ISSN 2397-2769

THE EXPERT WITNESS

THE JOURNAL FOR INSTRUCTING PROFESSIONALS & EXPERT WITNESSES

INTERNATIONAL ISSUE

Issue 36 April 2021 - £5.00 €6.00

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Welcome to the Expert Witness Journal

Hello and welcome to the 36th edition of the Expert Witness Journal. The focus of this issue are our 'International' experts and matters concerning experts worldwide.

The areas which experts operate internationally tend to be marine, finance, banking, and some elements of crime and surveying. In this issue we cover most of these, including; Noble Chartering Inc -v- Priminds Shipping Hong Kong Co Ltd by Lewis Moore, Chris Primikiris and Charlotte Wood. Pension Offsetting on Divorce - A "Navigation" Process by Peter Crowley. Climate Change Actions Against Corporations: Milieudefensie et al. v. Royal Dutch Shell plc. by Juliette Luycks, Tara Kok and Anne Hendrikx. Plus articles on general issues including, The Rise of the Global Expert by Adrian Bell.

Construction matters are covered with The Use of Experts in International Construction Disputes and The Role of the Single Joint Expert in Construction Disputes by Sekai Nyambo and 'So, how do I know if my building is 18m high or not?' by Bernadette Barker.

We have a dedicated international website which features experts who undertake work worldwide, as well as international news and articles. Our articles are also available online at: www.expertwitness.co.uk, where we have a dedicated articles page.

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Our Expert Witness Conference, the UK's largest expert witness gathering, will be back on Friday 5th November 2021. This year we will be running it as a hybrid event and you will have the option of either attending in person at Church House, in Westminster, or joining remotely. The Rt Hon Sir Geoffrey Vos, New Master of the Rolls since January 2021, who has promised to "radically rethink" civil justice, will be our keynote speaker.

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The Rise of the Global Expert Services Practice: Court of Appeal Guidance on Conflicts of Interest and Multiple Instructions

A Court of Appeal decision has upheld an injunction granted by the TCC preventing an international expert services firm from acting for more than one party to an international construction dispute, despite involving separate experts in different locations contracting via separate legal entities. Although not supporting the TCC's finding that fiduciary duties applied, the Court found that contractual undertakings to avoid conflicts of interest had been given on behalf of all companies within the international practice. Given the rise of globalisation in the expert services industry, and for professional services more generally, this decision is likely to have considerable ramifications for the marketing of such services and the basis on which they are procured.

Secretariat v A Company: a recap

The developer of a petrochemical plant appointed a consultant to provide engineering, procurement and construction management ("EPCM") services in relation to the project. The developer also engaged a contractor for the construction of certain aspects of the project. The contractor claimed against the developer in respect of additional costs incurred due to delays arising from the late release of certain designs. These were designs which the EPCM consultant was required to produce under its appointment. The developer's position was that it would seek to pass on to the EPCM consultant any liability it might have to the contractor.

The contractor commenced an ICC arbitration against the developer in relation to its claim (the "Contractor Arbitration"). The developer engaged a delay expert from Secretariat, an international expert services practice, to advise and act in connection with the arbitration. Some months later the EPCM consultant commenced its own arbitration against the developer for non-payment of fees (the "EPCM Arbitration"). The developer counterclaimed against the EPCM consultant in respect of delay and disruption to the project, including any liability it had to the contractor in the Contractor Arbitration.

Solicitors acting for the EPCM consultant subsequently notified the developer's solicitors that they were proposing to retain an expert from Secretariat to assist the EPCM consultant in the EPCM Arbitration. The developer objected on the basis that the Firm had already been appointed by it in the Contractor Arbitration to consider many of the same issues which would arise on its counterclaim in the EPCM Arbitration.

The EPCM consultant and Secretariat sought to justify the acceptance of both retainers on the basis that the experts were appointed in different disciplines, based in different geographic regions and engaged through different companies within the Secretariat group. Information barriers had also been put in place to avoid any transfer of confidential information.

The developer successfully obtained an injunction from the Technology and Construction Court restraining Secretariat from providing expert services to the EPCM consultant in connection with the EPCM Arbitration. The TCC concluded that Secretariat's appointment in the Contractor Arbitration carried with it a fiduciary duty of loyalty to the developer. Given the companies in the Secretariat group were marketed together as one global firm, and there was a common approach to the identification and management of any conflicts of interests, the duty of loyalty was owed by all of the corporate entities within the Secretariat group.

The Court of Appeal

The Court found it unnecessary, however, to uphold the TCC's finding as to fiduciary duties and expressed reservations as to the implications of such a finding. Instead, the Court based its decision on an express clause of the appointment in the Contractor Arbitration which prohibited conflicts of interests. The clause recorded that Secretariat had "confirmed you have no conflict of interest in acting for [the developer] in this engagement" and that it would "maintain this position for the duration of your engagement".

Although the appointment was addressed to and signed by a specific company within the Secretariat group, the Court found that the conflict of interest clause was agreed on behalf of all companies within the group. One reason for this was that the conflict check said to be confirmed in the appointment

had been carried out across all companies in the Secretariat group. Also of importance was the way in which the Secretariat business was managed and marketed:

"In considering what the parties would reasonably have understood, it is significant that companies within the group share the same name and are managed and marketed as a single global firm. They have a single website for the group as a whole, treating it as a single business in various jurisdictions, working as a team. It seems to me to be obvious that if an issue had arisen in the arbitration on which an employee in another company in the group had particular experience or expertise, both parties would naturally have expected that experience or expertise to be available to A Co as the client. … In these circumstances the undertaking given by Secretariat Consulting not to accept instructions which would give rise to a conflict of interest can readily – and in my judgment must – be understood as having been given on behalf of the group as a whole."

The Court agreed with the TCC that Secretariat had placed itself in a position of conflict by accepting an appointment for the consultant in the EPCM Arbitration. Whilst the Court acknowledged the question was a matter of degree, and that expert witnesses might readily act for and against the same company in disputes involvement separate projects or transactions, it considered this to be a clear case. The appointment in the EPCM Arbitration involved an overlap "of parties, role, project, and subject matter". The interests of the consultant in the EPCM Arbitration were opposed to the developer's interests such that the two Secretariat experts could easily find themselves supporting opposite positions on the same or similar issues.

Conclusions and implications

This decision has particular relevance to the increasing trend of globalisation among expert services firms and to professional services firms more generally. Such a trend is particularly notable in the construction and engineering sphere to which Secretariat belongs. Expansion is often the result of mergers between existing local practices, bringing with it the very real potential for instructions from multiple parties to an international dispute. As in the present case, such merged entities are typically marketed as a single firm with a unified management structure and a "global presence".

The Court of Appeal's reasoning poses a clear risk for such a business that undertakings to avoid conflicts of interests will be interpreted to apply globally across all of its companies. The Court acknowledged that appointments could be drafted to avoid this result, with such undertakings being limited to a specific company only. However, as the Court also noted: "Whether, if it does so, it will secure the instruction, is another matter."

The Court's reluctance to extend fiduciary obligations into expert witness appointments will be welcomed by many. The TCC's reasoning on this point was potentially applicable across the board to expert appointments of a general nature to assist a party in court or arbitration proceedings. Fiduciary obligations extend beyond mere duties of loyalty and, if upheld by the Court of Appeal, this is likely to have been an area of uncertainty productive of further disputes.

By contrast, the Court of Appeal's decision is firmly rooted in the individual circumstances of the Secretariat appointment and the terms agreed with the developer. In substance, the Court of Appeal's decision seems to be that when the express terms of the appointment were read against the factual matrix of Secretariat's marketing the proper construction and interpretation of the appointment was (i) the conflicts undertaking was given in respect of the entire group and (ii) that the signatory was acting as agent for the entire group. Such circumstances may, of course, differ in future cases. The basis of the Court of Appeal's decision means that it is open to international professional services firms to ensure that the express terms of their engagement avoid the conclusions reached in this case. In doing so there are two issues to address, first, whether any conflicts warranty or undertaking, is given in respect of the signatory or the entire group, and second, whether the signatory executes the terms of engagement for the entire group. Companies and firms wishing to avoid a similar result will need to deal with both of these issues, as the first might give rise to a liability for the signatory (even for conflicts generated by non-signatories) and the second a liability for non-signatories.

References:

Secretariat Consulting PTE Ltd & Ors v A Company [2021] EWCA Civ 6.

A v B [2020] EWHC 809 (TCC).

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Foreign Claims and UK Jurisdiction

Syed Rahman of Rahman Ravelli assesses the doctrine of forum (non) conveniens and a court's decision regarding jurisdiction on a foreign claim.

In the context of civil litigation, forum conveniens is a commonly-considered principle wherein the court decides whether to permit the service of proceedings outside the jurisdiction through the English courts, or to acknowledge that another forum would be more appropriate.

The recent judgment in Traxys Europe SA v Sodexmines Nigeria Ltd [2020] EWHC 2195 (Comm) considered whether the Commercial Court of England and Wales could exercise its jurisdiction over a claim in Nigeria. As a case, it is a useful illustration of the factors a court will consider when deciding whether a case should be heard in the UK.

Background

The claim concerns the sale of products by the first defendant, Sodexmines Nigeria Limited (Sodexmines), to the claimant, Traxys Europe S.A. (Traxys), in Nigeria. The second defendant, Mr Ali, is the beneficial owner of Sodexmines. It was alleged that the first defendant dishonestly substituted the purchased products with products described as "worthless" which were then provided to the claimant. The claimant then brought claims in contract/restitution against Sodexmines and in tort against the two defendants.

The contract between the parties provides for English law and jurisdiction. Therefore, permission to serve outside the jurisdiction (i.e. Nigeria) was granted. In this case, Mr Ali applied to the court to stay the proceedings against him on the grounds that Nigeria is the forum conveniens and so this English court should not exercise its jurisdiction.

The Burden of Proof

In an application to stay the exercise of the court's jurisdiction, the burden would lie with the defendant to show there is a more appropriate forum.

However, the judge in this case said that, on the facts and notwithstanding that Mr Ali was seeking a stay, this case falls into a second class of cases regarding the court's exercise of its discretionary power to allow service outside of the jurisdiction. In this latter class, the burden would fall on the claimant (as in Spiliada Maritime Corp. v Cansulex Ltd. [1987] 1 AC 460). It was, therefore, decided that the burden of proof lay upon the claimant to establish that the appropriate forum, in this case, was England, rather than Nigeria.

The Claimant's Argument

The claimant put forward the following factors in support of the submission that England is the appropriate forum:

1 - Sodexmines agreed to an exclusive English jurisdiction clause in the disputed contract.

2 - As per the contract, Sodexmines agreed for English law to govern its relationship with Traxys.

3 - The claim against Sodexmines is proceeding in England, and will continue to do so, even if the court stays the claim against Mr Ali.

4 - The evidence and the relevant documents will be in English.

5 - Mr Ali is a British citizen, and the English court is likely to be a convenient venue for both parties. By contrast, Mr Ali has fled and is avoiding entry to Nigeria.

6 - Mr Ali has repeatedly and continually told the Nigerian courts, in sworn evidence, that the civil dispute ought to be litigated in England and Wales.

7 - There is an accusation of evidence that Mr Ali interfered with a witness - so the claimant seeks to have the case heard in the UK under the "intense scrutiny" of an English court.

The Court's Response

Having studied each of the points made by the claimant, the court considered that:

1 and 2 - The first and second Defendants are legally separate and distinct persons - and so Mr Ali has not agreed to English law and jurisdiction for claims against him;

3 - The court held that it is unlikely the claim in tort will go ahead against the first defendant in England.

4 - The fact that the evidence and documents are in English is not a reason for the forum conveniens to be England.

5 - Mr Ali is likely to give evidence by video link, whether in Nigeria or England;

6 - It is true Mr Ali submitted before the Nigerian Courts that the civil claim was a matter for the English court.

7 - The point regarding alleged witness interference could not be resolved in this hearing as it needed to be scrutinised by the court (in the forum conveniens) with care.

Judgment

The judgment held that the claimant's factors, as outlined above, were "lacking in cogency" and that the claimant had failed to establish that England is the forum where the case should more appropriately be tried in the interests of the parties. The "centre of gravity" of the case is in Nigeria, not England.

The judge agreed with Mr Ali's supporting points that Nigeria was the appropriate forum because the tortious events took place in Nigeria and the witnesses are in Nigeria. The judge, therefore, granted Mr Ali's application for a stay of proceedings in this jurisdiction. However, it was judged that the worldwide freezing order (WFO) in place against Mr Ali - that was imposed by the English court - could and should remain until the claimant secures similar relief in Nigeria, at which point this court will set the WFO aside.

The details of this case, especially its outcome, will be useful to anyone considering bringing a claim in the UK, where the fundamental focus of the litigation may be abroad. It will also be of use to those who have to defend such a claim. It outlines some valuable factors concerning the circumstances that the court will deem appropriate for a case to be heard in the UK, where that case has a foreign jurisdictional anchor.

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UK Supreme Court: SFO Cannot Compel Foreign Companies to Produce Documents Held Outside the UK Under Section 2 Powers

by Sam Eastwood, Alistair Graham, Chris Roberts and James Ford at Mayer Brown.

On 5 February 2021, the UK Supreme Court (**"Court"**) unanimously held that the Serious Fraud Office (the **"SFO"**) cannot compel a foreign company not operating in the UK to produce documents pursuant to its powers under section 2(3) of the Criminal Justice Act 1987 (**"CJA"**).[1] As we reported in our previous Legal Update, in October 2018 the Divisional Court ruled that foreign companies must produce documents in response to a section 2 notice (**"Notice"**) if there is "sufficient connection" with the UK.[2] Overturning this decision, the Court found that implying the "sufficient connection" test into section 2(3) is inconsistent with the intention of Parliament, rejecting an extra-territorial reading of the SFO's section 2(3) powers. The practical effect of this decision is that, going forwards, foreign companies that do not operate in the UK, including foreign companies with UK subsidiaries, will no longer risk being subject to a Notice.

Key takeaways

- The Supreme Court has overturned a judgment of the Divisional Court, limiting the SFO's powers under section 2(3) of the CJA to compel foreign companies that have no presence in the UK to produce documents that are held abroad.

- The judgment does not inhibit the SFO from seeking documents held outside the UK jurisdiction in all circumstances. For example, the SFO may still compel foreign companies with a fixed place of business in the UK to produce documents held abroad under section 2(3) of the CJA. The SFO may also rely on alternative channels, such as mutual legal assistance or an overseas production order, to seek documents held abroad by foreign companies with no UK presence.

- It is possible that Parliament may respond to this judgment by introducing legislative reform that will reinforce the SFO's powers under the CJA and may expressly permit the use of the SFO's information gathering powers on foreign companies outside the UK in certain circumstances.

- Pending such legislative reform foreign companies with no presence in the UK will take comfort that they no longer risk being subject to a Notice.

1. Background

The appellant in the case, KBR, Inc. (**"KBR"**) was a US-incorporated company that has no fixed place of business in the UK and has never carried on a business in the UK although it has subsidiaries in the UK, including Kellogg Brown and Root Ltd (**"KBR Ltd"**). On 4 April 2017, the SFO issued a Notice to KBR Ltd in connection with an ongoing SFO investigation. In its responses to the Notice, KBR Ltd made it clear that some of the requested materials were held by KBR in the US, if and to the extent such materials existed. On 25 July 2017, officers of KBR attended a meeting with the SFO in London. At this meeting the SFO served a notice pursuant to section 2(3) CJA (**"the July Notice"**) on the Executive Vice President of KBR compelling the production of materials held by KBR outside the UK.

KBR applied for judicial review to quash the July Notice, arguing among other things that the July Notice was ultra vires because section 2(3) CJA does not permit the SFO to require a US-incorporated company to produce documents it holds outside the UK. The Divisional Court refused KBR's application and concluded that the CJA contained no express limitation on the persons from whom a document production could be sought. Notably, the Divisional Court ruled that section 2(3) was capable of having extra-territorial application "where there is a sufficient connection between the company and the jurisdiction"[3] (the **"Sufficient Connection Test"**). On the facts, the Divisional Court determined that there was sufficient connection between KBR and the UK, and so the July Notice was valid. KBR appealed.

2. The judgment

The Court noted that the starting point for a consideration of the scope of section 2(3) of the CJA is the presumption that UK legislation is generally not intended to have extra-territorial effect. This principle is rooted in international law and the concept of comity (i.e. mutual respect for the laws of other States).[4] The Court acknowledged that international law recognises the legitimate interest of States in legislating "in respect of the conduct of their nationals abroad"[5], but found that the presumption was clearly relevant in this case since KBR is not a UK company and has never had a registered office or carried on a business in the UK.

The Court then considered whether the presumption was rebuttable, that is whether Parliament had intended section 2(3) to confer on the SFO the power to compel a foreign company to produce documents it holds outside the UK. The SFO submitted that the

wording of section 2(3) CJA is "deliberately wide" and is not limited to documents in the possession or control of the recipient of a Notice.[6] The Court acknowledged the SFO's submissions in this respect, but noted that Parliament would normally make express provision where it intends to give extra-territorial effect to a statutory provision. Section 2(3) CJA has no such express provision.

However, the Court continued that it was possible for extra-territoriality of a statutory provision to be implied, including from the scheme, context and subject matter of the legislation. KBR argued that the CJA did not have extra-territorial effect as section 17 CJA provides that the Act "extends to England and Wales only".[7] The Court found that this provision did not assist KBR as it simply provided that the CJA formed part of the law of England and Wales, rather than dealing with issue of territoriality. The Court instead suggested that the practicality of enforcement was more relevant to identifying such implied terms.

The Divisional Court had agreed with the SFO's submission that section 2(3) CJA implied some extra-territorial scope because otherwise UK companies could resist Notices on the basis documents were stored on servers out of jurisdiction. However, in this judgment the Court held this example was not "a satisfactory basis for the reasoning"[8] because:

- It was questionable whether the legislation is given any material extra-territorial effect in this hypothetical situation;
- The presumption against extra-territoriality applies with much less force to legislation governing conduct abroad of a UK company; and
- This does not indicate the intention of Parliament for the very different circumstances of the present case, namely where the address of the July Notice is a foreign company that has never carried on a business in and has no presence in the UK.

Finally, the Court considered the SFO's further submission that extra-territorial effect may be implied where the purpose of the legislation cannot be achieved without such effect. The Court stated that the "question whether such a purposive reading is capable of rebutting the presumption against extra-territorial application will depend on the provisions, purpose and context of the relevant statute."[9]

3. Legislative history

The Court therefore examined the legislative history of the CJA, to determine whether it could be implied that a Notice had extra-territorial effect.

3.1 The Roskill Report

The CJA was enacted to give effect to the recommendations in a 1986 report of the Fraud Trials Committee, which was chaired by Lord Roskill (the **"Roskill Report"**), and led to the creation of the SFO. The Roskill Report had recommended that powers should be granted to the SFO in line with those of the then Department of Trade and Industry (**"DTI"**) under section 447 of the Companies Act 1985, to compel companies to produce documents. Whilst the Roskill Report did not deal with whether such powers should have extra-territorial effect, section 453 of the Companies Act 1985 provided that the DTI could exercise these powers in relation to foreign companies to the extent they were carrying on or had carried on business in Great Britain. However, no such equivalent provision was included in the CJA.

The Roskill Report did address the obtaining of foreign evidence for trials in England and Wales, and noted there was no power to compel someone out of jurisdiction to bring documents into the jurisdiction, and that evidence taken abroad was not admissible in criminal proceedings in England and Wales. It went on to recommend that legislation be sought to enable evidence to be taken abroad for use in criminal cases in England and Wales and that negotiations be set in train with other countries to provide for reciprocal arrangements on the taking and receipt of evidence, for example under mutual assistance treaties.

Ultimately, the Court found nothing in the Roskill Report recommending the creation of "a statutory power which would permit UK authorities unilaterally to compel, under threat of criminal sanction, the production of documents held out of [UK] jurisdiction."[10] On the contrary, the Court found that the Roskill Report emphasised the importance of establishing reciprocal arrangements for obtaining evidence from abroad.

3.2 The development of the CJA and subsequent legislation

The Court then considered the Criminal Justice Bill 1986/7 (the **"Bill"**) which became the CJA.

The Bill set out a court procedure for requesting assistance of foreign courts in obtaining evidence from abroad, echoing the assessment of the Roskill Report that existing informal procedures for obtaining such evidence through diplomatic channels tended to be ineffective. However, these provisions were removed prior to the CJA being enacted.

A similar provision setting out a procedure for requesting assistance from foreign courts was instead included in the Criminal Justice Act 1988, although this was directed at obtaining evidence for use in criminal trials and not for the investigation of crime in general. The Court found this was enough to show that Parliament intended evidence should be secured from abroad by international co-operation as envisaged in the Roskill Report, rather than by unilaterally compelling (under threat of criminal sanction) the production in the UK of documents held abroad by a foreign company.

The Court noted further subsequent legislation extended the UK's participation in international co-operation, adding weight to this assessment, including: the Criminal Justice (International Co-Operation Act 1990, the Criminal Justice and Public

Order Act 1994 and the Crime (International Co- Operation) Act 2003. The Court also noted that the UK and US have entered into international agreements relating to mutual legal assistance in both 1994 and 2003.

The Court concluded that successive Acts of Parliament had developed structures in domestic law which permit the United Kingdom to participate in international systems of mutual legal assistance in relation to both criminal proceedings and investigations. It noted that the safeguards and protections enacted by the legislation were of "critical importance" to the functioning of this international system. This included the regulation of the uses to which documentary evidence might be put and provision for its return.

The Court therefore held it was "inherently improbable"[11] that Parliament had intended for the SFO to have unilateral power to demand evidence from abroad without recourse to the Courts and without any of the safeguards put in place under the scheme of mutual legal assistance.

4. Serious Organised Crime Agency v Perry [2012] UKSC 35 (the "Perry Case")

KBR drew attention to the Perry Case as a helpful analogy to the case at issue. In the Perry Case, proceedings were brought under the Proceeds of Crime Act 2002 (**"POCA"**) by the Serious Organised Crime Agency (**"SOCA"**), which sought to deprive Mr Perry and his family of assets obtained in connection with his criminal conduct, namely a pension scheme fraud he had operated in Israel. The Judge in this matter made a disclosure order against Perry and his family under section 357 of POCA, and information notices were given to Perry and his daughters under this disclosure order by letter addressed to Perry's house in London. However the intended recipients were known by SOCA to be outside the jurisdiction of the UK. An application was made for the information notices to be set aside. The Supreme Court held unanimously that section 357 of POCA did not authorise the imposition of a disclosure order on persons out of the jurisdiction.

The Court noted that the similarity between a consideration of section 357 of POCA discussed in the Perry Case and the application of section 2(3) of the CJA in this case was "striking"[12], as were the public interest considerations in both cases. The Court also noted that Parliament responded to the Perry Case be amending POCA. These amendments did not confer on SOCA the power to demand information from abroad on pain of criminal penalties, but made provision for the mutual legal assistance procedure that respects international comity through international agreement, reciprocity and mutually agreed conditions.

5. The Sufficient Connection Test

Finally, the Court considered the Divisional Court's interpretation that section 2(3) of the CJA might confer upon SFO the power to require the production of documents held by a foreign company outside the UK provided there was a "sufficient connection" between the company and the jurisdiction of England and Wales.[13] The Court specifically considered how section 221 of the Insolvency Act 1986 (the **"IA 1986"**) has been interpreted by the courts as conferring "the widest of powers but have [also] provided a safeguard against the exorbitant exercise of those powers in the form of judicial discretion."

The Court found, however, that this broad interpretation of the IA 1986 did not provide a basis for the implication of a similar limitation on section 2(3) of the CJA. First, the safeguard of judicial discretion was only necessary due to the broad reading of the power under the 1986 Act, which was compelled by the language, purpose and context of the relevant provision. In contrast, the Court found no reason for such a broad reading of section 2(3) of the CJA and indeed indicated that such a reading would have been inconsistent with the intention of Parliament. Second, section 2(3) of the CJA confers a power on the SFO and not on a court, which means there is no scope to apply judicial discretion in interpreting this provision. Third, a statutory rule empowering the SFO to demand the production of documents by foreign companies outside UK jurisdiction when there is a "sufficient connection" would be "inherently uncertain".[14] Lastly, any attempt to imply such a limitation would exceed the appropriate bounds of interpretation and would involve "illegitimately re-writing the statute".[15]

6. Comment

This judgment is undoubtedly a setback for the SFO: it serves to limit the SFO's powers under section 2(3) of the CJA and notably restricts the SFO from unilaterally compelling foreign companies to produce documents that are held abroad where such foreign companies have no operations or presence in the UK. This setback is compounded by the fact that the UK has lost certain investigatory powers from which it previously benefitted when it was an EU member state. For example, in the post-Brexit world, the UK can no longer rely on tools such as European Investigation Orders, which previously enabled the SFO to obtain documents located in the EU expeditiously.

It is worth noting, however, that this judgment does not inhibit the SFO from seeking documents held outside UK jurisdiction in all circumstances. First, the SFO may still use its powers under section 2(3) of the CJA to compel a UK company or a foreign company with a fixed place of business in the UK to produce documents held outside the UK. Second, the SFO may still seek documents held abroad from foreign companies that have no presence in the UK through alternative channels, such as mutual legal assistance. This approach would rely on the cooperation of the SFO's international counterparts and would likely lead to a delay into its ongoing investigations.

In addition to mutual legal assistance, under the Crime (Overseas Production Orders) Act 2019, the SFO and other UK authorities, such as the Financial Conduct Authority, may be able to obtain certain electronic data pursuant to an Overseas Production Order (**"OPO"**) issued by the courts. The recipient of an OPO must provide data, usually within seven days, to the relevant UK agency. This tool provides a means for the SFO to obtain electronic data expeditiously in certain circumstances, but there are certain key limitations. First, the OPO regime is reliant on the entry of international agreements between the UK and other countries. To date, the United States is the only country to have entered such an agreement. Second, the OPO regime does not apply to hard copy and certain other materials, and so mutual legal assistance will remain a necessary route in many instances.

Despite the limitations this judgment imposes on the SFO's investigative powers, history suggests that legislative reform may follow this judgment both to clarify the intention of Parliament and to widen the scope of SFO's powers under section 2(3) of the CJA. As noted above, following the Perry Case, Parliament amended POCA to reverse the effect of the court's decision, in that case granting UK authorities an avenue to demand documents through mutual legal assistance. It is possible that Parliament may similarly respond by introducing legislative reform that will reinforce the SFO's powers under the CJA and potentially expressly permit the use of the SFO's information gathering powers on foreign companies outside the UK in certain circumstances.

It remains to be seen whether such legislative reform will be forthcoming, but for the time being, foreign companies with no presence in the UK will take comfort that they no longer risk being subject to a Notice when their representatives are physically present in the UK.

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If You Cannot Confirm the Provenance, how do you Expect me to Provide Expert Testimony?

by Dr Sophie Parsons, CEng, MIMMM BEng and PHD (Eng)

I started my career working at LGC Forensics, now known as Eurofins, specialising in the examination and reporting of trace evidence, i.e. fibres, paint, glass, and foam. I loved investigating crime scenes to establish a forensic link between people and incidents. I was known as the "Foam Queen" due to my interest in polyurethane foam evidence found in car seats, which could transfer onto the trousers of car thieves. I discovered that foams have reasonable evidential value, because of their distinctive pigments, dyes and differing rates of degradation. There are truly very few people who have the emotional and physical stamina to stare down a microscope for 8 hours a day, searching for foam on clothing and tapings taken from car seats. They were fun and challenging times and the foundation of my career in forensics.

Fast forward to 2012 and due to a family relocation I found myself in Hong Kong.

I wondered if I could get a job in the local crime laboratory but my lack of the local language, barred me from such government-related work. Eventually, I found myself working as a forensic engineer, doing accident investigation on behalf of the insurance market.

My undergraduate degree and PhD were both in materials engineering, which gave me the necessary skills to understand materials failure and corrosion, both of which were applicable to land and marine based investigative work. Having specialised in both the criminal and civil fields, I found it interesting to make comparisons between the two systems. Both have many unique features but the one that really stood out to me was the way in which evidence is handled in civil work.

One of the most critical and fundamental concepts in forensic science is the Chain of Custody. Put simply, this is chronological paper trail recording; where the item came from, who handled it, its current location and the location of all the supporting documentation to back all of this up.

When conducting criminal investigations, the chain of custody was very clear on all my cases. If a chain of custody was unclear, I understood the item was not admissible in court. Therefore, the paperwork was, and still, is extremely important.

In civil accident investigation cases, I noticed that this system was less rigorous and I had to explain to clients that if and when the case went to court, establishing the provenance was critical.

Marine based investigations are, by far, my favourite type of case work. I love nothing more than taking a launch out to sea, boarding a vessel, finding a broken or corroded object, taking samples back to the laboratory, and figuring out what happened and why the object failed.

Writing a court compliant report and then providing expert testimony is the ultimate stage, and one I enjoy enormously. When you are invited to stand before the court, as an expert witness, you have the opportunity to talk to a room about a subject that fascinates you, and the best part is that everyone is forced to listen. Sometimes the questions posed by opposing counsel are challenging, but that is part of the job.

I have had several experiences in marine based case work where the sampling methods and samples themselves were questionable, which could compromise the chain of custody.

One of my favourite examples involved travel to a dry dock in Asia to inspect the hull of a vessel, which was damaged, and to determine the nature and circumstances of the crack and hole observed by the crew, i.e. who or what did it, and how. When I arrived at dry dock, I was given access to the vessel and the crack damage, and I proceeded to mark out an area of the fracture surface that I wanted to have sectioned for later examination in the laboratory:

Above, inspecting the hull of a vessel, which was damaged

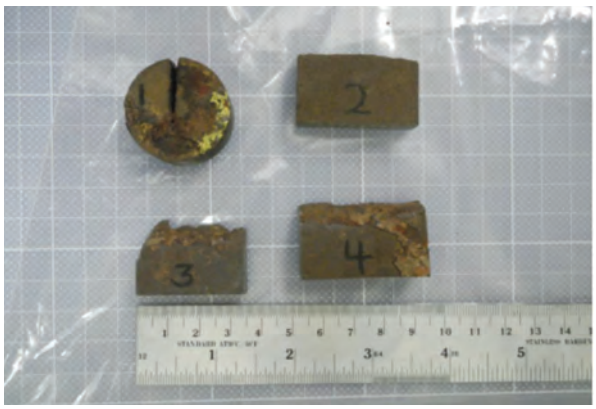
Normally, microscopic examination of a fracture surface can indicate the failure mode by identifying distinctive features along the surfaces of the material. After marking up the relevant areas of the crack, I was told that it was too dangerous for me to witness the steel containing the crack being cut out using an oxy-acetylene torch. An hour later, I was presented with a large piece of metal from the hull of the ship. I asked which part of the crack it originated from but was informed me that the crew did not know. It transpired that my marked-out areas had indeed been cut out but sadly, had been dropped into the sea, which was rather unfortunately, 13 metres deep.

To avoid disappointing me, the crew decided that providing me with another random piece of the hull, in no way associated with the fracture, might suffice.

After realising my evidence had been lost, I asked if I could be provided with a magnet and a rope to retrieve my evidence from the sea bed. It turned out there were no magnets or spare rope in dry dock, and there was insufficient time to find and instruct divers to find the pieces.

I persisted and was miraculously given permission to witness another attempt at removing more sections of the crack, along the fracture surfaces. During this time, I was told again to keep my distance for safety reasons and watched a welder wearing flip flops, light a cigarette with the acetylene torch before removing the pieces. The picture below was the aftermath of the hot-work.

I travelled back to the laboratory, with 20kg of metal on my back and had the samples further sectioned down for the necessary tests, as shown below:



I learned a very good lesson - I should always be present during any cutting/removal work in order to make sure that the correct samples are being taken.

Thankfully, due to my persistent and pedantic nature, I was able to find out what happened and correct it, in this case, and secure the relevant evidence.

In addition to being present and involved with sampling methodology and its subsequent execution, we as experts in a marine context need to ensure that the samples reach the laboratory safely.

I mentioned carrying heavy metal previously, which you can do if it is considered safe and not breaching any health and safety regulations.

However, if the case material is a metal ore cargo, such as nickel or aluminium, this is not practicable. Metal ores are shipped in bulk carrier vessels, usually in cargo holds that can hold in excess of 20,000 tonnes of material. Bulk carriers can experience liquefaction of the cargo, in which the bulk materials can enter a liquid state, causing instability and sometimes capsize. When the cargo is observed to be in the early stages of liquefaction, and forensic engineers can sample the material on-board, and test it establish whether the cargo was safe to load.

Due to the nature and size of the cargo stored in each cargo hold, sampling quantities can vary between hundreds of kilograms to several metric tonnes. To maintain the chain of custody, I need to ensure that the samples are bagged, tagged, and transported appropriately. I have, in certain circumstances, sat with the bags of nickel ore in a truck to ensure that they reach their target destination.

While marine investigation work is excellent fun, experts need to be robust when it comes to overseeing sampling of material/cargo and transportation to the laboratory. I find it is best to communicate the importance of chain of custody from the outset, making it clear to the Master of the Vessel and the Ship Owners in advance that I wish to sample the broken/corroded material or cargo.

When I am finished with my inspection on board, I request either the Chief Officer or the Master to sign the chain of custody documentation to indicate that they have released the item to me.

When I arrive at the laboratory, I request the exhibit handlers on site to sign that they have received the items, allowing me to commence preparing a court compliant report, knowing that I have secured the provenance.

Finally, all I need to worry about is the science, my ability to convey it appropriately to the court, and of course how to maintain good decorum on Zoom. In these truly novel times, you worry about your bandwidth as much as your appearance and demeanour.

Author
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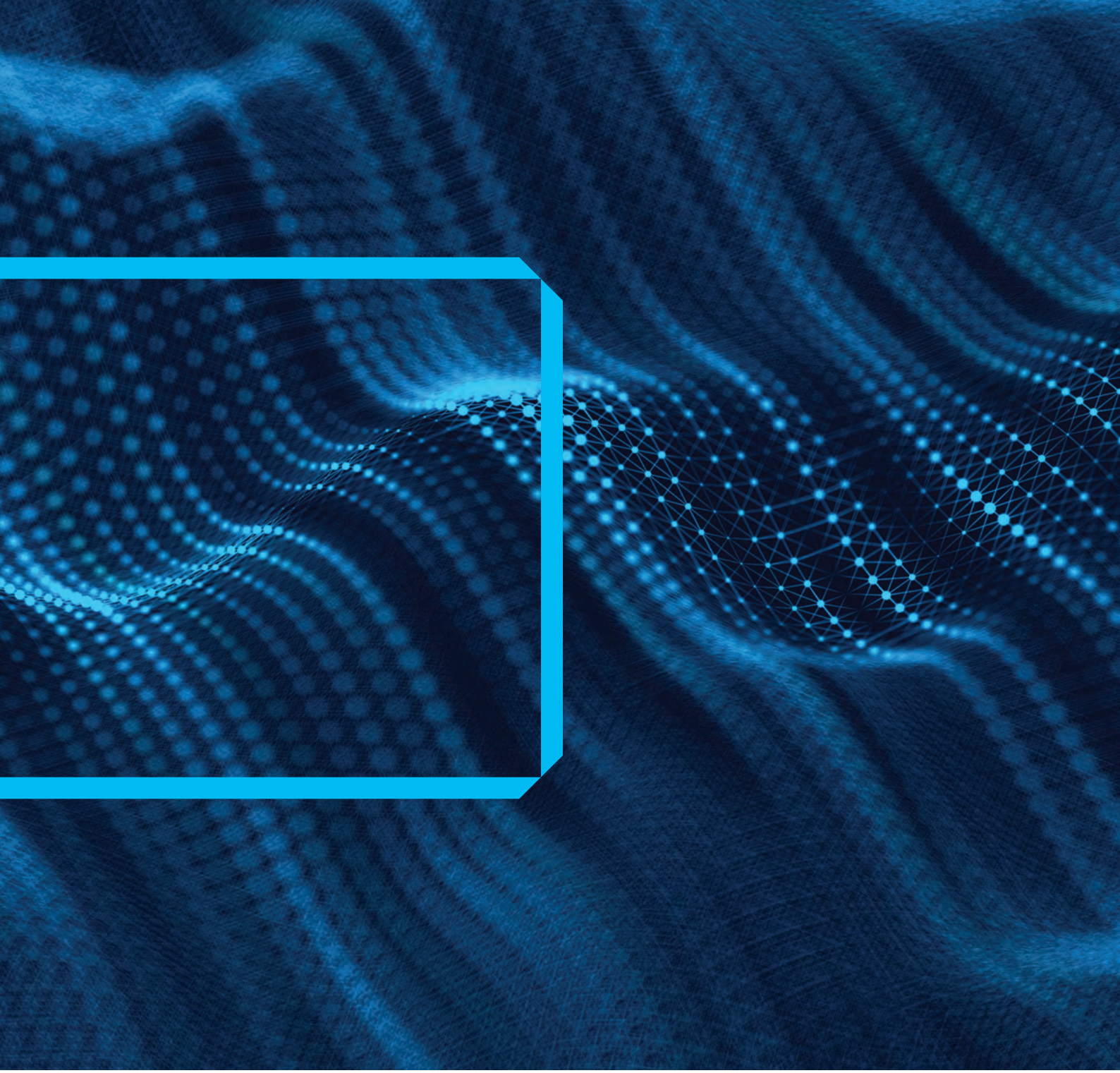
Sophie is a Principal Associate with Hawkins in their London office. In addition to her casework, Sophie regularly presents to law firms, P&I Clubs and loss adjusting companies on materials failure analysis, corrosion, and cargo/liquefaction matters. She is available 24/7 to discuss any urgent matters. '



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Spain and United Kingdom: Cross-border Criminal Evidence Gathering - The Use of European Investigations Orders in Spain and England & Wales

by Juan Pedro Cortes, Henry Garfield, Mark Banks, Eleanor Wallis, and Lucy Player-Bishop of Baker McKenzie.

