Dispute Resolution

September 2015

DISPUTE RESOLUTION BULLETIN





Welcome to the September edition of our Dispute Resolution Bulletin.

In our first article this month, Partner Daniel Martin looks at new non-financial reporting requirements for businesses and considers how they should be preparing.

Next, Partner Damian Honey, Senior Associate Andrew Williams and Associate Jonatan Sherman provide an update on the new Financial List which launches in the English High Court on 1 October 2015.

Finally, Professional Support Lawyer Sian Knight reports on how in-house counsel in Hong Kong are likely to be affected by the recent Hong Kong Court of Appeal decision in *Citic Pacific Ltd v Secretary for Justice and Commissioner of Police (29 June 2015)*.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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Called to account? New non-financial reporting requirements for businesses

Businesses increasingly find themselves under the spotlight to demonstrate that they are operating not only in accordance with the law, but also in an ethical and socially responsible manner.

The UK Bribery Act was a high-profile (and highly-politicised) example of commercial enterprises being required to ensure sound business practices. Two more recent (albeit slightly less high-profile) pieces of legislation continue the trend, with a focus on non-financial reporting.

Modern Slavery Act

The Modern Slavery Act (the Act), which received Royal Assent on 26 March 2015, seeks to combat slavery and human trafficking, in part by putting the onus on businesses to ensure that there is no forced labour in their supply chains.

Because of this focus on supply chains, the Act is likely to be of greatest relevance to the construction industry, as well as the food, clothing and technology sectors.

Section 54 of the Act requires that from October 2015, companies which carry on a business, or part of a business in the UK and which have a turnover of £36million or more must prepare a slavery and human trafficking statement for each financial year of the organisation (a s54 statement).

A s54 statement is one of the following:

- A statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its business.
- A statement that the organisation has taken no such steps.

Companies which are complying with these reporting obligations should publicise that fact, as this is an area where compliance can be a competitive advantage.

DANIEL MARTIN, PARTNER

While no particular steps are mandatory, the Act sets out six areas of information that a s54 statement "may" include and it seems clear that the UK Government expects that many business will choose to cover these areas. The areas include a number that will be recognised by those familiar with the adequate procedures under the UK Bribery Act, including a risk assessment, information about due diligence and details of training and monitoring.

The Act does not require the s54 statement to be included in the company accounts, but it must be:

- Published for each financial year.
- Published on the corporate website.
- Approved by the board and signed by a director.

It therefore seems likely that many businesses will choose to publish their s54 statement alongside the annual report.

EU directive on disclosure of non-financial reporting

As part of a drive to increase "the transparency of the social and environmental information" provided by businesses across the EU, whilst also creating a level playing field for those businesses, the EU published Directive 2014/95/EU on 15 November 2014 (the Directive).

The Directive affects "large companies" – defined as those which meet all of the following criteria:

- They have more than 500 employees.
- They meet financial thresholds (have a balance sheet of at least €20 million or net turnover of at least €40 million).
- They are "public interest" organisations (this includes listed companies, plus unlisted companies such as credit institutions, insurance undertakings and other businesses selected by member states).

It requires these companies to publish annual environmental, social and governance reports (also known as ESG reports or non-financial



statements), either within the annual corporate report, or in a separate filing.

ESG reports must include a description of the diversity policy applied in relation to the company's board and address three areas as a minimum:

- Environmental matters.
- Social and employee related aspects (e.g. gender equality, trade union rights, health and safety at work).
- Human rights, anti-corruption and bribery.

Companies must conduct a risk assessment of the particular risks which their business faces in relation to each of these matters. They must include within their ESG report a summary of those risks, a description of the company's policy in respect of these risks and the outcome of that policy. As well as a description of the company's business model, they must include information about their due diligence process (including with respect to their supply chain).

The Directive imposes the "comply or explain" principle, with the result that if a company fails to pursue policies relating to the areas covered by the Directive, it must explain why in its annual report.

The Directive must be implemented in each member state by 6 December 2016, with companies to start making reports for the financial year starting on 1 January 2017 or during the calendar year 2017. Penalties for failure to comply with the requirements of the Directive will be set by national legislation.

The Directive is unlikely to have a substantial impact on UK businesses because of the breadth of the UK's Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, which set out the current UK reporting requirements. Under these regulations, a strategic report is required which must include information about:

- Environmental matters.
- The company's employees.
- Social, community and human rights issues.

There is therefore substantial overlap with the requirements of an ESG report.

