**Dispute Resolution**

**April 2016**

# DISPUTE RESOLUTION BULLETIN





## Welcome to the April edition of our Dispute Resolution Bulletin

In the first article in this edition Damian Honey, Partner, and Nicola Gare, Professional Support Lawyer, look at Brexit and its implications from a disputes perspective.

Next, Mark Hook, Head of Costs, and Peter Jones, Senior Costs Lawyer, analyse the recent non-party funding judgments in *Deutsche Bank AG v Sebastian Holdings Inc* [2016] and *Legg anors v Sterte Garage Ltd anor* [2016] concerning director and insurer liability respectively, and comment on the trends they suggest.

Lastly, Hazel Brewer, Partner in our Perth Office, comments on securing freezing orders in expectation of foreign judgments or arbitration awards in the Australian courts.

Should you require any further information or assistance with 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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# Brexit: A Disputes Perspective

**Much has been written about the issues the UK will face as a country if the majority vote to leave the EU at the referendum on 23 June. However, little guidance has been given to corporations on how to address these issues in the context of their business, either in negotiating new contracts, or how they may impact upon current disputes.**

We envisage there being an increase in disputes, as parties seek to re-position themselves by, for example, terminating current contracts and re-negotiating on the basis of force majeure or frustration. Even before the referendum, the uncertainty over whether the UK will remain in or out of the EU may also result in ICSID investor disputes as parties claim the economic environment has changed.

In this article, we seek to highlight the key points you should consider when entering into a new contract, and the issues to have in mind on your current and future disputes. We see four main issues:

1. Choice of governing law.
2. Choice of jurisdiction.
3. Service of proceedings.
4. Enforcement of judgments.

## Potential Brexit options

The consequences of the UK leaving the EU will turn on the arrangements governing the future UK/EU relationship. Potential options include:

- The UK agreeing parallel systems with the EU member states, therefore retaining the status quo.
- Adoption of the Norwegian Model (Norway became a signatory to the Lugano Convention[1] and enjoys the benefit of similar enforcement regimes to those in the EU).
- Adoption of the WTO Model – reliance solely on rights and obligations under World Trade Organisation rules.

## The law as at the date of Brexit

This will depend on the extent to which the UK government decides that existing EU legislation should no longer form part of English law once the UK has left the EU.

It may decide to adopt the model used by a number of former British colonies on independence and if so, the law will not change retrospectively. This would mean that existing EU Regulations, and implemented Directives, would remain in force unless and until replaced. There is in any event an agreed two year transitory period should we vote to leave the EU.

## 1. Choice of governing law

*For the following reasons, we do not believe that Brexit will have a significant impact on England as a contractual choice of law, therefore parties should continue to consider this a safe governing law, and are advised to reject suggestions of a 'Brexit Clause' (a clause that operates only in the event that the UK leaves the EU). These are likely to be complex to draft and may not be enforceable.*

The current EU laws applicable to contractual and non-contractual obligations are enshrined in Rome I[2] (contractual claims) and Rome II[3] (tortious claims e.g. negligence) Regulations, which provide that the courts will uphold the parties' choice of law clause.

Contractual claims: Unless rules similar to Rome I and II are agreed between the UK/ EU, the English courts are likely to apply the rules in place before Rome I, namely the Rome Convention, which has similar terms to those in Rome I, particularly with respect to the parties' choice of law, and was enacted in the UK by the Contracts (Applicable Law) Act 1990. It is therefore unlikely that Brexit will impact upon choice of law clauses.

Tortious claims: Again, on Brexit, the UK/EU may decide to agree to keep a system of rules based on Rome II. If not, it is possible that the English courts will then apply the rules in place pre-Rome II, e.g. under the Private International Law (Miscellaneous Provisions) Act 1995 (which still applies to tort actions commenced prior to Rome II coming into force on 11 January 2009). A crucial difference is that this Act does not give the parties an express right to choose the law applicable to non-contractual relations, and instead provides that the applicable law will be based upon the law of the country in which the tort occurred, or the country in which the most significant event occurred.

## 2. Choice of jurisdiction

*We consider that Brexit will not result in parties moving away from English jurisdiction, unless enforcement and service are issues (see further below). Parties will wish to consider the wording of their current jurisdiction clauses, and in particular whether the contract refers to EU legislation, concepts, or makes mention of territorial scope in say a distribution agreement.*

1 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2007:339:TOC
2 Regulation 593/2008 on the law applicable to contractual obligations
3 Regulation 864/2007 on the law applicable to non-contractual obligations

Choice of jurisdiction is currently governed by the Recast Brussels Regulation[4], which gives party autonomy to the choice of jurisdiction, with the exception of arbitration, insolvency, insurance, consumer, and employment matters.