The last 10 to 15 years has seen a significant increase in criminal enforcement against companies, and an increase in co-operation between states when investigating and prosecuting corporate crime. As a result, multi-jurisdictional companies (and their employees) are at greater risk than ever of becoming involved in a criminal investigation, whether as a suspect or a witness. It is therefore important that companies and their employees are aware of the process that will be followed if they are required to provide evidence as part of a criminal investigation, and how best to prepare for that process.

In brief

The last 10 to 15 years has seen a significant increase in criminal enforcement against companies, and an increase in co-operation between states when investigating and prosecuting corporate crime. As a result, multi-jurisdictional companies (and their employees) are at greater risk than ever of becoming involved in a criminal investigation, whether as a suspect or a witness. It is therefore important that companies and their employees are aware of the process that will be followed if they are required to provide evidence as part of a criminal investigation, and how best to prepare for that process.

In this paper we will outline the process of taking evidence for use in criminal proceedings in Spain and in England & Wales, specifically witness evidence. First we focus on the domestic position in each jurisdiction, but then we turn to focus on the use and execution of European Investigation Orders (EIOs). EIOs were introduced in May 2014,[1] with the aim of simplifying the process of obtaining evidence from EU member states in cross-border criminal cases. We will conclude by addressing the question of preparing and assisting witnesses for giving evidence as part of criminal investigations, particularly within the framework of an EIO.

Domestic approach to gathering witness evidence: Spain and England & Wales

Spain

Evidence gathering

In Spain, criminal proceedings are regulated primarily by the Criminal Procedures Act (CPA), which has been in force since 1882. The CPA divides criminal proceedings into two stages: the investigative stage and the trial stage. Each stage is functionally entrusted to separate judicial bodies.

The first stage (the investigative stage) is aimed at carrying out an investigation of the suspected criminal conduct, in order to determine whether the conduct should be admitted for judgment at trial (the second stage). The first stage is when so-called "investigative measures or procedures" are carried out to establish, based on the available evidence, the possible existence of a crime, as well as the type of offence(s) and the alleged perpetrator(s).

One of the main investigative measures deployed in the first stage of Spanish criminal proceedings is that of witness depositions. This investigative measure is regulated by Articles 410 to 450 of the CPA.

Witness testimony is obtained personally from the witness. It consists of a natural person, other than the suspect, testifying to the facts as they know them. Witness testimony is based on sensorial perceptions that were acquired outside the proceedings and in relation to some past event.

Witness depositions must be ordered by a judge and their purpose is to investigate the facts, to determine who was responsible and, as appropriate, to order other measures.

As a general rule, any individual residing in Spanish territory, regardless of their nationality, may be called as a witness if they can provide some information of interest in relation to the investigation of the facts. To that end, the witness will be summoned by the court clerk via subpoena (except in urgent cases). The subpoena will include, among other information, the subject matter of the summons and the place, date and time the witness is to testify.

Testifying constitutes a duty that, in turn, generates a number of obligations that arise from Article 118 of the Spanish Constitution[2] and which can be classified as follows:

❖ The obligation to appear before the judge constitutes the first obligation of a witness.[3] Like most obligations, violation of it entails a penalty; specifically, a fine that can range from EUR 200 to EUR 5,000. In certain serious cases, it could entail arrest for the obstruction of justice or gross disobedience.

❖ When appearing before the court, the witness is obliged to testify, and refusing to do so could trigger prosecution for obstruction of justice or gross disobedience.

❖ This general rule has certain exceptions: (i) any person that is obliged to observe secrecy due to their office or position is exempt from testifying; (ii) said exemption is also enjoyed by the suspect's closest relatives;[4] and (iii) individuals with physical or moral disabilities that impede them from giving a statement are also exempt.

❖ Finally, the witness is obliged to tell the truth. To such end, they will testify under oath and failure to comply with said obligation constitutes the crime of perjury.

In addition to these obligations, witnesses also have certain rights, such as the right to receive adequate compensation from the party that calls them as a witness.[5] Said compensation must be sufficient to cover travel and subsistence. However, failure to receive such compensation in advance does not absolve the witness from their obligation to appear before the court. Likewise, as part of witnesses' fundamental right to the presumption of innocence, they are entitled not to testify against themselves nor declare they are guilty, pursuant to Article 24.2 of the Spanish Constitution. Witnesses shall not be obliged to testify about facts or respond to questions that could imply criminal liability for them. If, in the course of the deposition, such circumstance becomes evident, the deposition will be suspended immediately and the legal provisions established for suspect depositions will be followed.

Practical aspects
During the deposition, a witness cannot be accompanied by a lawyer, unless they are a victim of the crime, in which case they may be accompanied by their legal representative and a person of their choice. Likewise, in the case of witnesses who are minors or who lack capacity, the examining judge may agree to have the deposition executed through the intervention of experts and the public prosecutor.

Depending on the technical capabilities of the court, the deposition will be recorded in writing (transcribed) or in an audio-visual format.

Once the witness has been summoned and has appeared before the court, they will testify, assisted by an interpreter if necessary (always in the context of executing an EIO) and, after verifying their identity by means of their national identity card, and once they have taken an oath to tell the truth, they will answer "general legal questions" regarding their personal data and their possible relationship or conflict with the other parties in the proceedings.

The witnesses will then freely and spontaneously narrate the facts that are the subject matter of the lawsuit. Thereafter, the judge will ask the questions they deem necessary to clarify the facts, then allowing the Public Prosecutor's Office and the rest of the parties (or their lawyers) to ask their questions.

Once the deposition is over, the court clerk will inform the witness of their obligation to appear and testify again before the competent court when they are summoned to the trial to provide their part of the witness evidence. The court clerk will also warn the witnesses that they are obliged to keep their testimony confidential and that they are forbidden from disclosing its content or from making any public statement in relation thereto.

The witness deposition (whether transcribed or in audio-visual format) will be documented in the appropriate certificate, which will be legalised by the court clerk and provided to the parties.

England & Wales

Evidence gathering
The process in England & Wales for gathering evidence during a criminal investigation differs to that in Spain. In England & Wales, the police and particular regulators/prosecution authorities have their own powers to gather evidence and interview suspects or witnesses, which is then presented before a judge/jury during the course of a criminal trial.

The Police and Criminal Evidence Act 1984 (PACE) governs the powers of the police to investigate and gather evidence in relation to suspected crimes. PACE will also apply to persons other than police officers who have been charged with the duty of investigating offences or charging offenders.[6] PACE (and its accompanying codes of practice) sets out the relevant powers (and the conditions on the exercise of those powers), including to interview suspects.

In addition, specific bodies charged with the investigation of financial and business crimes have their own powers to investigate offences that fall within their remit. Such bodies include the Serious Fraud Office (SFO), which investigates (and also prosecutes) serious or complex fraud, bribery or money laundering, in respect of offences committed by both individuals and corporates. Section 2 of the Criminal Justice Act 1987 grants certain investigative powers to the SFO (section 2 powers), which include powers to:

❖ search property

❖ compel a person to provide information or documents to it

❖ compel a witness or suspect to attend an interview

In respect of (b) above, the SFO will issue what is known as a section 2 notice to an individual who it believes holds any information relevant to its investigation, thereby compelling it to produce this to the SFO. If the section 2 notice is being issued in respect of documents or evidence held by a company, it will usually be personally addressed to the most senior member

of the organisation who is aware of or responsible for the matters under investigation. A deadline for compliance will ordinarily be set in the notice. It is a criminal offence to fail to comply with a section 2 notice without a reasonable excuse. A section 2 notice will supersede any obligations of confidentiality, but legally privileged material does not have to be provided.

In respect of (c), the SFO can compel a potential witness to attend an interview in order to answer all questions on any matters relevant to the investigation fully and accurately. As above, it is a criminal offence to fail to do so, without a reasonable excuse, or to make a statement recklessly or deliberately that is known to be false or misleading.[7] However, the witness is otherwise protected against self-incrimination, meaning that anything said in the interview cannot (in most circumstances) be used as evidence against them,[8] and the interview cannot be used as a means to obtain material subject to legal professional privilege.

As in Spain, anyone who is required to attend the SFO's premises to be interviewed as a witness may be entitled to seek reasonable expenses from the SFO (but this does not apply to any legal representative accompanying them).

Finally, it is worth noting that, in relation to suspected offences under the UK Bribery Act 2010, the SFO can request the disclosure of information under its section 2 powers even before an investigation has commenced.

Practical aspects

If the SFO elects to interview a particular witness during an investigation, it may be as simple as a phone call or an invitation to attend the SFO offices on a voluntary basis. However, as explained above, the SFO also has the option to compel a witness to attend an interview by issuing a section 2 notice.[9] Once the notice is issued, the recipient must attend the interview at the time and place specified[10] and answer all questions truthfully on any topics relevant to the investigation.

The SFO has the discretion to allow a lawyer to accompany the witness to the interview. Accordingly, on receipt of a section 2 notice, it is important for the recipient to promptly seek legal advice; especially as the lawyer is required to apply to the SFO in order to attend the interview. The SFO will approve the request in the event that they consider the lawyer will either assist the purpose of the interview or provide essential assistance to the witness (whether to give legal advice or provide pastoral support). An additional legal representative is also able to attend to take notes by hand, though the interview is not allowed to be recorded or transcribed by the attendees.[11] If the lawyer in any way obstructs the interview process or prevents the free flow of information, the SFO is able to exclude the lawyer from the interview. The SFO retains discretion to refuse the presence of a legal representation at the interview, for example if the lawyer's attendance would cause a delay to the interview.

During the interview process, the SFO is required to uphold certain standards including treating the witness fairly, explaining the investigation process and ensuring the witness is protected from undue influence or intimidation. Once the interview is completed, the witness is required to keep all matters discussed confidential (though discussions are, of course, permitted between lawyer and client). The confidentiality requirement is to ensure the investigation is not disrupted (and disruption of an investigation could amount to a criminal offence). This is of particular importance when employees are called as witnesses in respect of an investigation into their employer (or facts relating to their employer). In these situations, it is of particular importance that the employee has its own independent legal advisor, separate to the company's lawyers. Finally, the SFO may also ask the witness to provide a written statement, though it cannot compel the witness to do so.

In the context of a police investigation, a person may be brought to a police station under arrest (if they are a suspect) or otherwise attend the station voluntarily. The police must allow for proper breaks (at least 15 minutes every two hours).

Importantly, in the case of voluntary attendance, the attendee is free to leave at any time.

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References

1 EIO were introduced by way of Directive 2014/41/EU of the European Parliament and of the Council, dated 3 April 2014 DOEUL no. 130, dated 1 May 2014. In Spain, the directive was transposed via Act 3/2018, dated 11 June, which amended Act 23/2014, dated 20 November (regarding the mutual recognition of judicial decisions on criminal matters in the European Union) and regulated the European Investigation Order. Act 3/2018 was published in Spain's Official State Gazette (BOE) on 12 June 2018. In England & Wales, the directive was transposed via the Criminal Justice (European Investigation Order) Regulations 2017 (SI 2017/730).

2 "Individuals are obliged to comply with the final judgments and decisions issued by Judges and Courts, as well as to collaborate with them in the course of the proceedings and in the enforcement of court decisions." Art 118 Spanish Constitution.

3 This duty has some exceptions, as can be expected, in the case of the King, the Queen, their respective consorts, the Crown Prince, the Regent and diplomatic agents. The other persons in the royal family, as well as presidents or members of the government will also be exempt from having to appear before the judge but not from testifying, as they can do so in writing, regarding facts that they know due to the office they hold, among others.

4 "The following individuals are exempt from the obligation to testify: the direct ascendant or descendent relatives of the accused, their spouse (or person holding a de facto relationship analogous to marriage), their siblings by blood or marriage, and the collateral blood relationships up to the second degree of consanguinity, as well as the relatives referred to in Article 261.3. The examining judge shall warn any witness included in the preceding paragraph that they are not obliged to testify against the accused; but that they may make such statements as they deem appropriate, and the clerk of the court shall record their response to said warning." Art. 416 CPA.

5 Either the prosecutor or the defendant.

6 Section 67(9) of PACE.

7 Section 2(14) of the Criminal Justice Act 1987.

8 The main exception here is where the witness is later prosecuted for a separate offence and the evidence the witness gives for the separate offence contradicts the evidence previously given for the earlier interview.

9 Pursuant to section 2 of the Criminal Justice Act 1987. Importantly, the SFO does not need to obtain a court order to issue this notice.

10 In practice, the time and location is usually agreed by the SFO and the recipient in advance.

11 For this reason, digital devices are not allowed in the interview room. However, the SFO are likely to digitally record the interview and will explain this procedure in advance of the interview.

Ten Golden Rules for Testifying Experts

"As the old adage goes, "stick to your knitting" – avoid making statements in your report that you cannot justify or do not have the expertise to support." ***Peter Caillard,*** *Principal, HKA*

Many words of wisdom have been penned for the Expert Witness embarking on his or her first experience of testifying, and numerous training courses exist to coach the Expert through the minefield of the courtroom experience. Despite this, the Experts who perform best on the witness stand are not necessarily those who have attended the most training courses, or with the highest level of technical knowledge, but those who understand the importance and value of the Expert in the courtroom and, in particular, those who follow a few basic rules.

1. Be prepared.
Probably the number one golden rule! It is often said that to fail to prepare is to prepare to fail. Never is this truer than on the witness stand. Ensure that you know your report inside out. This is particularly important in the case of jointly authored reports. Opposing counsel frequently enquires at the start of cross-examination 'for which parts of the report are you responsible?' Make sure that you can answer for everything for which you have acknowledged authorship.

Never allow yourself to be caught out by your own words. Read and re-read your report such that you're fully familiar with everything you have said.

Ensure that you understand as much about the procedural process as possible and, should the opportunity avail, visit the venue in advance to familiarise yourself with the layout of the facilities.

2. Remember that your role is to assist the arbitrator.
Although opposing counsel asks most of the questions, your answers are to the arbitrator. Try to look at the arbitrator when answering. It will help keep their attention. Eye contact indicates truthfulness. Always consider how your answer will help him – and do not hesitate to provide additional explanation if pertinent to the question and will assist the arbitrator's understanding.
Strive to impart upon the arbitrator the utmost confidence in you and your testimony. If he is confident that you have taken your duty of impartiality seriously, and that your focus is solely on assisting him understand the issues and reach his decision, then the influence of your testimony is hugely enhanced.

You should never act, or be perceived as acting, as a 'hired gun'. The witness who is seen to simply defend the case of his appointing party, however well-trained, however skilled, however eloquent, will not command the confidence of the arbitrator, and the impact of his evidence will be fatally diluted. The hired gun has shot himself in the foot!

Your credibility depends on the demonstration of your independence.

3. Do not stray beyond your knowledge.
As the old adage goes, "stick to your knitting" – avoid making statements in your report that you cannot justify or do not have the expertise to support. If under cross-examination the questioning goes beyond your knowledge or areas of expertise, you are fully entitled to point this out or caveat your responses accordingly. However, should the questions relate directly to opinions expressed in your report, you will appear weak if you cannot substantiate or defend your own words.

As the old adage goes, "stick to your knitting" – avoid making statements in your report that you cannot justify or do not have the expertise to support.

Keep to your instructions and your opinions on those matters. Do not try to be the advocate of your client's case. That's someone else's job!

4. Do not think that conceding a point is a weakness.
There are few more cringeworthy sights than an Expert squirming in the witness box as he attempts to defend a point as if his reputation depended on it. Actually, his reputation does depend on it; his reputation with the arbitrator depends on an accurate and relevant answer. Even if a concession might appear to weaken your client's case, it is far better to concede it and move

on, than to have excessive attention drawn to it by a skilled opposing counsel slowly taking you apart.

Where possible, turn the point to your advantage. The best approach is often to answer the question directly, then justify it. 'That is correct…However…' Use the opportunity, having directly answered the question, to explain why it is of no relevance, did no damage, was corrected by other matters, etc.

It is rare that an Expert sets out to deceive. But sometimes he can get carried away in his enthusiasm to defend his client's case. Remember, it is not your role as the Expert to defend their client's position. Your duty is to the arbitrator, and to give your Expert opinion on the matters referred to you to assist him with his decisions.

5. Never display irritation with the questioner or answer back.
In my dreams I think of all the retorts, the witty one-liners, or put-downs I would like to discharge at some of the interrogators I have faced in the past, but in my dreams is where such thoughts firmly stay! The Expert's ability to remain calm, resist provocation, and deliver a consummate professional performance is fundamental to gaining and retaining the confidence of the arbitrator. The arbitrator is unlikely to be a technical Expert in the subject under discussion. He needs your advice. Focus on that, and do not slide into pointless arguments.

There is never any benefit in locking horns with the opposing counsel. If your arguments are sound, your calm and reasoned responses to the questions will demonstrate the strength and validity of your opinions. An argumentative approach will be perceived as defensive and weaken your credibility.

6. Plan for any potential weaknesses in your curriculum vitae.
It is common practice for opposing counsel to commence his examination by questioning your CV; perhaps trying to imply a lack of experience in a particular field or jurisdiction. However, you can turn this into an opportunity. You should never claim experience that you do not possess, but you can use your answer to remind the arbitrator about the skills and experience that you do have; focussing on matters directly relevant to the issues in question.
Ensure you can reel off previous projects which involved similar type of work, or used similar contract forms, or were in similar locations. Demonstration of direct and relevant practical experience will always lend strength to your credibility.

7. Understand the opposing expert's viewpoint.
It is easy, having spent many months preparing your reports, to be dismissive of the other side's evidence. Do not fall into this trap. Ensure that you know as much as possible about the opposing Expert's views and know what they've said about your work. You do not have to agree with their views, but if you are ignorant of them you risk being caught out on the stand. They may indeed have identified a flaw in your arguments. If they have, you need time to respond. The witness stand is not the time to find out that your arguments are not as watertight as you thought!

Equally, should you have identified clear failings in your opposite number's opinions, you may even get the opportunity to point this out to the arbitrator in response to a question.

8. Listen very carefully to the question.
Ensure that you listen to and understand every question posed. If necessary, request that it be repeated. Failure to answer a question simply because you misunderstood it may give the impression of evasiveness. Sometimes counsel will ask long wandering questions with all types of extraneous comments slipped in. Take care not to agree with everything that is put to you!

Answer the question as directly as you can, then explain or caveat your response as necessary. Avoid hesitating when responding. I have seen too many Experts hesitate when asked a question, not because they cannot answer, but because they feel a direct answer would be detrimental to their client's case. Failure to give a direct answer to a direct question reduces credibility.

9. Focus on the questioner and the arbitrator.
Look the questioner in the eye when he asks his question. Look the arbitrator in the eye when you respond. Avoid too much eye contact with your own appointing legal and client team – a glance in their direction can give the appearance that you are seeking reassurance about your performance. Even an innocent glance following response to a question can appear to be asking "was that the answer you wanted me to give?" Focus on the questioner and arbitrator only!

10. Own the court
When on the witness stand, try to 'own' the place. You are the centre of attention. Rightly take the attitude that, on the subject in question, you are the most knowledgeable person in the room, and are there to advise and inform the court such that it can reach its decision. Answer the questions at your own pace and in your own way. Dress smartly and speak with confidence, even if you are wracked with nerves (as we all are – every time!).

In summary
Many people find cross-examination a daunting experience, but it needn't be. Follow a few simple rules as outlined above and your testimony will receive the respect, and achieve the influence, that a properly prepared testimony deserves.

It has been said that, of the level of influence exerted by a testifying Expert, only 10% is attributable to the words used. The remainder is conveyed through voice, body language, demeanour, attitude, and confidence. If the arbitrator believes in you, he will believe in your product. Job done!

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‘All Art is Theft’ - Pablo Picasso (misquoted)

“We saw it as a perk of the job; we were merely stealing from the dead”. This was from one of the ‘Cols Rouges’, the society of auction house porters at Hotel Drouot, the principal Paris art and antique auctioneers, on trial in March 2016. The ‘cols rouges’ soubriquet came from the red trim on the collars of the porters’ black uniforms, which they wore with white gloves. He was accused, along with 42 of his fellows and 6 auctioneers, of systematically stealing thousand of items worth millions of euros, most from deceased estates where detailed inventories did not exist – the pieces disappeared at the time that the houses were being cleared. If the non-appearance of an item at the auction rooms was queried, it miraculously re-appeared.

Those pieces included many items from the estate of Marcel Marceau, the world famous mime, who died in 2007 leaving a tax debt of several million euros – his daughters were livid when it came out in court that many of his personal effects had been purloined by the porters, including personal items from a trunk. Two pieces of furniture by the Art Deco designer Eileen Gray disappeared from her estate for three months in 2006 and then turned up at auction, where they made a combined total of over 1,000,000 euros. One porter said that they had no idea of the value and that the items were to have been “hauled away by the rag and bone man”. Other thefts included a Ming porcelain plate which fetched 325,000 euros, sketches by Picasso and a Marc Chagall oil painting.

Talk was of a “near-mafia” system and a practice which had become “habitual, even institutional”. As well as stealing complete items, part of an object would temporarily disappear, be sold at auction cheaply as it was not complete and be sold subsequently at a much higher price with the missing piece restored.

The investigation had begun in 2009, chasing a Gustave Courbet painting that had disappeared in transit in 2003. After 147 raids and the discovery of nearly 6,000 stolen items, estimated as weighing over 250 tons, the arrests were made. 30 of the porters, together with three of the auctioneers, were sentenced to up to three years in jail with eighteen months suspended, and each fined 60,000 euros, except for the auctioneers, who were each fined 25,000 euros. The ‘Cols Rouges’ were disbanded.

I could not help recalling that, when I worked in the London auction rooms many years ago, it was on the grapevine that one porter retired as the owner of eleven houses, but of course that could never be true!

How much art is stolen to order? How much is a target due to minimal security? How does the law differ from country to country in connection with legal ownership? When does stolen art become cultural appropriation? Let us dig deeper.

How much art is stolen to order?
The FBI reckon that about $6 billion worth of art and antiques is stolen worldwide every year. Other opinion puts this closer to $8 billion. That's more than 50,000 individual pieces. London alone accounts for about £500,000,000 each year. It is the third highest grossing criminal activity after drugs and arms dealing. The recovery rate is as low as 1.5% according to the *Art Newspaper,* others putting this up as high as 10%. However you look at it, it is low by any standards. London is a centre for stolen art as it is one of the centres of the global art market and moving art is commonplace. Nearly 50,000 are directly employed in the art and antiques market; it is reckoned that the UK has a 21% share of a $56 billion per year global art market.

Given the sums involved, it is hardly surprising that stolen art is used as a currency to fund drugs, arms and terrorism. If you want to buy a £2,000,000 house, there will be weeks of paperwork and checks and balances. If you want to buy a £2,000,000 work of art, the entire transaction could consist of a telephone call and a money transfer. No wonder central government want to introduce more regulation.

But to return to the question. Most thefts are for a quick sale, involving pieces that are easy to sell on without detection. The more valuable works of art are less frequently targeted as their theft will often engender a great deal of money and resources spent on recovery and it would need a rich individual to buy a work known to be stolen which could never be put on show outside their own property and even then with extreme caution.

On 1st January 2000 two thieves stole Paul Cezanne's view of 'Auvers-sur-Oise' from the Ashmolean Museum in Oxford, after breaking through a skylight, climbing down a rope and deploying a smoke bomb to cover the CCTV cameras. The painting has never been recovered and the police consider that this was stolen to order. It was considered in 2000 to have a value of about £3,000,000; now it would be considerably more, probably at least £10,000,000 'Poppy Flowers' by Vincent Van Gogh has been stolen twice; the first theft was in 1977 when it was stolen from a museum in Cairo and was recovered in 1987 in Kuwait. In 2010 it was stolen from the same museum and has yet to be recovered. Given its current estimated value of $55,000,000, perhaps the reward of $175,000 was just not enough. As a known work of art which is not difficult to find an image of, it could not be sold in the auction market and is likely to grace some billionaire's wall for the time being - if not stored away for now.

How much is a target due to minimal security?
Security is always a headache, particularly for museums with limited budgets, but churches have to be on the lookout for thieves on a continual basis, particularly if the church is the custodian of a valuable painting. Italy has a large number of such lucky churches, so it was fascinating to read in March this year of a church in Castelnuovo Magra, Liguria, where a gang of thieves thought that they had stolen Pieter Breughel the Younger's 'The Crucifixion', worth 3,000,000 euros. After a tip off, a copy of the painting had been swopped by the police for the original and secret cameras installed to catch the thieves in the act. This ensured that the real work was not damaged in the smash and grab lunchtime raid.

Several thefts from museums are inside jobs, particularly as many are from the archives and involve items on which research may yet need to be carried out. The loss may not be detected for years and even then may not be reported. The Victoria and Albert Museum in London became aware that trays of coins were being borrowed "for study purposes", the most valuable then removed and replaced with forgeries. A few years ago, the FBI discovered that pages stolen from books in the Vatican Library had been removed by an American professor who had been working there on secondment.

In a private home, apart from arranging adequate insurance, the main purpose would be to stop art being stolen in the first place. Most would cavil at a £10,000,000 painting hanging on the wall and not be prepared to pay for the alarms and additional security that would now be mandatory. Indeed about 30 years ago I became involved in a minor role with advising a private client on the sale of 'The Opening of Waterloo Bridge', the last major painting by John Constable, exhibited at the Royal Academy in 1832. It had hung over the fireplace in the living room of a manor house until the point that it was on loan for six months in the year, principally in the USA and Japan, and was bought by the Tate Gallery as a private treaty sale. My clients bought a slightly later 19th century view of St Pauls from the river to replace it, costing five figures rather than seven or eight and everyone could relax.

How is good title to a work of art gained?
What if it is stolen? Common law in the United Kingdom states that you cannot acquire good title as the buyer if the seller never had it in the first place. In Europe civil law is what is relevant and whether or not an item was bought in good faith. This might also go part of the way to explaining why a third of all paintings recovered after being stolen in the UK are found abroad.

There is also a special time limit in the case of theft as covered by the Limitation Act 1980. Under actions founded on tort, title to a converted chattel by the former owner is "extinguished". But when theft is involved, different rules apply.

How does the law differ from country to country in connection with legal ownership?
The Chinese government has, for a number of years, attempted to claim back any of the art and antiques looted from the sacking of the Summer Palace by

British and French forces in Beijng in 1860 and occasionally put up for sale in the West. Many of the artworks, including porcelain, jade, gold objects and textiles, are now found in 47 museums around the world. Many have ended up at the Chinese Museum in the Palace of Fontainebleau, established by the Empress Eugenie to display these new acquisitions.

In the 19th century, nothing could be done to reclaim the stolen items, but the Chinese government now wishes to bring back to the country those pieces that were regarded as amongst the best examples of Chinese art and craftsmanship. 7 statuettes from the Garden of Eternal Spring have been returned. 7 of 21 columns on show at the KODE Art Museum in Bergen, Norway were returned to Beijing University in 2014 as part of an agreement with a millionaire philanthropist.

From time to time, an artwork is brought forward that has been in the possession of the descendants of one of the soldiers at the Summer Palace in 1860. However, when such items have been entered in auctioneer's catalogues, the Chinese authorities have been in touch and the lot then removed from sale. Currently salerooms will not accept antiques with such a provenance.

The state-run China Poly Group, which includes the world's third largest auction house, and specifically its subsidiary Poly Cultural & Arts Co Ltd follows a programme which is dedicated to locating and recovering lost art. In 2009 a delegation was despatched to the West to locate looted Chinese art in museums around the world. Their main aim is to recover the 12 bronze zodiac fountain heads from the Summer Palace. Some have been bought back at auction, including two by a Chinese buyer in 2009 who refused to pay: the heads were then donated to China. Four of the heads remain undiscovered.

And it is not only the Chinese government that wishes to claw back its heritage. There is a new layer of Chinese super-rich collectors, thought by many experts to be behind recent thefts. In 2010 a gang broke into the Chinese Pavilion in the grounds of Drottningholm Palace, Sweden and stole pieces including a rhinoceros horn chalice, a green soapstone sculpture, a muskwood plate and a bronze teapot in just six minutes. In the same year 56 pieces were stolen from the KODE Museum; more were stolen in 2013. In 2012 a jade bowl and a porcelain sculpture were stolen from the Oriental Museum at Durham University and 18 items, including Chinese jades from the Fitzwilliam Museum in Cambridge. In 2015 22 further items from the Summer Palace were stolen from the Chinese Museum at Fontainebleau; this was a targeted theft as the other 1,500 rooms in the chateau were ignored.

Chinese billionaire art collectors now outnumber their American counterparts and, in the opinion of the Art Loss Register are the main buyers of Oriental art stolen from western museums. The Register notes: "There is also a widely held view that these pieces are not legitimately held in the West so there is nothing wrong acquiring them if they have been stolen from a western museum".

When does stolen art become cultural appropriation?

Probably the best known example of cultural appropriation is the Elgin marbles, removed from the Parthenon in Athens in the early 1800s and sold to the British government, who donated them to the British Museum in 1817. The museum has categorically refused to return them. At least they have been conserved for future generations to enjoy, wherever their location.

A continuing controversial area is the theft by the Nazis of art and antiques from German Jews. Hermann Goering hand wrote a catalogue of his large collection of art. This list includes details of Jews and others from whom the works were bought for minimal amounts or confiscated and where they were sent. The first entry dated April 1933 records the purchase of a Jacopo de'Barbari oil on wood, bought in Rome for 12,000 lira. Details of 1,375 paintings follow. Most of the works were gathered at Carinhall, a hunting estate outside Berlin. There were paintings by Monet, Van Gogh, Renoir, Corot, Rubens, Botticelli, Tintoretto and a large group of Lucas Cranachs. It is a fascinating insight into the changing taste of someone known for his brutality. In his hunting lodge the haul was carelessly displayed, without any consideration for presentation. The record stops suddenly in spring 1944. At the end of the Second World War the collection was packed into vans and Goering blew up Carinhall behind him as he left to flee south. Allied soldiers recovered the hoard in Bavaria. In 1945 the New York Times estimated the value of the works at $200,000,000. On the witness stand at the Nuremberg Trials Goering said "I admit I had a passion for collection. And if they were to be confiscated, I wanted my small part". The Reichsmarschall later took a cyanide pill before he could be hanged.

During the time that the Nazis were in power, they systematically plundered art and cultural property from every country that they occupied. Organisations were specially formed to determine which public and private collections would be most valuable. Some were earmarked for Hitler's Fuhrermuseum at Linz in Austria, which never came to fruition. Hitler believed that much of the finest art in the world belonged to Germany and had been taken during the Napoleonic and First World Wars.

For 45 years after the war, the Goering catalogue was in the hands of Rose Valland, who was a volunteer at the Jeu de Paume museum in Paris and made overseer during the Nazi occupation. The Jeu de Paume became a warehouse and a transit place for French art, particularly work that had been in Jewish hands, on its way to Germany. Goering visited the museum on 20 occasions to select 594 items for his own collection. The best was supposed to be reserved for Hitler and his cronies had the run of the rest, Some items, felt to be "degenerate", were burnt, including works by Picasso, Braques and Dali. Just before 1 August 1944, Valland informed the Resistance of the last train

bound to Germany to carry French art; the train made it no further than a yard just outside Paris. The book written by Valland about this entitled 'Le Front de L'art', was used as the basis for the 1965 film starring Burt Lancaster 'The Train'. In the 2014 film 'The Monuments Men', Cate Blanchett plays the character of Claire Simone, which is loosely based on Valland. That film dramatizes the efforts of the Allies in 1944 and 1945 in finding and saving art and cultural items before the Nazis could destroy them.

Valland spent the rest of her life looking for pieces that had not been returned to their rightful owners, searching museums for pieces, particularly in Eastern Europe. It is not known exactly how the Goering catalogue ended up in her possession, but it turned up in one of approximately 1,000 boxes that were passed to the French Ministry of Culture just before her death in 1980.

Despite all the efforts there is still a great deal that has yet to be returned to its rightful owners. And the state is not always as helpful as it might be. Let us look at the Netherlands, where there are tens of thousands of works of art, worth unofficially up to 600 million guilders, that are held by the Dutch government and in museums. It is unlikely that they will ever give many of them back.

Early in 2017 Bergkerk Cathedral, Deventer in Holland held an exhibition of 75 works of art stolen from the Jews. One of those involved was Professor Rudi Ekkart, who runs the Origins Unknown Agency dealing with looted art in Holland.

Holland was the home to a large number of art dealers, particularly in Amsterdam, many of whom were Jews who had settled there from Germany after suffering anti-Semitic persecution in Germany. Holland was neutral and felt to be democratic. There was a global depression and prices were relatively low, so some large collections were put together. In 1940 the country was overrun in four days, with no time for many to flee. Many Jews had to give up their art at bargain basement prices. During the next five years, thousands of paintings were moved to Germany, most confiscated or extorted from the Jews. An institution named the Liro Bank handled the sale of looted Jewish property, using the money gained to deport the Jews, who were forced to pay out of their own pockets for their movement into ghettos and later to the concentration and extermination camps, primarily Auschwitz and Sobibor.

Some Jewish art dealers manged to sell their businesses to non-Jewish trustees, but many fled to the UK or the USA, either abandoning their art in Holland or selling them to raise money for their escape. Assets left behind were seized by the Nazis, with the excuse that they were enemy property. Many ended up in the hands of Hitler or Goering. There were also a large number of suicides with the property of those who took their own lives confiscated and sent to Germany.

During the war, the Allies decided to return all plundered property to its country of origin, without compensation to the then-current owner. In 1945 the Dutch government set up the Netherlands Art Property Foundation (SNK) to deal with this and anyone who was aware of artworks being stolen from their family could fill out a form. This was partially successful with many items being returned, but it still left tens of thousands of artworks in the hands of the Dutch state authorities. The SNK was dissolved in 1957 and the responsibility passed to the Ministry of Education, Culture and Science. In the 1970s the ministry decided to sell many works and the proceeds went to the state.

At the end of the 1990s, with fresh international pressure to return art to its former owners, the Dutch government began to establish commissions, including the Origins Unknown Agency, to follow new lines of enquiry. One discovery was that many items that were supposed to have been returned were still in the possession of the state. In many cases the Netherlands government had demanded payment of the amount that they had been obliged to pay to reclaim the works from Germany. However there have been some happier results. In 1942 Friedrich Gutmann was forced to sell his art to German dealers. He and his wife, both converted Jews, died during the war, he in Theresienstadt, she in Auschwitz. The entire collection was returned to the Dutch government after the war had ended. The two Gutmann sons went to court to regain possession of the works. In 1952 the court ruled that the collection should be returned on condition that the sons pay the amount their father had received from the Germans. In 2002 the public commission ruled to return the collection

the public commission ruled to return the collection to the family without them having to pay after a further 50 years of upset.