Conclusion

These reporting requirements seek to "name and shame" organisations not doing enough to ensure they are acting ethically and in a socially responsible way, with customers, suppliers, trade unions and pressure groups likely to use evidence of corporate failings as a way to apply pressure for change.

The reputational harm associated with being a non-compliant organisation is likely to exceed the financial penalties.

Affected businesses should be aware of their increased reporting obligations and ensure that they collect the information required in order to be able to comply. They should also review corporate policies, both to check that they are fit for purpose and to ensure that employees (and where relevant, customers and suppliers) are aware of their contents.

Companies which are complying with these reporting obligations should publicise that fact, as this is an area where compliance can be a competitive advantage.

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A new financial court for England

The English judiciary's commitment to maintaining the English courts as preeminent in international financial dispute resolution has been further demonstrated this year by the introduction of a specialist financial court, which will begin to operate on 1 October 2015. Competition from other financial dispute resolution centres, including those in Dubai and Singapore, has no doubt added to the impetus for the English courts to adapt in response to ever-changing financial markets.

The Lord Chief Justice has explained that the objective of the new "Financial List" is to provide a "faster, more efficient and economical forum" for resolving financial disputes. The Financial List will offer a specialist court for complex financial litigation with the benefit of building upon the already well-established procedures of the English High Court. Since these procedures are familiar to its practitioners, this will reduce the time, effort and cost required for implementation.

A claim will qualify to be heard under the Financial List if it meets one or more of the following criteria:

- It is related to the financial markets and has a value of more than £50million or equivalent.
- It requires particular expertise in the financial markets.
- It raises issues of general importance to the financial markets.

The intention is to draw from the courts' existing significant financial expertise in order to both handle cases more efficiently and provide the

technical expertise that sophisticated international litigants expect and require. Each claim will therefore be allocated a judge nominated from either the Chancery Division or Commercial Court and who is authorised to try Financial List claims. The allocated judge will then preside over the case from the commencement of proceedings until enforcement. This approach seeks to ensure consistency and efficient case management.

Proceedings may be commenced in the Financial List by parties lodging claims in either the Commercial Court or the Chancery Division. A new CPR rule will come into force on 1 October 2015 with practice directions and a new guide. Procedures will broadly follow those in the Commercial Court with the intention that no new learning process will be required. From a practical point of view, it has also been proposed that new court forms will be available online.

These initiatives demonstrate the English judiciary's determination that the English courts remain at the forefront of international financial dispute resolution.

DAMIAN HONEY, PARTNER

Pilot test case scheme

In addition to hearing complex high-value financial disputes, the Financial List will hear market test cases under a two year pilot scheme that will also run from 1 October 2015. The draft practice direction on test cases specifies that a qualifying claim will be one that raises market issues in which "immediately relevant authoritative English law guidance is needed."

Claims may be brought by market participants with opposing interests and by mutual agreement, while relevant trade bodies or associations may be joined into proceedings. A claim can be heard without the existence of an actual dispute between the parties. The general rule will be that each party will bear its own costs.

These initiatives demonstrate the English judiciary's determination that the English courts remain at the forefront of international financial dispute resolution. The Financial List will provide a specialist forum for high-value, complex financial litigation overseen by experienced judges and ensuring consistency of decision making from a case's inception through to enforcement, if necessary. Making available a market test case procedure to provide English law guidance illustrates an intent to meet business needs and ensure robust guidance in dynamic international financial markets.

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Legal advice privilege in Hong Kong – what in-house counsel needs to know

The recent Hong Kong Court of Appeal decision in *Citic Pacific Ltd* v *Secretary for Justice and Commissioner of Police*[1] (Citic) rejected the much criticised *Three Rivers (No.5)* English authority, which had been followed in Citic at first instance. This departure is particularly relevant to in-house counsel as it does away with a narrow definition of 'client' and in so doing, provides greater protection from disclosure for communications covered by legal advice privilege.

Following the Court of Appeal decision in Citic, there is now a broader test for legal advice privilege than applied in Hong Kong before - the "dominant purpose test". This means that in order to be covered by legal advice privilege and protected from disclosure, a document needs to come into existence for the dominant purpose that it, or its contents, will be used to obtain legal advice.

Background

To put this in context, legal advice privilege is one of the two types of legal professional privilege that can arise. As the name suggests, it protects from compulsory disclosure confidential communications made between client and lawyer for the dominant purpose of giving and receiving legal advice. The other type of legal professional privilege, litigation privilege, provides a broader protection for communications created in contemplation of litigation, made between a solicitor and a third party, and between the client and a third party, for the purpose of obtaining

1 29 June 2015



advice, information or evidence relevant to the litigation.

