HERBERT SMITH FREEHILLS

CROSS-BORDER LITIGATION

INTERNATIONAL PERSPECTIVES

IN THIS ISSUE

ISSUE 2 NOVEMBER 2017

Read our Litigation Notes blog at

hsfnotes.com/litigation/

To see our other blogs, including Brexit Notes, Arbitration Notes and Public International Law Notes, visit http://hsfnotes.com

WELCOME

Welcome to the second issue of Cross-Border Litigation, a periodic publication spotlighting legal and practical issues specific to litigation with an international aspect.

We tap into the vast expertise of the firm's leading commercial litigators across the globe to give readers the benefit of their hands-on experience in conducting cross-border litigation and to flag key developments that should be on commercial parties' radars.

Why the focus on cross-border litigation? The increasing globalisation of business has inevitably resulted in a dramatic increase in the number of litigated disputes where the parties are based in different jurisdictions or there is some other international aspect (such as the location of evidence or assets).

Such disputes of course raise particular legal issues, many of which fall within what is traditionally known as 'private international law' - such as jurisdiction, choice of law and enforcement of foreign judgments. Those areas of law are continuing to evolve apace, both within national legal systems and through multi-jurisdictional arrangements. For commercial parties dealing internationally, an awareness of developments in those areas of law is important as a key part of dispute risk management - not only when a dispute arises but also at the deal-making and contract drafting stages.

Further, beyond matters of substantive law, cross-border litigation typically gives rise to practical challenges that do not arise to the same extent in domestic disputes. Relatively straightforward procedures can become complicated where they span borders, and it is important to be aware of these additional hurdles and how best to navigate them.

In this issue...

- We highlight a selection of key developments from across the globe since our last publication, which are likely to be of interest to commercial parties dealing internationally.
- Over two years after the much-heralded launch of the Singapore International Commercial Court, our Singapore office looks at the features of the court designed to attract international litigants and assesses how successful it has been in achieving that aim.
- We put the spotlight on Helmut Görling, partner in our German Corporate Crime and Investigations team, who has established a unique team combining legal experts, forensic accountants and investigators working together to help clients who have fallen victim to white collar crime. He reveals how his pre-law life as a criminal fraud detective brings an invaluable perspective to the challenges of global asset tracing.
- Our London disputes team summarises the English courts' approach to two separate issues pertinent to cross-border cases:
  - To what extent will a court take into account political factors, alleged corruption and other potential obstacles to justice in a foreign jurisdiction when deciding where a dispute should be heard?
  - What "use" can a party make of disclosed documentary material in considering its possible relevance to other actions without first needing the court's permission? Two recent English decisions (which may influence other common law jurisdictions) have suggested a narrower approach to what constitutes "using" documents than was previously generally understood.
- Following our earlier assessment (in our March 2017 issue) of the likely impact of Brexit on cross-border litigation, we provide an update taking into account the relevant negotiating positions put forward to date by the UK Government and the remaining EU Member States.
- We highlight the latest edition of our popular guide for in-house counsel on negotiating dispute resolution and governing law clauses in India-related contracts.

We hope that you enjoy reading this issue and welcome your feedback.

To read our first issue (March 2017), go to hsf.com/cbl

To discuss any of the topics covered or other cross-border litigation issues, do not hesitate to get in touch with one of our regional key contacts listed at the end of this publication, or your usual Herbert Smith Freehills contact.

Editors

Anna Pertoldi
Partner, London

Jan O'Neill
Professional Support Lawyer, London

IN BRIEF

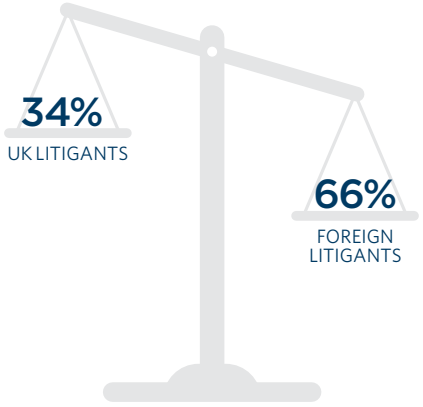
Who is using the England and Wales Commercial Court?

At a time when the English court system is concerned to reinforce its status as a pre-eminent international dispute resolution centre (against a backdrop of Brexit uncertainty and competition from other jurisdictions such as Singapore and Dubai), a recent Portland Communications report "Who Uses the Commercial Court" makes interesting reading. Analysing the judgments delivered by the court during 2015/16, key findings included that:

- 66% of litigants were from outside the UK
- the top four foreign countries of origin for litigants were Kazakhstan, Russia, Switzerland and the US - which have consistently ranked in the top eight countries over the past eight years that the reports have been compiled.

However ...

- the proportion of litigants coming from other EU Member States has continued its decline for the fourth consecutive year - from a peak of 35% (in 2012/13) down to 20%
- litigants are coming from an increasingly narrow pool of countries: last year saw the lowest recorded variety of different nationalities, with only 57 countries represented (compared to around 70 in the previous year)



US Supreme Court restricts personal jurisdiction over non-US corporate defendants

A string of US Supreme Court decisions in recent years has steadily scaled back the extent to which US courts can exercise personal jurisdiction over corporate defendants (including non-US incorporated companies).

Two recent decisions have continued this trend in respect of each of the two alternative bases upon which personal jurisdiction can be established: (i) "general" jurisdiction - on the basis that the defendant is "at home" in the jurisdiction and (ii) "specific" jurisdiction - on the basis of a connection between the specific claim and the jurisdiction. Although both cases concerned claims against US corporates, the principles will apply equally to claims against non-US companies.

