SLAUGHTER AND MAY/

DISPUTES BRIEFCASE

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

JANUARY 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 Briefcase are available **here**. The **Disputes Briefcase team** would welcome any thoughts and feedback.

Richard Swallow
Head of Disputes and Investigations

/ CONTENT

RECENT DEVELOPMENTS IN GROUP LITIGATION

Headwinds for funded claims as representative actions dismissed, claims of passive investors struck out, and companies allowed to assert privilege against shareholders

The rise of group litigation, often backed by litigation funders, has been a dominant theme of recent years. But just because more claims are being issued does not mean they are being won. Several recent judgments illustrate the challenges facing the funded claims market. These include the absence in England of a modern class action regime (except in competition claims, but even here funded claimants have faced setbacks recently, as discussed below). And as we also discuss in this edition of Briefcase, a Government-ordered review of third party funding is focusing attention on the role of funders.

REPRESENTATIVE ACTIONS

Outside the competition sphere, England has no procedural equivalent of US-style opt-out class actions. The closest approximation is the representative procedure in CPR 19.8: where more than one person has the "same interest" in a claim, one such person may bring the litigation as a representative of all the others without needing their consent. Only the representative, and not the represented, are party to the claim, but all will be bound by any judgment. The court has a discretion whether to allow a claim to proceed as a representative action.

For years, the courts interpreted the "same interest" requirement restrictively, limiting the application of CPR 19.8. And claims for damages were almost impossible because each member of the class would usually need to evidence and prove their loss. Then, in Lloyd v Google in 2021, the Supreme Court held that the representative procedure should be viewed as a flexible mechanism to facilitate access to justice. It suggested a solution to the problem of claiming damages: a bifurcated process where issues of fact or law common to the class were decided through a representative claim, with issues that needed to be assessed individually – e.g. limitation or damage – dealt with separately if and when necessary.

For funders in search of high returns at the lowest possible cost, a bifurcated representative action would be a way to obtain a ruling on liability in complex group litigation without the expense of having to assess and prove each claimant's standing or their loss. But finding a viable claim that the courts will allow to proceed as a representative action has proved challenging.

In Prismall v Google and DeepMind, Mr Prismall brought a representative action in the tort of misuse of private information for a class of 1.6 million people whose medical records were sent by a hospital to the defendants. The claim was struck out at first instance, and last December the Court of Appeal agreed. A representative claim for misuse of private information was always going to be very difficult to bring, the court said, because the individual circumstances of each member of the class would be relevant to establishing whether all the elements of the tort were made out.

Earlier this month, in Getty v Stability AI, the High Court rejected an attempt to bring a copyright infringement claim as a representative action. There were multiple issues with the claim's formulation, including a lack of certainty as to class definition. The claimant made a last-ditch attempt to save the action by asking the court to exercise a power under CPR 19.3 to allow certain class members to benefit from the claim without actually being made a party to it.

That failed too, but whether a more considered application might succeed in the future is an open question. Read more about the Getty decision and its implications in The Lens.

WIRRAL v INDIVIOR

In Wirral v Indivior, the claimant sought compensation under s.90A FSMA from two listed companies for alleged misleading statements to the market. Wirral brought a traditional, multi-party claim alongside various other investors in the defendants, but in parallel it brought a representative action on behalf of a much larger class, many of them retail investors. Wirral tried the bifurcated approach proposed in Lloyd v Google. This was the first time anyone had tried to bring a securities law claim in this

way, and it threatened to unleash a wave of copycat claims. But it failed in the High Court and earlier this month it failed in the Court of Appeal too.

The Court of Appeal's core finding was that courts have an unfettered discretion whether to allow representative actions to continue. The judge had been entitled to conclude that this dispute was more suited to the multi-party procedure than a representative action. A bifurcated representative action would deprive the court of the ability to actively case manage the claim. That was vital, particularly in the context of complex group litigation, to ensure the burden of litigation was not unfairly distributed and the size and scope of the dispute was properly managed. The court noted that in Allianz v Barclays (considered below), the strike-out of certain claims would not have been possible if that case had been brought as a representative action.