My own experience of stolen art

Which leads me to my own experience of stolen art and antiques, perhaps not as high value, but nevertheless profoundly upsetting for a number of reasons.

It was February 1992 and I had been living in a house just outside Midhurst in Sussex since 1988. It was a 1950s detached building set on a bank above the road with the Cowdray Park golf course about a 5 iron away across the lane in front with the playing field of the local school behind beyond a brick wall. A shared drive with the house next door ran up a shallow incline.

I had been in New York getting my engagement proposal accepted in the Rainbow Room – so I was shocked to hear on landing back in London that my home had been burgled and that my Audi had been stolen as the getaway vehicle; my neighbours had reported the break-in. I discovered a jemmy in the vegetable patch and footprints through the vegetable patch leading to the rear wall. A visit to the local police station was the occasion for me to be cross-examined and made to feel that I was the mastermind who had planned everything, ensuring that I was out of the country whilst the crime was being committed. I had carefully handled the jemmy to ensure that any fingerprints were not compromised and presented this to the police, but they showed a complete lack of interest in pursuing the matter and were not prepared to revisit the house to take details of the footprints.

Fortunately. the insurers were much more objective and the loss adjuster who came to visit me was happy to agree fair values on all that had been lost. I had photographs of all my possessions and, in most cases, original receipts from auction rooms and dealers that helped build a picture. Art surveyors/antique valuers are not allowed to insure at replacement levels as we are expected to replace at auction, but the adjuster appeared to appreciate that I was approaching the claim realistically. What hurt most was that I had been building collections of 18th century English porcelain, including a Derby figure of Neptune with his trident intact, George III wine-related silver with several sets of bottle tickets, my favourite being bucolic cherubs astride barrels, and small pieces of William IV mahogany furniture, including side tables and a set of dining chairs. All gone. The thieves had drunk most of the whisky and brandy and spilt what was not guzzled on to a favourite Heriz rug. Larger pieces, such as the dining table and sideboard were still there, as the object, once the keys of the car had been found, was to take only what was readily portable. You will have noted that I have not mentioned the theft of any pictures. Pictures are the least likely items to be stolen as they are so easily identifiable. Burglars take the pieces that they can sell on easily; this includes jewellery, silver and clocks.

This might well have been the end of the matter. I'd moved on, I had my money from insurers, the car was discovered in a supermarket car park outside Portsmouth about 6 weeks later, the odometer indicating that it had been driven there and abandoned immediately after Midhurst. There it sat until someone working at the supermarket thought to inform the police, possibly as the car had by now been vandalised. Fortunately, the car insurers also paid out.

Some months later I received a letter inviting me to attend at an address close to Brighton to examine the contents of what turned out to be two sizeable warehouses - with a view to identifying any of my stolen items. A gang of alleged burglars had been arrested and all the items then in their possession confiscated until it could be proved, one way or another, that these were indeed stolen items. The police believed that this was a gang that had been responsible to a spate of burglaries in Surrey and West Sussex over the last two years.

Unfortunately, I could not find any of my previously prized antiques, but I was professionally interested to note that there were several examples of the same item of ceramic spread around the viewing areas. In particular I saw 5 different examples of the Royal Doulton figurine 'The Old Balloon Seller', which portrays a seated woman in an apron holding a bunch of balloons. I spoke to the man in charge. "How does an owner prove that it was that particular 'Old Balloon Seller' that was stolen from them and not another example?" He explained that it would need an owner to identify a number of items as their own and produce some proof as to that prior ownership. All fair and good. "So, what happens if you have enough positive identification to convict based on, say, 10% of the total number of items in the warehouses? Who is the legal owner of the remaining 90%?" "If we cannot prove otherwise, that 90% remains the property of the accused." So, following a term in prison, a proven criminal could come out of jail, sell those items and pocket the money.

The question then is - how does Double Jeopardy apply? This prevents a person from being tried again for the same crime. Has the law changed since 1992? Yes, it has for murder, but does not cover burglary, which is considered a lesser offence. The 2003 Criminal Justice Act does allow for a retrial if new evidence, in the form of DNA, fingerprints or compelling new evidence, is brought forward, as instanced in the case concerning the murder of Julie Hogg in 1989 by William Dunlop, who was finally convicted in 2006. Importantly, the Director of Public Prosecutions must personally consent to an investigation being reopened. Perhaps the law will change in due course, but currently it appears that the criminal can openly sell what the law cannot prove does not belong to him, whatever the circumstantial evidence may seem to imply.

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New IBA Rules on the Taking of Evidence

Authors: Dr. Jonatan Baier, Corina Moschen.

Overview
On 17 December 2020, the International Bar Association ("IBA") adopted the revised IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), which supersede those of 2010. The revised rules will apply to arbitrations in which the parties agree to apply the IBA Rules after 17 December 2020, whether as part of new arbitration agreements or in determining the rules of procedure in a pending or future arbitration.

The IBA Rules reflect procedures in use in many different legal systems. They may be particularly useful when the parties come from different legal cultures and whose understanding of procedures is divergent. The IBA issued these Rules as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, as well as the conduct of evidentiary hearings. They are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations.

The revision of the IBA Rules primarily reflects practices that have been adopted by parties and arbitral tribunals since the global COVID-19 pandemic. At the same time, certain other provisions have also been optimized. The key revisions to the IBA Rules are the following:

Consultation on Evidentiary Issues (Article 2)
The new art. 2(2)(e) IBA Rules states that the evidentiary issues on which the tribunal may consult the parties include the treatment of any issues of cybersecurity and data protection.

This provision shall (particularly in light of the EU's General Data Protection Regulation) highlight the advisability of considering data protection issues, including issues of data privacy and cybersecurity, at an early stage. The ICCA-IBA Roadmap to Data Protection in International Arbitration and the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration can provide further guidance on these issues.

Document Production (Article 3)
Art. 3 IBA Rules includes updates regarding document production, namely the following:

• A party who has requested the production of documents may respond to an objection from the relevant counterparty if so directed by the arbitral tribunal, and within the time so ordered (art. 3(5) IBA Rules). This clarifies that parties may reply to objections, as it is often provided for in procedural orders, but that this right is not automatic.

• The arbitral tribunal does not have to consult with the parties when considering requests to produce (art. 3(7) IBA Rules).

• Documents that are produced to the opposing party in response to a request to produce do not need to be translated, but documents that are submitted to the arbitral tribunal do need to be translated into the language of the arbitration (art. 3(12)(d) and (e) IBA Rules). This means that translation costs are only incurred where necessary.

Witness statements and expert reports (Articles 4 and 5)
The new IBA Rules clarify that parties can submit second round witness statements and expert reports to cover new factual developments that could not have been addressed in a previous witness statement (art. 4(6)(b)) or expert report (art. 5(3)(b)).

These updates ensure that opportunities to give further evidence are still limited to responses to the counterparty's evidence, but recognise that this opportunity should also extend to circumstances where new evidence has come to light that it was not possible to adduce in the firsttime round.

Tribunal-appointed experts (Article 6)
In art. 6(3) IBA Rules the wording that the authority of a tribunal-appointed expert to request information or access shall be the same as the authority of the arbitral tribunal was deleted. This provision had the potential to be misinterpreted.

Evidentiary hearings (Article 8)
According to art. 8(2) IBA Rules, an Arbitral Tribunal may order that the evidentiary hearing be conducted as a "Remote Hearing", either at the request of a party or on its own motion. The newly inserted definition of "Remote Hearings" also includes hearings, where only certain participants or only parts of the hearing take place using tele and videoconferencing, or other communication technology.

In that event, the arbitral tribunal shall consult with the parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions. The protocol may address: (a) the technology to be used; (b) advance testing of the technology or training in use of the technology; (c) the starting and ending times considering, in particular, the time zones in which participants will be located; (d) how documents may be placed before a witness or the arbitral tribunal; and (e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

It is standard practice for parties to agree that a witness statement or an expert report serves as direct testimony and that witnesses need only appear at an

It is standard practice for parties to agree that a witness statement or an expert report serves as direct testimony and that witnesses need only appear at an evidentiary hearing if requested for crossexamination. Art. 8(5) IBA Rules clarifies that even in this case the Arbitral Tribunal may permit that witness to give evidence at the hearing. This was intended to address some uncertainty as to whether, when a party waives its right to crossexamine a witness, the party that presented the witness may nevertheless call that witness to give testimony.

Assessment of evidence (Article 9)

The new IBA Rules now specifically include a provision giving the arbitral tribunal the authority (in contrast to art. 9(2) IBA Rules, where the court "shall" exclude evidence in certain circumstances) to exclude evidence obtained illegally, either at the request of a party or on its own motion (art. 9(3) IBA Rules).

Conclusion

The new IBA Rules do not make any sweeping changes. They do, however, incorporate a number of topical and important issues which are relevant for our new operating environment, such as the reference to cybersecurity and data privacy issues and the new provision on remote hearings. In particular, the new IBA Rules confirm the prevailing practice of arbitral tribunals since the global COVID-19 pandemic and are thus a welcome development.

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Should Expert Witnesses Have a Right of Reply from Findings of Judges?

*by **Mark Tottenham,** author of The Reliable Expert Witness*

Expert evidence has increasingly been under the spotlight in case law over the past ten years. The courts are rightly concerned to uphold the best evidential standards. But should individual expert witnesses have their reputations damaged in written judgments without any right of reply?

It is relatively common to find comments concerning named experts in written judgments, similar to the following examples: *"This approach has no intellectual justification whatsoever and as an approach by an expert witness is wholly flawed."*[1]*; or "I was not impressed with the evidence of [the expert] for the reasons I have set out above. It was not thorough. It was not complete."*[2]

In the 2016 family law case of *Re W (A Child)*[3], the trial judge had severe criticisms to make of a police officer ("PO") and social worker ("SW") in their conduct of sexual abuse investigations. He gave them an opportunity to reply to the criticism, and stayed the publication of the judgment pending an appeal to the Court of Appeal.

The Court of Appeal held that the "private life rights" of PO and SW under Article 8 of the European Convention on Human Rights (ECHR) would be breached if the judgment was published. Even if it were not published, it was held that the need to inform employers or prospective employers of the findings would amount to such a breach.[4]

The court held that if 'findings of significance' were made concerning a witness, consideration should be given to: (a) ensuring that the case was adequately 'put' to the witness, and recalling him or her for cross-examination if necessary; (b) prior to such cross-examination, providing disclosure of relevant material, with time to reflect on it; and (c) investigating whether there was need for legal advice or legal representation.

However, the court was alive to the relevance of the judgment to expert witnesses, and held that such procedures should not apply to them, given that it was *"likely that the critical matters will have been fully canvassed by one or more of the parties in cross examination"*.

Nonetheless, the procedures in *Re W* were applied in the case of a single joint expert in the case of *Medway Council v R & Ors* (Rev 1)[5]. The expert had provided a single joint report, but failed to reply to subsequent communications, with the result that a new expert had to be retained. The original expert was located in time for the publication of the judgment, but the court was sufficiently unimpressed with his explanation and decided to name him.

In a later case[6], the *Re W* principles were considered in the case of a GP. The court - by agreement with the parties - decided not to name him, but to send the judgment for him to consider any *'training need and his future practice'*.

So, although the criticism of a professional might be considered a breach of human rights, English and Welsh law does not consider that any procedures should be adopted to protect the reputations of expert witnesses.

Irish law provides an interesting comparison, in that the right to a good name is enshrined in Article 40.3.2 of the Constitution of Ireland (Bunreacht na hEireann). It is a longstanding rule that, in tribunals of inquiry or parliamentary inquiries, any person whose reputation is at stake is entitled: (a) to a copy of the evidence that reflects on his good name; (b) to cross-examine by counsel his accusers; (c) to give rebutting evidence; and (d) to address by counsel the inquiry in his own defence.[8]

In 2015 the Irish Court of Appeal was explicitly critical of a line of questioning of an expert witness, saying: *"To my mind, when an expert witness comes to court to give evidence, their professional reputation should not be treated as a disposable and worthless commodity."* [9]

Nonetheless, the Irish courts are as reluctant as the English courts to extend a right of representation to non-parties whose reputation is at stake in court proceedings. A professor of economics was denied an opportunity to be represented in a case against his university[10]. A bankrupt was denied an opportunity to be represented in a case against his former company[11]. And a company was denied an opportunity to defend its reputation in a case by shareholders against the Minister for Finance[12].

In the last of those cases, the Supreme Court explicitly stated that expert witnesses could not be expected to have representation, saying: *"Damage to the reputation of a witness is thus an unavoidable consequence of the trial process. This is anomalous. In other circumstances the law goes to extreme lengths to protect reputation."*

In 2019, the Supreme Court went further: *"But sometimes it is necessary to actually say unpleasant things, such as that a person lied or that an expert witness lacked objectivity or skill or deceitfully adopted a point of view. That witness is unrepresented and his or her inability to exercise the defence of his or her reputation is a necessary and inevitable consequence of the trial process. Not everyone can be represented because the consequence would be for cases to become unmanageable."*[13]

But the anomalies in the law were exposed a more recent case in 2020,[14] where the trial judge was found by the Supreme Court to have made damaging comments about counsel's competence, including some that were 'personally insulting'. On appeal, they wrote:

"Such comments have no place in a judgment. The relationship between counsel and court must be one of mutual respect. The judge is in a particular position of power and can damage or destroy a career with a remark made in court or in a written judgment. Equally a judge can cause personal distress, not just because the judge holds a position of power, but also because he or she is held in high esteem by the profession and generally by members of society. It is no part of the judge's role to be personally insulting to the lawyers who appear before him or her. While there may be occasions when a judge may in a written judgment expressly doubt the integrity of counsel or his or her professional competence, that is not something to be done lightly and certainly not without giving an opportunity to the lawyer to respond and defend his or her reputation and professional competence."

In other words, the professional reputation of a member of the legal profession should not be called into question without giving that person an opportunity to respond and defend himself or herself.

The same principles should be applicable to expert witnesses. It must at least be possible to anonymise any generally critical comments about experts, unless it is deemed to be in the public interest to 'name and shame' them (as in the *Medway Council* case above). Where the court does take the view that the criticism should be made public, it should be possible to alert the witness in advance and give them a right of reply. In an appropriate case, if an expert has been criticised without adequate grounds, it is difficult to see why an appeal should not lie if, as held in *Re W*, such findings could amount to a breach of the 'private life rights' enshrined in the ECHR.

Just as counsel should be respectful of the professional reputations of expert witnesses in cross examination, judges in their written decisions should be wary of treating their reputations as a *"a disposable and worthless commodity"*.

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References

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3, [2016] EWCA Civ 1140

4, See also, R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis [2009] UKSC 3

5, [2016] EWFC B104

6, BCP Council v A [2020] EWFC B4 (28 February 2020)

7, The procedures were also considered in relation to a company director in the case of Pierhead Drinks Ltd v The Commissioners for HM Revenue and Customs (Tax) [2019] UKUT 7 (TCC) (23 January 2019).

8, In re Haughey [1971] 1 IR 217

9, O'Driscoll v. Hurley [2015] IECA 158

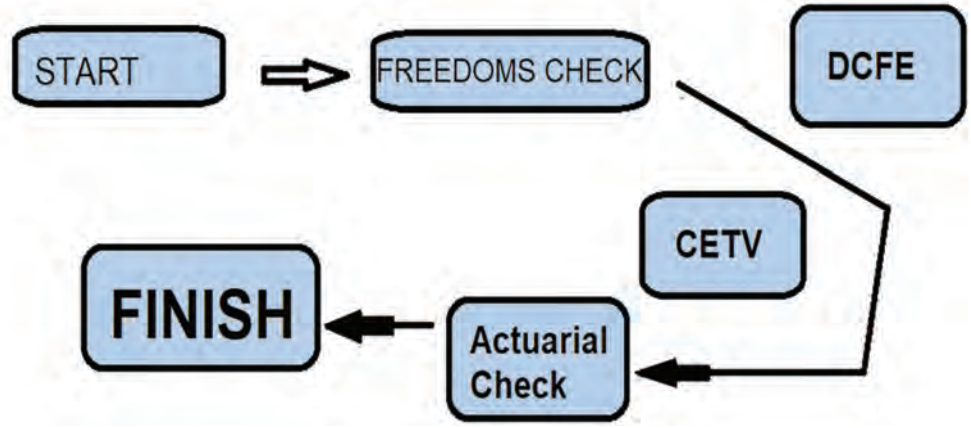
10, Barlow v. Fanning and UCC [2002] IESC 53 (02 July 2002)

11, Quinn & Ors v. Irish Bank Resolution Corporation Ltd & Ors [2012] IEHC 261 (High Court, Kelly P, 4 July 2012)

12, [Dowling v Minister for Finance [2013] IESC 58 (19 December 2013)]

13, Shatter v Guerin [2019] IESC 9 (26 February 2019)

14, Seredych v Minister for Justice [2020] IESC 62 (13 October 2020)



Pension Offsetting on Divorce - A "Navigation" Process

Valuing a pension has been a task that actuaries have performed for well over one hundred years. It is also a requirement in many divorce matters, where pension assets need to be compared with other types to generate an optimal solution to aggregate asset division.

This note draws on past work to attempt to derive an optimal solution. That said it has a number of weaknesses, all of which are described in the text. The treatment of exceptions is addressed – primarily in the case of unfunded pensions. Other solutions are compared. Finally, I consider the issue of negligence claims where pensions are alleged to have been valued incorrectly.

I will start by considering pensions in course of payment, which are easier to value. Additional assumptions in respect of deferred pensions will follow.

Our starting point is to define our destination. The expressions "True Value" and "Fair Value" appear frequently, in discussions on this topic, but are rarely defined further. "A best estimate of the cost of providing the pension with margins removed" seems hard to beat.

For any pension from a group scheme, both a market annuity quotation mirroring the corresponding benefits, and Cash Equivalent ("CE") from the scheme can be easily obtained *. However, the annuity rate will contain margins that will make it exceed the fair value. The CE should not involve any margins for safety (unless the CE is formally reduced) – however, the CEs for similar benefits may vary, depending on the scheme. Further analysis is provided later.

When seeking our "fair values", it is worth looking at how these are defined according to the two main branches of actuarial work which involve pensions, life assurance and defined benefit schemes. There are two useful starting points:

1) From Life Assurance, the "Best Estimate of Liability", or "BEL", which is a valuation of assurance products (including annuities) on the books of the assurer, but with any margins for prudence removed.

2) From Defined Benefit pensions within group pension schemes, the "Initial Cash Equivalent", or "ICE", representing a similar concept.**This applies to all Private Sector Defined Benefit Schemes.**

It is important to note that the legislation/regulation for each of these is set to prevent the value from being too low.

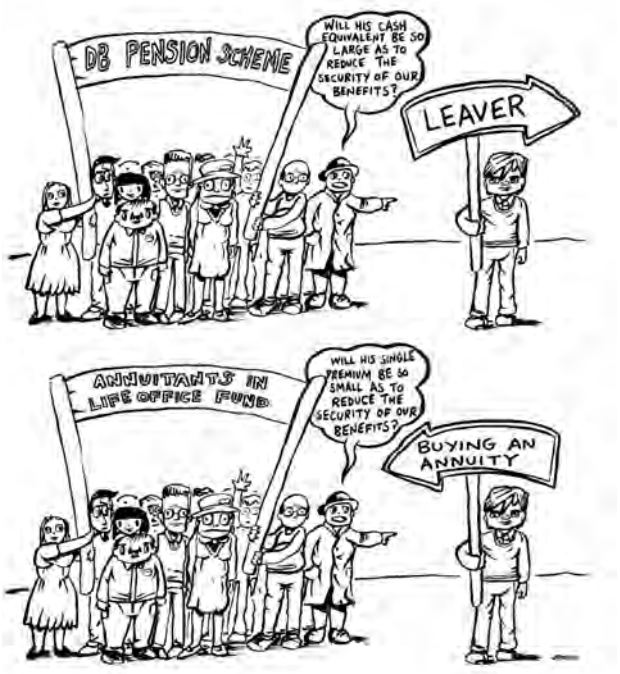
Further details can be found from the following links:
https://www.actuaries.org.uk/system/files/field/document/IandF_SA2_SolvencyII_2016.pdf
https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-guidance/transfer-values#3b18a262ae9646e2aa18c37d93ed0d9e
* There are some exceptions.

No adjustment is made by pension schemes to the Cash Equivalent on account of the fact that it is to be used for divorce (the practice of some public sector schemes to do this appears to have been discontinued).

However, for annuity rates, the provider must ensure that new entrants are not admitted too cheaply.

Correspondingly, for CEs, the Trustees and Scheme Actuary must ensure that transferers are not dispatched too generously.

I then turn to the published sources of information – the PAG report of July 2019, two editions of "Pensions on Divorce", the second and third editions being dated 2013 and 2018, the authors being Messrs Hay, Hess (HHJ), Locket, and Taylor (third edition only) (but referred to as HHLT throughout), and the published judgment of "WvH" (2020) – described by Mr Simon Sugar as "Probably the Most Important Pensions Case of 2020". As Mr Sugar co-authored another major work on the topic, Unlocking Matrimonial Assets on Divorce (2013), I think this collection covers formal opinion on the matter. The Second Edition of HHLT is included as it included useful information that the Third Edition does not.



The PAG report is endorsed by the Head of the England & Wales Family Division, and so seems a good place to start. It is available on the following link: *https://www.nuffieldfoundation.org/sites/default/files/files/Guide_To_The_Treatment_of_Pensions_on_Divorce-Digital (1).pdf*

That report cites five possible methods of valuing a pension for offsetting (page 40):

(a)The Defined Contribution Fund Equivalent (DCFE), explained as follows: A consistent basis of valuation of a pension is variously sometimes referred to as a 'true' value or 'fair' value, but (see the discussion in Part 6 above of valuations for capital and income equalisation) there is no standard definition of the value of a Defined Benefit pension. The approach that would arguably be most useful in offsetting cases is a 'Defined Contribution Fund Equivalent' (DCFE), where a DCFE is the gross replacement value of a Defined Benefit pension, using the same assumptions the expert would use to determine the estimated income from a Defined Contribution scheme for equality of income pension sharing calculations. In the offsetting context, it is suggested that it would be fair to base this on an assumption that an annuity would be purchased to match the pension member's income.

(b) Realisable value: if the Pension Holder is over 55, what capital would be available, perhaps after the tax-free lump sum is taken, drawdown has been exercised and tax paid.

(c) Fund account value/Cashflow modelling which involves a bespoke analysis of parties' capacity for risk.
(d) Actuarial value: similar to DCFE but with the PODE making certain adjustments to reflect that an annuity is unlikely to be purchased.

(e) Duxbury or similar (see below for a discussion): based on amortising a lump sum to zero on median expected life expectancy, which assumes a high level of risk for the claimant.

The report continues to state "Values (a), (b) and (d) are likely to be the appropriate methods in most cases".

Note– in the above, (a) above is described as "arguably being most useful".

Our approach is to employ a sequential analysis of the above methods, for reasons which will become clear. I describe this as a "Navigation Method", and it operates as follows:

1. Decide whether it is to be assumed that the pension is to be encashed as part of the divorce process – which is more likely for a "needs"* case. If it is, and a cash value is available, it should be possible to determine this with a little help from an IFA, and, possibly, without the need to employ any other expertise.

If this is not the case, (b) above can be disregarded.

It should be noted that (b) is not available if the member is either under age 55, or the pension is in payment (as a scheme pension, as opposed to drawdown). The figure of age 55 is subject to review, in the light of future state pension changes.

2. The next step in the process is a navigation between the DCFE and CE "lighthouses". Our experience, based on many cases over fifteen years, is that usually the ratio of DCFE to CE comes out at around 140%. This does not usually apply to unfunded schemes (public sector) and especially not to "irregular" schemes, such as the Armed Forces 1975 Scheme, or (now closed) sections of Police or Firefighters' schemes, where "cliff edge" type benefits are involved. For these schemes, the ratio is larger, and more volatile

This is used as a test in WvH, where Hess HHJ comments that:
"I have also considered whether I should go on to allow an element of offsetting, as is requested by the wife. …. Although I find it prima facie quite surprising that £120,891 of cash should be regarded as having an equivalent value of 2.2% of the husband's pension, i.e. on a CE basis 2.2% x £2,155,475 = £47,420, as Ms Goodall pointed out nobody has challenged Mr Goodwin on this figure and I must accept its correctness for the purposes of this argument."

If the £120,891 is the DCFE of the pension, the full value is £120,891 / (2.2%) = £5,495,045, which is just over 250% of the CE. As the offsetting proposal was not accepted, the issue must be regarded as tangential for the case in question – however, it shows the value of the method for orientation.

In HHLT 2nd edition, an example is given (page 123) where a "Replacement Value" (which appears to be similar to the DCFE) of £966,360 compares to a Cash Equivalent of £800,000. This gives a ratio of 121%, which might suggest a relatively generous Cash Equivalent for that pension. Unfortunately, HHLT 3rd edition does not include similar calculations.

* Where short term cash needs prevent an otherwise preferable solution. There may be better legal definitions.

Examining each of our "lighthouses" in more detail: The DCFE is effectively an externally set figure, so it could be verified by an alternative expert, if the need arose. The existence of margins is indicated in HHLT (3rd edition, page 166), where the mortality margin is mentioned. However, the link above to the Actuaries website shows how substantial these margins are likely to be. Moreover, an annuity rate also contains initial margins – expenses of marketing, sale and issue, commission, interest on solvency capital "borrowed" from shareholder funds, risk margin, and profit loading. If the pension is valued on the assumption that an annuity is actually to be bought, this would be appropriate – but then the solution would be pension sharing. Forcing the pension holder to pay the amount of the equivalent of any margins above the BEL to allow offsetting seems unfair if the settlement is to be in "risk free" cash.

The CE will conform to the following restrictions, as the Pension Regulator document shows:
• Best estimate of cost of providing benefits within the scheme

• All benefits must be allowed for – especially spouses death after retirement pension

• There can be no reduction in CE to recognise that a tax-free cash option might otherwise reduce the value of the benefits

• No allowance may be made for the fact that the CE might jeopardise the benefits for remaining members of the scheme UNLESS an Insufficiency Report has been prepared by the Actuary and agreed and signed off by the Trustees. This specifies by how much the CEs may be reduced.

The CE will include an allowance for spouse's pension – this works out at about 15% on top of the value of personal benefits, based on a "proportion married" assumption. Also, we assume that all benefits are taken as pension, as does the CE calculation. If this is not the case, another reduction to the CE should be made – this means reducing the CE by perhaps another 12.5%. We also assume all benefits are taken as pension.In a recent ACA Conference, typical commutation rates at age 65 were cited to be 18:1, while corresponding cash equivalents were 29:1 – 38% lower. Even allowing for either basic rate or combined basic/higher tax rates, this is relatively penal. Barring "needs" issues, we would not assume this option is taken, unless instructed to do so.

The spouses' pension issue is the more interesting. The pension holder can argue that the benefit will not now be available for them and should be excised from the figure. The recipient can argue that it is part of the CE offered and should be included. Effectively, this is a "precipice" benefit, which disappears at the point of divorce. It is a benefit when viewed retrospectively, but not prospectively. We believe the former argument would hold sway and removing the value of the spouse's benefit gives a" truer" figure.

Obviously, if freedoms were exploited, the value would be the higher one, but this would involve the destruction of guarantees, which is regarded against the member's best interests:
https://www.professionaladviser.com/news/4029214/fca-final-guidance-reiterates-db-transfers-consumers-best

The DCFE (single life quotation) involves two sets of margins. We estimate around 5% of the market price for initial costs, (to the degree they exceed the initial reserve), and another 5% that the reserve exceeds the "BEL"One further point – annuity purchasers tend to have higher than average life expectancy – higher than that of pension scheme members. Annuity mortality is about as high as is ever calculated by actuaries. CE mortality rates will be more appropriate. A further adjustment of 5% has been used.
(See Appendices for further explanation).

We then recommend averaging the adjusted values of DCFE and CE, in order to reduce any unwanted margins or volatility present in either of these.

Our experience is that the ration of DCFE to CE is around 140%. (Please see the appendices).

Assume this is the case. As an example, if the CE is £500,000, the DCFE would be £700,000, and the Fair Value (before any tax adjustment) would then be £510,000 (rounded).

If the CE has been formally reduced, (as permitted by the insufficiency Report), the unreduced figure should be used (which will be available), as the scheme will in future receive additional contributions which will support its meeting the benefit guarantee.

Before extending this method to include pensions in deferment, I have examined the influences for the margins for each of the above.

For the CE, there may be inherent margins which reduce the value, in order to protect the remaining members, while the DCFE will include similar margins to protect the annuity policyholders as a group.

If the DCFE/annuity margins are inadequate, the life office may need to raise additional capital, which is a serious matter, and not well regarded by either regulators or shareholders.

On the other hand, CE's are supported by continuous contributions from employers and members, and paying out over generous CEs will place a far smaller strain on financial resources.

It may be perceived that the choice of a market leading annuity rate will eliminate the margins – but this is not the case. Market leaders will tend to write substantial volumes of business, which will strain solvency reserves. No Life Actuary is going to risk the solvency of their office by setting inadequate annuity rates.

However, using the same annuity rate provides consistency for pensions relating to a single matter. In

contrast, CEs show variability, even if this is reduced by excluding unfunded schemes from our analysis. Averaging ameliorates both of these disadvantages.

Deferred Pensions
The CE will tend to involve assumptions in deferment which will err on the side of protecting the existing membership, if anything. It makes sense to adjust the DCFE annuity rate with deferment assumptions which are consistent with the annuity rate, i.e., conservative, to counter this effect.

Our method of adjusted averaging then extends to deferred pensions and ensures that the bases for pensions in payment and deferred pensions is consistent – important where one party is younger than the other, and whose pensions may not be in payment. Unfortunately, there has been no UK market in guaranteed deferred annuities, since well before the time when Equitable Life became insolvent due to issuing such guarantees, then under-reserving for them.

We then need to consider the other methods described in the PAG report.

(d) Actuarial Value is a general description – each method above is an "actuarial method", which is financially described by investment, inflation and mortality assumptions.

(c) is the same as (d), (all actuarial methods are discounted cashflow methods), with some adjustment for risk appetite/capacity. The last factor is like a utility adjustment, on which experts should no longer opine.

(e) Duxbury involves assumptions which were not designed to value pensions. In particular, Duxbury assumes that the paying party has a high risk of failing to make future payments – sometimes reducing by-over 50% of payments to allow for this risk. This is not appropriate for pensions.

We believe that the actuarial value (if our adjusted averaging method above is accepted), provides a test for the reasonableness of the result. This is done by reverse engineering our value to fit investment, inflation and mortality assumptions. If these appear reasonable, the job is done.

Alternatively, and perhaps in addition, a "sniff" test should be applied.

As a final point, if any of the pensions offer "freedoms" (realisable values), and the above process has been based on them not being taken, the position net of freedom releases might be reviewed.

We now discuss the methodology needed to assess unfunded and irregular pension schemes.

Unfunded (Public Sector) Schemes
The Cash Equivalents for public sector schemes are derived by a different rationale to those for private sector schemes. Such a rationale would not satisfy the requirements of The Pensions Regulator.

The rationale is provided by the following link:
https://www.gov.uk/government/publications/basis-for-setting-the-discount-rates-for-calculating-cash-equivalent-transfer-values-payable-by-public-service-pension-schemes

The controversial aspect is the discount rate. This is set at a far higher level than the Pensions Regulator would allow, reducing the CEs substantially. This is supported by HM Treasury.

However, it is possible to re-engineer public sector CEs to render them more akin to those in the private sector, via an Actuarial Method (see (d) above) and therefore more amenable to comparison with those values for a pension offsetting exercise. The full details are given in Technical Appendix B, but here it should be noted that the result should be checked by comparison with our DCFE – a ratio of 140% on average is expected, but I would expect the figure to fall within a range of around 110% to 170%, due to variability of CE and DCFE. I would investigate further at or beyond the ends of this range.

Irregular Schemes
Primarily Armed Forces Scheme (1975), Police Pension Scheme (1987), Firefighters Pension Scheme , and Prison Officers' Schemes, where the benefit to take any immediate pension at an early age is restricted to those who reach a certain period of accrued service, and failing that, even by a small margin, results in the total loss of that benefit. These are, effectively, precipice benefits which can be deemed to accrue on the last day of the predefined service period. Here, we need to correct a common misconception – that a Cash Equivalent "may exclude some of the accrued benefits". If benefits have not yet accrued, they do not have to be valued in the Cash Equivalent. However, if they are likely to accrue acutely in future, account needs to be taken of them in any balanced report, possibly working on more than one option. This is akin to the inclusion of those benefits in the formal Actuarial Valuation of the AFPS as a whole –
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792432/AFPS_2016_actuarial_valuation_report_final_28_Feb_2019.pdf page 44.

Negligence complaints, alleging that a "wrong value" was used
There have been reports of claims in the £100,000's, so this is clearly an area that should be addressed.

Likely cases arranged in order of likely gravity:

1 Irregular scheme – CE used without consideration of immediate retirement benefits that would be shortly available
Check each case – possibly severe.

2 Public Sector Scheme CE used without adjustment.
The Treasury argues that its values in calculating Cash Equivalents are fair – see the arguments in the link above.

Published texts have opined that public sector CEs are markedly low and not directly comparable with private sector ones (without adjustment). We agree with this view.

This position has been determined after serious consideration. To effectively criticise a senior government department for following a course of action which may, for example, unfairly penalise public sector workers, should not be undertaken lightly.

Our view is that an expert is at risk if he ignores the differential basis used for Public Sector CE calculations.

3 Private Sector Schemes

Any hearing would have to determine whether:

• There was a definitive fair value, or one more definitive than the one actually used

• Whether there was fault in selecting the value chosen.

➢ In the PAG report, the DCFE is pushed forwards as "arguably most appropriate" – however, under the analysis above, it may overstate the value e.g., in the example above, by 37.3% (700/510)

➢ Use of the CE, unadjusted, on the same criteria, is likely to understate the value by 2.0% ({510-500}/510).

➢ Using our former "averaging" method (expected to be 120% of the CE) overstates the result by 17.6% (500x1.2/510).

Overall, our view is that if the method used is fully explained and justified in any report, especially with reference to other possible methodsthere should be no problem.

Technical Appendix A – Life Office Annuity Pricing

Margins – Reserve over "BEL"

Following a request to Andy Pelkiewicz, Chair of the Solvency II, the following was provided, which is reproduced in full. NOTE - this represents personal views, and not expert or professional opinions. However, in the absence of other authority, they have been used.

My thanks go to Andy for his support.

Email 9 July 2020

Dear Peter,

I assume that you have approached me in my capacity as former Chair of the IFoA Risk Margin working party and co-author of the paper the working party presented last year.

The question that you have asked is in relation to annuity pricing, so I must point out that the risk margin is part of reserving for existing contracts under Solvency II, and has no direct bearing on pricing. Although the risk margin is part of the Technical Provisions under Solvency II, it can in many ways be better regarded as an additional capital requirement. Of course, a firm must allow for the cost of that "capital" in pricing, but it is somewhat indirect. Furthermore, neither I nor the other active members of the former working party have recent experience in UK firms, and in particular we have no practical experience of pricing.

I am happy to give some personal views on your question (and also include some input from other working party members), but given the above background, I would consider it inappropriate for the views of either me personally or the working party to be cited as expert opinions.

One reason that I am keen to give some sort of personal response is that when I divorced a few years ago, I felt that I was unfairly treated with regard to the division of pensions, both on questions of fundamental principle and details of the calculation. I wish the guide you had enclosed had been available then, I could have made use of it. So I'm happy if I can in a small way contribute to further improvements.

With regard to your question about the pricing margin in immediate annuities:

Firstly, I think one needs to resolve an issue of terminology. BEL (best estimate liabilities) is defined in Solvency II regulations as the base for reserving for existing contracts, and in my experience that is the meaning normally understood by this expression. Although BEL is broadly based on the firm's own expectations, it is unlikely to coincide precisely with the value of the contracts using the firm's own best estimate assumptions. The major differences for annuities are likely to be in the discount rate used (which is prescribed under Solvency II, though can be modified by the Matching Adjustment, subject to strong conditions). However, even with the demographic assumptions, I suspect there is some regulatory pressure to use a prudent assumption for future mortality improvements. So BEL may differ significantly from the firm's own best estimate, which might be the basis for pricing. That might not be too significant for your query, as I suspect it is the firm's own best estimate that you are looking for (even if in practice, the firm never needs to define it). Nevertheless, I think it is helpful to be clear.