- General jurisdiction: In *BNSF Railway Co v Tyrrell* 137 S.Ct.1549 (2017), the Supreme Court reaffirmed that, absent exceptional circumstances, a corporation will only be considered to be "at home" in a state (and therefore subject to general jurisdiction) if it is either incorporated or has its principal place of business there. This effectively curtails any potential to establish general jurisdiction over a non-US corporate purely on the basis of some trading activity by it in the US.
- Specific jurisdiction: In *Bristol-Myers Squibb v Superior Court of California*, No.16-466, slip op. (US, June 19, 2017), the Court confirmed that, in broad terms, specific jurisdiction will only arise if some activity or occurrence related to the claim occurred in the forum state. Most importantly, the mere fact that a defendant carried on business in a state will not on its own be regarded as a sufficient nexus between the claim and the state.

Combined with earlier authority confirming that corporate entities cannot be sued in a particular forum based on the mere presence of a subsidiary (in particular, the Supreme Court's *Daimler* decision), the effect these two recent decisions is to make it very difficult for US claimants to bring an action against a non-US corporate in the US unless the claims arose there – and then only in the state in which they arose. Both decisions will be welcomed by non-US companies who do business in the US and are concerned about their risk exposure arising from their US operations.

Worldwide freezing orders - establishing that assets exist

Worldwide freezing orders are a powerful weapon in the armoury of a litigant seeking to ensure that its opponent's overseas assets will be available to meet any judgment. However, an English court will not grant orders that will be futile and so will not grant a freezing order unless it is satisfied that assets exist upon which the injunction could bite. Securing details of such foreign assets is often not an easy exercise.

The Court of Appeal has recently considered what an applicant for a freezing order must prove in this regard. It held that an applicant must establish a "good arguable case" or "grounds for belief" that assets exist – rejecting a suggested higher threshold of a "likelihood" that assets exist. However it confirmed that it is not enough for an applicant to assert simply that the respondent is apparently wealthy and must have assets somewhere: *Ras Al Khaimah Investment Authority & Ors v Bestfort Development LLP & Ors* [2017] EWCA Civ 1014. Read more at hsfnotes.com/litigation/2017/09/05.

"Mandatory rules" do not override the parties' chosen law in contracts with an international element

Two recent decisions of the English Court of Appeal have provided substantial comfort for commercial parties regarding the risk of a foreign country's mandatory laws being applied to contracts they have chosen to be governed by English law.

Article 3(3) of the EU Rome Convention (and the equivalent in the current Rome I Regulation) in substance provides that, where a law is chosen to govern a contract but all the other aspects of the transaction are connected with another country, the chosen law will be subject to any 'mandatory rules' of that other country. The Court of Appeal has now clarified that, in order to resist the application of Article 3(3), it is necessary to establish only that the transaction in question had some international element (ie that it was not a purely domestic transaction) - not that it had a connection with some other particular country.

It remains to be seen what will be accepted as an "international element" in any given case, but these decisions suggest this may include the use of international forms of documentation (such as ISDA master agreements), the international nature of the market and the existence of related contracts entered into in another jurisdiction. *Banco Santander Totta SA v Companhia de Carris de Ferro De Lisboa SA* [2016] EWCA Civ 1267 and *Dexia Crediop SPA v Comune di Prato* [2017] EWCA Civ 428. Read more at hsfnotes.com/litigation/2017/08/25.

A new Standing International Forum of Commercial Courts

On 5 May 2017, commercial courts from five continents gathered in London for the inaugural meeting of a newly created Standing International Forum of Commercial Courts.

The representation from over 25 jurisdictions was at senior judicial level, including 16 courts represented by their Chief Justice. The invitation to meet and to form a standing forum came from the Lord Chief Justice of England and Wales, with a view to improving best practice in commercial dispute resolution through collaboration between jurisdictions, as well as providing assistance to developing countries.

Amongst the immediate next steps agreed was the production of a multilateral memorandum explaining how, under current rules, judgments of one commercial court may most efficiently be enforced in the country of another.

New York will host the next meeting of the Forum, in Autumn 2018.

China signs the Hague Convention on Choice of Court Agreements

On 12 September 2017, the People's Republic of China (**PRC**) signed the Hague Convention on Choice of Court Agreements. The Convention, in force since 1 October 2015, provides a regime for the mutual enforcement of exclusive jurisdiction agreements in commercial transactions, as well as for the enforcement of judgments resulting from proceedings based on such agreements.

The PRC still needs to ratify the Convention before it becomes a member state and bound by the terms of the Convention. However, the Chinese Ministry of Foreign Affairs has stated that it would "study the approval of the Convention as a priority, so that the Convention can become effective for the PRC as soon as possible". If and when it does, there will be increased opportunities for the recognition of Chinese court judgments internationally and vice versa. China's signing may also potentially act as an incentive for more countries to join the Convention (currently only Singapore, Mexico and the EU member states are members. The US, Ukraine and, very recently, Montenegro have signed but not yet ratified). Read more at hsfnotes.com/asiadisputes/2017/09/28

THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
HAS IT LIVED UP TO THE HYPE?

An important development in the cross-border litigation landscape in recent years has been the establishment of international commercial courts in several jurisdictions – specifically designed to handle high-value, complex, cross-border commercial cases.

In this issue, we feature the Singapore International Commercial Court, which was launched with much fanfare in January 2015.

Alastair Henderson and **Gitta Satryani** of our Singapore office review what impact the court has made since its launch and consider when it may (or may not) be an attractive option for international commercial parties.

The establishment of the Singapore International Commercial Court (**SICC**) was a key initiative in what is an ongoing drive by the Singaporean government to promote Singapore as an international centre for dispute resolution.

In order to assess its impact, it is necessary to first appreciate what type of cases the court can deal with and the procedural features designed to attract litigants.