The court was not impressed by the role the claimant's funder had played. Wirral had asserted that unless the representative action was allowed to continue, retail investors would be denied access to justice – because the funders said they would not finance their participation in the alternative multi-party proceedings. But in the absence of any further explanation on this point, the court thought it an "artificial construct", "engineered by the funders who … are gaming the system".

NO REMEDY FOR PASSIVE INVESTORS UNDER S.90A

In **Allianz v Barclays**, another claim brought under s.90A, the High Court held that each claimant needed to show they had actually read the information that allegedly contained misleading statements or omissions, or else had the gist communicated to them by third parties. The effect was that passive funds which simply tracked an index – a very large segment of the market – could not demonstrate reliance and had no claim. The decision will be welcomed by many listed companies because it is likely to reduce the size of any s.90A claim that could be brought against them. Although this claim was settled in the wake of the judgment, the decision's importance makes it likely these issues will be revisited before long.

COMPANIES CAN CLAIM PRIVILEGE AGAINST SHAREHOLDERS

Finally, in **Aabar v Glencore**, the Commercial Court decided that where a company is sued by its shareholders, those shareholders have no freestanding entitlement to see the company's privileged documents. The decision, which overturns what many considered a long-established rule of English law, will be welcomed by companies of all sizes: it increases the chances that legal advice sought and received will not need to be disclosed to shareholders, in litigation or otherwise. That will be particularly valuable for listed companies defending securities law claims. An appeal of the decision has been **fast-tracked to the Supreme Court**, but the judgment's detailed review and analysis of a confused area of law will give it significant weight. Read more about this judgment in our **briefing**.

GROUP ENVIRONMENTAL DAMAGE CLAIMS – ALAME v SHELL

Court of Appeal holds that claimants are not required to pursue environmental damage claims as global claims and gives guidance on management of group claims

The Court of Appeal in **Alame v Shell** has overturned the High Court by finding that group claims brought against Shell plc and its Nigerian subsidiary concerning environmental damage from oil spills in the Niger Delta do not need to be pursued as global claims. The Court of Appeal has also given guidance on the appropriate approach to disclosure and case management of group claims.

GLOBAL CLAIMS

The claimants identified some specific oil spills in their claims but said they were unable to particularise all the spills on which their claims were based until after disclosure and expert evidence. As a result, the High Court held that the claims had to proceed as 'global' (or 'all-or-nothing') claims, a concept borrowed from construction disputes. This meant the claimants could show that their loss was caused by multiple events for which Shell was responsible, rather than attributing their loss to individual oil spills. However, the claimants' claims would fail if Shell could show it was not responsible for an act or event which materially contributed to the claimants' loss.

The Court of Appeal held that the court could not require the claimants' claims to proceed as global claims. In the Court of Appeal's view, a party should be able to formulate their claims as they wish and not be "forced into a straitjacket" by the court or the defendant. Unless a claim is stayed or dismissed (e.g. by strike out or summary judgment), a party's right to bring a claim and how they intend to prove it, should normally be respected.

CASE MANAGEMENT

The Court of Appeal acknowledged the "circular procedural wrangle" in the case: the claimants argued they could not give more detail about their claims without more information from Shell, whilst Shell argued it could not give further information without more detail about the claims.

The Court of Appeal held that the court should manage the case according to three guiding principles to progressively refine the issues until final disposal of the litigation:

1. The court should strive to ensure parties are on an equal footing in relation to access to information. The Court of Appeal noted the "substantial inequality of arms" between the parties in terms of access to information and funding. In cases where there is an asymmetry of information, disclosure is one of the most powerful tools for achieving justice. Therefore, whilst the court should always be alert to 'fishing expeditions' in cases where the claimants have clearly articulated their claims, the court should carefully scrutinise any suggestions that the defendants do not know the nature of the case they have to meet to give disclosure.