My personal response to your question is that the immediate annuity market contains a very competitive end (albeit with few firms active), and that 10% over the firm's best estimate feels too high for this part of the market.

However, opinions from other members of the working party are:

• 10% is the right ball-park

• 10% or something a bit below (5%-10%) doesn't seem unreasonable

I think these opinions are set out in relation to a Solvency II BEL determined using a discount rate allowing for the matching adjustment, which probably means a discount rate a bit less than the firm expects to earn in practice (and might assume in pricing).

Although it is a bit vague, I hope these thoughts are of some help.

I'd also like to comment on one point in your draft. It refers to the diagrams in an IFoA document on Solvency II [The document relates to GI, which isn't relevant to annuity business, but that in itself doesn't affect the diagrams.] I think the main diagram you are referring to is the balance sheet in Section 1.5. I would suggest that this is misleading in respect of the point you are making for two reasons:

• The amounts added to BEL are either real capital requirements (MCR & SCR) or economically similar to a capital requirement (Risk Margin). The firm needs to hold these while the contract is in force, but expects to recover them. They are therefore only relevant to pricing in relation to the cost of capital that must be held.

• The diagram is itself illustrative and not to scale – in practice for a life insurer, BEL would be the dominant item on the liability side of the balance sheet, and not the relatively small item portrayed

It seems to me that there are some huge problems for division of pensions on divorce. Not least are differences in discount rate on comparing benefits from DB schemes and benefits secured from assumed conversion of a transfer value to income (whether from purchase of an actual annuity or decumulation). But I think one problem is the variation between schemes of the approach to calculating the Cash Equivalent – that is completely out of control of the parties or the courts. I think I quite like the idea of looking at the difference (on both sides) between a theoretical cost and the actual value (Cash Equivalent or annuity rate, as relevant) and dividing that between the parties, but I think a bigger practical problem on the annuity side is the frequent changes in rates due to market conditions than the margins added by insurers. I do know from experience that there are no easy answers.

Kind regards,
Andy Pelkiewicz

It would appear reasonable, based on the views expressed, to consider the margin to be anything between 5% and 10% of the BEL. We consider 5% reasonable.

Margins – Market Annuity Rate over Reserve
It is difficult to assess the margins charged, which include profit margin, as these are commercially sensitive. Commission rates of 1% - 3% have been cited (more for medically enhanced annuities), and there has been controversy over "non advised annuities".
https://www.fca.org.uk/publications/thematic-reviews/review-annuity-sales-practices

Overall, we assess that 5% may be a suitable figure, and if this perhaps seems high in a competitive market, combining with the perhaps understated 5% for the other margin should render the resulting 10% a reasonable figure.

Margins – Mortality
5% has been used.
Mortality issues are covered in Technical Appendix D

Tech Appendix B – One Consultancy (WAC) Experience
These assumptions will be justified later, but if it is accepted, the estimate of "Fair Value" (assuming all benefits taken as pension) will be:

The average of:
• 85% of the CE
• And 85% of the DCFE

If the DCFE is, as per our estimate above, 140% of the CE, the result is:
Fair Value = CE x (0.85 + 1.4 x .85) x 0.5 = CE x 102%.

Or, in terms of the DCFE,
Fair Value = DCFE x (.85/1.4 + 0.85) x 0.5 = 72.9% of the DCFE.

Testing this against other levels of DCFE/CE ratio:					
DCFE/CE	100%	120%	140%	160%	180%
Fair Value as % CE	85%.	93.5%.	102%.	110.5%	119%
Fair Value as % DCFE	85%.	77.9%.	72.9%.	69.1%.	66.1%.

We would set a floor for the fair value at 85% CE, and a ceiling of 85% of DCFE.

Technical Appendix C – Public Sector Cash Equivalent Rectification
As the discount rate is the main (arguably the only) "flaw" in public sector CEs, the question arises as to how this can be "corrected". When is considered that the security of benefits can practically regarded as absolute, and the government issues debt (gilts) that are highly marketable and define the market in yields, those same yields can be used to correct the pension value.

For example, currently both inflation and gilt yields (all terms) are running at around 1% pa. The real interest rate is therefor around zero.

The PCSPS scheme (for example) uses assumptions of 4.45% pa interest, and 2%pa inflation, giving a real rate of 2.4%.

The obvious solution is to rework the CE using 0% real interest, rather than 2.4%. This increases the CE at age 65 by around 40%. This is now in line with a private sector CE, as bearing in mind the public sector CE is around 50% of the DCFE, 50% x 1.4 x 1.4 = 98%, close to the DCFE.

Tech Appendix D – Other Mortality Issues
As described above, life assurers must be highly conservative when setting mortality rates for annuity premiums – for single premium business, there is no opportunity later to correct an imprudent assumption.

Base Mortality
On a quick assessment of recently issued mortality tables for assured annuities and group pension schemes, the difference appears to equate to around 10% in value (i.e., the assured annuity value is higher). However, more work is needed to verify this. We have used an adjustment of 5% in the meantime.

Other Mortality Issues
In addition, it should be noted the following "selection" events have occurred in the recent past:

Test Achats- Postcode Analysis
From 21 December 2012, assurance companies have been obliged to offer only unisex rates to annuity purchasers. As female lives have longer life expectancy, assurers must now "second guess" the factors which affect the mix of applicants by sex. Postcode analysis is likely to be a surrogate for gender.

On the other hand, mortality consultancies refer to "healthy postcodes" in their analysis (where breakdowns by sex are available), and geography is known to influence mortality rates.

PensionFreedoms
From 6 April 2015, "Pension Freedoms" were introduced, removing the restriction that those withdrawing funds form a Money Purchase arrangement were compelled to apply 75% of them to purchase a lifetime annuity. This is likely to lighten the mortality applicable to annuitants, as those individuals with substandard mortality are more likely to take case, lightening the mortality for the remaining annuity applicants.

The full effects of Test Achats and Freedoms may not be evident for some time, but Life Actuaries will have considered them when setting rates.

Impaired Lives
Concessionary rates are available for life impairing conditions, which may reduce the above impact of freedoms.Cash Equivalents are rarely adjusted for ill health (the exception being for ill health retirees in public sector schemes)

Competition
There is downward pressure on annuity rates caused by competition. However, this is limited, as solvency criteria must prevail. Undercharging for annuities was the major reason for Equitable Life's demise, and much law and regulation have been enacted since to prevent any repetition.

Covid 19
The Actuarial Profession consensus appears that it is too early to make adjustments to mortality for the effect of Covid 19 based on experience to date.

Miscellaneous
It has been opined that a spouse forced to leave the family home experiences a doubling of their mortality rate while any child of the marriage is young. *

* Ms Suella Braverman MP, "Fixing Family Justice", from "Britain Beyond Brexit", Centre for Policy Studies, 2019. I have requested the source of this statistic.

PAC 9 April 2021

AA v Persons Unknown and Others, Re Bitcoin

When is property not property? This case is interesting as it confirms and moves the definition of what can be considered "property" (and thereby be made subject to a proprietary court injunction), into the 21st century..

The case concerns a Canadian insurance company whose computer systems were hacked and encrypted with malware meaning that the company could not access any of its own or clients' data. The company was sent notes by the first defendant (person or persons unknown) in October 2019 demanding a ransom:

"Hello, to get your data back you have to pay $1,200,000 (one million two hundred thousand). You have to make the payment in Bitcoin."

The company was itself insured against cybercrime with an English insurance company ('AA'). AA subrogated the claim and proceeded to carry out negotiations with the hackers.

Subrogation is a legal term which means that a party (often an insurance company) can be substituted to assume their insured's right to an insurance or debt. A sum of $950,000 was agreed to be paid in Bitcoin in return for the decryption tool. The sum (109.25 Bitcoin) was paid despite AA being unable to identify the recipient (the second defendant). The decryption tool was put to work and it took 5 days for the insured company to decrypt and reinstate its 20 servers and a further 10 business days to decrypt its 1000 desktop computers.

AA hired a specialist company Chainalysis Inc. to track the ransom payment. This they did successfully and confirmed that 96 Bitcoin had been traced to a specific address linked to the cryptoasset exchange Bitfinex. Bitfinex was operated by iFinex and BFXWW Inc., the third and fourth defendants. The remainder had been transferred into fiat currency and dissipated. AA sought a proprietary injunction over the Bitcoin as a first step in recovering the ransom. AA commenced proceedings against four defendants based on claims of restitution and/or constructive trust. Two of the defendants operated the Bitfinex exchange on which the Bitcoins were being held, whilst the other defendants had made the ransom demand and now held some of the Bitcoin at the Bitfinex exchange address.

Nothing ever becomes real till it is experienced." - John Keats

The fundamental issue facing the court was whether Cryptoassets could be defined as "property" and therefore capable of being the subject of a proprietary injunction. The English law has traditionally treated property as falling into two classes- either a "choses in possession" ie capable of tangible possession, or a

choses in action" ie a right capable of being enforced by a legal action. Cryptocurrencies are virtual and intangible assets which cannot be possessed, nor do they carry any rights capable of enforcement by legal action. Mr. Justice Bryan, hearing the application in the High Court, reviewed all previous case law in this area and noted that even though there had been two previous decisions in the English courts in 2018 and 2019 where cryptocurrency had been defined as property in order to obtain a worldwide freezing order and an asset preservation order, the court had not considered the issue in depth. He referred to the UK Jurisdictional Task Force (UKJT) Legal Statement on Cryptoassets and Smart Contracts, published in November 2019. This discussed the definition of property in detail including its evolution over time. Although not binding on the court, the Judge considered it to be "an accurate statement as to the position under English law" and "compelling". He referred to two other previous cases "where the courts found no difficulty in treating novel kinds of intangible assets as property". These were a finding that a milk quota could be the subject of a trust and an EU carbon emissions allowance be the subject of a tracing claim. These were neither a "thing in possession" nor a "thing in action". He concluded that "the fact that a cryptoasset might not be a thing in action on a narrower definition of that term does not in itself mean that it cannot be treated as property." They met the four criteria set out in Lord Wilberforce's definition of property in NPB v Ainsworth 1965 in that they were definable identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence. Bryan J said it would be "fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession or choses in action".

In granting the interim injunction, Mr. Justice Bryan also consented to ancillary orders to support the effectiveness and speed of the injunction. The court gave anonymity to the parties, heard the case in private and allowed service to be by email. All these concessions ensured that the risk of copycat crimes was reduced and that the defendants were not tipped off enabling them to dispose of the remaining Bitcoin.

Soon after the judgement, HMRC updated its guide "Cryptoassets: tax for individuals". It includes a new section on the legal status of cryptocurrency exchange tokens and how they will be treated in relation to Inheritance and Capital Gains tax. Anyone holding these assets should ensure that their wills are drafted to reflect this new guidance.

Expert Evidence prides itself on assisting throughout the legal process where required and is a professional firm concentrating on the four main areas of dispute resolution; acting as expert witnesses in financial litigation, mediation, arbitration and adjudication. The firm has a civil, criminal and international practice and has advised in many recent cases. Areas of specialisation include banking, lending, regulation, investment, and tax.

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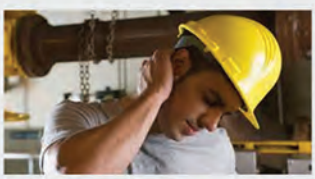
Industrial Diseases

Mental Health Act

CONTACT US

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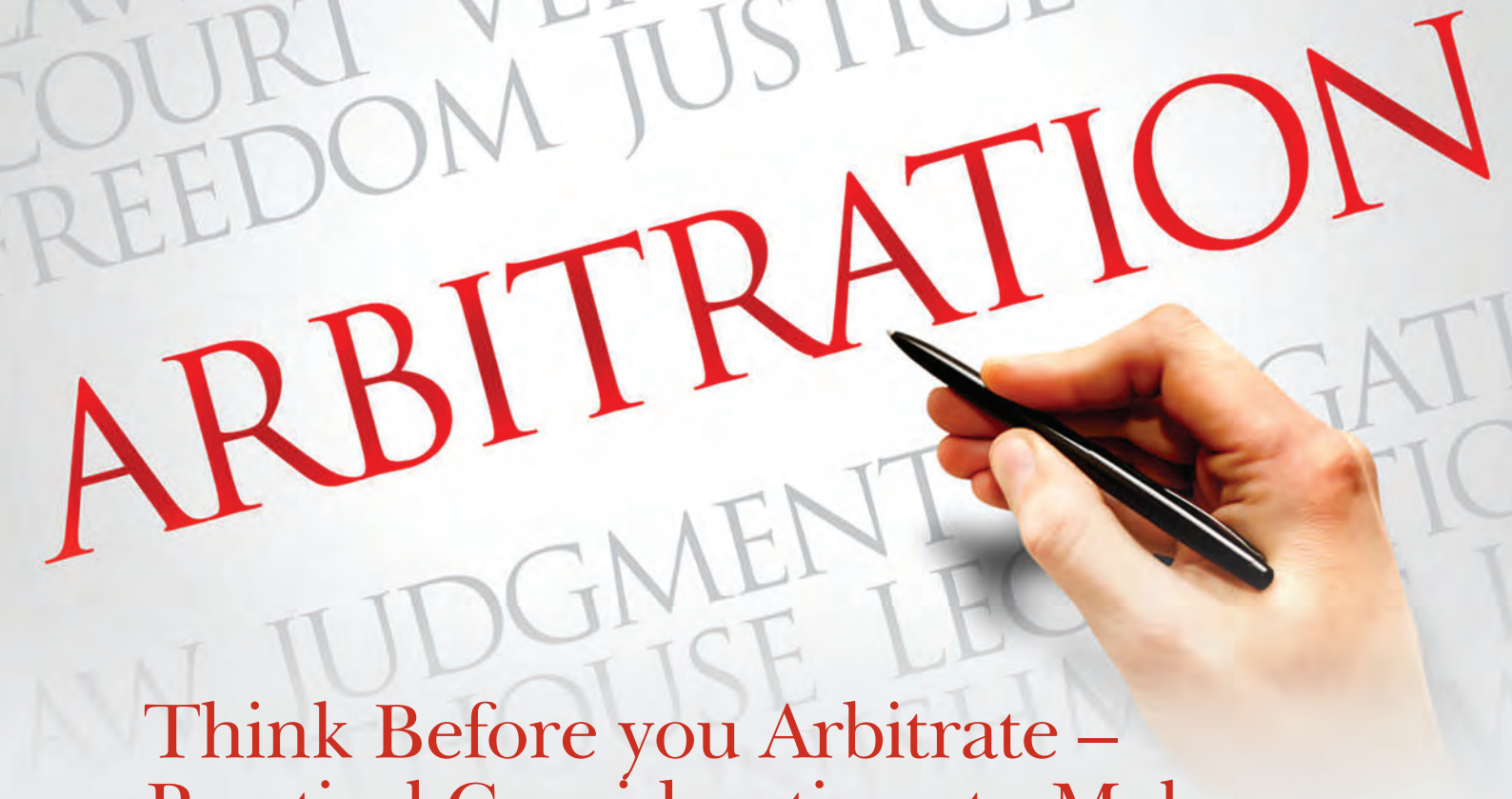

Think Before you Arbitrate – Practical Considerations to Make the Most of Arbitration

Arbitration is a common alternative to litigation in insurance contracts' dispute resolution clauses, but what are the practical implications of choosing arbitration over litigation? And what do insurers need to think about when electing to resolve a dispute by way of arbitration? There are a number of considerations to take into account when looking at the commonly referenced pros and cons of arbitration and the key differences with litigation. This article provides an overview.

Arbitration provides the parties with a great degree of freedom in comparison to traditional court proceedings, allowing them to shape the dispute resolution process as they wish. The procedural rules of courts tend to be more rigid and the burden of processes such as disclosure are becoming ever more onerous and expensive to comply with.

Neutrality, procedural flexibility and the focus on parties' autonomy are some of the most appealing characteristics of arbitration. Another great advantage is the ability for the parties to choose the arbitrator(s) and ensure that they possess the necessary qualification and expertise to bring a dispute to a fair and efficient resolution. This is of particular relevance when dealing with insurance disputes given that some foreign courts may not be particularly experienced in determining complex insurance questions and coverage disputes. The enforcement of an arbitral award pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is also likely to be easier than the enforcement of a foreign court judgment.

The freedoms provided by arbitration should, however, be carefully considered and addressed by insurers when choosing to arbitrate a dispute in order to avoid uncertainty and delays.

Flexibility means some important choices need to be made

When opting for arbitration instead of litigation, the parties will need to choose not only the law governing the contract, but also the law of the seat of the arbitration and the procedural rules which will govern the conduct of the arbitral proceedings. It is important for insurers to understand the implications of each of these choices:

- Law of the contract – This is the substantive law which governs the contract and which will be applied to determine the outcome of the dispute.
- Law of the seat – This is the procedural law which governs the arbitration proceedings. Among other things, the seat of the arbitration determines the extent to which local courts will be able to intervene in the arbitral process and to hear appeals of arbitral awards. Therefore, care should be taken to select an "arbitration-friendly" jurisdiction (in other words, a jurisdiction where the local courts are known to be supportive of arbitration) as the seat, with a view to avoiding unwarranted interferences with the arbitral process by the local courts. Notably, the seat of the

arbitration also determines the location where the award will be deemed to be made, which is significant for enforcement purposes. Accordingly, it will usually be preferable to ensure that the chosen seat is a signatory to the New York Convention.

- Procedural rules – In arbitral proceedings it is up to the parties to decide whether to adopt a set of established procedural rules from an arbitral institution (e.g. LCIA, ICC, ARIAS, etc.) or whether to create ad hoc procedural rules for the specific arbitration by agreement. In particular when choosing ad hoc arbitration, it will be important to ensure that the arbitration clause provides for the number of arbitrators who will hear a dispute and for the procedure to be used for their appointment.

Arbitration clauses in insurance contracts tend to be fairly brief but it is important to ensure they address each of the above considerations in a clear and unequivocal way in order to avoid any ambiguity which could lead to uncertainty as to the parties' intention and ultimately give rise to unintended results. In particular, the importance of the law of the seat and of any institutional rules which may be chosen for the conduct of the arbitration should not be underestimated as they can make a very significant difference to the cost and efficiency of the process.

Confidentiality is not a given

Arbitral proceedings are traditionally understood to be confidential, as opposed to court proceedings which are usually held in public. This can be of interest to both insureds and insurers for a number of reasons, including for example the fact that an arbitral award will not set a legal precedent and that the confidentiality of the proceedings will serve to shield the parties from reputational risks which may be associated with a dispute. That can be particularly valuable in insurance contracts where there may be a dispute about policy interpretation where there is a reasonable disagreement between insureds and insurers with a very strong commercial relationship, and what is required is time and space to resolve that technical dispute privately and without publicity – which is an inevitable consequence of public dispute resolution, in particular where high profile companies and industries are involved.

Nevertheless, it should not be assumed that confidentiality obligations will automatically arise when choosing arbitration and it is important to note that, even if confidentiality obligations do arise, their scope can vary greatly. The question as to which (if any) confidentiality obligations arise and the extent to which those obligations apply will usually turn on the law of the seat of the arbitration, as well as on the applicable institutional rules and the terms of the arbitration clause, as the latter will constitute the arbitration agreement between the parties.

Under English law there is an implied duty of confidentiality on the parties and the arbitrators, which applies to hearings as well as to those documents disclosed during the arbitral proceedings and those documents which are generated for the purposes of the arbitration (e.g. pleadings, expert reports, etc.), but is subject to some exceptions (e.g. where disclosure is ordered by the court, or is in the interest of justice or in the public interest). However, there is no uniform approach to the confidentiality of arbitral proceedings globally and confidentiality is not the default position in all jurisdictions – by way of example, there is no implied duty of confidentiality in foreign jurisdictions such as Norway and Sweden, or in a number of US states.

Similarly, some institutional rules impose confidentiality obligations on the parties in very specific terms - see, for example, the 2020 LCIA Rules which now go so far as to request that the parties seek confidentiality undertakings from factual witnesses, experts and service providers who would not otherwise be bound by confidentiality obligations in the same way. However, other institutional rules will impose more limited obligations (e.g. providing only for the confidentiality of the arbitral award itself) or may not address confidentiality at all.

Accordingly, where the intention is to ensure confidentiality, insurers should familiarise themselves with the applicable law and institutional rules to understand the protection those afford and any limitations or exceptions to the same. When in doubt, it will be prudent for insurers to ensure that an express confidentiality provision is included in the arbitration clause, or subsequently agreed with the insured.

"Cheaper and quicker"?

Whilst arbitration has the potential to be cheaper and quicker than litigation, whether this will be the case in practice will inevitably turn on the specific circumstances of a dispute. For example, lower value and less complex claims could be suitable for resolution by way of an arbitration which is conducted mainly on paper, with limited time allocated to oral hearings (if necessary) and with a sole arbitrator in charge, leading to significant time and cost savings.

However, when dealing with higher value and more complex claims arbitration is less likely to result in cost savings. The most obvious and significant factor in this respect is that in arbitral proceedings the parties will be paying for the arbitrators' time, the hiring of the hearing venue and, where the arbitration is to be conducted pursuant to the rules of an arbitral institution, the administrative costs related to the institution's management of the case – these are all additional expenses in comparison to those that would be incurred in court proceedings. Some administrative costs may be saved, for example, by choosing ad hoc arbitration as opposed to institutional arbitration, although some would argue that an arbitral award is more likely to be complied with when it is made by a tribunal under the rules of a well-respected arbitral institution.

Where the entity of a claim is difficult to estimate at the outset and the objective is to achieve cost savings wherever possible, insurers may wish to consider incorporating in the arbitration agreement simplified rules for streamlined procedures to deal with lower value claims. Various institutions offer such options, see for example the ARIAS Fast Track Arbitration Rules or the ICC Expedited Procedure Provisions.

Other factors can also affect the likely duration of arbitral proceedings. For example, arbitrations can often get off to a slow start if the parties have difficulty reaching agreement on the appointment of the arbitrator(s), or where the arbitration agreement provides for ad hoc arbitration and the parties need to agree on the procedural rules to be applied to the proceedings after a dispute has arisen.

Depending on the composition of the arbitral panel, a tribunal's case management style is also likely to be more relaxed and reactive when compared to that of the local courts so the proceedings may not always be as speedy. Courts usually have stronger, or more well-established, powers in respect of sanctions and interim relief, therefore courts are more likely to take action to discipline the behaviour of parties who are looking to delay the proceedings or circumvent the rules. Where the appointed arbitrators are based in different locations or have particularly busy diaries, their limited availability could also lead to some delays in the proceedings.

Ultimately, however, the question of whether arbitration proceedings will be quicker than litigation proceedings is likely to turn on the relevant jurisdiction being considered as an alternative forum for litigation purposes. For example, arbitral proceedings may not necessarily be quicker than English court proceedings but they may well be quicker than litigating a dispute in foreign courts, especially if the local court system is not sophisticated or particularly experienced in dealing with insurance disputes. In the circumstances, arbitration can offer a neutral dispute resolution venue, with the advantage that the parties will be able to select arbitrators who have the necessary expertise.

Finality of arbitral awards

Whilst the proceedings themselves may not always be quicker, arbitral awards are usually intended to be final and binding on the parties, with the grounds of appeal in arbitration proceedings generally limited to jurisdictional issues or procedural irregularities.

By way of example, in respect of London-seated arbitrations, the Arbitration Act 1996 provides that an arbitral award can only be challenged in the English courts for: (i) a lack of substantive jurisdiction (Section 67); (ii) a serious irregularity causing substantial injustice (Section 68); or (iii) subject to obtaining leave from the court, an appeal on a point of law arising out of an award (Section 69). Yet, the applicability of Section 69 can be, and often is, excluded by agreement.

Further, the extent to which an award can be challenged can be limited by the chosen institutional rules which govern the conduct of the arbitration – for example, various institutional rules provide that parties who choose to adopt them waive the right to any form of appeal. In the context of a London-seated arbitration, this means that there will be no right to appeal on a point of law under Section 69.

Accordingly, insurers should be mindful not just of their choice of seat but also of which institutional rules are selected in the arbitration agreement and what the implications of those rules will be in practical terms under the relevant law.

Procedural differences

As opposed to litigation, arbitration allows the parties to agree on a number of procedural aspects such as the language in which the proceedings will be conducted, whether their written submissions should take the form of pleadings or memorials, the extent of any factual and/or expert witness evidence required and the scope of the disclosure required in the proceedings.

The scope of disclosure is probably one of the most significant aspects where the traditional approach in arbitration is for document production to take place pursuant to document requests rather than pursuant to a duty to disclose all documents, whether helpful or unhelpful, which are relevant to the issues in dispute. The parties are, however, free to depart from the traditional arbitration approach if they so wish.

It is also worth noting that, whilst most arbitral tribunals will be empowered to make awards on the arbitration costs (i.e. the administrative / institutional costs) and the legal costs of the proceedings, there is usually no cost budgeting in arbitration and the costs awards made by an arbitral tribunal can therefore be more unpredictable than in those made by a court.

Conclusion

Whilst arbitration will not necessarily always be cheaper or quicker than litigation, it does offer some significant advantages, such as neutrality, procedural flexibility and the option of confidentiality. Whether arbitration as an alternative form of dispute resolution meets insurers' dispute resolution needs will turn on their specific circumstances and objectives, but it is certainly a valuable alternative to traditional court proceedings. The key is to ensure that due consideration is given to its practical implications from the outset in order to make the most of it.

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Overview of the SPC's Draft for Evidence Rules in IP disputes

By King & Wood Mallesons

On June 15, 2020, Supreme People's Court of the People's Republic of China (the "SPC") released a draft of the SPC's Provisions on Evidence in Civil Proceedings Involving IP Disputes for public comments (the "Draft"). The deadline for accepting comments is July 31, 2020. The Chinese version is accessible through the SPC's website[1] and an English translation is attached to this article for your easy reference.

Provisions related to civil procedure has been changing frequently in the past years. After a major amendment to the PRC Civil Procedure Law in 2012 (the "Civil Procedure Law"), the SPC issued the SPC's Interpretation on Application of the PRC Civil Procedure Law (the "Interpretation of the Civil Procedure Law") in 2015, which have some significant changes to the evidence rules for civil proceedings. The Draft is based on the abovementioned evidence rules and formalizes some special practices on evidence issues in IP disputes.

The Draft follows the SPC's Provisions on Evidence in Civil Proceedings (the "Evidence Rules in Civil Proceedings") in a four-chapter structure. This note serves as an overview of highlights in these four chapters with our comments.

1. Evidence Production by the Parties

1) Reducing Burden of Proof for Patents on Process or Method (Article 3)

It has been a primary obstacle for patent owners to prove infringement of patents on process or method. The Draft provides that a court may shift the burden of proof to the accused party when the patent owner can prove that the infringing products belongs to the same product as those manufactured by the patented process, the possibility of using the patented process is relatively high, and the patent owner has used reasonable efforts to prove the infringement.

It is worth mentioning that the Draft allows the court to use its discretion to shift the burden of proof even if all three conditions are satisfied. As there is no mechanism similar to discovery under the current PRC laws, an automatic burden-shifting after all three conditions are met should be the best way to solve the patent owner's current difficulties in proving infringement of patents on process or method, rather than relying on the court' discretion.

2) Self-admission not Applicable for Patent Infringement Comparison (Article 6)

The Evidence Rules in Civil Proceedings has detailed self-admission rules, one important basis of which is that self-admission applies only to facts, excluding legal analysis. With this, the Draft clarifies that ownership and status of rights in intellectual property disputes and comparison of the technical features in patent infringement disputes shall be not applied with the self-admission rules.

This article only applies to technical features in patent infringement disputes. However, disputes over trademarks and trade secrets also involve comparison, and the same rule should be applied. The draft should be further clarified at this issue.

3) Admission of Evidence without Notarization (Article 8)

Notarized purchase has become a "standard" procedure to secure infringing goods and relevant documentary evidence in IP disputes in the PRC. This substantially increases an IP owner's difficulty and costs to enforce its IP rights. This article seems to be intended for resolving this problem, i.e. making non-notarized infringing goods and documents as admissible evidence with certain effectiveness for case filing. However, the draft does not include any detailed rules on examining non-notarized evidence, making this article with little practical significance. In other words, IP owners would still need to secure notarized evidence of infringement to establish a solid infringement claim.

4) Special Rules on Extraterritorial Evidence (Articles 9-11)

The Draft reflects the SPC's efforts to simplify the formality requirements for evidence formed outside the territory of the People's Republic of China, including the following:

- Legalization is no longer required for extraterritorial evidence if the party acknowledges its authenticity or the producing party provides testimony indicating that the witness is willing to be punished for perjury (Article 9).

- Notarization or legalization is not required for the following documentary evidence: evidence that has been already affirmed by judgments or decisions issued by PRC courts or effective arbitration documents, publications or patent documents accessible through official or public sources, and documents that can be verified through other means (Article 10).

- Court can infer that the attorney has authorization to attend all the proceedings related to the dispute if the power of attorney does not clarify which proceedings the attorney is authorized to represent, and for the purpose of convenience, the court can also infers that the attorney can receive court's service in subsequent proceedings. Notarization and legalization can be waived for subsequent proceedings if the power of attorney issued for the first-instance proceeding has been notarized and legalized (Article 11).

The articles above are generally favorable to foreign litigants, and simplify the time-consuming and costly notarization and legalization process. However, we also notice that Article 9 is slightly stricter than the relevant provisions of the Evidence Rules in Civil Proceedings, which provides that except for evidence involving civil status, legalization is not required for all documentary evidence formed outside of the territory of the People's Republic of China.

2. Investigation, Collection and Preservation of Evidence

1) Factors to be Considered for Approval of Preservation of Evidence (Article 12)

This article prescribes factors to be considered by the court to decide whether to approve preservation of evidence, in which items (1) and (2) provide objective difficulty for the applicant to collect evidence on its own, item (3) provides importance of the evidence sought for preservation on case trial, and item (4) emphasizes in laws the impact of measures of preservation of evidence on the party possessing the evidence for the first time. In current judicial practice, the court has discretion, to a large extent, about whether to approve preservation of evidence. While this article lists the factors to be considered by the court, it does not specify the conditions in light of which the court should carry out preservation of evidence. To this end, we propose the wording thereof to be modified as "the court shall approve the application for preservation of evidence when the applicant proves by evidence the following factors have been met". Additionally, this article does not stipulate such a condition that the applicant's evidence already shows there is a relatively high likelihood of infringement. In this case, this article may be more favorable to the applicant which is the plaintiff in most infringement cases, and might be abused by the applicant.

2) Court carrying out Preservation of Evidence and Modes of Preservation (Articles 13 and 14)

These articles provide the court carrying out preservation of evidence and the applicable modes of preservation, and undue influence on normal business operation of the party possessing the evidence shall be avoided as much as possible. These provisions are consistent with the current judicial practice.

3) Service of Ruling for Preservation of Evidence and Outcome for hindering Preservation (Articles 15 and 16)

These articles prescribe the service of court ruling for preservation of evidence, the outcome for refusing to cooperate or hindering preservation of evidence, and the outcome for dissembling, replacing or altering the evidence subject to preservation without any authorization, which are actually consistent with current judicial practice. In practice, in order to prevent the party possessing the evidence being informed of the litigation or the ruling for preservation of evidence ahead of the preservation conducted by the court and then hiding or altering the pertinent evidence, the court usually serves the court documents and the ruling to the party possessing the evidence on the spot of preservation.

4) Pertinent Measures of Onsite Preservation of Evidence (Articles 17-19)

These articles prescribe pertinent measures of onsite preservation of evidence, including attendees of the preservation and specific measures of preservation. In terms of the attendees, even if the party possessing the evidence claims the evidence to be preserved involves trade secrets, the court shall allow the attorneys, patent agents or technical experts of the applicant to be present for the preservation, who nevertheless shall execute an NDA. In current practice, the litigants usually cannot reach consensus on the attendees participating in the preservation. In this case, the court is more inclined to take more conservative measures and does not allow any person from the applicant to be present there, which substantially deprives the applicant of opportunities to express opinions or advices on the spot of preservation and further decreases efficiency of preservation. Such a problem shall be addressed to a large extent by Article 19.

5) Relief to Wrong Preservation and Outcome of Abandonment of Evidence Preserved by the Applicant (Articles 20 and 21)

These articles prescribe relief available to the party possessing the evidence when the preservation is filed incorrectly and how the court shall react when the applicant waives use of the evidence preserved. Such provisions are not different from the current laws and practice.

6) Scope of Appraisal Items (Articles 22 and 23)

These articles prescribe scope of items subject to appraisal, in which item (4) of Article 23 provides that an appraisal could be done to decide "whether the technology at issue involves any drawback". We understand such drawbacks probably refer to drawbacks existing in the patent at issue per se, including insufficient disclosure of the Description or unclear scope of claims, which shall belong to grounds of patent invalidation. We tend to opine the appraisal institute is not in a good position to give opinions on such an issue under the current legal system.

7) Appraisal Institute (Articles 24 and 25)

These articles prescribe an appraisal institute could engage other test institutes to do a test, and the court could directly engage a professional institute and person with a corresponding level to conduct appraisal in such a business sector that a uniform registration and management system has not been in place for appraisal persons and appraisal institutes. The said provisions give solutions to two scenarios that usually occur current judicial practice. In the first scenario, the party dissatisfying with the appraisal opinion usually contends for a procedural drawback that arises out of the test institute engaged by the appraisal instate lack of adequate qualifications. And in the second scenario, the court could not involve any appraisal when a uniform registration and management system has not been in place for appraisal persons and appraisal institutes in a particular sector. These scenarios shall be able to be addressed with

explicit legal grounds thanks to introduction of these provisions into judicial interpretations.

8) Alteration of Scope of Appraisal (Article 26)
This article involves alteration of scope of appraisal in the course of appraisal, e.g., when the scope of appraisal is altered because the patent claims to be appraised are amended in the invalidation proceeding. This article does not make differences from the current judicial practice either.

9) Probative Power of Ex-parte Appraisal Report (Article 27)
This article prescribes the probative power of an ex-parte appraisal report. In judicial practice, both the plaintiff, for purpose of proving infringement, and the defendant, for purpose of proving non-infringement, could retain, on their own, an appraisal institute and persons to issue an appraisal report on relevant facts. The courts usually have different attitudes towards the ex-parte appraisal report. In particular, some courts organize cross-examination on the appraisal institute and persons, and then decide objectively the probative power of the ex-parte appraisal report; while some other courts tend to deny the appraisal report simply because the counter party expresses different opinions, and arrange another appraisal. The courts will be more inclined to the former approach with introduction of this article into the Judicial Interpretations, and determine the probative power of the appraisal report after fully listening to cross-examinations of both parties upon the report.

10) Other Special Issues (Article 28)
This article prescribes that a litigant could apply with the court to retain a professional institute to issue an appraisal report, economic analysis report or market survey report against other special issues. According to this provision, the court could also retain an adequate institute to conduct objective evaluations on damages, trademark reputation and likelihood of confusion or misleading. This provision will make the calculation of damages more professional and scientific.

11) Distribution of Burden of Proof (Article 29)
This article essentially belong to reasonable distribution of burden of proof among the parties. The SPC's Interpretations Concerning Certain Issues on Application of Law for Trial of Cases on Disputes over Patent Infringement II and the PRC Trademark Law already provides rules about distribution of burden of proof for damages. Since this article is not explicitly limited to proof about damages, the provision about reasonable distribution of burden of proof could also be applicable to finding of infringement, particularly when the accused infringing solution refers to a large-scale equipment or computer software. However, similar to Article 12, the wording "could" as used in the Draft still gives the courts a high degree of discretion, and we recommend listing the specific conditions for shifting the burden of proof, which, in connection with the wording "shall", could impart to the law a higher level of guidance and foreseeability.