What cases can be heard by the SICC?

The SICC is a division of the Singapore High Court with the jurisdiction to hear claims that are both international and commercial in nature and which would otherwise be heard in the High Court.

The terms "international" and "commercial" are both defined terms and they essentially form the basis of the SICC's jurisdiction. Both terms are defined very broadly:

- A claim is international if it features a place other than Singapore - such as the identity of the parties, where their place of business is, or the place of performance of obligations.
- A claim is considered to be a commercial claim if it arises from a commercial relationship or an in personam intellectual property dispute. (The legislation provides a non-exhaustive list of examples of what is considered to be a commercial claim - which is similar to those found in Singapore's International Arbitration Act.)

This doesn't mean, however, that any international commercial claim can be commenced in the SICC at any time. For a claim to be heard by the SICC, it must either:

- have been transferred from the High Court; or
- be the subject of a contractual submission to the SICC under a jurisdiction clause in the parties' agreement.

Notably, the legislation allows parties to agree expressly in their contract that the subject matter of a claim is international and commercial, so as to engage the SICC's jurisdiction. This clearly has the potential, at least in theory, to allow a very wide variety of claims to be brought (provided the parties have given forethought to the issue).

Special features of the SICC

So what is so special about the SICC? Its main value proposition – and a key basis on which it has been promoted – is that it is able to provide parties with some of the best practices found in international arbitration in a court setting.

Some of the features of international arbitration that have been adopted or adapted in the SICC include:

- **International jurists**: In addition to the Singapore High Court judges, the Chief Justice has also appointed a number of eminent international jurists from various jurisdictions including the UK, France, Australia, Japan, and Austria. The idea is that the SICC is able to assemble a fit-for-purpose panel of judges for cases that require specific expertise. This adapts the practice in international arbitration of appointing arbitrators with specific expertise (although in the SICC's case, it is not the parties but the court that assembles the panel).
- **Flexible procedural and evidential rules**: Parties are free to adopt a more flexible set of procedural rules – they are not bound by the Rules of Court applicable to cases before the High Court. So for example, they could adopt as guidelines the IBA Rules on the Taking of Evidence to reduce the scope of document production. In addition, foreign law could be submitted from the bar, rather than needing to be proved as a question of fact by calling expert witnesses (as is required under common law rules of evidence). This ties in with the fact that the SICC could include a judge with foreign law expertise where a particular foreign law is in issue. For example, a French judge could be asked to be on the panel if the governing law of the agreement in dispute is French law.
- **International counsel**: Related to the above point is that where a case is certified not to have any connection to Singapore other than the governing law or the forum selection clause, parties are free to select foreign counsel to represent them so long as the counsel chosen is registered with the SICC. This is unlike Singapore High Court litigation which requires parties to appoint local counsel. Additionally, where foreign law is in issue parties could also appoint counsel admitted to practice that law to make submissions before the SICC – consistent with the removal of the need for an expert witness statement to prove foreign law. Because of this, many of the lawyers in our firm are registered or can be registered quickly with the SICC.
- **Confidentiality**: Although public proceedings are still the default position, the SICC has a greater discretion than the High Court to order that proceedings be confidential This is a key feature of international arbitration that many commercial parties find attractive.
- **Costs**: The general principle applies, that the unsuccessful party pays the reasonable costs of the proceedings to the successful party. However, the SICC (unlike the High Court) is not bound by the local costs recovery policies which prevent a party from recovering its full legal costs despite succeeding in the claim. The SICC enjoys a much wider discretion in relation to costs and is not bound by the internal costs scale applicable in the High Court. Again, this is also a feature of international arbitration that many commercial parties find attractive. It should also be noted that court fees for the SICC are likely to be lower than the fees payable in the Singapore International Arbitration Centre (SIAC), which are charged as a proportion of the sum in dispute.

> "Its main value proposition... ...is that it is able to provide parties with some of the best practices found in international arbitration in a court setting"

Conversely, one feature of SICC proceedings which notably departs from international arbitration is the **availability of appeal** (to the Singapore Court of Appeal). This is of course a feature of a court system which is not available (or if available, only to a limited extent) in international commercial arbitration.

Two and a half years on...

So given all these attractive features, the question is how much of an impact has the SICC had since its inception? The answer to this really must be considered in two parts.

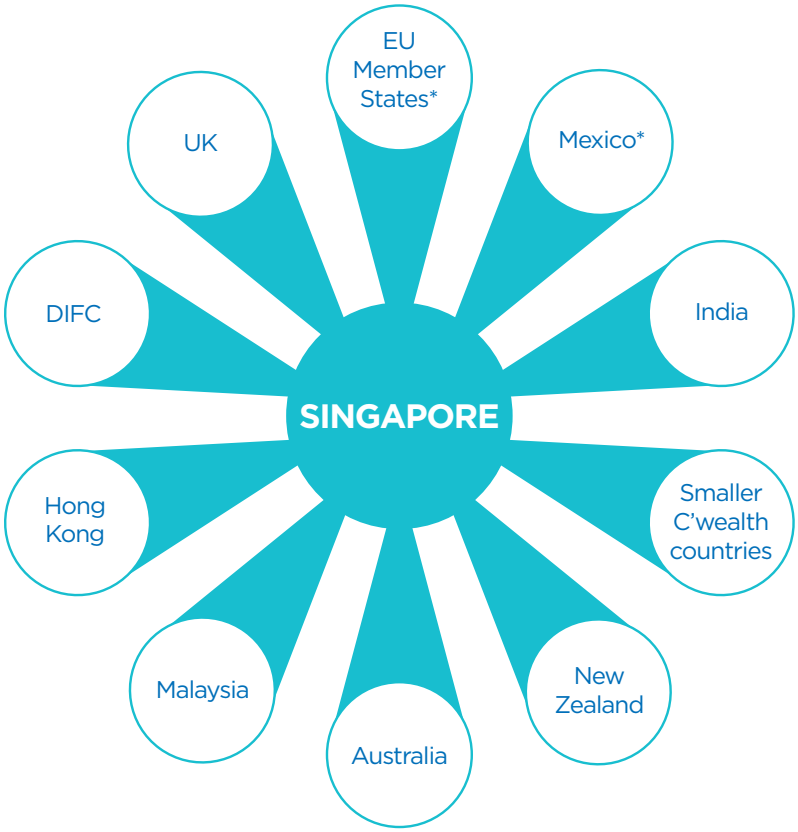
The SICC has certainly made some impact in terms of increasing commercial parties' awareness of its existence and its attractions in comparison to High Court proceedings or international arbitration. Apart from an impressive promotional campaign, it has primarily done so through the portfolio of cases that it has heard or is in the process of hearing since its launch.

