law processes which can in some cases be slow and may necessitate the instruction of local lawyers. The UK signed the Convention on 12 January and is expected to ratify in the coming months. It will come into force for the UK 12 months after that – probably in mid-2025. The Convention will only apply to judgments given in proceedings started after its entry into force.

## NEW POWERS FOR COURTS TO DISREGARD CJEU CASE LAW:

The **Retained EU Law (Revocation and Reform) Act**, which became law last year, revoked some Retained EU Law and ended the supremacy of that which remained over pre-Brexit domestic legislation. One important part of the Act is expected to come into force later this year: new rules to make it easier for courts to depart from retained CJEU case law and related pre-2021 domestic case law. The Court of Appeal will be required to have regard to specified factors, including the extent to which the relevant retained EU case law "restricts the proper development of domestic law". The breadth of this provision will, for the first time, give litigants the scope to argue for new interpretations of the law in the many areas where Retained EU Law (now known as "Assimilated law") remains relevant.

## CHANGES TO THE ARBITRATION ACT:

A new **Arbitration Bill** to reform the **Arbitration Act 1996** was introduced to Parliament in November 2023. The Bill aims to solidify England's reputation as a world leading centre to resolve legal disputes. The Bill reflects the Law Commission's proposed reforms to the current Act (as reported in our **October edition of Briefcase**), including changes to the governing law of the arbitration agreement. One important exception is that the Bill would apply to existing arbitration agreements, but not to arbitrations that have already commenced. This change differs from the Law Commission's proposal that the Bill should not apply to existing arbitration agreements and seeks to reflect concerns about the creation of a dual system. The Act is following a fast-track legislative process and is expected to be passed into law by mid-2024.

## UK TO RATIFY INTERNATIONAL FRAMEWORK FOR MEDIATED SETTLEMENTS:

**The Singapore Mediation Convention** aims to create an international framework for the enforcement of settlement agreements following mediation. Whilst the Convention currently has limited take-up (**13 parties**), in time it could become as significant and wide-reaching as the New York Convention is for arbitral awards. Having signed the Convention last May, the UK Government has **indicated** that it plans to ratify the Convention in 2024, subject to parliamentary scrutiny and once the necessary implementing legislation and rules are in place, and for the Convention to come into force for the UK six months later. However, it is not clear what impact the forthcoming UK general election will have on the Government's legislative plans.

## 2024 HORIZON SCANNING PROGRAMME

For more of what to expect in 2024, see our 2024 **Horizon Scanning Programme** which offers over twenty short pieces with briefing and insight on the most pressing issues companies will tackle this year, including coverage on the following topics relevant to disputes and investigations:

- The Economic Crime and Corporate Transparency Act – what you need to know
- ESG in 2024: maturity, clarity and uncertainty
- Business and human rights
- Securities litigation
- Collective proceedings: emerging trends
- Competition and consumer law enforcement
- Cybersecurity in 2024

# CONTACTS

If you would like to discuss any of the above in more details, 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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