3. Evidence Exchange and Cross-examination

1) Admission of the practicing the prior art/design defense and prior user rights defense in the retrial proceeding (Article 30)
This article prescribes that where the alleged infringer fails to raise a practicing the prior art/design defense and/or prior user rights defense in the first instance proceeding and the second instance proceeding, in the application for the re-trial proceeding, the alleged infringer presents evidence relevant to such defenses, the people's court generally shall not admit such evidence. Pursuant to this article, if a party did not raise a practicing the prior art defense in the first instance and the second instance, it cannot raise such defense in the re-trial proceeding, and relevant evidence will not be admitted by the court. However, if a party has raised a practicing the prior art defense in the previous proceedings, and in the retrial proceeding further asserts the defense based on newly discovered evidence, shall the court admit the evidence and re-consider whether the practicing the prior art defense is established or not? Otherwise, shall the alleged infringer file a patent invalidation proceeding based on the newly discovered evidence, and petition the court to suspend the re-trial proceeding?

2) Exchange and Cross-Examination of Evidence Involving Trade Secrets (Articles 31-35)
These articles prescribe the exchange and cross-examination of evidence involving trade secrets. In order to prevent trade secret misappropriation for a second time and protect the trade secret of the right holder, it is necessary to restrain the parties and litigation participants from duplicating evidence involving trade secret. Such regulation complies with current laws, judicial interpretations, and judicial practice.

Pursuant to Article 68 of the Civil Procedural Law, evidence involving nation secret, trade secret and individual privacy shall be kept confidential, if needs to be presented in court, shall not be presented in public hearing. Article 11 of the Provisions of the SPC on Several Issues Relating to Application of Law for Trial of Civil Actions Arising from Monopoly further stipulates that for evidence involving national secrets, trade secrets, individual privacy or other contents shall be kept confidential according to law, the People's Court may, ex officio or per the application of parties, adopt protective measures including non-public hearing, restriction or prohibition of duplication, showing to attorneys only, and ordering to sign letters of commitment. Article 25 of the SPC's Notice on Issues Concerning Maximizing the Role of Intellectual Property Right Trials in Boosting the Great Development and Great Prosperity of Socialist Culture and Promoting the Independent and Coordinated Development of Economy explicitly stipulates

that the People's Court may adopt measures restraining scope of knowledge and channels of distribution of the trade secret to prevent it from being misappropriated for a second time. Besides, the Jiangsu High Court clearly points out in Paragraph 13, Article 3 of Guidance on Implementing the Strictest Judicial Protection of Intellectual Property Rights to Provide Judicial Guarantee for High-Quality development issued in August, 2019 that [the People's Court] shall effectively protect the trade secret from misappropriation during the litigation; protect the trade secret from being misappropriated for a second time by issuing a protective order, ordering the parties to sign a confidentiality agreement or commitment, prohibiting duplicating and taking photos, disclosing the trade secret step by step, and presenting evidence involving trade secret to third party experts to examine, etc. It can be seen that in practice, courts generally adopt measures to restrict or prohibit duplication of evidence involving trade secrets.

When protecting the trade secret of the plaintiff from being misappropriated for a second time, the defendant's right to cross-examination also shall be sufficiently protected to achieve a balance of interests between the parties. Article 31 of the Draft prescribes that attorneys, patent agents, persons with expertise may inspect but not extract evidence involving trade secret. Inspection but not extraction may increase difficulty in reviewing case files for the defendant's representatives and may impair the defendant's right to cross-examination. Thus, it is suggested to add the right to extract evidence involving trade secret for the attorneys, patent agents and persons with expertise. Besides, Article 34 also stipulates that when an agreement not to exchange and cross-examine evidence involving trade secret is reached, the court may not organize the exchange and cross-examination of such evidence. However, in practice, it is unlikely that the parties will reach such an agreement. To take a step back, if the parties reach such an agreement, underlying issues including the admission of such evidence and the relief for a party if the court finds not in favor of it based on such evidence are left unresolved for the Draft is silent on these issues. Answers thereto is needed in the final version.

3) Witness Testifying Before Court (Articles 36-37)
These articles relate to witness testifying before court, and prescribe that the court shall grant the application for a witness to testify where the fact to be testified and the fact to be proved is relevant and it is indeed necessary for the witness to testify before court. Where the court grants a witness to testify in written testimony, it shall organize the parties to cross-examine the witness testimony. Where the court notifies relevant unit and individuals to testify before court, and the unit or individual refuses to testify, the testimony of such witnesses shall not be used as the basis for fact-finding of the case. These provisions echo with the Evidence Rules for Civil Proceedings. Article 68 of the Evidence Rules for Civil Proceedings prescribes that the people's court shall request the witness to testify and accept inquiries from the judges and the parties; where agreed by the parties and permitted by court, a witness may testify in ways other than appearing in court; the written testimony of a witness who refuses to testify before court without good cause shall not be used as the basis for fact-finding of the case. The Evidence Rules for Civil Proceedings first explicitly stipulates that a witness shall testify before court, and further specifies detailed conditions for a witness not testifying before court, i.e., the agreement of the parties to allow the witness to testify in other ways and the permission by court. The Draft stipulates that even if a witness is permitted not to testify before court, its testimony has to be cross-examined before admitted by the court for fact-finding.

4) Provisions on Expert Assistants (Articles 38-42)
These articles relate to the appearance of person with expertise, and prescribes the identification and qualification, the procedure for appearance, the assumption of fees, etc. of person with expertise. A person with expertise is the so-called expert assistant, an expert designated by a party to assist the party to express professional opinions on technical issues before court; the opinion of the expert assistant shall be deemed as the statement of the party. Article 84 of the Evidence Rules for Civil Proceedings stipulates that the judges may inquire the person with expertise, while permitted by court, the parties may inquire the person with expertise, and that the persons with expertise from the two parties may debate on the relevant issues, and shall not participate in trial proceedings other than cross-examining the appraisal opinion and expressing opinions on specialized technical issues. The appearance of an expert assistant is often seen in cases involving complicated technical issues such as patent disputes in the technical sector of tele-communications and bio-pharmaceuticals. Since a person with expertise is designated by one party, its expert opinion will inevitably incline towards one side. However, the system of the person with expertise is of positive value in judicial practice in view of its flexibility and its function in helping the judge in fact-finding relating to technical issues by collaborating with the technical investigators and appraisers.

4. Evidence Examination and Verification

1) Electronic Evidence (Articles 44-46)
For electronic evidence, in addition to be consistent with the rules specified in the Evidence Rules in Civil Proceedings, it further clarifies that the emails sent to unspecified multi-parties via public email box can be verified by the court. It further defines the court should not deny the evidence only on the ground that the evidence was produced in a manner violating administrative regulations. This has made the evidence collected from YouTube, Google, etc., which is only accessible by means of violating network administrative regulations, can be produced in Mainland China, which used to be produced via local notarization in Hong Kong or Taiwan.

2) Notarized Evidence (Articles 47 and 48)
For notarized evidence, the Draft clarifies that the court should not deny the notarized evidence only on the ground that the applicant for notarization is not the interested party, the notary office does not have jurisdiction; and it also rules that the notary office should do some clarification in certain cases per the requirement of the court.

3) Judicial Appraisal (Articles 49 and 50)
For judicial appraisal, the court should make a comprehensive examination on eligibility of the report, considering qualification and capability of the appraisal center, the method adopted and the logic of its reasoning, the material submitted, the identity of appraisal experts etc.

5. Relation with the Civil Procedure Law and Relevant Interpretations (Article 51)

The Draft also specifies its relationship with the Evidence Rules in Civil Proceedings and those Provisions issued before this Draft. Only for those not specified in this Draft, the Evidence Rules in Civil Proceedings will apply, and for those inconsistent rules in other judicial interpretations issued before the Draft, the Draft will prevail.

This article is co-authored by Jing Xu, Ben Ni, Xinyue Song and Xiaoxia Zhang.

For more information including full articles please see *www.chinalawinsight.com/2020/07/articles/intellectual-property/overview-of-the-spcs-draft-for-evidence-rules-in-ip-disputes/#page=1*

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Court of Appeal Sets Aside Contempt Regarding Statement of Truth

Introduction

*In **Mathnasium Center Licensing, LLC v Chang**,(1) the Court of Appeal allowed the defendant's appeal against a lower court's finding that he had made a false statement of truth with respect to an admission in a defence filed on behalf of a company. As is normal in such appeals, the Court of Appeal was reluctant to disturb a lower court's primary finding. However, in this case, the Court of Appeal considered that the lower court had been plainly wrong to make an order for committal for contempt of court. The Court of Appeal agreed with the lower court that, in principle, a person who makes a statement of truth in a pleading that verifies a false admission of fact can be committed for contempt of court. However, the admission must be clear and unqualified and this is where the Court of Appeal disagreed with the lower court. In this case, the defendant appears to have made a mistake, possibly as a result of an unfortunate miscommunication with the company's lawyers while under pressure to meet a final deadline for the filing of the defence*

Background

Since April 2009, when Hong Kong adopted its civil justice reforms, statements of truth for pleadings, witness statements and expert reports have become an important part of the local litigation landscape. Statements of truth force those who sign them to focus their minds on their belief as to the accuracy of matters referred to in (for example) a pleading or witness statement.

In *Mathnasium Center Licensing*, the plaintiff sued a company in respect of which the defendant was a shareholder and director. The plaintiff's claim was for certain royalty payments alleged to be owed by the company, pursuant to a franchise agreement relating to several learning centres. Crucial to the determination of the amount of royalties was the operation of the learning centres. The plaintiff claimed (among other things) that the centres were opened and operated by the company and the company appears to have admitted this in its defence, which was verified by a statement of truth signed by the defendant. The defence was filed just before the deadline on 4 September 2015 (the date of the statement of truth).

As it transpired, some of the learning centres were operated by certain third-party entities, in which the defendant allegedly had an interest. The admission in the defence led the plaintiff to continue enforcement proceedings against the company which, in turn, appears to have eventually ceased operations. The defendant explained the admission as being the result of (among other things) a miscommunication with the company's lawyers regarding his instructions.

At first instance, the defendant was found to have committed contempt of court. The lower court considered that it had been beyond reasonable doubt that the statement of truth was false, the defendant did not have an honest belief as to the admission and the admission had been material. It made no difference that the falsity was in respect of an admission, as opposed to a false averment in a pleading.

As for sentencing, the court sentenced the defendant to three months' imprisonment – which was stayed pending his appeal.

Three principal issues required determination:

- Could an admission in a pleading constitute a statement of fact for the purpose of verifying a pleading (a legal issue)?
- If so, was the admission clear and unqualified (a factual issue)?
- Had the lower court been plainly wrong in its assessment of the facts?

Appeal

In a detailed judgment, the Court of Appeal allowed the defendant's appeal.

As for the first issue, the Court of Appeal agreed with the lower court:(2)

There is no reason in principle why a person who made a statement of truth to verify a false admission of a fact stated in a pleading may not be committed for contempt, provided that his admission as to the fact is clear and unqualified.(3)

As for the second issue, the Court of Appeal strongly disagreed with the lower court. Taking a holistic approach to the company's defence, the Court of Appeal did not consider that the admission was unqualified. Whether the admission was 'unqualified' did not depend (for example) on how the defendant had characterised it, but rather on a fair and proper

reading of the averments in the plaintiff's claim and the totality of the defendant's defence. The Court of Appeal appears to have considered that while the company had admitted a part of the plaintiff's claim – namely, that the learning centres were "opened and operated" by the company – in other parts of its claim the plaintiff had pleaded that the learning centres had been "opened by [the company], or caused or permitted to be opened or operated or franchised by [the company]", a distinction which was important as to the nature of the company's admission and whether it was unqualified. In the circumstances, the admission should not be read in isolation.(4) The Court of Appeal stated that:

When the relevant averments in the statement of claim are read properly with the relevant responses in the defence, what would seem to be an unqualified admission in §7 of the defence is clearly shown not to be the case. In the absence of an unqualified admission in the defence, the application to commit the defendant for making the statements of truth to verify false admissions of fact in the defence falls at the first hurdle.(5)

This appears to have been enough for the plaintiff's application to commit the defendant for contempt to fail. However, as regards the third issue, the Court of Appeal considered that the lower court had misdirected itself as regards certain important evidence that raised a reasonable doubt in favour of the defendant. For example, the Court of Appeal did not think that the defendant's case of mistake or miscommunication with his lawyers was implausible.(6)

The Court of Appeal set aside the lower court's order of committal and the sentence.

Comment

The Court of Appeal's judgment is notable for its detail, especially given that an appeal court is generally reluctant to disturb a lower court's findings of primary fact as to the credibility of a party's evidence – unless (for example) the lower court reached a plainly wrong conclusion on the facts.

Several practical points, perhaps, come to mind.

Applications for contempt of court are serious and should not be commenced, unless there are convincing grounds.

Drafting pleadings is often complex and the aim is usually for as much particularity as is feasible. In this context, the Court of Appeal's analysis of the plaintiff's statement of claim is revealing.

Further, the circumstances in which the defendant signed the statement of truth suggest a possible lack of attention and reliance on an earlier draft - perhaps, under the pressure of an urgent deadline.(7) As a general point, pleadings and witness statements are too important to be rushed, even when working against a final deadline, and statements of truth can have consequences. In particular, a defendant should be careful when responding to a plaintiff's averment (allegation) with a general admission.

A person who deliberately makes a false statement of truth in court proceedings in Hong Kong can expect to be found in contempt of court and to receive a custodial sentence of (at least) several months - for example, more than a fine and an order for legal costs against them. An honest mistake by (or on behalf of) a party does not amount to contempt, although it could adversely affect their case.

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This article was originally edited by, and first published on, **www.internationallawoffice.com**

Endnotes

(1) [2020] HKCA 1016 and [2021] HKCA 112.
(2) [2020] HKCA 1016, at paras 30-31.
(3) Supra note 2, at para 32.
(4) Supra note 2, at para 44.
(5) Supra note 2, at para 46
(6) Supra note 2, at para 58.
(7) Supra note 2, at paras 7 and 53. It appears that the company's defence was filed between 2:00pm and 3:00pm, just before the 4:00pm deadline for filing on 4 September 2015, pursuant to a final court order (an 'unless order').

Noble Chartering Inc -v- Priminds Shipping Hong Kong Co Ltd [2021] EWCA Civ 87

The Court of Appeal had to consider whether a draft bill of lading contained any representations made by the shipper regarding the 'apparent good order and condition' of the cargo.

The facts

The owners were the disponent owners of the motor vessel "TAI PRIZE" under an amended NYPE charterparty with the shipowner dated 08 September 2011. The charterers chartered the vessel pursuant to a voyage charterparty dated 29 June 2012 for the carriage of one cargo of heavy grains, soya or sorghum from Brazil to China.

The vessel arrived at Santos for loading. A Congenbill 1994 bill of lading (B/L) was drafted by the shipper and offered for signature by or on behalf of the master of the vessel. Under the heading 'shipper's description of goods' the cargo was described as '63,366.150 metric tons Brazilian soyabeans clean on board'.

The B/L was executed by agents on behalf of the master without any reservations stating that the cargo had been 'Shipped… in apparent good order and condition…'

The vessel arrived at Guangzhou and discharge commenced on 15 September 2012. It was suspended *'due to charred cargo found'*. The receiver brought a claim for damages in China which the shipowner contested but lost at first instance and on appeal.

Subsequently, the shipowner commenced arbitration in London against owners who settled the claim and then sought in further arbitration an indemnity for the amounts paid to the shipowner from charterers. There was no express provision in the charterparty under which owners were entitled to an indemnity.

The arbitrator found as fact that the damaged beans had been loaded in a pre-existing damaged condition and that the damage was not reasonably visible to the master or any agent of owners at or during loading. However, the arbitrator concluded that because the discolouration of the beans would have been visible on reasonable examination by the shipper, it followed that the cargo was not in apparent good order and condition when shipped notwithstanding her earlier conclusion. She held charterers liable to owners because the shipper was charterers' agent and therefore they had impliedly warranted the accuracy of any

statement as to condition contained in the B/L.
On charterers' appeal in the Commercial Court the judge held that (1) by presenting the draft bill of lading to the master for signature, the shipper was doing no more than inviting the master to make a representation of fact in accordance with his own assessment of the apparent condition of the cargo, (2) the bill of lading was not inaccurate as a matter of law, and (3) there was no room for the implication of an obligation to indemnify owners.

Owners appealed. The Court of Appeal had to consider the following three questions of law:

(1) Did the words 'clean on board' and 'Shipped... in apparent good order and condition...' in the draft B/L presented to the master amount to a representation by the shippers and/or charterers as to the apparent condition of the cargo or were they instead an invitation to the master to make a representation of fact in accordance with his own assessment?

(2) In light of the answer to question 1, on the findings of fact made by the arbitrator, was any statement in the B/L inaccurate as a matter of law?

(3) If so, were charterers obliged to indemnify owners against any consequences of that statement being inaccurate?

The meaning of 'apparent good order and condition' in a bill of lading
Males LJ delivering the leading judgment held that several points were clear from the relevant case law and textbook commentary:

First, a statement in a bill of lading as to the apparent order and condition of the cargo referred to its external condition, as would be apparent on a reasonable examination.

Second, what amounted to a reasonable examination depended on the actual circumstances prevailing at the load port. The master's responsibility was to take reasonable steps to examine the cargo, but he was not required to disrupt normal loading procedures.

Third, what mattered was what was reasonably apparent to the master or other servants of the carrier. The bill of lading contained a representation by the master and said nothing about what might be apparent to anyone else, such as the shipper.

Fourth, the statement related to the apparent order and condition of the cargo at the time of shipment, that was to say of receipt by the carrier, and not at any earlier time.

Fifth, the statement was based upon the reasonable examination of the cargo which the master had (or should have) undertaken.

Was the bill of lading accurate?
Once it was understood that a statement as to the apparent order and condition of the cargo referred only to its external condition as that appeared on reasonable examination by or on behalf of the master in the circumstances prevailing at the load port, it was clear that the bill of lading as issued and signed on behalf of the master in the present case was accurate. The arbitrator's additional finding that the shippers would have been able to discover by reasonable means the condition of the beans before they were loaded was nothing to the point. The issue was whether the cargo was in good order and condition 'so far as met the eye' and, for this purpose, it was the master's eye which counted.

Indemnity
In these circumstances the third question, which assumed the existence of an inaccuracy in the bill of lading, did not arise. However, the Court of Appeal agreed with the first instance judge that charterers were not obliged to indemnify the owners against liability for the cargo claim and that to impose liability on the charterers based on the tender of a draft bill of lading containing a statement that the cargo was shipped in apparent good order and condition would be contrary to the scheme of the Hague Rules.

Comments
The Court of Appeal confirmed that the words 'clean on board' and shipped 'in apparent good order and condition' in the draft B/L were merely an invitation to the master to make a representation of fact in accordance with his own assessment of the cargo's condition.

The judge had some sympathy with the arbitrator's observation that it was unfair for owners to be liable without recourse to the charterers when their liability arose from the shipment of damaged cargo and the shippers (on charterers' 'side of the line') could by a reasonable examination have ascertained its damaged condition when the master could not.

He noted that it might seem unfair for charterers who actually know about pre-existing damage to escape liability. The Court left open the possibility that, by tendering a draft bill containing a statement that the cargo is in apparent good order and condition, the shippers made an implied representation that they are not actually aware of any hidden defects or damage which, if known to the master, would mean that he could not properly sign the bill as tendered. However, this was not a case where there was any finding of actual knowledge on the part of either the shippers or charterers so there was no good reason to distort the established meaning of a phrase such as 'shipped in apparent good order and condition', or the established understanding of what was happening when a draft bill containing those words is tendered to a master for signature, in order to address any perceived unfairness.

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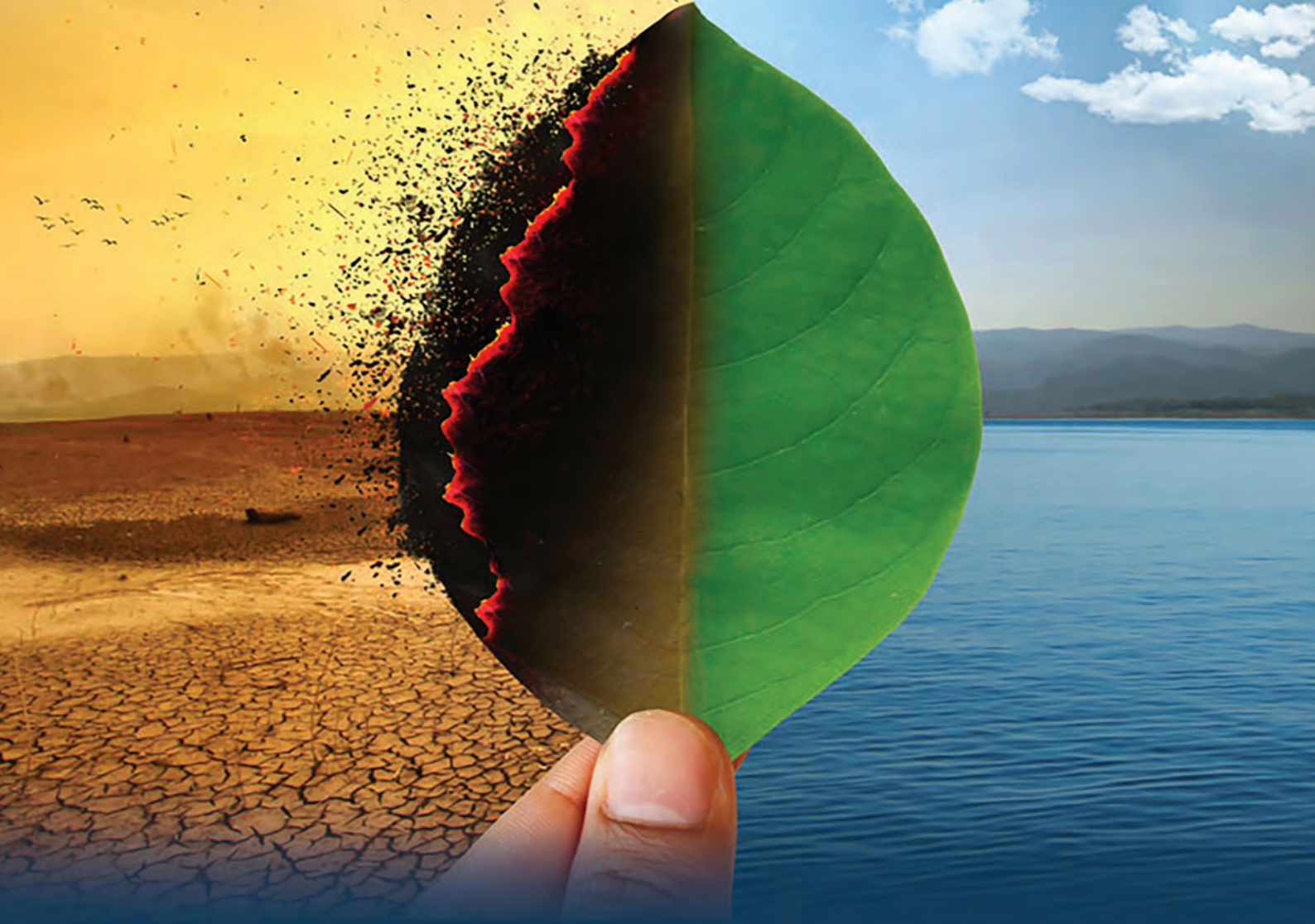

Climate Change Actions Against Corporations: Milieudefensie et al. v. Royal Dutch Shell plc.

In December 2020 a hearing took place before the District Court in The Hague (the Netherlands) in the climate change case between Milieudefensie et al. v. Royal Dutch Shell plc. A decision is expected on 26 May 2021. In this blog we set out the key issues that were addressed.

Background

In April 2019 several Dutch NGOs and more than 17,000 individual co-claimants ("Milieudefensie et al.") filed a case against Royal Dutch Shell plc. ("RDS") requesting a declaratory decision that RDS acts unlawfully towards the claimants if it does not reduce the combined volume of all CO2 emissions associated with its business activities and fossil products by 45% by 2030, 72% by 2040 and 100% by 2050, compared to 2010 levels. In addition, they request the court to order RDS to lower such CO2 emissions accordingly. Milieudefensie et al. stress the importance and timing of this case in light of the severe consequences of climate change and the possibilities still available for society as a whole – within certain time frames – to limit the negative effects of climate change and global warming. As the young generation representative put forward by Milieudefensie et al. at the end of the hearing said: "The question that is asked time and again in this court case is this: who has what responsibility?" The claim follows the Dutch Supreme Court's landmark decision in Urgenda, in which it held that the Dutch State has a positive obligation under the European Convention on Human Rights to reduce emissions of greenhouse gasses by at least 25% by the end of 2020 measured against 1990. As in Urgenda, the Milieudefensie claimants brought a class action under Article 305a of Book 3 of the Dutch Civil Code.

The merits of the claim
Milieudefensie et al. argue that the climate change impacts of RDS's activities violate a duty of care owed under Dutch law to prevent dangerous climate change. They claim that the duty of care specifically rests with RDS as the holding company headquartered in The Hague (The Netherlands) which sets the (emissions) policy for the entire Shell group worldwide and as such has control over these emissions. According to Milieudefensie et al., the violation of the duty of care involves unlawful endangerment and breaches of obligations under the ECHR that are owed by Shell by virtue of its responsibility to respect human rights. Milieudefensie et al. furthermore rely on soft law in substantiating their claim, such as the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinationals and the principles drawn up by the UN Global Compact. RDS denies that such specific duty of care rests upon it under Dutch law and argues that no obligations arise from the ECHR or soft law on which to provide a basis for the relief sought. According to RDS, it has no control over the emissions of its group companies or end-users of these companies' products, and in any event cannot be held liable under Dutch law for the emissions of these actors. Moreover, RDS argues that even if declaratory relief is granted, this will not lead to an actual reduction of CO2 emissions as third parties would step in to meet the demand for fossil fuels and other products.

Applicable law
Milieudefensie et al. argue that Dutch law is applicable to the question whether RDS acts unlawfully and thus is to be held liable for the CO2 emissions of its group of companies and the end-users of its products. They premise this argument primarily on the ground that the damage causing the event takes place in the Netherlands, because RDS determines and adopts the (emission) policy for the entire group of companies in The Hague (Handlungsort). Alternatively, Dutch law is applicable when applying the Erfolgsort test as the damage in the form of climate change (also) manifests itself in the Netherlands. RDS, on the contrary, argues that instead of Dutch law, the laws of the countries where the CO2 emissions are caused by its group companies and its end-users (Handlungsort) or the laws of the countries where the damage is suffered (Erfolgsort) apply to the claims of Milieudefensie et al.

Role of the court
The distinct roles of the courts, government and of business is a recurring theme in climate change litigation cases across the globe and also in this case is point of debate. According to RDS, awarding the claims of Milieudefensie et al. will interfere with existing legislation and regulatory frameworks and the energy transition policies that states have developed and will continue to develop in the future. RDS argues that it is mainly states which can influence the supply and demand for oil, gas and sustainable energy through laws and regulations. Court interference (by awarding the present claims), according to RDS, causes a high degree of legal uncertainty. Most importantly, the court must exercise restraint, as these legal proceedings concern issues of policy and politics reserved to Dutch governmental bodies. By granting the claims, the court will go beyond what is permitted based on the existing case law of the Dutch Supreme Court regarding the court's role in the development of law. Milieudefensie et al. disagree and see a role for the court where the legislator does not take any or not sufficient measures to tackle the current climate change problems.

Looking ahead
The District Court will render judgment on 26 May 2021. An English translation of the judgment will become available that same day.

Climate change-related claims against corporations are on the rise. As the pressure on corporations increases to step up the fight against global warming, this ruling may also have implications for other energy and fossil fuel companies across the globe, whether these issues are left to the politicians or will come within the ambit of the powers of the court. This case is one of a number ongoing across the world in which claimants seek to hold companies liable for a breach of a duty of care owed in relation to human rights and environmental harms. One example involves litigation against RDS in the UK and seeks to establish liability against it in connection with the activities of its subsidiary in relation to an oil leakage in Nigeria (e.g. Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents) (judgment forthcoming)).

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Beefing up Emission and Fuel Standards in the Arctic

by Markus Laurantzon and Nina M Hanevold-Sandvik

Introduction

On 20 November 2020 the 75th session of the International Maritime Organisation (IMO) Marine Environment Protection Committee (MEPC) approved a ban on the use and carriage of so-called 'heavy fuel oil' ('HFO') in the Arctic. The new regulation amends the International Code for Ships Operating in Polar Waters (the Polar Code), as implemented in the International Convention for the Prevention of Pollution from Ships (MARPOL). The proposed amendments are expected to be formally adopted at the next MEPC session in June 2021. However, more stringent standards have already been proposed by the Norwegian government for the area surrounding Svalbard.

Although there is no clear definition of 'HFO', it is generally said to be a category of fuel oils with a particularly high viscosity and density, making it nearly tar-like. Therefore, HFO behaves differently than other fuels when released into water. Spills of HFO are of particular concern in polar waters as:

- the biological weathering generally takes longer;
- the HFO may solidify and sink, get trapped under and in ice and be transported over long distances; and
- clean-up is especially onerous in dark, cold and icy Arctic conditions.

Therefore, the oil will remain in the environment for a long time and may have devastating and lasting effects.

In addition, the combustion of HFO leads to some of the highest levels of exhaust emissions of all marine fuels, including black carbon emissions, which, when deposited in snow and ice, reduces the surface albedo and contributes to so-called 'Arctic amplification', a combination of feed-back processes speeding up the melting of sea ice and creating warmer temperatures in the region. Although HFO is not the most-used fuel in the Arctic, its use is reported to have increased more than any other type of fuel in the region in recent years.

While only recently agreed, the draft amendments have already been heavily criticised for not being effective enough and offering too many wavers and exemptions. Apparently, the proposed IMO ban was not considered sufficient by the Norwegian government either which, shortly before the new regulations were approved, put out on hearing national legislation which would ban all use of HFO in the waters surrounding Svalbard. Therefore, the exact extent of future fuel standards in the Arctic remains to be seen, and the regulations may vary.

Polar Code and current pollution standards

On 1 January 2017 the Polar Code entered into force. It prescribes mandatory minimum standards and non-mandatory guidelines regarding safety and pollution prevention for vessels operating in both Arctic and Antarctic polar areas. It was adopted through amendments to the International Convention on Safety of Life at Sea (SOLAS) and MARPOL and has a supplementary function to existing IMO instruments. Its supplementary function means that, among other things, the new and stricter IMO regulations in MARPOL concerning the sulphur content of ships' fuel oil (IMO 2020) also apply to vessels operating within the Polar Code's geographical scope. This is also the case for other IMO measures to fulfil the organisation's goal of a 50% reduction in greenhouse gas emissions from international shipping compared with 2008 levels by no later than 2050.

Figure 1: The Polar Code's geographical scope, IMO

Mandatory pollution measures are prescribed in Part II-A of the Polar Code, which amends MARPOL Annexes I, II, IV and V. Part II-A prohibits and regulates discharges into polar waters. Spread out in different MARPOL annexes, the Polar Code:

- fixes a ban on "any discharge" of oil or oily mixtures (Annex I) and noxious liquid substances (Annex II) into the sea;
- prescribes operational requirements and prohibitions to prevent pollution by sewage from ships (Annex IV); and
- prohibits the disposal of any garbage, cargo residue and food waste in ice-covered areas (Annex V).

The amendments to SOLAS prescribe new and stricter safety provisions for ships operating in polar waters, including for equipment, design, construction, operation and manning.

Approved ban on HFO in Polar Code

Ever since HFO was banned for carriage in bulk as cargo, use as ballast or carriage and use as fuel in the

Antarctic in 2011, a ban on HFO has been anticipated in Arctic waters. Therefore, on approval, the Polar Code was criticised for not prohibiting the use of HFO in the Arctic.

Part of the reason that it took so long to adopt the new ban is because Canada and Russia have been fearing the impact on their energy supply to local communities and shipping of commodities. This also explains the Arctic HFO ban's current form, with exemptions and waivers that have been subject to heavy criticism from environmentalists ever since the first draft was released.

There are several aspects of the approved ban which lead to questions on its efficiency. First, it prohibits only the "use and carriage" of HFO as "fuel" and not "the carriage in bulk as cargo [and] use as ballast", as the Antarctic ban does. Second, it will come into effect on 1 July 2024, which means that there will be a more than three-year grace period after what is expected to be its formal adoption.

Further, it offers exemptions from the ban for certain newer vessels with a gap of at least 76cm between the fuel tank and the outer hull of the ship. This gap – even though it may provide some protection – might nonetheless fail to prevent oil spills, provided that the damage is serious enough. These exemptions last until 1 July 2029.

Finally, states bordering Arctic waters can "waive the requirements of [the HFO regulation] for ships flying the flag of the Party while operating in waters subject to the sovereignty or jurisdiction of that Party" until 1 July 2029. In other words, according to the Polar Code's definition of 'Arctic waters', Norway (because of Svalbard and Jan Mayen), among other countries, may waive the obligation to not carry or use HFO as fuel in its territorial seas and exclusive economic zones until 2029.

The exemptions and waivers are potentially substantial. At present, it is primarily vessels with an Arctic flag that use HFO in the region. A study conducted by the International Council on Clean Transportation (https://theicct.org/) suggests that "had the proposed HFO ban been in place in 2019, exemptions and waivers would have allowed as much as 70% of HFO carriage and 84% of HFO use to remain in the Arctic"(1) – making the ban potentially toothless for nearly another decade.

Proposed Norwegian ban of HFO in waters around Svalbard

On the other hand, Norway shows no desire to utilise the right to waive the Polar Code requirements in its waters. Simultaneously, as environmentalists were heavily criticising the proposed Polar Code ban, the Norwegian government ceased the opportunity to put out on hearing a proposal for a full ban on HFO in the waters around Svalbard.

The proposal is an amendment to the Svalbard Environmental Protection Act (SEPA), which already bans the carriage and usage of HFO by all ships in the natural parks in Svalbard. The current ban is stricter than the one in the Polar Code as it also bans the use of hybrid oil (which may be as dangerous to the environment as heavy oil).

The new Norwegian proposal states that ships "calling at" the territorial sea around Svalbard must not use or carry on board petroleum-based fuel other than natural gas and marine gas oil. 'Marine gas oil' and 'natural gas' will be more closely defined by regulation. The ban – if passed by Parliament – is expected to enter into force on 1 January 2022.

The proposal has been praised by environmental organisations for being stricter than the Polar Code, as it prescribes a ban not only on traditional HFO but also on hybrid oil, in all of Svalbard's territorial sea and without any substantial waivers and exemptions, entering into force as early as 2022. The consultation paper for the proposal suggests that should the ban be put in place at present, it would have consequences for cruise vessels, bulk vessels, refrigerator ships, cargo ships and fishing vessels currently operating in the Svalbard region.

An expansion of the current SEPA ban seems reasonable. An oil spill does not follow borders and a spill outside the Svalbard natural parks might spread easily to these areas that are in need of particular protection. However, parties might question whether such a ban is in accordance with international law and, in particular, the right to "innocent passage" prescribed in Article 17 of the United Nations Convention on the Law of the Sea (UNCLOS). However, it is likely that a ban for any vessel calling at a port or roadstead in Svalbard is lawful in accordance with the principles of port state jurisdiction. Further, based on the consultation paper, it would appear that the use of the wording "call at" would mean that the ban would not apply to vessels performing innocent passage, continuous and expeditious through the territorial sea (Article 19 of the UNCLOS).

Comment

Many developments relating to emission and fuel standards in the Arctic took place in 2020. A ban on the use of HFO in the Arctic has been in the pipeline for a long time and will finally be adopted in 2021. Even though the IMO is beefing up its emission and fuel standards in the Arctic, with its waivers and exemptions it is clear that the ban is far from bullet-proof. It remains to be seen whether other states will follow Norway's lead and propose similar bans in their waters. This would ensure harmonisation of the standards in the region, which in turn would the benefit both the environment and the shipping industry's predictability.

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The Lonely Expert

The Role of the Single Joint Expert in Construction Disputes

"The objective of appointing a single expert would be to reduce costs, expedite the process and reduce the prospect of divergent expert evidence."
***Sekai Nyambo**, Associate Director, HKA*

Introduction
An expert witness can be defined as an individual with specialized experience or knowledge in a particular discipline which surpasses that which would be expected of a layperson. The expert witness' duty is to provide the court or tribunal with an unbiased opinion regarding the matters in dispute which are within their expertise.[1] In construction disputes, expert evidence typically involves specialist areas such as architectural, quantum, delay analysis / scheduling and engineering.