> "The number of judgments delivered in a relatively short period of time showcases the SICC's efficiency in resolving cases"

Judgment has been rendered in a respectable 15 cases (available at www.sicc.gov.sg/HearingsJudgments.aspx?id=72). All of these cases are transfer cases – meaning they were originally commenced in the High Court. This makes sense given that the SICC was only established in 2015; it will take a while before we see cases commenced as a result of a contractual submission to jurisdiction.

The number of judgments delivered in a relatively short period of time showcases the SICC's efficiency in resolving cases. By way of example, the judgments in BCBC Singapore and Telemedia Pacific were both handed down 14 months after they were transferred from the High Court to the SICC. This goes some way to supporting the contention that the SICC could be just as if not more efficient than international arbitration in resolving commercial disputes. The international mix of judges hearing the 15 cases also sends a strong signal to commercial end users that the availability of an international panel is not just lip service.

Singapore's reciprocal enforcement agreements



* Via The Hague Convention – only where there is an exclusive jurisdiction clause

Enforcing SICC judgments

However, the second factor to be considered when assessing the SICC's success is that its ability to attract cases is inextricably linked to the question of enforcement – that is, how can one enforce an SICC judgment outside Singapore? It is after all no different than a judgment rendered by the Singapore High Court since the SICC is a division of the High Court. It most definitely is not an arbitral award so the successful party cannot rely on the New York Convention regime.

Singapore does have bilateral agreements with a number of jurisdictions for the reciprocal recognition and enforcement of judgments. In those jurisdictions, a Singapore judgment can be relatively easily enforced (provided that a number of basic conditions are satisfied) so that a judgment creditor does not have to go through potentially lengthy court proceedings. However, that list of jurisdictions is relatively limited: apart from the Dubai International Financial Centre, it is largely limited to Commonwealth jurisdictions including the UK, various Australian and Indian courts, New Zealand, Hong Kong and several smaller Commonwealth countries. Further, it is worth noting that the reciprocal arrangements are generally limited to the enforcement of monetary judgments – they do not extend to non-monetary relief such as orders for specific performance of contractual obligations.

In an effort to improve the enforceability of its judgments, in June 2016 Singapore ratified the Hague Convention on Choice of Court Agreements (it came into effect in Singapore just over a year ago, in October 2016). The Convention provides for the mutual enforcement of commercial and civil judgments (subject to certain conditions set

out in the Convention) by the courts of the states that have ratified the Convention. Those states currently include the EU Member States (except Denmark) as well as Mexico, meaning that Singapore's ratification of the Hague Convention effectively increased the number of jurisdictions with which Singapore has enforcement arrangements from about 10 to about 40. To that extent, the ratification definitely expanded the scope of the commercial transactions for which the SICC could present an attractive dispute resolution option.

However, there remain a number of important caveats. One is that the Hague Convention only applies where there was an exclusive jurisdiction clause by which the parties submitted to the jurisdiction of the relevant court (agreed after the relevant country ratified the Convention).

The other, perhaps more important, limitation is the fact that the Hague Convention is still very much in its infancy in terms of global coverage, with only the EU, Mexico and Singapore having ratified it. Notably, some of Singapore's largest trading partners, including Indonesia, Canada and the US are conspicuously absent. (The US signed the Convention in 2009 but has given no indication whether and when it intends to ratify it.) China's recent signature of the Convention and announcement of an intention to ratify it promptly may go some way to increasing the momentum of the Convention, but the current position is that it remains limited and has a long way to go before it rivals the New York Convention as a comprehensive global framework (under which arbitral awards are enforceable in more than 150 states and territories).

Accordingly, whether the SICC will be an attractive option in any particular case will depend very much on the geographic location of the parties and their assets. In transactions where there is a possibility of needing to enforce against assets located in a jurisdiction with whom Singapore does not have an enforcement arrangement (either via the Hague Convention or bilaterally), a party may hesitate to submit to the SICC's jurisdiction. For such a party, arbitration may be a preferred option.

In summary, Singapore has certainly made an impact in establishing the SICC and ratifying the Hague Convention. It has provided commercial parties with more options as to how they may resolve their disputes. For the right parties and the right dispute, the SICC, coupled with the enforcement framework of the Hague Convention, could be a good option. However, its appeal as a global dispute resolution centre will remain limited until Singaporean judgments can be more widely enforced in other parts of the world.

Alastair Henderson
Managing Partner, SE Asia
T +65 68688058
alastair.henderson@hsf.com

Gitta Satryani
Senior Associate, Singapore
T +65 68688067
gitta.satryani@hsf.com

POST BREXIT CHOICE OF LAW, JURISDICTION AND ENFORCEMENT OF JUDGMENTS
WHERE ARE WE NOW?