### Post-Brexit

As part of any Brexit negotiations, the UK/EU may agree to continue the Recast Brussels regime, which in any event provides for the courts to decline jurisdiction in favour of *non-member state* courts in certain circumstances. In addition, or in the alternative, the UK may decide to join:

- The Lugano Convention, which operates a similar recognition and enforcement regime to the Recast Brussels, but as between member states and members of the European Free Trade Association (EFTA) such as Switzerland, Iceland, and Norway.
- The Hague Convention on Choice of Court Agreements 2005 (Hague Convention), which is applied to jurisdiction and enforcement where the parties have agreed an *exclusive* jurisdiction clause. It came into force between the member states (excluding Denmark) and Mexico on 1 October 2015, and is expected to attract other signatories. The UK would need to sign this Convention independently of the EU.

  Under the Hague Convention, a non-money judgment, for example a final injunction, can be enforced. However, interim protective measures are not covered, and so interim injunctions or freezing orders cannot be enforced. This contrasts with the position under the Recast Brussels, which does cover these interim measures. There is no requirement for the court to be first seised and so if the Hague Convention applied there would be no need to race to issue proceedings, and avoid a 'torpedo' action.

4 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:EN:PDF

**Unless there is an agreement to continue the reciprocal enforcement and recognition of judgments, which may be agreed, enforcement of judgments between UK/ member states will no longer be automatic.**

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If no convention applies, the English courts will revert to forum conveniens principles, and consider the extent of any relationship with this jurisdiction, and whether the proceedings were first to be issued (but this point will not by itself be conclusive, and so the 'torpedo' may not be an issue in practice).

In addition, if Recast Brussels no longer applies, parties subject to an arbitration agreement with an English seat will be able to be protect their arbitration proceedings using an anti-suit injunction, not permitted under Recast Brussels.

### 3. Service of litigation proceedings

In the absence of any agreement for reciprocal service, or the UK becoming a signatory (in its own right) to the 2007 Lugano Convention, it is likely that it would become necessary for claimants to apply for permission to serve English court proceedings within the EU. A practical work around to avoid the lengthy delay that would result, is for an agent for service of process clause to be included in contracts.

### 4. Enforcement of judgments

Unless there is an agreement to continue the reciprocal enforcement and recognition of judgments, which is likely, enforcement of judgments between UK/member states will no longer be automatic. The party seeking to enforce will need to sue on the judgment.

### Post-Brexit

On Brexit, unless there is agreement to continue reciprocal arrangements, or agree a similar regime – which may well be the case, as it would be in the interests of the member states to keep reciprocity for enforcement in the UK of judgments secured in their courts - the English courts will revert to the previous common law position and require determination of the substance of the dispute. Similarly, member states are likely to require a re-determination of the case, or may interpret enforceability of the judgment under their own national laws, which is likely to lead to uncertainly and inconsistency.

There is also uncertainty about the extent to which relief granted by the English courts would be recognised by the courts of member states particularly in relation to claims for declarations, specific performance, and injunctions.

Therefore, in relation to existing litigation, parties may wish to obtain a judgment as soon as possible to take advantage of the automatic recognition and enforcement mechanism currently applicable under the Recast Brussels Regulation.

### HFW perspective

For the reasons discussed above, we do not envisage a need for parties to reconsider using English choice of law or jurisdiction clauses. English law remains a safe and responsible choice for both contractual and non-contractual disputes. Parties should however be alive to the need to review and possibly revise their contracts where either reference to EU legislation, or geographical area is made.

Where enforcement is a concern, parties may wish to obtain a judgment and enforce as soon as possible whilst the Recast Brussels Regulation still applies.

We have not mentioned arbitration, this is because it will fall outside of the issues Brexit may create, especially in relation to enforcement due to the UK's membership of the New York Convention 1958, which will continue to apply to the other 155 signatories, including the EU member states.

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## Court of Appeal considers non-party funding in two recent cases

**In two recent cases the Court of Appeal has considered whether and the extent to which non-parties will be liable for funding litigation under section 51 Senior Courts Act 1981 (SCA). The two cases are distinct in that the first, *Deutsche Bank AG v Sebastian Holdings Inc* [2016][1], concerns director liability, and the second *Legg and others v Sterte Garage Ltd and another* [2016][2], the liability of casualty insurers of the insolvent defendant, but both judgments indicate the willingness of the courts to apply its discretion and widen the net of those caught by non-party costs orders.**

In the first case, *Deutsche Bank AG v Sebastian Holdings Inc* [2016], the lower court held the shareholder and director (Vik) of the judgment debtor company, against whom the Claimant bank (the Bank), had succeeded in obtaining a judgment for almost US$250 million, with costs amounting to approximately £60 million, liable under section 51 SCA on the basis that Vik had controlled, funded, and was so closely connected to the company that it would not be unjust to bind him to it, and that he would personally have benefitted from the litigation, ordering an 'on account' costs payment of just over £36 million. Vik appealed the non-party costs order.