In Hong Kong, the fundamental human right to 'confidential legal advice' is guaranteed by Art.35 of the Basic Law and affirmed by case law. As between a lawyer and a client, legal professional privilege respects the interests of justice by protecting confidential communications made for the purpose of obtaining legal advice from being disclosed. The privilege protection extends to both in-house counsel and lawyers in private practice.

As those working as in-house counsel are well aware, the role of in-house counsel includes much more than just strict legal advice. Increasingly your input is likely to be sought in respect of commercial matters. As an employee, and an in-house counsel, you juggle a fiduciary duty to act in the interests of the business, to maintain confidentiality over the company's business and to meet the standards of professional conduct expected of a lawyer in Hong Kong. For in-house counsel, legal advice privilege will only work to protect confidential communications when you act in the capacity of legal advisor. The need to manage the dual nature of the role - as 'client' of external lawyers and as legal/commercial advisor for your internal corporate clients - is an added level of complexity in dealing with issues relating to legal advice privilege.

What happened in Citic?

At first instance in Citic, the court applied the *Three Rivers (No.5.)* narrow definition of 'client' and held that only the group legal department (and Board of Directors) were the 'client' of external legal counsel. This limited the extent to which legal advice privilege protected documents from disclosure: communications between employees from outside the defined group and external lawyers would not

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SIÂN KNIGHT, PROFESSIONAL SUPPORT LAWYER

be protected by legal advice privilege. Citic appealed.

In a judgment concerned to uphold the fundamental right to confidential legal advice, the Hong Kong Court of Appeal held that the definition of 'client' should not be restricted to the limited definition in *Three Rivers (No.5)* as this would tend to frustrate the purpose of legal professional privilege. Instead, the 'client' will simply be the relevant corporation or institution. Further the dominant purpose test is the proper test to set the limit for legal advice privilege, namely the document must have come into existence for the dominant purpose of obtaining legal advice.

How will this affect you?

The decision in Citic provides additional protection against the compulsory disclosure of confidential communications over which legal professional privilege is claimed. Legal privilege is a ground to oppose the production of documents in arbitration and litigation. The wider definition of client in respect of legal advice privilege ensures that in-house counsel can look to employees throughout the business to collate information for the purpose of obtaining legal advice without losing privilege. Moreover, there are several investigatory bodies in Hong Kong with the right to seize documents, and two more will shortly have such powers under the Competition Ordinance. A corporation faced with an investigation is now in a stronger position to resist inspection of confidential materials on grounds of legal advice privilege.

HFW perspective

We consider the Court of Appeal decision a welcome development which demonstrates a pragmatic approach to legal advice privilege in the context of large corporations. That said, there are no grounds for complacency as privilege can only attach to confidential communications. From an in-house perspective, it would therefore still be prudent to discourage the use of wide e-mail circulation lists. Instead, in-house counsel are advised to adopt best practices to minimise circulation groups, to keep written communications to a minimum and provide legal advice separately from other issues so as to ensure that the dominant purpose test is satisfied.

For more information please contact Siân Knight, Professional Support Lawyer, on +852 3983 7788 or sian.knight@hfw.com, or your usual contact at HFW.


Conferences and events

LexMex 2015
London, 29 September 2015
Presenting: Christopher Cardona

Asia Offshore Energy Conference
Bali, 30 September – 2 October 2015
Attending: Richard Jowett, Sam Wakerley and Paul Aston

HFW Conference: Current Trends in the Indian Market
Mumbai, 14 October 2015
Presenting: Damian Honey, Paul Dean, David Morriss, Ashwani Kochhar, Alistair Mackie, Brian Perrott, Peter Murphy and Hari Krishna

Enforcing Arbitration Awards with Injunctions and Imprisonment Orders
Geneva, 15 October 2015
Presenting: Chris Swart, Katie Pritchard and Michael Buisset

C5's Forum on International Trade Disputes
Brussels, 20-21 October 2015
Presenting: Folkert Graafsma

CIARB Centenary Celebrations
Sydney, 23/24 November 2015
Attending: Nick Longley, Amanda Davidson, Carolyn Chudleigh and Christopher Lockwood

FIDIC Users' Conference
London, 1-2 December 2015
Presenting: Michael Sergeant and Max Wieliczko

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