The UK's rules on choice of law, jurisdiction and enforcement of judgments are in large part dependent on reciprocal arrangements set out in EU Regulations. So what will happen post Brexit when these Regulations no longer apply automatically?

In this issue **Anna Pertoldi**, partner in our London office, looks at the UK Government's paper published in August this year, "*Providing a cross-border civil judicial cooperation framework*", which responds to the EU Commission's June "*Position paper on Judicial Cooperation in Civil and Commercial Matters*".

The UK Government's paper gives, she believes, cause for quiet optimism.

Choice of law

In short, there should be very little change post Brexit.

At present the Rome I Regulation ((EC) No 593/2008) governs the applicable law in contractual matters in all EU Member States other than Denmark, and Rome II ((EC) No 864/2007) governs the applicable law in non-contractual matters.

Post Brexit, a court in a remaining EU Member State, Germany for example, will still apply those Regulations to determine the applicable law, which as before may be the law of an EU or non EU country. So if such a court would have found that English law was the applicable law before Brexit, it should continue to do so post Brexit.

In the UK, the Government's August paper sets out its intention that Rome I and Rome II will be incorporated into UK domestic law at the point of exit. Nothing is said in the paper about how the former Regulations will be interpreted, but presumably, pursuant to clause 6(3) of the European Union (Withdrawal) Bill, courts other than the Supreme Court should apply CJEU decisions pre-dating exit day. The Supreme Court will not be bound by those decisions, but it must apply the same test as it would in deciding to depart from its own case law. UK courts would be free to ignore post Brexit CJEU decisions, but they may well look at that case law to assist in interpretation, in the same way that they might look at an Australian decision where the same principles apply in both countries. For more information on the Withdrawal Bill, published in July 2017, see the post on our Brexit Notes blog at hsfnotes.com/brexit/2017/07/13.

The EU Commission's June paper focuses on the position at the point of exit, rather than proposals regarding a future arrangement. Indeed it is so concerned to stick to that approach that it does not mention that the Rome Regulations apply as between EU countries and third countries just as much as between EU countries. It proposes that choices of law entered into before the withdrawal date should continue to be given effect in accordance with current rules. As explained above, however, the UK Government is prepared to incorporate the Rome Regulations into its domestic law as "retained EU law" thus keeping EU and UK rules in line. Commercial parties should therefore see little change post Brexit to how the applicable law is determined.

Jurisdiction and enforcement of judgments

The position here is more complicated, but the UK Government's willingness to take into account CJEU judgments suggests that, from its perspective at least, a deal can be negotiated which ensures a continuation of the current rules, or something similar.

At present, the recast Brussels Regulation ((EU) 1215/2012) allocates jurisdiction as between EU Member States and governs enforcement of most judgments from those countries. CJEU decisions on the recast Brussels Regulation are binding on all Member States. Similar rules are in place between the EU and the European Free Trade Association members, Norway, Switzerland and Iceland, under the Lugano Convention 2007. CJEU decisions are not binding on the EFTA countries but they must "pay due account" to those decisions.

In its August paper, the UK Government states that it will seek to participate in the Lugano Convention. It therefore appears to be prepared for UK courts to take CJEU decisions into account in reaching decisions. A similar message comes through in the Prime Minister, Teresa May's, speech in Florence on 22 September 2017 where she said she wanted the UK courts to be able to take judgments of the CJEU into account with a view to ensuring consistent interpretation of EU legislation.

There is no requirement that the UK becomes a member of EFTA in order to join the Lugano Convention. Membership of the Convention is possible with unanimous agreement from the contracting states.

If the UK were to participate in Lugano, without reaching any other agreements, then the position on jurisdiction and enforcement of judgments would be very similar to the current position. The UK would however be unable to take advantage of the improvements made in the recast Brussels Regulation, at least until

Lugano catches up with the recast Regulation and makes similar improvements, which seems likely in time. Some of those advantages are significant and were hard won. In particular the change in the rules which ensures precedence is given to the court chosen in an exclusive jurisdiction clause over the court first seised of a dispute.

The UK Government is, it seems, hoping to go beyond Lugano and will be seeking an agreement with the EU that allows for close and comprehensive cross-border cooperation on a reciprocal basis "which reflects closely the substantive principles of cooperation under the current EU framework". So, presumably something akin to the recast Brussels Regulation, although without giving precedence to the CJEU. The Lugano Convention would then continue to apply, as at present, just to Norway, Switzerland and Iceland.

What is the view of the EU Commission? That isn't clear from its paper, which as referred to above, focuses on the position at the point of exit (as to which more below) rather than proposals regarding a future arrangement. However, the jurisdiction and enforcement rules benefit all countries, so it is to be hoped that common ground can be found.

A final point to make is that the UK Government's paper makes clear its intention to participate in the Hague Convention on Choice of Court Agreements 2005, which sets out jurisdiction rules where there is an exclusive choice of court agreement. The UK is currently a party to the Convention by virtue of its EU membership, but would have to join in its own right to continue to take the benefit of the Convention post Brexit. It is possible to sign up to Hague without agreement from the EU so this is a step which can be taken very quickly after Brexit. The UK Government has been extensively lobbied to make clear its intention to join the Hague Convention post Brexit, so this is a welcome statement.

Separation terms

The Government paper comments on the EU Commission's proposals on the terms of separation, in the event no agreement has been reached on the applicable rules going forward. There is significant agreement here, although the UK Government's proposals go further than the Commission's in some respects.

The most significant difference between the UK Government's separation proposals and those of the Commission is that, under the UK proposals, certain judicial decisions given after the withdrawal date would continue to be enforced under the current rules. They would therefore be subject to a more generous enforcement regime than would otherwise apply under the laws of each remaining EU Member State. In contrast, under the Commission's proposal, the current rules on enforcement would only apply to judicial decisions given before the withdrawal date.