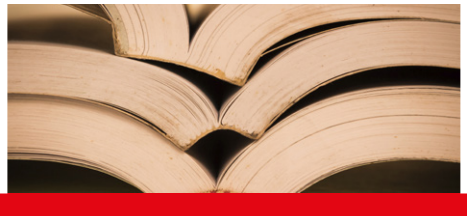
In dismissing the appeal, the Court of Appeal considered the principles applicable to applying discretionary non-party costs orders, as set out in *Symphony Group Plc v Hodgson* [1994][3] and the cases that followed, including the Privy Council decision in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004][4] namely that:

1. Non-party costs orders should always be exceptional, and ordered only where it is just in the circumstances to do so.
2. The discretion will not normally be applied to pure funders.
3. There should be substantial control of and benefit to be gained in the outcome of the proceedings to take the funding from simply facilitating access to justice.

In giving the lead judgment, Moore-Bick LJ, noted that:

- Symphony provided "guidance" as opposed to "rules" on how to apply discretion to non-parties.
- The facts of this case differed from those in Symphony, which related to the application of a non-party costs order to an individual who was at arms length to the proceedings, and not as in this case where Vik was involved in every stage, including giving evidence. There was therefore no need to warn that he was at risk of a costs order.
- The lower court's decision that failure by the Bank to seek security for costs against Vik was not fatal to a section 51 SCA costs order.
- The principle of witness immunity as set out in Symphony, was not relevant here, as the lower

1 EWCA Civ 23
2 EWCA Civ 97
3 QB 179
4 UKPC 39 The Dymocks summary was applied by the Court of Appeal in *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655 and is, therefore now binding on English courts.


The case is also an example of where a third party claimant may rely on the Third Parties Act 1930 to recover its costs directly from the liability insurers of an insolvent defendant.

PETER JONES, SENIOR COSTS LAWYER

court based its finding on Vik's relationship to the company, rather than the legitimacy of it.

- Issues as to the amount of costs ordered could be addressed at the detailed assessment stage, and was not required on ordering a payment on account.

In the second case, *Legg and others v Sterte Garage Ltd and another* [2016], the Court of Appeal applied for perhaps the first time, the concept of non-party costs order liability to casualty insurers.

The claimants were a group of residential property owners (Legg), whose homes are located near the first defendant's (Sterte) garage, and who in 2008 brought proceedings for loss caused by Sterte's negligence and nuisance causing a significant diesel spillage in 1997, which affected their properties. The second defendant, Aviva, was Sterte's public liability insurers who provided cover, and supported the litigation. It became clear that the cause of the damage, a long term leak, was not covered under the policy, and Aviva withdrew cover and funding of the litigation. Sterte went into liquidation, which resulted in judgment in default of a defence being entered against Sterte, who were unable to pay the judgment sum and the costs ordered.

The Court of Appeal relied on the five principles established in *TGA Chapman Ltd v Christopher* [1997][5] needed to make a non-party costs order against an insurer, namely that the:

1. Insurer determined that the claim would be fought.
2. Insurer funded the defence of the claim.
3. Insurer had the conduct of the litigation.
4. Insurer fought the claim exclusively to defend their own interests.
5. Defence failed in its entirety.

The court found that each one of these was satisfied entitling it to dismiss the appeal and make a non-party costs order against Aviva, who they held had failed to show the lower court's exercise of discretion was in any way flawed. Agreeing with the lower court that Aviva was acting predominantly in its own interest in defending the claims, the purpose in doing so was not to protect Sterte against an award of damages, but to seek to defend a claim, which as pleaded fell within the cover provided. The Court of Appeal added that Aviva would have an answer to the claim for a non-party costs order against them had the claimants abandoned the 1997 claim.

To our knowledge this is the first time in which a non-party costs order has been made against a casualty insurer, as opposed to for example, an indemnity insurer, highlighting the court's willingness to extend non-party costs orders to those outside the usual grouping.

The case is also an example of where a third party claimant may rely on the Third Parties Act 1930 to recover its costs directly from the liability insurers of an insolvent defendant. This element of the case is examined in more detail in our Insurance Bulletin dated 17 March 2016, available at http://www.hfw.com/Insurance-Bulletin-17-March-2016.