In this article, we shall explore the history, role and challenges faced by single joint experts in construction and engineering disputes.

The Background
The Civil Procedure Rules were introduced in the UK to improve access to justice and reduce litigation costs. Part 35 attempts to address some of the issues regarding expert evidence in civil litigation identified in Lord Woolf's report *'Access to Justice'*, namely: excessive costs; lack of independence; the needless production of expert evidence; and the rise of a *'litigation support industry'* to name a few.[2] The Rules were introduced to foster cost-effective litigation practices.

It was Lord Woolf's view that: *"A single expert is much more likely to be impartial than a party's expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up."* [3]

Single Joint Expert in Litigation
Under Civil Procedure Rule (CPR) 35.7, the courts can direct that evidence on an issue is given by a single joint expert where the parties wish expert evidence to be submitted that issue. A Single Joint Expert (SJE) is an expert appointed jointly by both parties to a dispute to give expert evidence in proceedings. In the instance that the parties are unable to agree on the expert, then the court is able to choose one from an agreed list of experts prepared or identified by the parties. The court is also empowered to determine that the expert is selected by any other means it deems appropriate.[4]

It is often argued that the disadvantage of having the SJE is that the court or tribunal does not get the benefit of differing opinions which naturally arise from

two experts with divergent backgrounds and experiences. A common example of this is having two experienced quantum experts, one from a contracting background, the other from a private quantity surveying practice; the result is typically two separate views based on the same set of facts.

The CPR positively encourage the use of SJEs. Under Practice Direction (PD) 35.7 of the CPR the courts will consider[5]:

- The appropriateness for each party to have its own expert taking into account the amount in dispute, the importance to the parties, and the complexity of the issue.
- The practicality of instructing the SJE in the event that a conference may be required with the legal representatives, experts and other witnesses.
- Whether the SJE is likely to resolve the issue more speedily and cost effective than separately instructed experts.
- If the expert evidence falls within a well-established field of knowledge and consequently is not likely to be challenged, or whether there is a likelihood of an extensive range of expert opinion.
- Whether one of the parties has already instructed an expert on the issue in question and if this was done pursuant to any practice direction or relevant pre-action protocol, etc.

This is further endorsed in the Civil Justice Council (CJC) guidance which states, "Wherever possible, a joint report should be obtained".[6]

The Technology and Construction Court (TCC) provides guidance on use of SJEs which appear in line with PD 35.7. It contends that SJEs would be unsuitable for disputes on liability, disputes that are large and technically complex or where experts may already have been appointed pursuant to pre-action protocol. However, there seems to be room for the use of SJEs for:

- low value disputes which require technical evidence, but the cost of each party having its own expert would be disproportionately high;
- a self-contained technical issue which is not necessarily controversial; or
- a situation where a laboratory test can be carried out on behalf of the parties.[7]

Single Joint Expert in Arbitration

In international arbitration, there are some similarities in approach.

For instance, guidance provided by the Chartered Institute of Arbitrators (CIArb) states: *"The resolution of many disputes referred to international commercial arbitration frequently involves deciding complex technical issues which may require specific knowledge or experience. To address this need…(2) parties may jointly agree to appoint a single expert; (3) arbitrators may wish to appoint a single expert instead of the parties doing so; and/or (4) arbitrators may wish to appoint a tribunal-appointed expert in addition to the party-appointed expert(s)".* [8]

The objective of appointing a single expert would be to reduce costs, expedite the process and reduce the prospect of divergent expert evidence. According to the CIArb guidance, the benefit of having the SJE is to provide "…a more cost-effective method of adducing expert evidence which makes it particularly attractive in cases where the cost and delay of resolving competing expert opinions would be disproportionate to the sums in dispute."[9]

Whilst having experts appointed by the tribunal in addition to those appointed by the parties will increase costs to the arbitral process, the tribunal may deem it fitting where they require help to decide between differing expert opinions, particularly on complex technical issues. [10] This then raises the question whether in some way, such an expert then becomes, de facto, an arbitrator.

Experiences in other Jurisdictions

As we have seen above, the UK Civil Procedure Rules allow for court discretion as to whether evidence is given by the SJE. Other jurisdictions appear to have gone a stage further.

In Queensland Australia, the Uniform Civil Procedure Rules provide that: "…if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court"[11]

In Hong Kong, following *Peace Mark (Holdings) Ltd v Chau Cham Wong Patrick* [12], a growing trend of the use of SJE was noted [13].

The High Court's Rules make provision for the use of a single expert instead of experts appointed by the parties. Rule 4A of Order 38 states: "(1) In any action in which any question for an expert witness arises, the Court may, at or before the trial of the action, Order 2 or more parties to the action to appoint a single joint expert witness to give evidence on that question."[14]

In Peace Mark (Holdings) the court said: "It is instructive to note that under Practice Directions 5.2 (Case Management), the court will not give permission to a party to adduce expert evidence unless the appropriateness of appointing a SJE has been considered (§20(1)(c))." [15]

It appears that in Hong Kong there is an emphasis on cost efficient litigation proceedings with the use of SJEs being the default position unless parties can justify their appointment as inappropriate.

In the United States, however, the parties prefer to appoint their own experts. Whilst there are court appointed experts, there is no provision for the use of SJEs.

The Shadow Expert

In jurisdictions such as Australia and Hong Kong, where the use of SJEs is not uncommon, this has brought about use of the "shadow expert" (themselves also known as an expert adviser). A party may wish to appoint a shadow expert to assist in formulation of the case, but this person does not give evidence in the proceedings. Their duty is to the party that has appointed them, rather than the court or tribunal.[16] In construction disputes, parties may consider it necessary to have shadow experts particularly where there are substantial sums at stake which rely on quantum and

delay expert evidence. Parties may wish to prove the opinions of the SJE by using the shadow expert to review report submissions of the SJE. The shadow expert may also assist in formulating questions that will be used in cross-examining the SJE. The obvious downside of having shadow experts is the additional costs to the proceedings, this is contrary to the purpose of having the SJE. Furthermore, the process could end up with different viewpoints as to the correct outcome; the risk of such an outcome would be similar where a tribunal appoints a single expert along with the experts appointed by the parties.

Important Matters for the SJE

When considering taking an appointment as a single joint expert, the individual in question must consider the following issues:

- The principal and first duty of the SJE, like any other expert witness, is to the court or tribunal. However, as they have been appointed by both parties, they still owe a duty to each party.
- The SJE is instructed by more than one party, consequently, there is even more pressure to ensure that all their dealings with the parties are always meticulously fair and transparent. The SJE must avoid communicating with one party independent of the other(s). [17] If it can be shown that one party has interfered in the SJE arriving at his opinion, the other party may be granted leave to rely on its own expert's report. This was the case in Edwards v Bruce & Hyslop (Brucast) Limited[18] where the court allowed the claimant to rely on its own expert's report, on the grounds that between the SJE's first and second report, unbeknown to the claimant and the court, the defendant's solicitors had been involved in 'clandestine communications' with the SJE.[19]
- There may be a lack of co-operation or resistance (for example in document production) from one party if they were forced into the SJE arrangement where the court had denied them having their own expert. In such situations, a successful outcome may require the SJE exercise skilful diplomacy and determination.
- Solicitors from opposing sides will usually try to agree the instructions and the lead solicitor issues these to the SJE. Where the instructing parties cannot agree on a set of instructions, CPR 35.8 allows each party to issue independent instructions, but these must be copied to the other party and any queries the SJE may have are copied to all the instructing parties. The SJE would need to somehow reconcile the two sets of instructions. It is worth recognising that any queries may take longer to address compared to situations where the expert is instructed by one party only. If the SJE is required to consider different assumptions of fact, then the SJE costs may increase if the SJE must provide multiple opinions to address the permutations raised in the separate instructions.
- The life of the SJE is often a lonely one. Typically, the SJE has had no prior involvement or knowledge of the case. They will have not advised on technical aspects of the dispute prior to formal proceedings. They will have not had any input or influenced the formulation of the pleadings.

Conclusion

It is clear, that to ensure a better outcome from the appointment of an SJE, there needs to be an agreement which covers all facets of the appointment. This should include: clear instructions; terms of reference; a documented and agreed means by which the SJE may seek clarification or any additional information; and agreement on remuneration. To fail to do this as a basic minimum is likely to guarantee a tumultuous process, an awful experience for the SJE and the probability of an unsatisfactory outcome for the parties to the dispute.

The intentions set out by Lord Woolf and implemented through the CPR as they relate to the appointment of SJEs are commendable. However, the reality is that the use of SJEs, especially in the UK, is fairly uncommon whether in litigation or arbitration. This is simply because the criteria established by the CPR for using SJEs would exclude many TCC disputes. There is no appetite for their use in our legal system. Therefore, the SJE will continue to be restricted to cases where the issues are uncontroversial and are not particularly complex. This raises the question that given a significant number of construction disputes referred to adjudication relate to money and time issues, one wonders whether this may be a dispute forum where there could be room for further growth in the use of SJE, thereby reducing the need for parties to appoint their own experts and achieving more mutually satisfactory outcomes?

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The Use of Experts in International Construction Disputes: Conflicts of Interest and Multiple Instructions

A recent decision of the Technology and Construction Court appears to be the first reported English decision to uphold a fudiciary duty of loyalty in an expert witness appointment. The finding in this case meant that an international expert services firm was unable to act for more than one party to an international construction dispute, even through separate experts in different locations contracting via separate legal entities. Given the rise of globalisation in the expert services industry, this decision is likely to have considerable ramifications for global expert services firms and the drafting of their expert witness appointments.

A v B

The developer of a petrochemical plant appointed a consultant to provide engineering, procurement and construction management ("EPCM") services in relation to the project. The developer also engaged a contractor for the construction of certain aspects of the project. The contractor claimed against the developer in respect of additional costs incurred due to delays arising from the late release of certain designs. These were designs which the EPCM consultant was required to produce under its appointment. The developer's position was that it would seek to pass on to the EPCM consultant any liability it might have to the contractor.

The contractor commenced an ICC arbitration against the developer in relation to its claim (the "Contractor Arbitration"). The developer engaged a delay expert from an international expert services practice (the "Firm") to advise and act in connection with the arbitration. Some months later the EPCM consultant commenced its own arbitration against the developer for non-payment of fees (the "EPCM Arbitration"). The developer counterclaimed against the EPCM consultant in respect of delay and disruption to the project, including any liability it had to the contractor in the Contractor Arbitration.

Solicitors acting for the EPCM consultant subsequently notified the developer's solicitors that they were proposing to retain an expert from the Firm to assist the EPCM consultant in the EPCM Arbitration. The developer objected on the basis that the Firm had already been appointed by it in the Contractor Arbitration to consider many of the same issues which would arise on its counterclaim in the EPCM Arbitration.

The EPCM consultant and the Firm sought to justify the acceptance of both retainers on four grounds:

- Each of the experts had a duty to act independently and to assist the tribunal.
- The appointed experts were natural persons distinct from their corporate employers.
- The experts were appointed in different disciplines, based in different geographic regions and engaged through different companies within the Firm.
- Information barriers were to be maintained to avoid any transfer of confidential information.

The developer rejected these justifications and sought an injunction restraining the Firm from providing expert services to the EPCM consultant in connection with the EPCM Arbitration.

A duty of loyalty?

The principle issue before the Technology and Construction Court was whether the Firm's appointment by the EPCM consultant was in breach of any fiduciary duty of loyalty owed to the developer through its original appointment in the Contractor Arbitration. By the time of the hearing, the developer no longer relied on any risk to confidential information and the extent of physical and informational separation between the two experts became largely irrelevant. The crucial issue was whether the Firm's appointment in the Contractor Arbitration carried with it a fiduciary duty of loyalty.

The court concluded that such a duty did apply, emphasising that the developer had engaged the Firm to "provide extensive advice and support for the [developer] throughout the arbitration proceedings". A previous case in which an expert was found not to owe a duty of loyalty was distinguished on the basis that the client in that case was aware that the expert would continue to provide the relevant services to others including the opposing party in question.

The Firm argued that the finding of a duty of loyalty would conflict with the independent role of an expert and the duties owed to the court or tribunal in this regard. This argument was rejected by reference to the similar position in which solicitors and barrister stand:

"In common with counsel and solicitors, an independent expert owes duties to the court that may not align with the interests of the client. However, as with counsel and solicitors, the paramount duty owed to the court is not inconsistent with an additional duty of loyalty to the client. … [T]he terms of the expert's appointment will encompass that paramount duty to the court."

to determine that the expert is selected by any other means it deems appropriate.[4]

It is often argued that the disadvantage of having the SJE is that the court or tribunal does not get the benefit of differing opinions which naturally arise from two experts with divergent backgrounds and experiences. A common example of this is having two experienced quantum experts, one from a contracting background, the other from a private quantity surveying practice; the result is typically two separate views based on the same set of facts.

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When considering taking an appointment as a single joint expert, the individual in question must consider the following issues:

- The principal and first duty of the SJE, like any other expert witness, is to the court or tribunal. However, as they have been appointed by both parties, they still owe a duty to each party.

- The SJE is instructed by more than one party, consequently, there is even more pressure to ensure that all their dealings with the parties are always meticulously fair and transparent. The SJE must avoid communicating with one party independent of the other(s). [17] If it can be shown that one party has interfered in the SJE arriving at his opinion, the other party may be granted leave to rely on its own expert's report. This was the case in Edwards v Bruce & Hyslop (Brucast) Limited[18] where the court allowed the claimant to rely on its own expert's report, on the grounds that between the SJE's first and second report, unbeknown to the claimant and the court, the defendant's solicitors had been involved in 'clandestine communications' with the SJE.[19]

- There may be a lack of co-operation or resistance (for example in document production) from one party if they were forced into the SJE arrangement where the court had denied them having their own expert. In such situations, a successful outcome may require the SJE exercise skilful diplomacy and determination.

- Solicitors from opposing sides will usually try to agree the instructions and the lead solicitor issues these to the SJE. Where the instructing parties cannot agree on a set of instructions, CPR 35.8 allows each party to issue independent instructions, but these must be copied to the other party and any queries the SJE may have are copied to all the instructing parties. The SJE would need to somehow reconcile the two sets of instructions. It is worth recognising that any queries may take longer to address compared to situations where the expert is instructed by one party only. If the SJE is required to consider different assumptions of fact, then the SJE costs may increase if the SJE must provide multiple opinions to address the permutations raised in the separate instructions.

- The life of the SJE is often a lonely one. Typically, the SJE has had no prior involvement or knowledge of the case. They will have not advised on technical aspects of the dispute prior to formal proceedings. They will have not had any input or influenced the formulation of the pleadings.

Conclusion

It is clear, that to ensure a better outcome from the appointment of an SJE, there needs to be an agreement which covers all facets of the appointment. This should include: clear instructions; terms of reference; a documented and agreed means by which the SJE may seek clarification or any additional information; and agreement on remuneration. To fail to do this as a basic minimum is likely to guarantee a tumultuous process, an awful experience for the SJE and the probability of an unsatisfactory outcome for the parties to the dispute.

The intentions set out by Lord Woolf and implemented through the CPR as they relate to the appointment of SJEs are commendable. However, the reality is that the use of SJEs, especially in the UK, is fairly uncommon whether in litigation or arbitration. This is simply because the criteria established by the CPR for using SJEs would exclude many TCC disputes. There is no appetite for their use in our legal system. Therefore, the SJE will continue to be restricted to cases where the issues are uncontroversial and are not particularly complex. This raises the question that given a significant number of construction disputes referred to adjudication relate to money and time issues, one wonders whether this may be a dispute forum where there could be room for further growth in the use of SJE, thereby reducing the need for parties to appoint their own experts and achieving more mutually satisfactory outcomes?

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For references please see online article

So, how do I know if my building is 18m high or not?

by Bernadette Barker BA (Hons) Dip Arch RIBA MSc (Construction Law & Arbitration) FCIArb DipICArb C.Arb MIFireE

This may seem a strange question to ask but not when it comes to measuring the height of the buildings in relation to the recent Advice Notes issued by the Ministry of Housing Communities and Local Government (MHCLG) following the establishment of the Independent Expert Advisory Panel (the Expert Panel).

It is also an important question in relation to the application of particular sections of the Building Regulations.

And in relation to external wall surveys and the EWS1 form as published by the Royal Institution of Chartered Surveyors (RICS) in December 2019 the question was also applicable up until 8 March 2021 when Version 2 of the EWS1 form was published.

To provide context and background, following the tragedy of Grenfell Tower when a fire broke out on 14 June 2017 and 80 lives were lost, The Ministry of Housing, Communities and Local Government (MHCLG) established the Building Safety Programme to make sure that buildings are safe, and that people feel safe now, and in the future.

The Ministry of Housing Communities and Local Government (MHCLG) published a series of Advice Notes.

Advice Note 14 published by the MHCLG states that the Advice Note is for the attention of anyone responsible for, or advising on, the fire safety of external wall systems of residential buildings 18m or above in height.

Advice Note 14 was supposed to give building owners clear advice on non-aluminium composite material (ACM) cladding systems but resulted in confusion for many leaseholders across the country.

It is my opinion that it also resulted in confusion because it did not state how the 18m in relation to a building was measured.

Advice Note 14 required that building owners were required to check that external wall systems to residential buildings over 18m are safe.

In late December 2019 the EWS1 form was published.

The RICS, the BSA and UK Finance agreed an industry-wide process, to be used by valuers, lenders, building owners and fire safety experts, in the valuation of high-rise properties to help unblock the deadlock in the housing market. It was developed in conjunction with the Ministry of Housing, Communities and Local Government.

The External Wall Fire Review process requires a fire safety assessment to be conducted by a suitably qualified and competent professional and confirmed using the EWS1 Form.

The EWS1 form as published on 16 December 2019 stated:
'Objective - This form is intended for recording in a consistent manner what assessment has been carried out for the external wall construction of residential apartment buildings where the highest floor is 18m or more above ground level …… '

The *"Objective"*does not exclude the plant room floor (if any) when measuring the height to the highest floor.

Whilst the EWS1 form was silent as to how the 18m height of a building was measured it did make reference to regulations and stated:
'The assessment takes account of regulations and published design guidance as were current at the time of construction as well as those which are current at the time of this assessment. It cannot be guaranteed that it would address

guidance and regulations which may be introduced in the future'.

At the date of the publication of the EWS1 form in December 2019 there had been no clarification by MHCLG as to how the 18m was measured.

The EWS1 Form Version 2 has now been revised as at 8 March 2021 and now makes no reference to an 18m criteria.

MHCLG Advice for Building Owners of Multi-storey, Multi-occupied Residential Buildings dated 20 January 2020 consolidated and superseded the existing MHCLG Advice Notes 1 to 22.

Moving forward, the Advice Note of 20 January 2020 clarified how the 18m height of a building is measured and stated under item 1.8:

'Expert Panel advice initially focused on the risk a high rise residential buildings of 18m or more to the height of the top occupied story (as per Diagram D of Approved Document B 2019 edition). The 18m threshold is established in the guidance to the Building Regulations and is the point at which additional fire safety provisions are provided for'.

As stated above Advice Note 14 was actually silent as to how the 18m was measured and there was no guidance on how the 18m would be measured from the date of publication of Advice Note 14 in December 2018 to 20 January 2020 when MHCLG published *Advice for a building owners of multi-story multi occupied residential buildings* which superseded the MHCLG Advice Note 14.

In 2019 I contacted the London Fire and Rescue Service to enquire as to how the 18m was measured and a response was given that normally building regulations would be followed. This however was not really information that could be relied upon. I also made a call to the MHCLG but no response was received.

Some buildings which are subject to the MHCLG Advice Notes would have been built under earlier Building Regulations than the 2010 Building Regulations.

However, the interpretation of *"height"* is the same under Building Regulations 2000 and Building Regulations 2010.

The Building Regulations 2000 states under interpretation: *"height" means the height of the building measured from the mean level of the ground adjoining the outside of the external walls of the building to the level of half the vertical height of the roof of the building, or to the top of the walls or of the parapet, if any, whichever is the higher';*

The Building Regulations 2010 states under interpretation: *'"height" means the height of the building measured from the mean level of the ground adjoining the outside of the external walls of the building to the level of half the vertical height of the roof of the building, or to the top of the walls or of the parapet, if any, whichever is the higher';*

In November 2018 the UK Government announced changes to the Building Regulations in order to implement the ban on the use of combustible material in the externals walls of certain high rise buildings in England.

The Building (Amendment) Regulations 2018 which came into force on 21 December 2018, Regulation(7)(4) states in relation to a *"relevant building":*

'(q) a "relevant building" means a building with a storey (not including roof top plant areas or any story consisting exclusively of plant rooms) at least 18m above ground level and which-

(i) Contains one or more dwellings

(ii) Contains an institution; or

(iii) Contains a room for residential purposes (excluding any room in a hostel, hotel or boarding house); and

(b) "above ground level" in relation to a storey means above ground level when measured from the lowest ground level adjoining the outside of the building to the top of the floor surface of the storey.'

There is therefore now a conflict or what might be called a discrepancy in the 2010 Building Regulations following the publication of the Building (Amendment) Regulations 2018 (which amended the 2010 Building Regulations).

The method of measurement of *'height'* for a *"relevant"* building under the Building Amendment Regulations 2018 under Regulation 7 does not include for the 'mean' ground level when assessing the height of the building.

Indeed, Regulation 7 (4) (b) specifically states that the measurement is taken *'from the lowest ground level'*.

The Building (Amendment) Regulations 2018 which came into force on 21 December 2018 and Regulation(7)(4) defines what is meant by a *'relevant'* building:

Having said that, prior to the publication of the Building (Amendment) Regulations 2018 there was no such thing as a *"relevant building"* under Regulation 7 and the Building Regulations are also not retrospective.

In relation to assessment of the height of an existing building Reg 7(4) of the Building (Amendment) Regulations 2018 would not be applicable to that building unless of course the Regulations were applicable at the time of the development and construction.

Theoretically therefore, if a building owner had assessed their building as being of a height of 18m in January 2019 and a decision had been made to remove *'cladding'* having followed the guidance in Advice Note 14, by the time of the publication of the consolidated Advice Note dated 20 January 2020 a different decision might have been made as the height the building measured in accordance with the Advice Note of 20 January 2020 might not have fallen under the requirement for the *'cladding'* material to be removed if the criteria was a height of 18m as defined in the Advice Note dated on 20 January 2020.

To summarise:
i. In Advice Note 14 there was no definition as to how 18m was measured.

ii. Advice note dated 20 January 2020 stated in relation to the height of the building:

'…..18 m or more to the height of the top occupied story (as per Diagram D of Approved Document B 2019 edition').

The difference in the two Advice Notes could possibly have meant the removal of cladding from a building or not and with the associated costs if the cladding was removed.

However, it should be remembered that item 1.5 of MHCLG Advice Note January 2020 also stated that the need to assess and manage the risk of external fire spread applies to buildings of any height (i.e., buildings under 18m) and stated:

'Following recent events, the Expert Panel has significant concerns that consideration is not routinely given to Requirement B4 of Schedule 1 to the Building Regulations (on external walls resisting the spread of fire), particularly in circumstances where the Guidance in Approved Document B is less specific. Requirement B4 is clear and requires that the "external walls of the building shall adequately resist of the spread of fireover the walls and from one building to another, having regard to the height, use and location of the building'. The need to assess and manage the risk of external fire spread applies to buildings of any height'.

The Approved Documents are a series of documents that give practical guidance on how to meet the requirements of the Building Regulations 2010 for England. The Approved Documents give guidance on each of the technical parts of the Regulations and provide guidance for common building situations.

Approved Documents state that there may be other ways to comply with the requirements other than the methods described in an Approved Document.

Approved Document B for the 2010 Building Regulations states that fire safety engineering might provide an alternative approach to fire safety and refers to BS 7974:2019 *Application of Fire Safety Engineering Principles to The Design of Buildings. Code of Practice* and supporting Published Documents which

provide a framework for and guidance on the application of fire safety engineering principles in the design of buildings.

BS 7974:2019 appears to make no reference to the definition of height and refers back to BS9999.

BS 9999:2017 Fire Safety and Design, Management and Use of Buildings-Code of Practice Under, Item 3.66 of Terms and Definitions defined the height of the building as: *'Distance of the surface of the highest point of the floor of the highest storey (excluding any such story consisting exclusively of plant rooms) to the fire and rescue service access level measured at the centre of that face of the building where the distance is greatest'.*

On this last matter we find that there is yet another method of measuring the height of the building and it is at this point I will conclude.

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Diales have launched new service - Arabic litigation technical support

The highly experienced team has already been involved in several landmark litigation disputes, worth over AED 1 billion

Diales have announced the launch of a new market offering for Middle East-based clients requiring litigation technical support in Arabic.

Diales, one of the leading global specialists in Expert Witness services, has established a unique in-house team of Arabic-speaking technical experts, who are able to assist clients in the submission of complex technical matters to local courts across the GCC region, and in the presentation of the case in court.

Mahmoud Abougabal has been put in charge of the newest service stream. Mahmoud is a delay analyst with over 14 years experience in the construction industry. He is regularly appointed by lawyers in the UAE and has been cross examined on multiple occasions in high-profile construction litigation disputes.

On his appointment to lead the service, Mahmoud said: "We are witnessing a growing interest in settling complex high-cost construction disputes by means of local court litigation. We believe that our ability to consistently provide hands-on, high-quality and quick-fire support has been essential in our recent benchmark successes in the field."

The highly experienced team has already been involved in several landmark litigation disputes, worth over AED 1 billion. The experts are also proficient in participation in cross-examination sessions conducted in Arabic with the court-appointed experts, and can support clients with the preparation of follow-up and rebuttal reports.

David Merritt, Managing Director and quantum expert said: "By leading the way in the sector with this new advisory service, Diales aims to fill the gap in the provision of support for clients who find themselves having to manage litigation in local Arabic speaking courts. Our team of Arabic speaking experts can help our clients understand the process more effectively and enable important commercial decisions to be made more seamlessly and intuitively. Early evidence suggests our clients are already finding real value in this service".

Updated guidance from the Court of Protection on capacity assessments & reports

The decision in AMDC -v- AG & Anor [2020] sets out the importance of implementing a thorough and structured process in dealing with capacity assessments and reports.

The decision in AMDC -v- AG & Anor [2020] sets out the importance of implementing a thorough and structured process in dealing with capacity assessments and reports.

The case concerned AG, a 68 year-old woman, and her capacity to make decisions pertaining to various issues. As part of the proceedings, the parties jointly instructed a psychiatric expert to assess AG's capacity. The case stresses the importance of parties and the court being able to identify that the fundamental principles of the MCA 2005 have been followed in expert reports, that proper steps have been taken to support P's decision-making and engagement in the assessment, and that conclusions reached are adequately explained.

The concerns relating to the expert's evidence included the following:

❖ The report did not provide sufficient evidence either that AG had been given the relevant information in relation to each decision or of the discussions the expert had had with her about the relevant information;

❖ Different conclusions were reached at different times without clear explanations of why the conclusions had changed or how the evidence, as a whole, fitted together;

❖ The expert's final conclusion had been reached on a broad-brush basis rather than by reference to each decision under consideration;

❖ There was a lack of information to show how AG had been assisted to engage. This left doubts as to whether AG was incapable of understanding the purpose of the interview, whether she had been given adequate support to engage or whether she had simply chosen not to speak to the expert;

❖ There was a lack of cogent explanations for why the presumption of capacity had been displaced in relation to the decisions under consideration. Conclusions were stated but not clearly explained.

A resumed hearing is fixed for January 2021 with directions for fresh capacity evidence from a new expert.

Poole J set out helpful guidance on how written reports on capacity could best benefit the court:

❖ An expert report on capacity is not a clinical assessment but should seek to assist the court to determine certain identified issues. The expert should therefore pay close regard to the terms of the Mental Capacity Act 2005 (MCA) and Code of Practice and the letter of instruction.

❖ The letter of instruction should identify the decisions under consideration, the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity and the causal relationship between any impairment and the inability to decide. If an expert is unsure what decisions they are being asked to consider, and what the relevant information is in respect to those decisions, they should ask for clarification.

❖ It is important that the parties and the court can see from their reports that the expert has understood and applied the presumption of capacity and other fundamental principles as set out at section 1 of the MCA 2005.

❖ In cases where the expert assesses capacity in relation to more than one decision, broad-brush conclusions are unlikely to be as helpful as specific conclusions as to the capacity to make each decision. Experts should also ensure that their opinions in relation to each decision are consistent and coherent.

❖ Expert reports should only state the experts' opinions, but also explain the basis of each opinion. The court is unlikely to give weight to an opinion unless it knows on what evidence it was based and what reasoning led to it being formed.

❖ If an expert changes their opinion on capacity, following re-assessment or otherwise, a full explanation of why their conclusion has changed ought to be provided.

❖ The interview with P need not be fully transcribed in the body of the report, but if the expert relies on a particular exchange of something said by P, then an account of what has been said should be included.

❖ If, on assessment, P does not engage with the expert, then the expert is not required to mechanically ask P about each and every piece of relevant information if to do so would be obviously futile or even aggravating. The report, however, should record what attempts were made to assist P to engage.

The case stresses the importance of parties and the court being able to identify that in expert reports the fundamental principles of the MCA 2005 have been followed, that proper steps have been taken to support P's decision-making and engagement in the assessment and that conclusions reached are adequately explained.

Should you require any further information, please feel free to contact Leah Selkirk.
www.hilldickinson.com/sectors/health

Unlawful Conduct v Unlawful Conduct ….Who Wins ?

by Dominique Dolman and Lily Pidge at Irwin Mitchell LLP

Summary
The case of *Ras Al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349 considered the highly topical issue of whether information that has been obtained by unlawful hacking can be used in Court proceedings against the person from whom it was stolen from.

The default position is that all evidence is admissible, regardless of how it was obtained. While the Courts do have the discretion to exclude evidence, they are under a duty to strike a fair balance between condemning unlawful conduct (such as hacking) and uncovering the truth. This will ultimately be decided on a case by case basis and will depend upon the severity of the unlawful conduct and the relevance of the evidence that was unlawfully obtained. In this case, the evidence was held to be admissible.

Facts
The Emirate of Ras Al Khaimah's Investment Authority (RAKIA) entered into a contract in 2007 with HeavyLift International Airlines FZC (HeavyLift) which at the time, was owned by Mr Azima. It was agreed by the parties that they would set up a pilot training school. Mr Azima was an experienced and highly regarded businessman within the aviation industry and was friends with RAKIA's CEO, Dr Massaad. Despite their combined expertise, the joint venture was unsuccessful and stopped trading in 2010. This subsequently gave rise to a claim for compensation by HeavyLift.

Around the same time, RAKIA sold one of its subsidiaries. Mr Azima received two payments totalling $1.5m in 2011 and 2012, which he later claimed was commission under a referral agreement for introducing potential buyers of a hotel that the subsidiary owned. Mr Azima then made a payment of $500,000 to Dr Massaad. RAKIA later claimed that the referral agreement was a sham and that the payment to Dr Massaad was actually a bribe.

In 2012, RAKIA began investigating Dr Massaad's conduct and he was later convicted by the UAE's authorities (in his absence) of fraud, bribery and embezzlement.

In 2016, RAKIA entered into a settlement agreement with Mr Azima and HeavyLift in relation to claims for compensation arising out of the failure of the pilot training school. Within the settlement agreement, it was agreed that RAKIA would pay Mr Azima a sum of $2.6m in 'full and final settlement'. In return, Mr Azima represented to RAKIA that he had at all times, acted in good faith and that he would continue to act in good faith. The settlement agreement contained a jurisdiction clause in favour of the Courts of England and Wales.

At some point after the settlement agreement had been agreed by both parties, Mr Azima's emails were hacked and a significant amount of confidential information was stolen and circulated publicly.

Following this, RAKIA brought a claim in the English Courts against Mr Azima for fraudulently misrepresenting that Heavylift had made a significant investment totalling $2.6m into the pilot training school. RAKIA alleged that such representation was relied upon by RAKIA and had fraudulently induced them to enter into the settlement agreement.

In his defence, Mr Azima claimed that RAKIA could not rely upon the material they were using to bring their claim as the material had been obtained through unlawful means (i.e. he had been hacked). Therefore, he asserted that the evidence should not be admissible and should be excluded from the proceedings. He further alleged that RAKIA were behind the hacking and put forward a counterclaim in

relation to an actionable breach of US Federal Law, a breach of confidence, misuse of private information, invasion of privacy and conspiracy to injure by unlawful means.

Trial judgement
Mr Andrew Lenon QC sitting as Deputy Judge found that Mr Azima had:
a) induced RAKIA to enter into the settlement agreement by means of fraudulent misrepresentation;

b) manufactured a sham referral agreement intended to conceal his dishonest misappropriation of funds;

c) been guilty of bribery by making payments to Dr Massaad;

d) falsely represented that he had acted in good faith; and

e) engaged in unlawful means conspiracy in connection with the intended sale of the hotel (owned by the subsidiary).

Accordingly, Mr Azima's counterclaim and allegations of hacking were dismissed.

Appeal
As RAKIA's initial case relied so much upon the use of Mr Azima's confidential emails that had been hacked, Mr Azima appealed the judgment.

On appeal, Mr Azima raised 9 grounds of appeal. Grounds 1-4 criticised the trial Judge's findings in regard to the hacking. Ground 5 claimed that if the Judge had found that RAKIA was responsible for the hacking of the emails (as Mr Azima had always asserted) then the claim would have been struck out for an abuse of process. Ground 6 stated that the counterclaim and hacking allegations should never have been dismissed. Grounds 7-9 similarly attacked the Judge's findings of fact in regard to RAKIA's claims. In essence, Mr Azima's legal team maintained that RAKIA were responsible for the hacking and as such, critiqued the trial Judge's findings of fact on this point. They further asserted that the unlawfully obtained evidence should have been excluded as evidence and the fact that it was not, constituted an abuse of process.

Appeal judgement
The appeal Judges found that Mr Azima's attacks on the trial Judge's findings of fact failed. They asserted that even if, hypothetically, RAKIA was responsible for the hacking, RAKIA's claims regarding fraudulent misrepresentation should not be struck out or dismissed.

The Judges briefly considered the issue that Mr Azima's counterclaim and allegations of hacking acted by way of an equitable set off to provide him with a defence to RAKIA's claims. On this point, they concluded that equity does not and will not protect a dishonest man from the consequences of his dishonesty. Therefore, the hacking counterclaim did not give rise to an equitable set-off.

Consequently, RAKIA's claim was upheld. However, it is worth noting that Mr Azima's appeal under ground 6 (that the counterclaim and hacking allegations should never have been dismissed) was allowed. Hence, Mr Azima's counterclaim is now pending trial, based on fresh evidence.

What this means for litigants?
This judgment is significant as it demonstrates that evidence (that is considered to be material to the issues within a case) will be admitted into formal proceedings, even if it was obtained through unlawful means.

The Court of Appeal seemed reluctant to depart from the equitable principles that a person cannot seek to be protected or gain from their dishonest actions but it will be interesting to note what the further consequences will be if Mr Azima is successful in his appeal and whether the hacking allegations made against RAKIA are upheld on such appeal.

With cybercrime and the hacking of private information undoubtedly on the rise, it will be interesting to see how the Courts will continue to strike a balance and reach a just and fair conclusion when having to weigh up one act of unlawful conduct against another.

Many thanks to **Dominique Dolman** at Irwin Mitchell LLP for permission to reproduce this article.
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Expert Witnesses Across Borders

Despite the differences in procedures and the approach to expert witness instructions in different countries, the most important aspects of the expert witness role remain the same. The expert witness has an important role to play in the litigation of technical issues that require knowledge, training and experience to be able to analyse issues and provide opinions that can help the court make decisions.

For a few years after starting my career as a forensic engineer in the USA, prospective clients would ask if I had yet testified in court. At that stage in my career, I completed hundreds of investigations and produced numerous reports, but had never testified in court or deposition. The reaction by the clients would vary from polite silence to hide their lack of interest to polite encouragement saying: "your reports must be so good, no one wants to challenge them." I chose to believe the latter while continuing to eagerly wait for my opportunity to demonstrate my abilities as an expert witness.