TERMS OF SEPARATION: CURRENT POSITIONS

Applicable law	The existing EU rules on applicable law for contractual and non-contractual obligations should continue to apply to contracts concluded before the withdrawal date and, in respect of non-contractual liability, to events giving rise to damage that occur before the withdrawal date. This is agreed by the EU, although the UK Government's proposals go further to ensure continued common rules on applicable law, as explained above.
Jurisdiction	The existing EU rules governing jurisdiction should continue to apply to all legal proceedings instituted before the withdrawal date. Again, there is agreement on this.
Choice of court	Where a choice of court has been made prior to withdrawal, the current rules should continue to apply to establishment of jurisdiction and recognition and enforcement of any resulting judicial decision, regardless of whether the relevant dispute arises/ judgment is given before or after withdrawal. This would give a long tail to the operation of the current rules, even if no other agreements were reached. The EU proposal is narrower, merely suggesting a choice of court in a contract entered into before withdrawal should continue to be given effect in accordance with current rules. Nothing is said about the resulting judgment.
Recognition and enforcement of judicial decisions	The existing EU rules should continue to apply where proceedings were instituted before the withdrawal date. The EU proposal in contrast is that the current rules would apply where judgment was given before the withdrawal date.
Judicial cooperation procedures and requests for information	Those pending on the withdrawal date should continue to be governed by existing EU rules.

Next steps

The UK Government's paper is very welcome. The Government has clearly taken on board the submissions we and others have made on the importance to business of clear and wide ranging reciprocal rules on choice of law, jurisdiction and enforcement of judgments.

The Commission's stance is however unknown, other than on the terms of separation, and negotiations are at an early stage.

So, whilst there is cause for quiet optimism, as with all things Brexit, watch this space.

Anna Pertoldi
Partner
T +44 20 7466 2399
anna.pertoldi@hsf.com

SPOTLIGHT ON **HELMUT GÖRLING**

Helmut is a partner in our Frankfurt office and a member of our global Corporate Crime and Investigations team, specialising in advising and representing companies that have fallen victim to white-collar crime. As one of the leading compliance and investigation practitioners in the market, he has represented clients in numerous trials involving fraudulent insolvency, officers' liability and international asset tracing / enforcement.

Here he discusses how his background in law enforcement enables him to offer a unique set of skills to clients, particularly when seeking to locate and recover missing money internationally.

Before embarking on a legal career, you had an interesting background – as a detective?

Yes, that's true. Before I studied law I was a detective in the German state of Hesse for more than 10 years, most recently at the state office of criminal investigation in Wiesbaden. I was detective-in-charge for serious fraud cases, conducting investigations, raids, arrests, seizures and such things – and of course I had to defend the results of my investigations constantly in court.

What drew you into the area of fraud investigation?

In the course of my police career I experienced various crime sectors such as murder investigations (horrible!), Interpol cases (sounds thrilling, but was almost exclusively desk work), drug trade investigations (day and night on the road - and dangerous) and burglary (frustrating). When a vacancy arose in the serious fraud department at the state office of criminal investigations, I jumped at it and was fortunate enough to get the job. It was a very exciting time to work in an elite team of highly qualified, experienced detectives. Things went well for me there. But then it became clear that as a result I was expected to accept a promotion to the Command Staff, which would've meant a future of pure desk-based managerial work. That held no interest for me at all, so I took the leap to make a career change and began my law studies.

Did you plan to make use of your fraud experience in your legal practice?

Not necessarily. After qualifying, I joined one of the big German law firms as an associate (much older of course than all the highly qualified greenhorns I started out with). A short time after joining, something special happened: A big US corporation asked the firm to help them with a major international fraud case which had come to light in their German affiliate. Nobody in the firm had any idea how to approach the investigative work necessary in a case like this and how to deal with the law enforcement authorities and whistleblowers. I was obviously well placed with my dual qualifications to work on it and we ended up securing a successful outcome for the client. That lead to another corporate crime case, which lead to another, and soon I had built up an established corporate crime business

unit. Three years after joining I was elected as a partner.

You then started your own law firm. What prompted that?

As with many things in life it was mainly down to chance. In late 2000 I received an offer from one of the big US law firms and elected to move there, with the aim of winning some of the big US corporations as clients for what was now my specialist corporate crime practice. But about six months in, I was invited by Microsoft Corporation to a pitch to support them in their fight against organised software piracy in Germany. I was thrilled to win the pitch – only to learn that my firm had discovered that it was conflicted and had to withdraw. One day later Microsoft made me an offer to give me the mandate if I left the firm and set up my own business. It was an offer I couldn't refuse and, with a heavy heart, I left the firm and started my own firm in 2001, which over the years grew to a sizeable team of lawyers, accountants and forensic specialists. Most of the team moved with me to Herbert Smith Freehills in May 2016 to form the firm's German Corporate Crime and Investigations team.

What are the main areas of your team's activities today?

We mainly work on behalf of companies that have fallen victim to white-collar crime. Most of the cases are officers' liability cases, corruption, fraud, embezzlement etc. We conduct internal investigations to clarify the facts and to identify and secure evidence, represent defrauded companies in court, and liaise with law enforcement authorities and insurance companies.