## HFW perspective

As seen above, the principles relevant to determining whether to exercise discretion and order a section 51 SCA non-party costs order now focus on whether the order would be just in the circumstances of the case, looking at the non-party's relationship to those it is funding and to the litigation, and whether they are exercising an element of control.

The categories of those caught by a non-party costs order have been extended by *Legg v Sterte*, to include casualty insurers, and we expect to see the courts further widen the net of those caught in its discretion. Those considering funding should therefore consider their own position and take care not to act in any way that might suggest they are controlling or benefitting from the litigation.

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5 EWCA Civ 2052

# Arbitration and enforcement bolstered by Australian High Court decision: freezing order can be granted in expectation of a foreign judgment or arbitration award.

**A party to arbitration or court proceedings in Australia can obtain a freezing order in advance of obtaining a domestic court judgment or arbitration award, in prescribed circumstances. In *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2015][1] the High Court of Australia has confirmed that Australian courts have the same power to grant freezing orders prior to a judgment or award being obtained in respect of proceedings commenced outside of Australia, provided that judgment or award would be enforceable in Australia.**

In summary, the Foreign Judgments Act 1991 (the FJA) allows registration and enforcement in Australia of judgments obtained in certain countries, including Singapore, the United Kingdom, and France, which have reciprocal arrangements in place for the enforcement of Australian court judgments.

## The facts and arguments

BCBC Singapore Pte Ltd (BCBC) commenced proceedings against PT Bayan Resources TBK (Bayan) in the High Court of Singapore for damages for breach of a joint venture agreement. The parties, the shareholder agreement and the dispute had no connection with Australia. However, Bayan owned shares in a West Australian company (Ausco) and, under the FJA, any judgment BCBC obtained against Bayan in the Singaporean High Court proceeding would be enforceable against Bayan's Australian assets.

As such a freezing order is not available as a means by which to obtain security for a claim where no real danger of dissipation can be established.

HAZEL BREWER, PARTNER

BCBC applied to the Supreme Court of Western Australia for a freezing order over Bayan's shares in Ausco. The freezing order was granted.

Banyan appealed to the High Court and, for the purposes of the appeal, conceded that BCBC met the prescribed requirements for the grant of a freezing order in that:

- BCBC had *"a good arguable case"*.
- BCBC had *"sufficient prospect"* of obtaining a judgment in its favour.
- BCBC could enforce the judgment in Western Australia.
- There was *'a danger that [any] judgment will be wholly or partly unsatisfied'* because Bayan might dispose of its Australian assets at any time.

However, Banyan argued that the WA Supreme Court did not have the power under either Commonwealth or State legislation (the FJA or the *Supreme Court Act 1935*), to make a freezing order in respect of a foreign judgment before the foreign judgment was obtained.

## The decision

The High Court unanimously rejected Banyan's argument and confirmed that:

- Each State's Supreme Court has the power to make a freezing order in the exercise of its inherent jurisdiction to make such orders as that Court may determine to be appropriate *"to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction"* and that the Supreme Court's power was not limited to cases where substantive proceedings in that Supreme Court had been commenced or were imminent.
- The Supreme Court's power arose equally to protect *"a prospective enforcement process"* under the FJA before a judgment was obtained.
- The purpose of a freezing order is to protect a prospective enforcement process and that

1 HCA 36

it was irrelevant that a freezing order is requested in anticipation of a foreign judgment coming into existence.

- Where a party is exposed to the risk that their opponent may dissipate their assets, there is no reason to distinguish between arbitral proceedings and proceedings instituted in court, specifically approving an earlier decision that a freezing order is available to support domestic arbitrations.
- Federal jurisdiction arises under the FJA, which means that a prospective award in an international arbitration would be accorded the same status as a domestic arbitration or foreign judgment.

### HFW perspective

A freezing order is now a very powerful asset for any claimant in foreign proceedings where a genuine danger exists that an opponent's Australian assets will be disposed of in advance of a judgment or award being obtained. However, freezing orders are not easily obtained, the prescribed circumstances must be demonstrated:

- An ex parte application requires full and frank disclosure of all relevant facts.
- An undertaking in respect of damages will almost always be required.

As such a freezing order is not available as a means by which to obtain security for a claim where no real danger of dissipation can be established.

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## hfw Conferences and events

**5th Annual Global Competition Law Forum**
Hong Kong
21 April 2016
Presenting: Anthony Woolich
Panelist: Caroline Thomas

**HFW Seminar: consequences of the migratory crisis on cross-channel traffic players**
Paris
12 May 2016
Presenting: Christopher Brehm

**2nd Annual Qatar International Arbitration Summit**
Qatar
18 May 2016
Presenting: Damian Honey

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