2. Lead cases should be selected by a collaborative process involving the court as necessary. In the Court of Appeal's view, the present case was a "paradigm example" of a case which could only be progressed by way of lead claims. The High Court's direction for a factual trial to assess causes of all oil contamination over a three-year period in a 500 square mile region of the Niger Delta was "a recipe for an extremely expensive and insufficiently focused disaster".

3. It is an "important principle" that once the claimants have sufficient information, they should be required to refine and set out the nature of their case with sufficient particularity, so the defendants know the case they must meet and have a fair opportunity to meet it at trial.

How these principles were to be implemented was a matter for the High Court, but the Court of Appeal indicated their preference that lead cases be chosen (or criteria for their choice be agreed) before disclosure to enable earlier refinement of the issues.

DISPUTE RESOLUTION CLAUSES

Two recent High Court decisions on agreements to resolve disputes by arbitration or other methods illustrate the importance of clear drafting in parties' dispute resolution clauses

Well-drafted dispute resolution agreements are an important way for parties to mitigate their risk exposure should a dispute arise. In two recent cases, the High Court has considered complex disputes clauses providing for arbitration alongside other dispute resolution mechanisms. Both cases provide a helpful reminder of the English courts' readiness to uphold parties' dispute resolution agreements and the importance of clear drafting to give effect to those agreements.

BUGSBY PROPERTY v OMNI BRIDGEWAY

The parties entered a litigation funding agreement which stated that disputes were to be resolved by London seated arbitration under the LCIA Rules. The LFA was later amended by a variation agreement which provided that any party was entitled to resolve specified disputes by referring them to an independent KC. Omni purported to commence LCIA arbitration pursuant to the arbitration clause in the LFA. Bugsby purported to exercise its right to appoint a KC under the variation agreement.

The High Court held that, properly construed, the dispute resolution clause in the variation agreement was not an arbitration agreement. The clause did not provide for the parties to make submissions, for evidence to be heard, or for an award to be issued and did not use language commonly associated with arbitration. The clause stated that the KC would be "instructed" to "provide the Parties with an opinion". As a professionally drafted contract, the Court was entitled to give more weight to the natural meaning of the words chosen. In addition, the clause in the variation agreement had to be read in the context of the clause in the LFA. In this context, it was clear that the LFA provided for LCIA arbitration whereas the variation agreement provided for no particular procedure. This strongly suggested that the two clauses were intended to provide for different processes.

BARCLAYS v VEB

The parties entered a currency swap on 1992 ISDA Master Agreement terms with a bespoke unilateral (asymmetric) option clause. The clause stated that disputes were to be resolved by London seated LCIA arbitration, but Barclays retained the right to require by notice in writing that a dispute instead be heard by the English courts.

Barclays terminated the agreement. After Barclays obtained a **High Court anti-suit injunction** restraining VEB from continuing Russian court proceedings in breach of contract, VEB commenced LCIA arbitration pursuant to the parties' agreement. Barclays gave notice to VEB requiring the dispute to be heard by the English courts and challenged the arbitrator's jurisdiction.

The High Court found that the arbitrator did not have jurisdiction to hear the dispute because Barclays had validly given notice to VEB requiring it to withdraw the arbitration proceedings in accordance with the option clause. The notice did not put VEB in an impossible position such that it would not be able to pursue arbitration or court litigation. It was "fanciful" the Court would construe the anti-suit injunction, which required VEB not to commence or pursue any other claim or proceedings arising out of the swap agreement other than by LCIA arbitration, as precluding VEB from commencing English court proceedings pursuant to the option clause. Further, Barclays had not waived its right to rely on the option. Barclays gave notice to VEB within 14 days of service of the request for arbitration, as required by the option clause. In addition, Barclays' references to arbitration rather than court proceedings in the anti-suit injunction application did not amount to a waiver, as it was not necessary for Barclays to say anything about its option at that stage when the issue between the parties concerned whether VEB should continue the Russian proceedings in breach of contract.