As the years went by and as I investigated even more failures of electrical systems in a variety of applications, I was eventually called on to serve as an expert witness and testify at a jury trial in Duluth, Minnesota in the USA. The case involved root cause investigation of an HVAC unit in a hospital, which resulted in multi-million dollar damage to sophisticated medical equipment. While on the stand, the opposing counsel objected to my testimony based on the fact that I was an electrical engineer and should not be testifying about the design and operation of an HVAC unit. My client asked the court to allow him to qualify me, which he did to the full satisfaction of the court, allowing me to testify as intended. And that is when my career started as an expert witness. Soon thereafter, more and more of my investigations led to legal proceedings and though testimony at trial in front of jury was infrequent, I had to testify in depositions several times a year.

After 20 years of working in the USA, I moved to the UK and thought that my experience as an expert witness across the pond will surely be as important to clients in the UK as it was in the USA. It did not take long to realise that process of providing expert witness work in the UK was considerably different than what it was in the USA. Advice from good clients with many years of experience in the English court system steered me towards institutions that offer expert witness training. After completing a number of courses that covered expert witness work from instruction to expert report preparation and court cross-examination, it became clear that the differences were not really in the role or the substance of expert witness work, as much as it was in the procedures and the process.

I have since been instructed to serve as an expert witness in arbitration proceedings in the UAE, as well as several other countries in Europe and the Middle East. The different experiences taught me that differences between proceedings, civil procedures, report formats and client expectations can impact the effectiveness of an expert witness when working in different jurisdictions.

Over the years, I have reviewed and carefully studied research papers investigating the differences between the role of the expert witness in different countries. A paper published by World Bank in 2010 titled "Comparative Study on Expert Witnesses in Court Proceedings" attempts to address some of the differences in expert witness work in different jurisdictions around the world. Many other papers are also good resources for information on the topic. This article is not meant to be a scientific research of the similarities and differences of the expert witness role between various jurisdictions. Instead, I seek only to provide an expert's perspective of some of the challenges that can arise when providing services to clients in other countries.

Role of the Expert

In all locations, the role of the expert is to help the court and the trier of fact by expressing independent and impartial "opinion" based on available information, previous experience, education and background. Experts should never act as advocates arguing the merits of a case, finding evidence or suggesting what the case should consist of.

In some jurisdictions, where legal proceedings are not as well developed or understood, the expert may be pressured or expected to provide evidence favourable to their client. Experts must resist and be especially careful about being influenced in their opinion and how it is presented.

In most cases, the role of the expert starts at the early stage of investigating an incident or loss, and continues through the litigation process where the same expert is expected to present their findings and opinions in court. Experts can also be instructed to present an opinion about the outcome of an investigation that was carried out by others. Experts instructed in this way typically possess more expert witness experience and can better provide expert evidence in court if required.

The "Right" Expert

Defining an expert is not as straight forward as it seems. There is always the debate whether the expert is the one who knows everything there is to know about something or if it is the one who knows just enough more than the general public to be able to opine on the subject. That debate exists in many jurisdictions.

In general, lawyers seek to find an expert who would have experience that "perfectly" matches the issues involved in the case. Unfortunately, the only expert who has exact experience in the issues of the matter is mostly likely working for one of the parties and therefore would be conflicted and would not be available to provide independent and impartial opinion about the issues. As a result, lawyers would have to select an expert with as close an experience as possible to the issues. When the issues are typical or general in nature, the task would be straight forward. However, as the issues become more complex and highly technical, finding the right expert could be a challenge.

From the experts' perspective, to be able to tell the client if their expertise would be a good match for the issues involved in litigation, it would be important for them to actually understand the issues with some level of details. Obviously, and for good reason, lawyers are reluctant to share the issues with the experts at the very early stages of expert qualification and selection process. Signing an NDA (Non-Disclosure Agreement) would protect the information shared by the lawyers with the potential experts. In my opinion, it is very important to only share limited amount of information necessary to assist the potential expert and the client in determining if the expert possess the qualifications and expertise needed to address the issues involved in the matter.

In addition to the experience, the expert must have the right qualifications which may be difficult to define when dealing with issues that span across so many different disciplines. For example, it has been my experience in the USA where lawyers will not seek to appoint an electrical engineer alone or a fire investigator alone to opine on the investigation of the origin and cause of an electrical fire. Instead, many lawyers would rather choose to hire two experts: one to act as a fire investigation expert to opine on origin and proximate cause and the other to act as an electrical engineer to opine on the root cause of failure. Meanwhile in the UK, there's nothing to prevent a qualified chemist, fire investigator, or engineer (electrical or mechanical or even another discipline) from acting as an electrical fire expert, provided they can demonstrate their expertise in the subject matter.

Registration and Certification

Regardless of jurisdiction, the expert needs to have sufficient knowledge and demonstrate their expertise about the disputed issues before being asked to opine on these issues. While qualifications, experience and background are the most relied upon criteria to verify someone's expertise, registration and certifications are mandatory in some countries. For example, a Professional Engineering registration is regarded as a must-have for expert witnesses in some states around the USA, though some courts have rejected the notion that the expert must be registered with the state before he or she can testify.

Chartered registration by a recognised institution carries a significant weight in the UK. Certification by professional organisations like the International Association of Arson Investigators (IAAI) in the USA or its affiliate, the UK-AFI, is also a well-regarded qualification for experts seeking to provide expert testimony in fire cause and origin investigations.

Court Registration

In some countries, the expert must be qualified and registered by the local court. In Jordan, Turkey and Dubai, for example, professionals seeking to provide testimony to the court must be registered with the court before they are allowed to do so. The process of registration and the requirements for qualifying differ between countries. In many instances, the ability

to present opinions and testify in the local language is a prerequisite before being allowed to testify. Similarly, expert reports must be translated into the official language before being admitted as evidence. Therefore, when qualifying an expert, it may be necessary to know if they would be able to present their opinions effectively in the language of the court.
In these countries, the residency and affiliation requirements to register with the court as an expert are too difficult to attain by an expert who does not regularly practice in that country. Instead, the only available registered experts may lack the necessary specific and narrowly defined expertise in the subject matter. In these situations, the expert with the specific qualifications would not be allowed to testify, while the expert who has the required registration may lack the specific expertise.

In some of these jurisdictions, clients may have two experts providing services: one with the necessary technical qualifications and another with the language proficiency and recognition of the court system to present the findings to the court.

Understanding of Local Environment
The process of selecting the right expert can be challenging to both clients and experts. Along with the right qualifications, expert testimony experience and ability to prepare and present opinions clearly and concisely in expert reports always ranks high on the list of criteria considered by clients. Other criteria that clients consider include availability, location, language and cost.

It is important, in my opinion, that clients use a holistic approach when selecting the expert, especially when looking at issues that have a cultural context. Clients are well-advised to try to avoid limiting their selection to highly qualified technical experts who may struggle to present opinions within the context of the local environment.

For example, in one case where I was instructed to act as an expert, the dispute boiled down to application and understanding of highly complex technical international standards that had to be framed within local codes and regulations. In that case, the supplier and their expert insisted that their products should have been evaluated purely based on their application of international standards, where the contractors insisted that they were bound by rules and regulations of the local authority having jurisdiction, who insisted that they will follow their own review process based on their own codes and standards. The ability to understand the technical issues within the context of the local environment was instrumental in the final outcome of the litigation.

Over the years, I have witnessed many situations where highly qualified experts failed to take into account the local context of the technical issues and as a result failed to consider the right issues and provide opinions related to that. On the flip side, I have also witnessed proceedings where local experts attempted to focus on the cultural environment and failed to provide the correct technical justification for their opinions.

Instruction
In some jurisdictions, like the USA, experts are instructed to act on behalf of only one party. On the other hand, in the UK and other European jurisdictions, experts can be instructed jointly by both parties.
Courts in some countries appoint experts through the court to provide expert opinion regarding technical issues involved in a case. In these instances, the expert may have to be registered with the court before the instruction and parties may be given the opportunity to agree to the appointment or on rare occasions, ask for another expert. In my experience, when the court appoints an expert, parties may wish to instruct their own experts to review the court's expert report and suggest any modifications that may be required.

In several countries, court experts are not only instructed to opine on issues related to litigation, but to witness, participate or take on investigations at the very early stages of a loss or insurance claim. In these instances, parties realise early that the matter has potential to develop into a dispute and wish to preserve their rights early on. Therefore, one or more parties would approach the court and ask for the appointment of an expert to be part of the investigation or carry out their own.

The court-registered expert system provides courts with access to experts whose impartiality is completely trusted by the court. However, since courts cannot have experts for all technical matters, on occasions, experts with very limited if not completely irrelevant experience are appointed. In these cases, parties need to be careful to have their own expert working closely with the court expert to ensure that the relevant technical issues are adequately expressed.

Expert Reports
Different rules and procedure govern the expert reports given in different jurisdictions around the world, as well as how expert reports are used.
In the USA, expert reports are typically prepared to essentially summarise the expert's findings and opinions, which are then explained and presented in more details during deposition, in court or both. It was not uncommon for my clients in the USA to instruct me early on that reports need to be very concise rather than detailed and that I should reserve my explanation of the evidence to deposition or court.
In the UK and many other jurisdictions, reports are the main evidence and therefore should stand on their own. Therefore, reports must be prepared in a way to provide all the evidence and allow the court to reach conclusions based on the contents of the report alone, if they chose not to hear verbal evidence from the experts.

What goes in the report is also different between various jurisdictions around the world. In many countries, format and content of expert reports are

defined by rules of evidence. In the UK for example, expert reports must be compliant with Part 35 of the Civil Procedure Rules. Other countries have similar rules.

Joint Expert Statements

Joint expert statements are prepared between experts in order to ascertain what issues experts agree on, what issues remain a point of disagreement, further issues, and further plans of action, in addition to changes in expert opinions.

Generally joint statements are produced following the preparation of expert reports. Experts acting on behalf of different parties can discuss the issues related to a case and can try to agree on some of them while explaining their disagreements on the others.

Expert conferences and joint statements can be beneficial in focusing the court's attention on issues of disagreement. Even "without prejudice" expert conferences and joint statements can help different parties focus on specific issues during mediation.

Depositions

As I explained earlier, an expert report in the USA may not include all the details of an expert's opinion. To find out more details about the expert, their opinions and the basis for those opinions, experts are deposed by opposing counsel. The details of the deposition are recorded by a court reporter and the transcripts are reviewed by the expert and then signed. The transcripts become a part of the court records and can be referred to during trial.

Depositions allow lawyers to gauge the strength of the other experts' opinions and prepare for cross-examination in court. Lawyers may also forward deposition transcripts of the other experts to their expert and ask for their review or their opinion with regard to the other experts' answers during depositions.

Conclusion

A successful expert witness must possess the right qualifications, experience and ability to present complex technical issues in a clear and concise way. Independence and impartiality are extremely important criteria to have and to commit to by all expert witnesses, regardless of where are they asked to work.

Mamoon Alyah, PE, CEng, IRMCert

Mr. Alyah has been instructed on numerous occasions to act as an expert witness by lawyers in the USA, UK, Europe, Australia and several countries in the Middle East. He has over 34 years of experience investigating failures and disputes involving electrical and power systems in different applications. As the managing director of CEERISK Consulting, he manages a team of experts providing expert witness services to clients around the world.

GBRW Expert Witness

GBRW Expert Witness *is a specialised company based in the City of London which provides expert support, in the form of expert reports and/or advice, on banking, insurance and financial sector issues. Our directors and associates engaged by us have given evidence in more than 700 disputes over the past fourteen years. Five of our directors work as experts and our database of more than 100 experienced associates is one of the widest internationally for financial sector cases.*

Our experience includes civil and criminal court proceedings, arbitrations and mediations and our experts have given evidence in jurisdictions which include England and Wales, Northern Ireland, Scotland, Australia, Bahamas, Canada, Cayman Islands, Dubai, France, Hong Kong, Ireland, Jersey, New Zealand, Poland, Singapore, Sweden, Switzerland and the United States.

Our office in Singapore, headed by Martin Edwards, provides coverage of law firms in Singapore, Hong Kong and other Asian legal centres and our office in Athens, headed by Emmanouil Skourtis, focuses on the consulting and expert markets in Greece and Cyprus.

We have in-depth Trade Finance related expertise. Three of our directors – John Turnbull, Martin Edwards and Paul Rex – have backgrounds structuring trade finance transactions and dealing with documentation issues, including documentary credits, guarantees and synthetic trade transactions. In addition, we can provide expert support in trading physical commodities and commodity derivatives; marine, aviation and trade credit insurance; Trade-based Money Laundering and financial crime; and shipping finance.

GBRW Expert Witness also has an agreement with a group of specialists in the steel and metals sector and can now provide experts on a range of technical and commercial issues, including raw materials supply, melt shop operations, casting, rolling, steel distribution and transport.

Representative Engagements

Some examples of disputes where GBRW Expert Witness's experts have provided evidence are shown below.

Financing Disputes

- Instructed as an expert on credit and structuring issues in connection with Arbitration of fraudulent insurance claims relating to the collapse of the Saudi AlGosaibi Group.
- Provided an opinion for a Greek pipe manufacturing exporter on potential claims against a bank providing export finance to the exporter's customer.
- Instructed by law firm defending claims against an accounting firm in connection with an invoice financing fraud perpetrated by one of its clients.
- A case involving three Swiss banks claiming against an international inspection company over a Ukrainian grain financing fraud.
- Expert advisor in claim in the High Court of Hong Kong concerning the presentation of fraudulent documents under Documentary Credits and Collections.
- Dispute over whether Letter of Credit issued in connection with exports of low ash metallurgical coke was compliant with underlying sales contract.
- Expert evidence for a Lebanese bank claiming against its Irish correspondent over delays in presenting shipping documents for live cattle exports under Documentary Letters of Credit

Trading Disputes

• Calculation of the quantum of a claim against a supplier of iron ore whose cargoes fell below agreed quality standards and were subsequently combined with other shipments before onward sales.

• Expert opinion on behalf of a shipowner whether one cargo of naphtha provided a structural hedge against losses suffered by the shipper when delays occurred in lifting a second cargo.

Insurance

• Instructed by lawyers for a syndicate of trade credit insurers in connection with claims under trade credit policies relating to Bills of Exchange issued in connection with sales of palm and vegetable oils and grains.

• Avoidance of a trade credit insurance policy covering a number of structured steel trades on the basis of material non-disclosures and misrepresentations on the part of the insured.

• Advice on whether a European bank claiming against its credit insurer acted as a prudent insured when lending to a steel trading business with links to Iran.

• Negligence claim against insurance broker over alleged failure to provide suitable insurance cover for shipments of fur pelts stored in Chinese warehouses.

Shipping Finance

• Valuations of a joint venture shipping business in connection with a dispute between the two shareholders.

• Opinion on commercial risk issues involved in lease structure used by a lessor in dispute with tax authority.

Our management team

Paul Rex oversees GBRW Expert Witness's activities. He has dealt personally with a range of areas which include lending and credit approval procedures, trade finance and other forms of specialised lending.

Paul has acted as an expert in more than 70 cases and has given oral evidence in several of these, most recently in a UK extradition hearing for the owner of Kingfisher Airlines (2017), a London Arbitration (2015), IRD v Westpac New Zealand (2009, High Court of New Zealand) and KBC & BOTM UFJ v Ferrero & Others (2009, High Court).

His initial career as a banker involved senior positions at Chemical Bank (now JP Morgan) and Crédit Agricole and he has worked in more than 30 countries during his 25 years as a banking consultant and expert witness.

Formerly Joint General Manager and Global Head of Structured Trade and Commodity Finance at Sumitomo Mitsui Banking Corporation, and currently Executive Advisor at a London-based international bank, **John Turnbull** is GBRW Expert Witness's Director, Trade Finance. He has acted as expert witness in a number of high-profile trade finance legal cases, including Documentary Credits discrepancy disputes, Trade Based Money Laundering and fraud. His recent cases include Mena Energy DMCC v Hascol Petroleum Ltd (2017, High Court); GHK v DBS, HK (2019 High Court HK); and LCIA and SIAC Arbitrations (2021).

John is Chair of the ICC UK Banking Committee, a member of the ICC Banking Commission Global Financial Crime Committee and a former Chair of the UK Association of Foreign Banks Trade Finance Committee. He was also Co-Chair of the ICC Consulting Group for the revision of UCP 500 (now UCP 600) and has chaired, organised and lectured at many UK International Chamber of Commerce conferences on International Trade, Documentary Credits and regulatory issues for over 25 years. He speaks regularly at conferences and training courses organised by GTR, The London Institute of Banking and Finance and others and is a member of the joint Wolfsberg Group, ICC and BAFT Trade Finance Principles drafting group for the control of Financial Crime risks in Trade Finance.

Martin Edwards opened our Singapore office in 2011. He spent 23 years in Asia during his banking career with Crédit Agricole, Banque Indosuez and Chemical Bank (now JP Morgan) and has had business development and credit responsibilities for portfolios of Commodity and Trade Finance and other lending activities in the Asia/Pacific region and the Middle East (Bahrain/Dubai/Yemen).

Martin also has considerable consulting experience working with banks in South East Asia and a deep knowledge of trade flows and trade financing techniques such as pre-financing and counter-trade in the region.

In the mid 1980s Martin founded and developed a Singapore based financial consulting/trade services group of companies focused on trade finance linkage between Asian based SMEs and specialist trade finance banks.

Tim Dowlen is GBRW Expert Witness's Director, Insurance. He is a former Senior Examiner in Liability Insurance for the Chartered Insurance Institute and an experienced broking expert who until recently was a practising insurance broker in the Lloyd's and London market.

Tim is retained as insurance adviser by a well-known fund management group. He has been instructed in over 130 cases (including six court appearances) and oversees the development of GBRW EW's insurance work.

Tim has been involved in identifying and engaging new experts in a number of specialised insurance areas in the trade finance field.

Hin Leong and Agritrade – a tough year for trade finance in Singapore

Corporate lending is not a simple field and Commodity and Trade Finance (CTF) lending is particularly demanding. It involves not only a thorough knowledge of general and specialist banking techniques and products, but also a deep knowledge of individual clients and the markets for the products CTF banks are financing.

This is not a business simply handled from an office. It requires hands-on client visits, inspection of stocks, processing operations and transport facilities conducted by well-trained marketing, operational and risk specialists working as a team.

Anything less than a fully committed and highly skilled operation risks exposing a bank (and therefore its depositors and shareholders) to an unacceptably high degree of risk, potentially large losses, and the severe business disruptions caused by having to deal with problem loans.

This is what CTF banks in Singapore have experienced.

In the first half of 2020, two major commodity traders - Hin Leong Trading and Agritrade International - defaulted on facilities provided by 41 banks and totalling over US$4.5 billion amid rumours of fraud and forgery. Numerous examples have emerged of several banks financing the same transactions. These have generated an increasingly complex web of lawsuits involving trading companies, banks and insurance companies which have provided credit risk policies – litigation which looks likely to last for several years. One consequence is that several international banks are either exiting or scaling back CTF activities.

A working group of about 20 banks has been formed to propose new guidelines to encourage best practices in Commodity and Trade Finance banking. This move is supported by the Monetary Authority of Singapore (MAS), together with Enterprise Singapore (ESG), the Accounting and Corporate Regulatory Authority (ACRA) and the Association of Banks in Singapore (ABS)

In fact, a combination of traditional and new factors is required to address the current situation.

The traditional "Four Ks"

Firstly, banks should re-visit basic banking principles, the most important of which is **KYC (Know Your Client).** This core principle is at the heart of all good banking practice and is of vital importance when handling CTF banking where there is a high scope for fraud, forgery, and concealment of trading losses (for example, in the futures markets). Recent experiences in Singapore suggest that the additional step of KYCC (Know Your Client's Client) will attract increasing scrutiny from credit committees.

To this must be added **KTM (Know The Market)** for the commodity the bank is financing. Price movements of commodities can often be volatile and the bank should be aware of the underlying market dynamics in order to assess whether the transaction that it is being asked to finance makes commercial sense, whether the client has the expertise and management resources to handle it, or whether it represents too much risk for the company (and therefore the bank) to take on.

CTF banking products are much more technical than a simple commercial loan or overdraft. Every CTF banker (both marketing and product specialists) must **KTP (Know the banking Products).** A bank's product specialists are expected to have first class knowledge of the specialised instruments involved in CTF, such as Letters of Credit, Letters of Indemnity, futures and other derivatives. However, the Marketing Officers calling on clients and assessing transactions must also have a comprehensive understanding of these areas in order to both assess risk and to propose solutions which limit the bank's exposures.

Many traders finance transactions on a trade by trade basis, which means that the client may have a limited pool of available capital to absorb unexpected losses. In practice, banks engaging in CTF are often relying on a deal by deal basis on the collateral of the underlying goods pledged and the associated purchase and sale contracts. The fourth K is therefore **KTE (Know the Escape route).** If the transaction goes wrong, and the bank is left holding the collateral, how can it realise this discreetly and quickly to liquidate its position without alerting the market to the bank's situation (and depressing the price).

"Front and Back Offices"

Good CTF banking is not done from an office. It involves frequent "rolled-up sleeve" visits during which the banker looks, asks, listens and learns. It involves investigating every link of a trade transaction from supplier to buyer via processing and storage (if these are involved). The chain is only as strong as its weakest link. The bank must identify the weak links and ensure that they will not disrupt the transaction and (ultimately) threaten repayment of its loans. That is the job of the CTF Relationship Manager supported by Product and Risk specialists.

The most successful CTF banks have an 'integrated' team of "front office" Marketing Officers and "back office" Product Specialists. Product Specialists will typically have years of product experience to draw on and will sometimes alert the team when something simply does not "smell right" - unusual terms of trade for the commodity concerned? An unusual origin or perhaps time of year for the trade to be taking place?

The litigation consequences

The events of the last year have created a high level of demand for expert witnesses and/or expert advice in the CTF field. In many cases, both front office and back office experts are required – many CTF problems are attributable to transactions "falling through the cracks" between these two areas. As the lawsuits proliferate, they have also created the need not only for experts in banking practices, but also in the trading markets for petroleum and various soft and hard commodities, futures market hedging techniques and

(a growth area in recent years) credit insurance products relating to CTF.

Many of the disputes currently being litigated which involve double, triple or multiple financing of specific cargoes will generate claims between the banks providing financing; the trading companies acting as counterparties to the banks' clients; and the insurance companies which have provided credit risk insurance. This three-way conflict is further complicated by potential counter-claims by each party against the other two.

The result is to shine a spotlight on the full spectrum of market practices involved in a typical trading transactions, including banks' credit policies and procedures; the quality of due diligence carried out on borrowers (including their governance structures and internal controls) and on individual trades; market practice in trading different commodities; whether proposals to insurers have made full disclosure of all relevant facts; and whether lenders have actually acted as "prudent insureds".

Very few individuals have the breadth of experience to address more than one or two of these areas, so a successful claim or defence is likely to involve a team of experts in different disciplines selected for their ability to cover all of the major issues being litigated.

GBRW's training offering

GBRW Expert Witness is part of the GBRW Group, which also includes GBRW Consulting, focused on management consulting services in the banking and finance sectors, and GBRW Learning, delivering training in these same areas. Trainers come from GBRW's management team and from external specialists, many of whom also act as experts in their fields of specialisation.

The Group's clients include banks and financial institutions, governments and government agencies, International Financial Institutions and development agencies, and other private sector companies.

GBRW Learning's trade finance training courses include:

- International Trade Finance for Relationship Managers
- Documentary Credits and Guarantees
- Financial Crime, Fraud and Trade-Based Money Laundering
- Commodity Derivatives
- Marine Cargo, Energy and Oil and Gas and Aviation insurance

They can be presented as webinars via videolink; as one-to-one mentoring; and (when circumstances permit again) as classroom based training. For more information, please request a copy of our Training Course Brochure.

Further information

For further information on the expert resources which we can provide for financial sector disputes, please visit our website or download our GBRW Expert Witness brochure or our GBRW Expert Witness Trade Finance brochure

If you would like to speak with one of our directors, please email us at our general address **experts@gbrwexpertwitness.com** or use firstname.lastname@gbrwexpertwitness.com for specific individuals .

Hand-arm Vibration Inspection and Enforcement Guidance: What will the HSE Inspector be Looking For?

Have you ever wondered what would happen if a Health and Safety Executive (HSE) Inspector turned up at your site to look at how you manage hand-arm vibration?

HSE recently revised its internal guidance for Inspectors on hand-arm vibration (formerly called the Topic Inspection Pack). The revised Operational Guidance 'Hand-arm vibration Inspection and Enforcement Guidance' is intended for use by Inspectors or visiting officers when inspecting work activities involving risks from exposure to hand-arm vibration (HAV), enforcing the Control of Vibration at Work Regulations 2005 (the Vibration Regulations) and investigating cases of hand-arm vibration syndrome (HAVS) and carpal tunnel syndrome (CTS) reported through the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR).

So if your employees are exposed to hand-arm vibration, and especially if you have recently reported a case of HAVS or CTS, you might want to check that you are complying with the Vibration Regulations, what questions you are likely to be asked, and how HSE inspectors are likely to go about assessing your management of risks from hand-arm vibration.

In this article, Sue Hewitt and Dr Chris Nelson from Finch Consulting discuss a few points in the guidance that are worth being aware of when it comes to managing hand-arm vibration.

How much effort should be put into a vibration exposure assessment?

In relation to vibration exposure assessment, the Operational Guidance states:

"HSE does not expect employers to make a precise or detailed assessment of exposure beyond what is required to identify the need for action."

In other words, you should not usually need to put a great deal of time and effort into trying to quantify the daily vibration exposures of your employees. It's important to understand that exposures will always vary from day to day and that in any case there is a large degree of uncertainty attached to any assessment of daily vibration exposure. The important thing is to establish whether the exposure is sufficient to cause concern, and in particular, whether it's likely to reach or exceed the Exposure Action Value (EAV) or Exposure Limit Value (ELV). If it's not easy to decide whether, for example, the EAV is exceeded, then it's probably best to simply assume that it is, record this decision, and then concentrate your efforts and resources on identifying and prioritising the necessary actions to control the risk.

On their website, the HSE provides freely available information to help with a vibration exposure assessment, so that you do not have to look too far, or use up too much resource, to get started. There is a table of typical vibration magnitudes of some common machines. There is also a calculator which will calculate the daily vibration exposure for your combination of vibration magnitudes and exposure times. Your vibration exposure assessments only have to be sufficient to identify where there are high daily exposures and to compare the exposures of your workers with the EAV and ELV, so that you can identify and then prioritise the necessary actions.

What might lead an Inspector to decide to take enforcement action?

The Operational Guidance recommends that Inspectors should 'take action' when HAV is identified as a "matter of evident concern" during inspections. A matter of evident concern for HAV is defined in the guidance as where:

Exposure is likely to be at or above the EAV
There is evidence of vibration-related ill health (e.g., HAVS, CTS) not being properly managed;
Employees report tingling when using vibrating tools, which persists for 20 minutes or more afterwards.

The section on enforcement advises that the issuing of Improvement Notices will usually be appropriate where:

The EAV is likely to be exceeded regularly and frequently; and
Exposure is not as low as is reasonably practicable (ALARP)
The remaining risk is not appropriately managed.

Regular and frequent' is defined in the guidance as: *"repeated several days each week over months and years".*

Failure to appropriately manage the remaining risk may include failure to operate an adequate health surveillance programme and failure to provide appropriate information, instruction and training.

In cases of very high vibration exposure (above the ELV), the inspector may also decide to issue a Prohibition Notice.

In relation to the potential for prosecution, the guidance states:
"Prosecution should be proposed where serious breaches of the Vibration Regulations are found, and strategic and duty-holder factors indicate such action would meet the principles and expectations of the HSE enforcement policy statement."

HSE's enforcement policy states that all enforcement action should be proportionate to the health and safety risks and to the seriousness of any breach of law.

Exposures above the Exposure Action Value
In our experience, there seems to be a common misconception amongst employers that vibration exposure has to be below the EAV, and that if it is, then nothing more needs to be done. However, this is not correct.

Daily vibration exposures do not have to be below the EAV, provided it can be shown that they are ALARP and appropriate health surveillance is in place. However, if there is a reasonably practicable control measure available that has not been implemented, and exposures are likely to be at or above the EAV, then you are legally required to take further action to reduce the exposures to ALARP. Whatever the exposure level, Reg 6(1) requires you to ensure that risks from vibration are eliminated, or reduced to ALARP. However, if the daily exposure is below the EAV, in the range where the HSE considers the risk of a serious health effect to be remote, it is likely that only straightforward and low-cost control action would be considered reasonably practicable.

Some employers try to prevent exposures from exceeding a certain limit, for example, using electronic monitoring devices or daily timesheet records. The chosen limit might be the EAV, or sometimes a different exposure value is chosen, such as the ELV. Some workers may be given lower individual daily exposure limits if they have HAVS. However, a question that could legitimately be asked of this approach is: 'What is the employee instructed to do if the limit is reached?' If this reveals that there are further reasonably practicable steps the employer could take to reduce exposures but has not taken, then the employer has demonstrated that it is not fully compliant with the requirements of the Regulations.

In any case, a policy of working up to a daily limit, rather than down to ALARP by managing the allocation of work, is not compliant with the Vibration Regulations.

If an inspector does find that there are exposures likely to reach or exceed the EAV then the guidance directs the Inspector to "give priority to preventing risk (i.e. elimination and control)". It also advises an Inspector to "check that measures are adapted to prevent risk to workers susceptible to HAV injury, for example, to prevent progression of symptoms in workers with diagnosed HAVS/CTS".

In our experience, another common failing in the management of HAVS can occur when dealing with those who have a diagnosis of HAVS at an early stage and who are retained in the same or similar work, albeit with increased frequency of health surveillance. Frequently the medical opinion recommends a daily exposure limit in terms of HSE points which is below the EAV, but without any knowledge of the individual's previous level of exposure. For example, maximum daily exposure of 80 points may be recommended when it was previously set at 100 points (the EAV). This is then implemented simply by declaring it to be that individual's new exposure limit. However, if this does not bring about a significant reduction in that individual's typical exposure (their average daily exposure might previously, for example, have been 50 points), or if there are no real changes to the individual's day to day work pattern, it is unlikely to have any impact on exposure and may not prevent the progression of the disease. It should be recognised that, although the risk is relatively low for most healthy people, exposures below the EAV are not considered safe and it is possible for susceptible individuals to develop symptoms or for symptoms to progress even at lower levels.

The level of risk and benchmarks
The Operational Guidance includes a 'Risk Matrix' for HAVS which the HSE uses in combination with its Enforcement Management Model (EMM) to demonstrate that there is an extreme risk gap for vibration exposure above the EAV and a substantial risk gap where exposures are below the EAV but above 1 m/s2 A(8).

The guidance says that the inspection should focus on: *'high-risk activities with the potential for high HAV exposures, i.e. exposures likely to be above the EAV where inadequate controls can result in an extreme risk gap under the Enforcement Management Model.'*

The guidance also states that the 'benchmark' for decisions on enforcement is set at: *"a 'nil/negligible' risk of a serious health effect"*

For HAVS, a serious health effect is defined as reaching a disabling severity (i.e. stage 2 late or stage 3) before retirement age. Compliance with this benchmark standard requires that:

Exposure is likely to be below the EAV and there is no evidence of HAVS or where HAVS is present, health surveillance shows it is not progressive;

OR

The risk/exposure is ALARP (but above the EAV) and there is adequate health surveillance, with procedures in place to prevent any cases of HAVS from advancing, particularly to more disabling severity (e.g. stage 2 late or stage 3 on the Stockholm Scale, see L140).

If the HSE follows its own guidance, a visiting officer or inspector should not be overly concerned with the extent of the risk assessment, provided that it is suitable and sufficient (as discussed above) and that it demonstrates that exposures are below the EAV and/or that any risks are reduced to ALARP.

Appendix 1 of the guidance explains how exposure will be determined by the Inspector if necessary and includes generic vibration magnitude information for use where there is no other suitable data. The overriding aim of this assessment is to decide whether Regs 6(2) (control), 7(1)(b) (health surveillance), 8(1)(b) (information, instruction and training) and

6(4) (application of ELV) apply. One possible consequence of this is that the HSE decides to take enforcement action, even prosecution, without a detailed investigation of the work and vibration exposures. Defending or mitigating against HSE action may therefore be aided by expert evidence.

RIDDOR reports of HAVS and CTS
Appendices 4 and 5 of the Operational Guidance relate to investigations following receipt of a RIDDOR report and include a list of questions that might be asked by a visiting officer or Inspector when investigating a RIDDOR report.
Appendix 4 states that immediate enforcement action should be taken where high risks from HAV exposure are present and not controlled and managed adequately, and it recommends that prosecution should be proposed when:

There is a single case of HAVS stage 2 late or stage 3
Multiple cases of HAVS stage 1 and stage 2 early or late.

There are/were exposures regularly at or above the EAV that are/were not controlled and managed SFAIRP to prevent harm.

If you are concerned about hand-arm vibration issues, and compliance with the Vibration Regulations, contact Finch Consulting. We have a wealth of experience and expertise and we can help you to get to grips with managing the risks. If you are in the position of having to defend either a civil claim for HAVS or CTS, or an HSE prosecution, Finch can also provide valuable expert evidence, if instructed by your Solicitors.

Authors
Sue Hewitt & Dr Chris Nelson

ABOUT FINCH CONSULTING LTD
Engineers, first and foremost, Finch Consulting provide expert witness, legal counsel, training workshops and consulting services to clients in the legal, financial and insurance, food and drink, leisure, manufacturing, energy and waste sectors.

Established in 1991, Finch has a turnover of £4m and employs a team of 33 personnel who work from the company's headquarters located at the Ivanhoe Business Park in Ashby de la Zouch.

Corrupt practice and conflicts of interest: why Bux v GMC is required reading for experts and litigators alike

by Christopher Sykes at Doughty Street Chambers

Zuber Bux v The General Medical Council [2021] EWHC 762 (Admin) is required reading for those seeking to understand the duties of experts, especially when a conflict of interest arises.

Dr Bux was a medico-legal expert who drafted reports for one firm concerning holiday sickness claims. The *"boilerplate"* reports were *"invariably supportive of the claim"* (§8). They did not declare that Dr Bux was married to a partner at the firm, or that he received payments into a company in which he and his wife were sole shareholders (§6). This conflict of interest was exposed in 2018 alongside other concerns about his conduct (§13; 67; 82). Disciplinary proceedings before the MPT ended with his erasure from the Medical Register.

Dr Bux appealed that decision. The appeal was heard by Mostyn J. The judgment is worth reading for three reasons.

Firstly, it rounded up the authorities on expert duties from *Whitehouse v Jordan* [1981] 1 WLR 246 to *Towuaghantse v GMC* [2021] EWHC 681 (Admin). It explained how conflicts of interest may arise (§24; 28). It is a valuable resource for experts and litigators alike.

Secondly, Mostyn J clarified that there are two types of conflict. An expert *"will be conflicted not only when a personal influence actually influences his testimony, but [also] when a personal interest is capable of influencing his evidence" (§69)*. The first type *"where done consciously involves considerable moral turpitude"*. The second type involves no wrongdoing but must be declared (§23; 34). Failure to do so *"is likely to have very serious consequences"* for the expert and their report (§45).

Finally, Mostyn J recommended *"urgent"* reforms to the GMC procedural rules to identify such conflicts. *"Had there been a requirement to seek permission to adduce expert evidence in those rules (as in CPR 35.4(1)),"* he stated, *"[then] I am certain that it would have been refused in this case"* (§58).

Mostyn J upheld the decision of the MPT. The failure of Dr Bux to declare his conflict of interest ("*which had all the hallmarks of corrupt practice*") was dishonest (§13; 89). This was an extreme case of conflict that is less likely to occur in practice. Its real interest lies in Mostyn J clarifying that conflicts must be declared whether they are actual or potential (i.e. whether the first or the second type). Such conflicts are rare but Bux v GMC is a reminder of the importance of rigorously identifying them when they do arise.

81. I reiterate: a conflict of interest will arise when an expert witness's opinions are actually influenced, or are capable of being influenced, by his personal interests.

- Mr Justice Mostyn

Delayed Diagnosis of Cauda Equina Syndrome: High Court Emphasises the Importance of Urgent Investigation and Treatment when Condition is Suspected

by Philippa Luscombe, Partner, Penningtons Manches Cooper.