And there is another thing which deserves particular mention: The services of our specialised Asset tracing / Global Enforcement Group. This team, which I'm fortunate enough to lead, is a real expert brain trust, consisting of lawyers, forensic accountants and researchers specialised in identifying attachable assets hidden anywhere in the world. Our asset tracing specialists are working together next door with our lawyers specialised in international enforcement law. We identify attachable assets, conduct freeze and seize actions as well as enforcement operations all over the world. To obtain court judgments and arbitral awards to the benefit of our clients is one thing. But to enforce judgments and awards successfully in difficult global cases is another thing. Our Asset tracing / Global Enforcement team knows what to do if debtors appear to be "penniless", if debtors' assets are distributed in tax havens or if the infringing counterparty is hiding or moving assets to "discreet countries".

Your team has had some remarkable successes in tracking down assets – can you share any details?

We are currently undertaking asset tracing activities in some major global fraud cases with damages totalling more than €300 million. For that purpose members of the team are carrying out investigations all over the globe, working together with the firm's specialist lawyers in various offices in the Middle East, USA and Europe. That includes a lot of investigation work by team members on the ground in a number of countries, including the Seychelles, the US, Hungary, Luxembourg and Dubai , as well as in-depth desktop research work. And I am very happy that we hope to be able to offer some of our asset tracing / asset recovery / global enforcement services based on alternative fee arrangements in the very near future. This will help address any client concerns about the risk of throwing good money after bad in difficult global enforcement and recovery cases.

GET IN TOUCH

T +49 69 2222 82511
helmut.goerling@hsf.com

herbertsmithfreehills.com/our-people/dr-helmut-gorling

"USING" DISCLOSED DOCUMENTS IN CROSS-BORDER LITIGATION

Given that cross-border litigation often has the potential to involve multiple proceedings, one problematic issue that frequently arises is the extent to which documentary material disclosed in one action can be used for the purposes of other proceedings.

Adam Johnson QC and **Kevin Kilgour** of our London office look at two recent English decisions which arguably take a more restrictive approach to this question than previously thought to be the case - and which could potentially have an impact on the approach taken in other common law jurisdictions.

In many common law jurisdictions, the obligation to disclose documents in litigation represents an imposition on a party's right to keep their confidential information confidential. In English litigation, for example, if a party has a document that supports or adversely affects its or another party's case and which is not subject to legal privilege, that party will generally be obliged to disclose the document, irrespective of whether it contains confidential information.

To mitigate the intrusive nature of this obligation and to promote compliance with it, in England and other common law jurisdictions, the law has historically imposed an implied undertaking in respect of disclosed documents.

That implied undertaking requires parties to litigation only to use disclosed documents for the purposes of the proceedings in which they have been disclosed, unless the documents have been referred to in open court or the court or the disclosing party has consented to use for another purpose. A similar implied undertaking is required in respect of witness statements. In England, these implied undertakings have been codified in rules 31.22 and 32.12 of the Civil Procedure Rules.

As cross-border litigation frequently involves parallel or subsequent related proceedings in different jurisdictions based on the same documentary material, the effects of these implied undertakings will often need to be considered, not least because a breach could amount to a contempt of court.

What amounts to "use" of a document?

In England, clarification on the approach to be taken has been provided by two recent High Court decisions: *Tchenguiz and anor v Grant Thornton UK LLP and ors* [2017] 1 WLR 2809 and *Grosvenor Chemicals Ltd v UPL Europe Ltd* [2017] EWHC 1893 (Ch).

The *Tchenguiz* decision related to litigation concerning claims of conspiracy. The defendants to the conspiracy claim had been parties to other proceedings concerning the collapse of an Icelandic bank. In those other proceedings, documents had been disclosed to them that would likely need to be disclosed in the conspiracy claim. The defendants therefore sought a declaration as to whether reviewing and, if necessary, disclosing the relevant documents in the conspiracy claim would amount to "use" of documents disclosed in the other proceedings. The defendants unsuccessfully argued that they should not need consent to take those steps.

The *Grosvenor* decision concerned an application by the claimants for permission to bring contempt proceedings against the defendants on the basis that the defendants had used documents disclosed in the underlying litigation to prepare letters asserting new claims against the claimants and one of the defendant's own former employees.

Both cases confirmed that the word "use" is to be given its natural meaning when determining whether a party has used a document for a purpose other than the proceedings in which it was disclosed. The court found that a document can be "used" by, for example, simply reading it, copying it or showing it to another party. In the *Grosvenor* case, for example, the judge held that it was a breach of the relevant rules for the defendants to use documents to prepare letters asserting new claims that could not sensibly be brought in the proceedings in which those documents had been disclosed.

Although these decisions are only directly applicable in England, the judge in the *Tchenguiz* case expressly acknowledged that his judgment might have an impact on the approach taken in other common law jurisdictions.

Prior to these decisions, parties may well have assumed that they would only "use" a document in connection with related proceedings if they were to rely on it or deploy it in some way in those proceedings. Indeed, the defendants in the *Tchenguiz* case argued for this approach. These recent decisions suggest that the rules are more onerous than that.

Obtaining consent

The court's consent to a collateral use may well be forthcoming if a good reason can be shown why that use is appropriate. For example, in cross-border fraud cases, the court will generally grant consent to allow documents disclosed in liability proceedings to be used in foreign proceedings aimed at tracing assets.

However, these decisions suggest that litigants should seek consent even before reviewing documents disclosed in one set of proceedings to see whether they might be relevant to another set of proceedings (although the cases make clear that a litigant who reviews documents for the purposes of the proceedings in which they were disclosed and simply realises they are also relevant to other proceedings has done nothing wrong). Consent is then also needed to deploy those documents in the related proceedings in the event that relevant material is found in the review. This situation will almost inevitably arise regularly in cross-border litigation involving related proceedings.

> "Litigants should seek consent even before reviewing documents disclosed in one set of proceedings to see whether they might be relevant to another set of proceedings"

These decisions therefore have the potentially undesirable side effect of creating litigation that might have been avoided if the approach advocated for by the defendants in *Tchenguiz* was adopted. Applications for consent to review documents may well now be made in circumstances where it is later discovered that there was nothing of relevance in the documents to begin with.