These cases show that parties need to be clear in their drafting of dispute resolution agreements and what they are looking to achieve. This is true for disputes mechanisms in the same (and varied) agreement, as highlighted above, but as the recent case of **Tyson v Re GIC** demonstrates, also in multi-contract deals.

Read more in our **briefing**.

FIRST COLLECTIVE ACTIONS JUDGMENT – LE PATOUREL v BT

Competition Appeal Tribunal dismisses £1.1bn collective action against BT over alleged unfair pricing in first collective proceedings judgment

Nine years after the collective proceedings regime for competition law breaches was introduced, the CAT has delivered its first substantive judgment, dismissing the claim in **Justin Le Patourel v BT Group PLC**. Although this claim failed, the judgment contains useful lessons for class representatives and defendants. It is unlikely to deter future collective proceedings.

THE CLAIM

Justin Le Patourel, a former Ofcom official, sought £1 billion in damages from BT on behalf of some 2.3 million people. He alleged BT had abused its dominant market position in residential landline services to impose unfair prices on customers. Unlike many competition damages actions, which rely on a pre-existing regulatory finding of a competition law infringement, this was a 'standalone' claim: Le Patourel had to prove that BT had breached relevant competition law and then show that these breaches had caused losses in the amount claimed. He relied heavily on non-binding provisional findings made by Ofcom in 2017, which raised concerns about BT's pricing practices and led to Ofcom accepting voluntary undertakings from BT to reduce the prices of certain services.

In December, the CAT delivered its judgment and dismissed the claim. It found that although the prices charged by BT were excessive, they were not unfair because they bore a reasonable relation to the economic value of the services provided. Accordingly, BT had not abused its dominant market position and was not liable.

KEY INSIGHTS

Prior regulatory findings are not conclusive: The decision confirms that non-binding regulatory findings are no guarantee of success at trial. Although Ofcom's findings were influential at the certification stage, they were subjected to much greater scrutiny at trial. The CAT considered that the more detailed evidence available to it and the limited and specific objectives of Ofcom in its preliminary findings allowed it to substitute its own independent conclusions.

Unfair pricing analysis: The CAT applied the two-stage **United Brands** test to evaluate whether BT's pricing was unfair. First, it established a competitive benchmark, factoring in direct and indirect costs and a reasonable margin. BT's prices were up to 49.9% above this benchmark and therefore significantly and persistently excessive. But at the second stage, the CAT decided BT's prices were not unfair. In a highly fact-sensitive analysis, the CAT found that the prices reasonably reflected the economic value of the services provided. Relevant factors included BT's strong brand, demonstrated by certain customers' reluctance to switch to alternative, lower-cost providers.

Role of expert evidence: Expert evidence played a central role, with eight experts appearing at trial. Notably, the CAT adopted a blended approach by taking aspects of the very different methodologies proposed by each side.

Quantum analysis: The CAT also addressed several quantum-related issues. It confirmed that the starting point for a quantum analysis was the difference between the competitive benchmark used to measure excessiveness (not the highest lawful level at which BT could have set its prices) and the actual price. The CAT rejected a novel claim for inflation-related damages and a claim for compound interest, noting – somewhat reluctantly (and citing **Sempra Metals Ltd v IRC**) – that such claims require specific evidence and are therefore likely to be challenging in collective proceedings.

BROADER MARKET IMPLICATIONS

The dismissal of Le Patourel's claim is a warning to other class representatives that certification of collective proceedings is merely the first (low) hurdle they must clear: it is no guarantee of substantive success at trial. But this judgment alone is unlikely to deter the litigation funders who make these claims possible. The failure of one claim in a larger portfolio is likely to be viewed as a cost of doing business. Whether this appetite can be sustained will become clearer this year, as the CAT delivers judgments in several more long-running sets of collective proceedings.