Judgment has recently been given in the case of *Jarman v Brighton and Sussex University Hospitals NHS Trust* [2021] EWHC 323 (QB). Ms Jarman, the claimant, suffered a back injury at work in February 2015. Over the next few weeks she attended her GP practice three times complaining of back pain and some subjective signs of Cauda Equina Syndrome (CES) which were not confirmed on examination by the GP.

On the first two occasions she was advised to return if her symptoms persisted and, at the third appointment, in light of continuing and progressive sensory symptoms, her GP referred her to the A&E department at the Royal Sussex County Hospital run by the defendant trust.

At attendance at the defendant's hospital on 3 March 2015 and, after reporting her history, the A&E team referred Ms Jarman to the orthopaedic team where an orthopaedic registrar reviewed her. His notes indicated that he carried out a full assessment and, importantly, tested her for signs and symptoms of CES.

Cauda Equina Syndrome is a condition where part or all of a disc in the spine applies pressure to a set of nerves at the base of the spine known as the Cauda Equina that control, among other things, bladder, bowel and sexual function and sensation. They are sensitive nerves that can only sustain a period of compression before they suffer permanent and irreversible damage. This means that, although CES is rare, it should always be regarded as a surgical emergency in its early stages as the timing of surgery will make all the difference to the outcome.

The registrar noted that Ms Jarman was reporting subjective symptoms consistent with CES but documented that his objective testing did not reveal any indicators that she was suffering from CES. He made a diagnosis of likely disc prolapse but not consequent CES and referred her for an MRI scan to investigate her back pain but not to eliminate the possibility of CES. This was requested as routine, although the defendant accepted that it should have been categorised as "urgent" which, under the trust's system, would be within a fortnight. Ms Jarman was advised to return if her symptoms persisted and there was evidence to suggest that the registar told her that she would have an MRI scan within a few days.

Ms Jarman duly underwent a lumbar spine MRI just over two weeks later on 18 March 2015. The scan report on 20 March confirmed compression of the Cauda Equina nerves by a prolapsed disc. Arrangements were made for Ms Jarman to undergo surgery to remove the compression from her Cauda Equina nerves the next day, 21 March 2015. However, despite surgery, she was left with significant permanent neurological dysfunction as a result of the damage sustained.

Ms Jarman brought a claim against the trust alleging that the urgency allocated to the MRI scan was inappropriate and that she should have had a scan no later than 7 March (ie within the few days suggested to her and noted) and surgery by no later than 9 March as with earlier surgery she would have had a better outcome.

Her primary case was that the suggestion of a scan within a few days was because she was a suspected CES patient and therefore the trust should have kept to this timescale. The trust, while accepting that she should have had a scan within 14 days, did not accept that the reason for the scan was because she was suspected of CES. Its clear position was as per the records that she was not suspected of having CES. If she had been, then she would have needed an immediate scan. As she was not a suspected CES patient, the timescale within which she had the scan was acceptable.

The claimant's secondary case was that she should have been suspected of having CES and received an immediate scan as a result. The trust's position was that CES had been considered as a potential diagnosis and a thorough assessment was carried out which did not reveal any objective signs of CES and, therefore, there was no obligation to arrange an immediate scan to confirm or exclude the presence of CES.

The judge in this case provided a very good summary of Cauda Equina Syndrome and the significance of timing of diagnosis and treatment in his judgment. He said: "CES is a relatively rare condition which is commonly caused by a disc prolapse. The disc bulges and puts pressure on the bundle of nerve roots emerging from the end of the spinal cord below the first lumbar vertebra. These nerves transmit messages to and from the bladder, bowel, genitals and saddle area, and control sensation and movement in that area. CES is typically characterised by severe lower back pain with bilateral sciatica and is associated with saddle anaesthesia, urinary retention and bowel dysfunction.

"As the Court of Appeal has recently noted in Hewes v West Hertfordshire Acute Hospitals NHS Trust & Ors [2020] EWCA Civ 1523, §5, once CES has been diagnosed, it is seen as an emergency, because unless the pressure on the nerves is released quickly, they can be damaged permanently. CES may be suspected following consideration of a patient's symptoms (as subjectively reported) and, following examination, of any objective physical signs of CES, but a diagnosis of CES can only be confirmed by an MRI scan."

In terms of liability or breach of duty on the issue of the timing of the MRI scan, the parties were not completely opposed. Both orthopaedic experts felt that good care would have been to arrange a scan for the claimant on the day of her attendance. Of note was that the parties agreed that the threshold for scanning any patients with indicators of CES is probably lower than in 2015 but whereas the claimant's expert thought that the delay to 18 March was unacceptable and a breach of duty, the defendant's expert felt that it was within a range of reasonable practice and, so although not what he would have done, still acceptable.

The claimant's expert did not say that a scan that day was mandatory but that it should have been done within three to four days as per the 'few days' that the claimant was advised would be the case. It was agreed that the registrar's assessment had been thorough and that there were no objective signs of CES. The weight of evidence was that in 2015 it would have been acceptable not to further investigate CES although nowadays the threshold might be lower.

In giving his judgment the judge detailed the legal tests that he needed to apply: "There was no dispute between the parties as to the applicable legal principles. I must apply the well-known Bolam test (see Bolam v Friern Hospital Management Committee [1957] 1 WLR 582), whereby a doctor must provide care which conforms to the standard reasonably to be expected of a competent doctor and will not be in breach of the duty of care if a responsible body of medical opinion would have approved of the treatment given, even if other experts might disagree. The relevant doctors in the present case … were practitioners in the field of general orthopaedics and the parties agreed that the issue of breach of duty should be determined according to the standards reasonably to be expected of competent general orthopaedic specialists, rather than, say, specialists in spinal surgery. It was also common ground that the relevant standards were those which were applicable in March 2015, when the claimant attended the trust, and not those which a general orthopaedic specialist would apply today."

He went on to say: "Where, as in the present case, the court is presented with a range of expert views, some of which support the defendant and some of which do not, it is of particular importance to understand the basis upon which the court would be entitled to reject the evidence on behalf of the defendant as not reflecting a "responsible body of medical opinion …".

I emphasise that in my view it will seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman [in Maynard v West Midlands RHA [1984] 1 WLR 634 at 638E] makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which the defendant's conduct falls to be assessed."

The court had to decide whether the care provided was reasonable based on expert opinion. The judgment sets out a succinct reminder of the tests to be applied.

- Where a body of appropriate expert opinion considers that an act or omission alleged to be negligent is reasonable, a court will attach substantial weight to that opinion.
- This is so even if there is another body of appropriate opinion which condemns the same act or omission as negligent.
- The court in making this assessment must not however delegate the task of deciding the issue to the expert. It is ultimately an issue that the court, taking account of that expert evidence, must decide for itself.
- In making an assessment of whether to accept an expert's opinion, the court should take account of a variety of factors including (but not limited to) whether the evidence is tendered in good faith; whether the expert is "responsible", "competent" and/or "respectable"; and whether the opinion is reasonable and logical.

Having set out the tests that should be applied, the judge found in the defendant's favour and highlighted the following points as the basis for that finding:

- The claimant could not cite any published guidelines, academic literature or decided cases to support the contention that a patient with the claimant's symptoms should be referred for an emergency scan in March 2015 when there were no clinical signs of CES.
- The court had to judge the standard of care as at March 2015, despite there being a tendency to undertake MRI scans more frequently nowadays.
- The defendant was able to produce some academic literature in support of its position on this issue – particularly that patients with normal perianal sensation and low (<200ml) residual bladder volume after scanning are at low risk of CES.
- The court found that the claimant's expert's conclusion was, to an extent, based upon a "fundamental flaw", in that he stated that the scan should

have occurred within 48-72 hours as opposed to immediately. The judge held that he "could not satisfactorily explain why a four day delay would have been appropriate, let alone correct". It was agreed between all the experts (including neurosurgeons) that once you suspect CES then a scan must be done as quickly as possible – therefore either CES should have been suspected and a scan done immediately or this was not a patient with suspected CES in which case a two week wait would be acceptable and there would be no reason to wait three to four days. The judge went on: "I therefore reject Mr Spilsbury's contention and such is the oddity of his position that I am driven to accept the defendant's submission that Mr Spilsbury was guilty, to some extent at least, of framing his position to fit the claimant's primary legal argument, that the trust was negligent by not implementing Mr Khan's plan to scan within "a few days". This was, in my view, an important shortcoming in Mr Spilsbury's evidence."

- The judge found the defendant's orthopaedic expert's "reasoning, and his conclusions, to be logical and reasonable".

In any event, the judgment made clear that the case would have failed on causation as the three to four days that the claimant's expert would have accepted as reasonable to perform a scan (which would then have resulted in a diagnosis) would have taken the claimant past the 'window of opportunity' for a better outcome in any event (generally considered to be within 48 hours of onset) if she did have CES on 3 March and there was no clear evidence of a deterioration in the window within which (on the claimant's case) there was a delay in surgery ie 9 - 21 March.

Interestingly, this was despite a one-off incident of complete incontinence. The judge heard evidence on this and concluded that, as the claimant retained bladder control after that incident, she did not become CESR (complete CES where the damage is irreversible).

Philippa Luscombe, head of the Penningtons Manches Cooper Cauda Equina claims team, comments: "One of the difficulties with timely diagnosis and treatment of CES is that in the early stages symptoms may be felt by the claimant but not detected on formal examination.

"This creates a difficulty for clinicians assessing patients with back pain who report Cauda Equina symptoms but where examination is normal. CES is a diagnosis based on clinical signs and MRI imaging and if there are no objective clinical signs of CES then imaging is not mandatory. However, some patients who report symptoms consistent with CES but have no objective findings on examination may be in the category of patients with the very early stages of CES – and thus may progress quickly to become patients who need urgent surgery.

"Clinicians therefore have to decide how to manage these patients. In this case, the claimant received a full and comprehensive assessment and examination and it was clear that CES was being considered. On the findings on examination it was reasonable for the registrar - based on 2015 standards - to conclude that there were no objective signs of CES and not to perform a scan, although it was agreed that it would have been good practice to have done so.

"What was required in light of his decision was clear advice to the claimant to return if things progressed – which was given. This was therefore a case where, unfortunately, the claimant's diagnosis was delayed and she did progress to full CES and suffered long-term damage. But on the expert evidence presented by the claimant, she did not have a case sufficiently persuasive to the court that the care she received was unacceptable (rather than not as good as it could have been) or that she would have had a better outcome with the care that her expert would have regarded as acceptable.

"Although unsuccessful, this case does help claimants with delayed diagnosis of Cauda Equina claims as it emphasises the importance of early diagnosis and treatment; the need for clinicians to be alert to whether a patient may have CES and to carry out a thorough assessment and arrange imaging if the assessment is consistent with CES; the increasing trend towards arranging imaging in patients with subjective but not objective signs of CES; and the need for real urgency in performing imaging where CES is suspected."

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Who has the Right to Sue a Consultant?

by Foo Joon Liang and Tasha Lim Yi Chien

Introduction

Every construction project has at least one consultant appointed by a developer (also known as an 'employer' of the project). While the types of consultant and their respective roles may differ from project to project, a consultant's role generally includes the certification of work and progress. In most instances, this also requires the consultant to certify the amount payable for work done and the amount payable by the employer to the main contractor. A payment certificate will be issued thereafter.

As cashflow is crucial for main contractors in any ongoing construction project, prompt and expeditious payments by the employer are often expected. However, if the main contractor is dissatisfied with the payment certificate, can the main contractor sue the consultant for negligence? The Court of Appeal addressed this question in a recent case commenced by PCP Construction Sdn Bhd against L3 Architects Sdn Bhd.(1) In its decision, the Court of Appeal unanimously upheld the decision of the high court in dismissing PCP Construction's claim against L3 Architects.(2)

Facts

The developer, Leap Modulation Sdn Bhd, appointed PCP Construction and L3 Architects as the main contractor and consultant, respectively, in a construction project. The project was regulated by the Agreement and Conditions of Building Contract (Private Edition with Quantities) 1998 with amendments (PAM Contract).

A dispute arose between PCP Construction and Leap Modulation concerning the non-payment of Interim Payment Certificates (IPCs) 17R and 18, which PCP Construction sought to resolve by way of adjudication under the Construction Payment and Adjudication Act 2012. The adjudicator found in favour of PCP Construction.

However, when the adjudication decision was heard at the high court, the court set aside part of the adjudication decision as the adjudicator had failed to consider Leap Modulations' set off (which included, among other things, IPC 19, wherein L3 Architects had allowed a deduction of RM750,000 for the costs of non-compliance works) on the basis that they were not set out in the payment response.(3)

Thereafter, PCP Construction commenced a negligence action against L3 Architects which stemmed from IPC 19. PCP Construction argued that because of L3 Architects' negligence, it now had to pay a sum of RM351,646.68 to Leap Modulation (ie, the set off).

At all material times, it was not disputed that there was no contractual relationship between PCP Construction and L3 Architects and both had their respective contracts with Leap Modulation.

Case of negligence?

It is trite law that in an action for negligence three elements must be proved – namely, whether:

- the defendant has a duty of care towards the plaintiff;
- the defendant has breached said duty of care; and
- the breach by the defendant has caused the plaintiff to suffer losses.

Without a contractual relationship between the parties, did L3 Architects owe a duty of care towards PCP Construction? The sessions court found that there was a duty of care and gave judgment against L3 Architects.

High court decision

Dissatisfied, L3 Architects appealed to the high court. The court allowed the appeal and set aside the judgment against L3 Architects, mainly on the basis that L3 Architects did not owe a duty of care to PCP Construction as the main contractor. In any event, PCP Construction had suffered no loss or damage as a result of IPC 19.

Duty of care by a consultant to a main contractor

PCP Construction relied on the UK House of Lords' decision in *Arenson v Casson Beckman Rutley & Co*(4) in both the sessions court and the high court. In *Arenson*, the question before the House of Lords, as framed by Lord Simon of Glaisdale, was:

> *whether an accountant/auditor of a private company who on request values shares in the company in the knowledge that his valuation is to determine the price to be paid for the shares under a contract for their sale is liable to be sued if he makes his valuation negligently.*

In Arenson, the House of Lords found that there was no reason of public policy to treat the respondent valuers' task of evaluating the shares as an exception to the general rule of liability for negligence whereby immunity is granted to judges and arbitrators. In the course of its judgment, the House of Lords made obiter observations on a duty of care owed by a consultant to the main contractor, drawing on its decision in *Sutcliffe v Thackrah*.(5) In this decision, the House of Lords had held that in general, any architect or valuer is liable to the party which employed them if they caused loss by reason of their negligence. However, as an exception to that rule, immunity

would be accorded to the architect or valuer if they could show that, by agreement, they had been appointed to act as an arbitrator or quasi-arbitrator.

The UK Court of Appeal considered Arenson in *Pacific Associates Inc v Baxter*(6) but decided against following it, given the absence of a contract between the parties (ie, a contractor and an engineer) and the availability of a contractual remedy between the contractor and employer. It was held that, among other things, the courts should be slow to superimpose an added duty of care upon a party when the relevant rights come under a contractual framework that provides for the same.

Since *Pacific Associates*, the courts in Singapore(7) and Malaysia,(8) among other jurisdictions, have applied its approach.

The Singapore Court of Appeal found the salient facts in S*pandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*(9) to be materially the same as those in Pacific Associates and set out a two-stage test of proximity and policy considerations with a preliminary requirement of factual foreseeability for the purposes of determining a duty of care. Applying said test, the court held that it was foreseeable that any negligence by the superintending officer in its certification would deprive the contractor of monies to which it would have been entitled. However, in light of the arbitration clause in the contract which allowed the contractor to claim under-certified amounts and any interest in relation thereto in arbitration proceedings against the employer, the requirement of proximity was not satisfied.

The Malaysian Federal Court thoroughly discussed *Spandeck Engineering in Lok Kok Beng v Loh Chiak Eong*,(10) wherein the apex court propounded a more restricted approach for cases of pure economic loss and held as follows:

[45] The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases. The fact that damages sought by the claimant is pure economic loss not flowing from personal injury or damage to the property is also a factor to be considered. As has often been acknowledged, a more restricted approach is preferable for cases of pure economic loss. As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement. The reason for a more stringent approach taken in the claims involving pure economic loss is because such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues.

High court decision

Having analysed the various cases and authorities submitted, the high court in PCP Construction was of the view that the approach taken in *Pacific Associates* should be followed. Among others, Aliza Sulaiman JC (now a high court judge) noted that the issues, subject matter and relationship of the parties in *Sutcliffe* and *Arenson* were different from the present case. In *Sutcliffe*, the architect had been sued by its employer (not a contractor), while Arenson concerned the evaluation of shares and was not a construction dispute.

The high court held that the arbitration clause in the PAM Contract (ie, Clause 34) served as an adequate basis for PCP Construction to pursue its grievances against Leap Modulation for issues such as wrongful certification. As such, it would not be reasonable to impose a duty of care on L3 Architects given the factual matrix of the case as this would be inconsistent with the structure of the relationships as governed by the contracts between Leap Modulation and PCP Construction, and Leap Modulation and L3 Architects.

It was thus held that architects (in this case, L3 Architects) should not be liable for claims for pure economic loss in negligence where a contractual matrix exists between the employer and main contractor by way of a PAM Contract, which clearly defines the rights and liabilities of each party. As held in *Lok Kok Beng*, there is a need to adhere to the agreed contractual terms.

Was there a loss suffered?

When this case was brought before the high court, the entire adjudication decision between PCP Construction and Leap Modulation had been set aside for failure to consider the set offs raised by Leap Modulation,(11) consistent with the Federal Court case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd*.(12)

As such, even if a duty of care existed, PCP Construction had not suffered any losses as adjudication decisions are only of temporary finality, as propounded in *Martego Sdn Bhd v Arkitek Meor.*(13) Accordingly, PCP Construction is not prevented from pursuing its claim in a final dispute resolution forum (eg, in court or via arbitration).

The high court further held that unless and until such a claim is pursued and dismissed in a final dispute resolution forum on the ground that there was a wrongful under-certification by L3 Architects, PCP Construction has not suffered a loss.

It should be noted that IPC 19 was also an interim certificate.

Saga Fire Engineering Sdn Bhd v IR Lee Yee Seng

The high court case of *Saga Fire Engineering v IR Lee Yee Seng*(14) (affirmed on appeal) was raised by PCP Construction during the appeal and is of significance.

In *Saga Fire Engineering*, the plaintiff contractor faced a variety of problems that arose from the defendant engineer's professional negligence. The plaintiff commenced a claim in adjudication against the owner of the project, obtained an adjudication decision in its favour and later resolved its dispute with the owner by way of a settlement agreement.

The plaintiff's contention was that as a result of the defendant's negligence in certification, the plaintiff had suffered losses. The court found that the architects owed a duty of care to the contractor and were liable for the losses suffered.

Saga Fire Engineering is arguably distinguishable as the plaintiff and the owner resolved their disputes by way of an adjudication decision and later, a settlement agreement. There was a crystallisation of the loss. Accordingly, the only remaining avenue for the plaintiff was against the defendant for negligence.

Court of Appeal decision

Despite PCP Construction's attempts to rely on Saga Fire, the Court of Appeal unanimously agreed with the findings of Aliza Sulaiman JC and affirmed the high court's decision.

For further information on this topic please contact **Foo Joon Liang** or **Tasha Lim Yi Chien** at **Gan Partnership** by telephone (+603 7931 7060) or email **joonliang@ganlaw.my** or **tasha@ganlaw.my.**

The Gan Partnership website can be accessed at **www.ganlaw.my.**

Endnotes

(1) W-04(C)(W)-347-06/2019.

(2) L3 Architects Sdn Bhd v PCP Construction Sdn Bhd [2019] 1 LNS 1321.

(3) PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd [2017] MLJU 905.

(4) [1977] A.C. 405.

(5) [1974] 1 All ER 859.

(6) [1989] 2 All ER 159.

(7) Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2008] 4 LRC 61.

(8) Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd [2017] 2 MLJ 629 and Bodibasixs Manufacturing Sdn Bhd v Entogenex Industries Sdn Bhd [2018] 9 MLJ 417.

(9) [2008] 4 LRC 61.

(10) [2015] 7 CLJ 1008.

(11) Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd [2019] 1 MLJ 334.

(12) [2019] 5 CLJ 479; [2017] 1 LNS 1378; [2018] 2 MLJ 22.

(13) [2018] 2 CLJ 163.

(14) Shah Alam High Court Civil Suit BA-22C-10-02/2017.

COVID-19: Interviews, communication and unreliable reports

by Graham Rogers - Consultant Psychologist

Let's start as I mean to go on by challenging the courts; lockdown is making the criminal courts rely on poor psychological/psychiatric information, being less reliable and based on flawed methodologies.

More specifically, it fails to comply with CPR (2020), 19.2 which explicitly states that an experts report needs be "objective and unbiased." However, to produce such, requires the methodology to be scientifically sound; that is, reliable and valid. Indeed, this is specifically noted as a requirement for expert evidence by the Forensic Science Regulator, Dr Gillian Tully (2019).

As one will see, the use of assessments based predominantly on interviews, and in lockdown, videoconferencing, are not objective, not free from bias, are based on a methodology that is unscientific and ultimately invalid, and therefore the findings themselves must be unreliable.

Specifically, Nordgaard et al (2013) state, "that fully structured interview is neither theoretically adequate nor practically valid in obtaining psycho-diagnostic information," p 353. That is, 'interviews' do not produce reliable information upon which to base a diagnosis, or I would argue, an opinion for the court.

Moreover, the role of 'subjectivity' is acknowledged and its degrading role mourned by some, "British psychiatry has led to an undervaluing of subjectivity and of the role of emotions within psychiatric training and practice. Reintegrating the subjective perspective and promoting emotional awareness and reflection may go some way towards restoring faith in the psychiatric specialty," Yakeley et al (2014), p 97. That is, subjectivity is the norm and whereas I would argue it should be part of the wider assessment process, one cannot rely on it for the courts, or diagnostic purposes.

Kunz et al (2019) state, "the experts' final judgement is further influenced by their interaction with patients, personal experiences, training, personal, and societal norms and values. This complexity calls for a rigorously structured approach to medical evaluations, with clear guidance on the process for acquiring and integrating information," online version/ open access. That is, judgements are being influenced by factors other than those we immediately see. We interpret what we are told during the interview by many issues, which may serve to bias our opinions.

Such difficulties are acknowledged, though I would argue, in the absence of evidence to the contrary, they are ignored. Yet, bias within expert assessments and reports is seen as an area that must be managed by the professional, Dror (2013), Dror (2015), Kukucka et al (2017), Zaft et al (2018). Indeed, where assessments affect the thinking of the court, including the defendant's ability to access the trial, and to aspects of sentencing, one needs to highlight such difficulties.

Let's consider the basics, or rather, let's ask, what are the characteristics of the people we are interviewing? Is their understanding of what we ask as interviewers reliable? Can they consistently provide us with reliable and accurate information?

I would argue that initially, the issue with interviewing overlaps with the information from the Royal College of Speech and Language Therapists (RCSLT), their written submission to the MOJ (2012), and Coles et al (2017), on behalf of the RCSLT, p 6.

"In a Youth Offending Service all new entrants to the Intensive Supervision and Surveillance Programme (ISSP) were screened and 65% (49) required speech and language therapy intervention. A significant number (20%) scored at the 'severely delayed' level on standardised assessment and 6% as 'very severely delayed."

"In a recent study in a Secure Training Centre 109 young people were screened for speech, language, and communication needs (SLCN). Only two of the participants had previously been identified with SLCN. Of those screened only 28% were found to not require any additional support, whilst 14.4% were identified for 1:1 speech and language therapy intervention."

"At a southern Young Offender Institution an audit of 38 young people found that only one young person achieved age equivalence on a language assessment whilst 67% could be classified as having a developmental language disorder (-1.5SD)."

What these show is that for younger offenders, in excess of 65% are likely to have speech, language and communication difficulties, most needing support and intervention, a great many being labelled as 'language disordered' (-1.5SD = standard score at or below 78-80).

If two in every three clients has a language disorder, how do we guarantee that what we have been told is accurate? Indeed, we already know that denial, minimisation (avoidance) and compliance (agreement) are often found when one encounters those who fail to understand. That is, those with SLCN have strategies to avoid revealing the extent of their difficulties.

Regarding adults, Coles et al (2017) write,
"A project based in Pontypridd Probation Service showed that all participants had "below average" speech, language and communication ability and revealed specific problems experienced with comprehension and expression."

Further, "A study conducted in north west England found that up to 80% of adult prisoners had speech, language and communication needs."

And again, referring to a study from the 1980's; "Over 44% of women in the criminal justice system have communication difficulties. It is important to note that the incidence of communication problems with these females whilst found to be lower than for males in the criminal justice system remains significantly higher than for the general population."

One immediately sees the similarity with youth, a very high proportion of adult offenders with speech, language, and communication needs, as one would expect.

Developmental language disorders do not simply disappear when a person transitions from youth to adulthood, their difficulties, and the way they are shown often become hidden; it is the adaptations to their lives, the ways they avoid 'difficult' situations, the way they rely on others and so on, that enable them to hide their disability, and manage adulthood.

However, their difficulties make clinical interviews problematic, less reliable and prone to distortion, with the result that diagnosis and opinions derived from relying on them will be unreliable.

By way of example, I assessed a young adult offender, the fourth professional to see him. To the first professional the offender said he gained GCSE's from school. To the second he revealed he had 'A' levels, and to the third, the psychiatrist, he said he had a university degree. However, I discovered he left school aged 14 years and never attended college: he did not have GCSE's, 'A' levels or a degree. The motivations to hide ones difficulties can add to the complexity of an interview.

Of course if so many defendants, offenders, and parolees have such difficulties, it raises concern regarding the reliability of what they say at interview; as shown. Are they answering the question asked, or are they answering what they think is being asked; they are not necessarily the same. Alternatively, are they providing what they think you want or need to hear?

Further, The Bromley Briefings (reported annually) note that the proportion of prisoners with low (cognitive/intellectual) ability is high, and out of proportion to that found within the community. The average Full-Scale IQ (FSIQ) score for the population in general is 100. The average for UK prisoners is around 87.

To put it another way, an FSIQ score of 100 is as good if not better than 50% of the population, whereas a score of 87, is as good if not better than just 20%. That means that when using an IQ test, half of the prison population fall into the lowest 20% of the wider community.

Interestingly, Dame Mary Warnock as she was later to become, produced her report into special needs at school (1978), noting that at any one time 20% of students would have special educational needs (SEN) warranting support and intervention.

Broadly speaking, an alternative way of understanding this is that as many as half the prison population may have special needs warranting support and intervention.

The Warnock report led to the Education Act, (1981), which led to 'Statements of Special Educational Needs,' provided to the most needy 2% of children, and set out provision for others with SEN.

Hence, considering the above together, low FSIQ allied to a language difficulty/disorder will make interviewing a difficult and potentially unreliable process.

As a broad estimate: up to 50% of all offenders whose offences may warrant a prison sentence will have difficulties sufficient to interfere with daily life,

reasoning and decision making, with 65% of all such offenders having speech, language and communication difficulties.

Then we consider mental illness, where the report from the Prisons and Probation Ombudsman (2016) cited that for those sentenced to four years and less in prison:

"61% of the sample was identified as likely to have a personality disorder, 10% a psychotic disorder, and over a third reported significant symptoms of anxiety or depression. 21% of the sample reported feeling that they needed help or support with their mental health," p 8.

In pointing out the obvious, if so many offenders have significant mental illness, intellectual difficulties and language and communication difficulties and disorders, are we suggesting these will not affect the reliability of an interview?

An assessment that predominantly relies on an interview, or during the COVID-19 pandemic, videoconferencing, is one that is basing its clinical decision making on an unreliable source of information, the offender.

In my view, one should consider that it is not the offender's responsibility to be more reliable, rather it is the responsibility of the professional to conduct an assessment using a reliable methodology.

I would argue that as the methodology is so flawed with this population group, those psychologists and psychiatrists who rely on interview based assessments may be misleading the courts.

The reliability of assessment methodologies has been widely studied, with a major paper being released by Meyer et al (2001) on behalf of the working party for the American Psychological Association. Following a five year review of 'assessment methodologies,' they noted:

"The data indicates that even though it may be less expensive at the outset, a single clinician using a single method (e.g. interview) to obtain information from a patient will develop an incomplete or biased understanding of that patient. To the extent that such impressions guide diagnostic and treatment decisions, patients will be misunderstood, mischaracterized, misdiagnosed, and less than optimally treated," p 150.

To this point, I have only addressed the difficulties interviewing offenders from the perspective of what the offender brings to the process. However, I have yet to move onto the difficulties with the structure of the interview and the inherent bias and subjectivity within them; which will be 'part 2' of this article.

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The Cab Rank Rule: English Barristers in Foreign Courts

***Matthew Happold** writes for the New Law Journal on The Cab Rank Rule: English Barristers in Foreign Courts. Matthew looks at the Bar, professional ethics, foreign work, the cab rank rule and the obligation not to discriminate. All in the light of the recent controversies concerning David Perry QC and Dinah Rose QC*

Recent events have put barristers' professional ethics in the spotlight and raised questions about the scope and importance of the cab rank rule. News in January that David Perry QC had accepted instructions to prosecute a number of prominent pro-democracy activities in the Hong Kong courts gave rise to extensive, often virulently expressed, criticism. Foreign secretary Dominic Rabb said that he could not understand how 'anyone of good conscience' could agree to act in such a case. Baroness Kennedy QC called Mr Perry's decision 'a source of shame'. Shadow attorney general and former lord chancellor Lord Falconer of Thoroton said if Mr Perry did not withdraw, he would not be acting consistently with UK values. Less than a week later, Mr Perry withdrew from the case.

Even more recently, Dinah Rose QC published a statement that she would not withdraw from appearing before the Privy Council on behalf of the government of the Cayman Islands to argue that the Bill of Rights in the Caymanian Constitution does not guarantee same-sex couples the right to marry. Ms Rose has received 'pressure in the form of abuse and threats', while former justice of the South African Constitutional Court Edwin Cameron accused her of 'prosecut[ing] a homophobic case to deny LGBTIQ persons in the Cayman Islands equal rights '.

home & away

Despite claims made by some of Mr Perry's defenders, the cab rank rule did not apply to his situation. Put simply: the cab rank rule requires a barrister to accept instructions in any case in a field in which they profess to practise (having regard to their experience and seniority), subject to their availability and payment of a proper professional fee. In other words, barristers cannot choose their clients based the nature of the allegations against them or their character or reputation. The rule is said to harness self-interest to the public interest, ensuring unpopular people and causes can access legal representation by shielding barristers from criticism for taking their cases, thus maintaining access to justice and the rule of law.

The Bar Standards Board's (BSB) Code of Conduct, however, provides that the cab rank rule: 'does not apply if... accepting the instructions would require you to do any foreign work'; and foreign work covers 'legal services of whatsoever nature relating to... court or other legal proceedings taking place or contemplated to take place outside England and Wales'.

What the exception means is that, in addition to instructions to appear before the courts of foreign states, the cab rank rule does not apply to instructions to appear before arbitral tribunals or international courts, such as the European Court of Human Rights, the International Court of Justice, the International Criminal Court, and the European Court of Justice (albeit that UK lawyers lost their rights of audience before that court at the end of last year), at least if they are seated outside England and Wales. Indeed, it is commonly said that the exception was introduced to avoid barristers being obliged to appear for defendants before the International Military Tribunal at Nuremberg. Because the proceedings before the Judicial Committee of the Privy Council in which Ms Rose has been briefed are taking place in London, however, the cab rank rule applies to her case.

Considering core duties

Exclusion of the cab rank rule does not grant a licence to discriminate when deciding whether to accept foreign work, because the Code of Conduct's eighth core duty not to discriminate unlawfully against any person continues to apply. Barristers undertaking foreign work may not discriminate the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender reassignment, sexual orientation, marital or civil partnership status, disability, age, religion or belief, or pregnancy and maternity. In addition, barristers may not withhold their services based on the nature of the case and the conduct, opinions or beliefs of the prospective client. So although barristers are not obliged to accept foreign work, they must not discriminate when doing so.

But what if others consider the party represented immoral, the cause promoted abhorrent, or the law applied iniquitous? Nothing in the code per se prevents a barrister from acting, at least in the absence of other circumstances. If instructions are accepted, however, the barrister is required to comport themselves to the same standards as when appearing in the courts of England and Wales. For example, a barrister must not knowingly or recklessly mislead the

court, or abuse their role as an advocate. Moreover, the circumstances that require a barrister to cease to act and return their instructions are the same as when appearing in England and Wales. Although barristers 'must comply with any applicable rule of conduct prescribed by the law or by any national or local Bar', that obligation is subject to compliance with the code's core duties, requiring that they act honestly and with integrity and maintain their independence. In other words, although the identity of the party for which the barrister is acting does not prevent them from acting in foreign proceedings, the way those proceedings are conducted can. One would expect barristers instructed to prosecute abroad, particularly in politically sensitive cases, to keep this injunction in the forefront of their minds.

It might be argued that in some cases, acceptance of foreign work would breach the code's fifth core duty (CD5) that a barrister 'must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession'. In addition, a barrister 'must not do anything which could reasonably be seen by the public to undermine' their honesty, integrity and independence, because conduct on a barrister's part which the public may reasonably perceive as undermining their honesty, integrity or independence is likely to diminish the trust and confidence which the public places in them or in the profession, in breach of CD5.

Here we enter into uncharted waters. None of the examples given in the code of behaviour that might reasonably be seen as compromising a barrister's independence relate to participation in foreign proceedings. One might think that a barrister acting as prosecutor in a 'show trial', where the defendant's guilt has already been determined and the trial is conducted purely for propaganda purposes, would breach CD5. But such participation would also seem to violate other professional obligations and various other situations come to mind.Would a barrister be acting in breach of CD5 if they agreed to seek the death penalty when prosecuting in foreign proceedings, or prosecuted conduct (such as homosexual activities) not criminal in the UK, or acted for an alleged war criminal or a state alleged to have committed genocide before an international court or tribunal? Given that the question in any case is whether there is 'sufficiently serious misconduct in the exercise of professional practice such that it can properly be described as misconduct going to fitness to practise', one can imagine the BSB and Disciplinary Tribunals taking a cautious approach. Indeed, in her statement Ms Rose relied not so much on the cab rank rule itself (not least because she had appeared earlier on the proceedings before the Cayman Court of Appeal) as on the 'long-standing principle, essential to the maintenance of access to justice and the rule of law that a lawyer is not to be equated with their client, and is not to be subject to pressure to reject an unpopular brief'. Barristers are required to 'promote fearlessly and by all proper and lawful means' their lay client's best interests without regard to their own interests, and not to permit 'their absolute independence, integrity and freedom from external pressures to be compromised'. Returning a brief in response to external criticism might well breach these obligations.

A proper defence

The continued demand for the services of its members worldwide can be seen as a tribute to the standards of advocacy at the Bar of England and Wales. In undertaking foreign work, however, barristers cannot shelter behind the cab rank rule. In each case, they must consider whether their participation is in accordance with their professional obligations, but this need not be their only consideration, providing they do not discriminate contrary to the Code of Conduct. It is too trite to say that as professionals they cannot be criticised for the service they choose to provide. Barristers acting in controversial cases overseas need to take responsibility for their decisions and be prepared to justify them.

Perhaps two more things can be drawn from the current controversy. First, the contours of the exception to the rule for foreign work may need to be refined. It seems odd, for instance, to exclude instructions to appear before international courts and tribunals based on whether such bodies are seated in England and Wales or elsewhere. More fundamentally, it shows how little the cab rank rule-and the principles underlying it—are appreciated, even by lawyers. It will be recalled that in 2013 a Legal Services Board report declared the rule redundant and called for its abolition, albeit that the idea was successfully resisted by the BSB *(see bit.ly/3q6j1Sl)*. Today, greater scrutiny of barristers' conduct, including on social media, means that defenders of the rule need to show its continued importance. If not, they may face renewed calls for its abolition

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As well as taking instructions to act before the English courts, Matthew has acted as counsel in cases before the European Court of Human Rights and the Court of Justice of the European Union (the General Court and the Court of Justice).

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This article was first published in New Law Journal (www.newlawjournal.co.uk).
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