CLASS ACTION REJECTED – RIEFA v APPLE AND AMAZON

CAT holds that proposed class representative is unsuitable and refuses to certify collective proceedings in warning to funders and claimants

The CAT has refused to grant a collective proceedings order in **Riefa v Apple and Amazon**, holding that the proposed class representative was unsuitable – the first time this has happened. The judgment is a warning to PCRs, and those standing behind them, that a PCR cannot be a mere figurehead for proceedings being conducted by their lawyers, "but must act as the independent advocate for the class".

The opt-out claim, brought on a standalone basis, alleged that Amazon and Apple had entered into anti-competitive agreements that had the effect of increasing the price of Apple products on Amazon's retail platform. The PCR was a company owned and controlled by Professor Christine Riefa, a legal academic. She estimated the class size at 36 million people and the total loss suffered at some £500 million before interest. Apple and Amazon denied the substantive allegations but did not seek to resist certification on that basis. Instead, they challenged, at the CAT's urging, the suitability of Prof Riefa as the PCR.

At the first CPO certification hearing in July 2024, the tribunal raised concerns about the ability of Prof Riefa to act in the best interests of the class, independently of the interests of her funders and solicitors.

In a first for the CAT, the Tribunal granted the proposed defendants' application to cross-examine the PCR at a second hearing last autumn. The CAT concluded that Prof Riefa did not demonstrate a strong understanding of the funding arrangements she had entered on behalf of the class, nor the conflicts of interest that might arise because of the arrangements. In particular, Prof Riefa had:

- agreed with the funder's request to keep the terms of funding confidential, including from potential class members. A subsequent agreement from the funder to waive confidentiality over certain provisions at its own unilateral discretion was too little, too late.
- failed to demonstrate an adequate understanding of the mechanism for the calculation of the funder's success fee, the circumstances in which payments might be made to the funder, insurer and lawyers in priority to class members, and her own contractual role in seeking to regulate this.
- had not demonstrated the necessary understanding or expertise to challenge the funding arrangements proposed to her by the funders and solicitors and had not taken adequate steps to bolster her position by consulting with independent experts.

In sum, Prof Riefa had failed to demonstrate "sufficient independence or robustness so as to act fairly and adequately in the interests of the class" and therefore had not satisfied the authorisation condition required to grant a CPO. The CAT made clear that, to meet this condition, the class representative "must demonstrate that it has a clear view of the interests of the class and can engage robustly and independently with advice received". That included a good understanding of the effect of the proposed funding terms, and the risks of any conflicts of interest.

Finally, it is worth noting that the CAT took the lead in probing the PCR's suitability in this case; the proposed defendants' application to cross-examine her was effectively invited by the Tribunal, and their attacks on her followed the CAT's lead.

OTHER RECENT DEVELOPMENTS AND WHAT TO WATCH OUT FOR

ENGLISH COURT HAS JURISDICTION IN OVERSEAS SUPPLY CHAIN LIABILITY CASE

The English courts have become an attractive forum for group claims against UK-based multinational corporations for alleged environmental and human rights harms by their foreign subsidiaries. More recently, claims have extended to companies' overseas supply chains. Claims previously relied on EU rules requiring the English courts to take jurisdiction over UK 'anchor' defendants, even where claims had little connection with England. However, rule changes following Brexit mean that the English courts now have discretion whether to hear claims against UK defendants.

In one of the first cases to consider these issues post-Brexit, the **Court of Appeal has overturned** the decision of the **High Court in Limbu v Dyson**. In doing so, the Court of Appeal has found that claims brought by migrant workers against UK and overseas companies in the Dyson group concerning alleged wrongdoing by a third-party Malaysian supplier can proceed in the English High Court. Conducting its own evaluative assessment, the Court of Appeal found that England is the more appropriate forum for the dispute because the workers would be unable to fund proceedings in Malaysia, despite "unprecedented" undertakings offered by Dyson to fund certain court costs of the workers, and because of the presence of other connecting factors with England.

See our **January 2024 edition of Briefcase** and our **client briefing** on the High Court decision for more background.

IMPORTANT JUDGMENTS FOR THE MOTOR FINANCE INDUSTRY

In the recent landmark case of **Hopcraft, Wrench and Johnson v Close Brothers and FirstRand**, the Court of Appeal set out (1) the nature of the duties owed by car dealers who arrange car finance on behalf of their customers and (2) the circumstances in which lenders can be held liable as a result of undisclosed commissions. This judgment has significant implications for lenders in the motor finance industry and has been fast tracked to the Supreme Court in April. As has been reported, HM Treasury, the FCA and others have applied for permission to intervene in the appeals. Slaughter and May are acting for Close Brothers in the appeals.

In **Clydesdale Financial Services v FOS**, the Administrative Court dismissed a claim for judicial review of a January 2024 decision of the Financial Ombudsman Service, in which the FOS upheld a complaint by a customer regarding undisclosed commission in a motor finance agreement. The decision to dismiss the judicial review application is now being appealed. To read more about this case, see the **December edition** of our Financial Regulation Weekly Bulletin. To read more about other developments affecting the motor finance industry, please see **our Horizon Scanning piece on reflections and projections on FCA enforcement**.

COMPETITION LITIGATION ROUND-UP

Parts 1 and 2 of the **Digital Markets, Competition and Consumers Act 2024** came into force on 1 January. The Act (which we covered in the **July edition of Briefcase**) alters the legal and regulatory landscape for big tech firms designated as having "strategic market status" (SMS), by imposing obligations and exposing them to pro-competitive interventions from the Competition and Markets Authority. The Act will have important regulatory implications, but it could also have a significant impact on competition litigation. Crucially, the Act gives individuals a new private right of action where they have suffered loss because of certain breaches of the Act (see **Section 101**). It also (1) gives the CMA wider investigatory and enforcement powers, (2) makes several changes to the merger control regime and (3) permits the award of exemplary damages for breaches of competition law. We expect to see an uptick in litigation as the CMA, companies and individuals grapple with these new rights and obligations. To read more about the Act, and for an overview of the additional consumer protection changes coming into force in April, see our **Competition and Regulatory Newsletter**, the **Lens** and our Horizon Scanning piece **"All change" for consumer protection**.

On the collective actions front, the parties in the long-running **Merricks v Mastercard proceedings** have reached an in-principle

settlement for £200 million. However, the litigation funder (Innsworth) is seeking to challenge the settlement on the basis that it is "too low" and "premature". The extent to which the Competition Appeal Tribunal gives weight to the funder's objections at the settlement approval hearing (**scheduled** for 19-21 February) will be watched closely. So too will Innsworth's commencement of arbitral proceedings against Mr Merricks in relation to the proposed settlement.

The Supreme Court is due to hear an appeal in the **Evans v Barclays foreign exchange collective proceedings** on 1 and 2 April. This is the third time that the Supreme Court will rule on a point of law arising out of the collective proceedings regime. Given that the Court is expected to clarify the test to be applied by the CAT when certifying proceedings on an opt-in or opt-out basis, this case will be watched closely. Slaughter and May act for JPMorgan in the appeal. To read more about this case, please see the **October 2023 edition of Briefcase** and our **briefing**.

CJC INTERIM REPORT ON LITIGATION FUNDING AND CONSULTATION

In the **October edition of Briefcase**, we reported that the Civil Justice Council was embarked on a review of the third party litigation funding market. Its central aim is to consider whether the market as currently structured is delivering effective access to justice. The review's terms of reference – set by the Ministry of Justice – directed the CJC to consider whether reforms were needed to, for instance, cap funder returns or more effectively manage the costs of funded litigation.

The CJC published its **interim report** at the end of October. It surveys the current landscape and considers the approaches to regulation of funding in other jurisdictions. Its purpose is to frame a public consultation, not to express the views of the CJC or propose potential reforms. That consultation seeks views from all market participants and is widely framed. But the key question it asks is whether the current system of self-regulation is still fit for purpose or whether now is the time for a new mandatory regulatory framework.

The consultation was due to close at the end of January but has now been extended for an extra month. That may delay publication of the CJC's final report, which had been expected this summer.

COURT PROCEDURE: KEY UPDATES

In November, the CJC published its **Phase Two Report** on Pre-Action Protocols (PAPs). Recommendations include: (1) parties who choose to engage in a formal alternative dispute resolution process at the pre-action stage be exempt from any automatic requirement to engage in mediation after issuing proceedings (see our **October Briefcase** on rule changes confirming the courts' power to order mandatory ADR which the High Court recently put to use in **DKH Retail v City Football Group**); (2) the current PAP for judicial review be replaced; and (3) multi-track litigation (the usual track for claims above £100,000 and more complex claims) in the Business and Property Courts have its own (newly created) PAP. The report also touches on the possibility of a PAP for representative actions and group litigation in the future, noting that this is "worthy of further consideration".

In December, the Supreme Court published its new **Rules** and **Practice Directions**. These apply to all cases filed from 2 December onwards. Noteworthy changes include (1) a **new digital portal** (mandatory for represented parties); (2) changes to the deadline for filing an application for permission to appeal (so that the clock starts ticking on the 28-day deadline from the date of the order of the court below refusing permission to appeal, rather than from the date of the decision being appealed); and (3) a requirement that Statements of Facts and Issues, together with written cases, be published on the Court's website no later than seven days before the hearing.

The new requirement to publish certain documents in Supreme Court proceedings can be understood in terms of the broader push towards greater transparency in court proceedings. In December, the **Transparency and Open Justice Board**, which aims to **"examine and modernise"** the approach to open justice across all courts and tribunals, published its **draft Key Objectives**, with **Explanatory Notes**. Areas of review include access to documents from the court records by non-parties; the level of information published about cases pending before courts and tribunals; and access to court hearings. As reported previously in Briefcase (see **April** and **July** editions), the Civil Rules Procedure Committee is considering rule changes to widen non-party access to court documents. The CRPC has **confirmed** it will continue its work on the issue during 2025. But, given the overlap between the remits of the CPRC and the Board, as well as the early stage of the Board's work, it may be some time before any rule changes are made.

ARBITRATION DEVELOPMENTS

Following our last update on the Arbitration Bill in the **October edition of Briefcase**, in November the Bill passed its third reading in the House of Lords and has begun its passage through the House of Commons. The Bill had its second reading in the Commons on 29 January.

The Singapore International Arbitration Centre has released the 7th edition of its arbitration rules, which came into effect on 1 January. The **SIAC Rules 2025** introduce new or revised provisions which aim to give parties and tribunals additional tools to enable them to resolve their arbitral disputes more efficiently. **Changes include** revised emergency arbitration rules, including a new rule introducing the possibility of protective preliminary order applications; a new streamlined procedure for low value disputes; new rules on co-ordinating related proceedings; expansion of the cases eligible for the expedited procedure; amended rules on arbitrator appointments; a new requirement for parties to disclose certain third-party funding agreements; new rules enabling preliminary determination; and new administrative procedures, such as a new online case management system (SIAC Gateway). In other institutional news, the Hong Kong International Arbitration Centre has published a **Practice Note on Compatibility of Arbitration Clauses under HKIAC Rules** which provides guidance on HKIAC's approach to arbitration agreements where a single arbitration is commenced under multiple contracts or a request is made to consolidate multiple arbitrations. The London Court of International Arbitration has published its third **Costs and Duration Analysis** to give users greater insight into the costs and time scales of LCIA arbitrations.

In December, the Court of Appeal delivered an important judgment in **The M/T Prestige: Spain v London Steam-Ship**. The Court of Appeal refused to enforce a USD 1bn Spanish judgment under the EU Brussels I Regulation on the basis that it was inconsistent with an earlier English arbitration award against Spain in relation to the same dispute. The decision arises from a longstanding insurance dispute concerning the sinking of the M/T Prestige off the coast of Spain which caused an oil spill that polluted 2300km of coastline. The judgment covers important issues, including the findings that an arbitral award can create an issue estoppel making recognition of a foreign judgment under Brussels I contrary to English public policy and that equitable compensation is not available to commercial parties where a state does not comply with its equitable obligation to arbitrate.

Arbitration-related appeals to watch out for this year include an appeal in the highly publicised **P&ID v Nigeria** proceedings. The UK Supreme Court will consider the Court of Appeal's decision to allow the appeal of a costs order made following Nigeria's successful application to set aside two awards, but dismiss the appeal on the currency in which the costs order was made. In addition, the Court of Appeal is set to hear an appeal in **General Dynamics v Libya** in which the Commercial Court held that Libya had waived its right to immunity from execution of an arbitration award under the State Immunity Act.

DEVELOPMENTS IN CROSS-BORDER ENFORCEMENT HAGUE JUDGMENTS CONVENTION AND HAGUE CHOICE OF COURT CONVENTION

As reported in our **July edition of Briefcase**, the **2019 Hague Judgments Convention**, which the UK ratified last year, will come into force for the UK on 1 July 2025. The Convention will make it significantly easier to enforce a wide range of English court judgments in 28 countries, including all EU member states except Denmark, and vice versa. Read our **briefing** for more detail.

Separately, as of 1 January, Switzerland has acceded to the **2005 Hague Convention on Choice of Court Agreements**. In doing so, Switzerland joins the UK, all EU member states, Albania, Mexico, Montenegro, Moldova, Singapore and Ukraine. The Convention sets out a framework of rules relating to choice of court agreements made between parties to cross-border commercial contracts and recognition and enforcement of judgments issued by the courts of contracting states pursuant to those agreements. The Convention only applies to exclusive jurisdiction agreements. Unusually, however, Switzerland has issued a **declaration** stating that its courts will also recognise and enforce judgments by the courts of other contracting states where proceedings are commenced pursuant to a non-exclusive jurisdiction clause (non-exclusive clauses are separately within the scope of the 2019 Convention).

These developments go some way towards restoring a level of reciprocity in the recognition and enforcement of judgments between the UK and EU member states / Switzerland which, subject to transitional arrangements, ended with the Brexit transition period.

GOVERNMENT PLANS TO OVERHAUL JUDICIAL REVIEW CHALLENGES OF NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS

In January, the UK Government **announced** its intention to overhaul judicial review challenges of Nationally Significant Infrastructure Projects (NSIPs). The proposed changes aim to speed up completion of major infrastructure projects as part of the Government's commitments to clean power and drive growth. The proposed changes include removing the current paper permission stage so that all permission applications will instead go straight to an oral hearing. If at an oral hearing the court considers an application to be "totally without merit", the applicant will have no right of appeal. The proposed changes follow an **independent** review conducted by Lord Banner into delays to NSIPs because of legal challenges and a Government **call for evidence** which closed at the end of last year. The Government has confirmed it will publish its response to the call for evidence in due course.

HORIZON SCANNING

- America first? The continuing rise of class actions in England and Wales
- "All change" for consumer protection: what you need to know
- M&A Disputes: a reminder on high risk areas for disputes and the latest on managing them
- Reflections and projections on FCA enforcement
- Artificial intelligence: Growing litigation risk
- Clarity across borders: Delivering on due diligence in the value chain

RECENT WORK

- Ministry of Defence on landmark litigation of Armed Forces

OUR OTHER RECENT BRIEFINGS

- Chambers and Partners Global Practice Guide – Litigation 2025 – England & Wales: Law and Practice
- In-Depth: Banking Litigation – 8th edition – United Kingdom chapter
- In-Depth: Banking Litigation – 8th edition – Hong Kong chapter
- Global Arbitration Review's Guide to Climate Change and Related Disputes – 1st edition
- Climate change reaches world's highest court
- UK Supreme Court confirms the Sky is not the limit when it comes to trademark applications and bad faith
- Purposive interpretation by the UK Supreme Court in Cobalt Data Centre
- Global Investigations Bulletin – December 2024

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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