The English court, however, appears to recognise that this may lead to an increase in applications for consent and, it seems, is prepared to take a pragmatic approach to keep costs proportionate. The judge in the *Tchenguiz* decision acknowledged that, in straightforward cases, the costs of applications for consent can be kept down by seeking a decision "on the papers" (ie, without a hearing). Since these decisions were handed down, this firm has also been involved in cross-border cases where the court has been prepared to help save time and cost by granting prior consent allowing our clients both to review disclosed documents for the purposes of proceedings in other jurisdictions and to deploy any material found which is relevant in those other proceedings.

Adam Johnson QC
Partner, London
T +44 20 7466 2064
adam.johnson@hsf.com

Kevin Kilgour
Senior associate, London
T +44 20 7466 2584
kevin.kilgour@hsf.com

JURISDICTION DISPUTES
POLITICS, CORRUPTION AND OTHER OBSTACLES TO JUSTICE IN FOREIGN JURISDICTIONS

When deciding disputes over jurisdiction, courts are sometimes faced with arguments that justice could not be obtained in a particular foreign jurisdiction due to issues concerning politics, corruption or other obstacles to justice there. However, for a court to delve into such questions is potentially controversial and in tension with international law principles of judicial comity – in other words, arguments that a court has no business expressing views on how foreign courts might administer justice.

The English courts have had substantial experience of grappling with such arguments. **Gary Milner-Moore** and **Alice Poole** in our London office review the English courts' approach to this issue, observing that, while they will respect international comity and will require cogent evidence as to the risk of injustice in any particular case, they are prepared to base jurisdiction decisions on such factors in appropriate cases.

Under the common law,[1] there are two main contexts in which an English court might be asked to consider the standard of justice in a foreign jurisdiction:

1. Proceedings commenced in England as of right – where there is a clear basis for English jurisdiction, there is still the possibility that the proceedings can be stayed in favour of another forum on what is traditionally termed *forum non conveniens* grounds;[2]
2. Where a claimant is seeking permission to serve a claim on a defendant outside of the jurisdiction of the English courts (that is, asking the English court to accept jurisdiction).

Gary Milner-Moore
Partner, London
T +44 20 7466 2454
gary.milner-moore@hsf.com

Alice Poole
Associate, London
T +44 20 7466 2849
alice.poole@hsf.com

At the heart of both routes lies an enquiry into the location where the case may be tried "suitably for the interest of all the parties and the ends of justice". That is a statement from *Sim v Robinow*[3], a Scottish case which has since been adopted as the governing principle in the UK for both contexts – the leading case in England and Wales is *Spiliada Maritime Corporation v Cansulex Ltd*[4], which sets out a two stage test for the court to apply when considering *forum non conveniens* questions.

The "natural forum"

Stage one of the *Spiliada* test is typically to identify what is termed the "natural forum" – the forum with which the proceedings have the most real and substantial connection. With regard to this test, the important difference between the two contexts mentioned above relates to the burden of proof.

Where the proceedings are started as of right in England, the burden is on the defendant to show why they should be stayed – the defendant must show that there is another available forum which is clearly or distinctly more appropriate. Under the second route, where a claimant is seeking permission to serve out of the jurisdiction, the burden is on the claimant to show that England is the "proper place", as it is put in section IV to part 6 of the Civil Procedure Rules. In practice, this typically means showing that England is clearly the more appropriate forum – in other words, the obverse of the test for a stay.

If the result of stage one of the test is in favour of the foreign jurisdiction, there is a second stage – the opposing party may then be able to establish that, nonetheless, "justice requires" (as it was put in *Spiliada*) the continuation of the English proceedings.

What "justice requires"

It is under the second stage of the test that any factors concerning politics, corruption and other obstacles to justice in the foreign system are likely to be addressed. The necessity for the second stage of the test was best described by Lord Diplock in *The Abidin Daver*[5] when he said:[6]

> "the possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suits whether for ideological or political reason, or because of the experience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies".

Lord Goff's formulation of the test in *Connelly v RTZ Corporation*[7] requires the claimant to establish that substantial justice cannot be done in the foreign forum:

> "generally speaking the plaintiff will have to take that [more appropriate] forum as

> he finds it, even if it is in certain respects less advantageous to him than the English forum...Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay."

There are no hard and fast rules in relation to the factors that will be relevant to the exercise of the court's discretion at the second stage of the *Spiliada* test. The examples set out below illustrate the types of factors that the court will take into account.

(i) Foreign forum unavailable

At the relatively uncontroversial end of the spectrum are the (admittedly rare) cases where the English court considers that the foreign court is so lacking in resources or infrastructure that it is technically unavailable. In the *Katanga Mining* case[8] the English court rejected the argument that the Democratic Republic of Congo was an alternative forum, on the basis that it had no developed infrastructure in which the rule of law could be expected to function. This type of case is relatively uncontroversial from a judicial comity perspective, as in such circumstances there is only a very minor tension between justice and international comity.

(ii) Differences between the foreign court and English court

More controversial are arguments based on differences between the foreign court and the English court, as these arguments require the English court to consider the standard of justice in the foreign court. This is a contentious area.

As a starting point, differences in procedure are not generally enough. This sentiment was pithily put in the recent case of *Dawnus Sierra Leone v Timis Mining*[9] where it was stated that

> "a procedure is not improper or unjust simply because it is not the procedure of the courts of England and Wales".

For example, therefore, in the recent *Ahmed v Khalifa*[10] decision, the fact that there was limited cross-examination, limited disclosure and a different costs regime in Bahrain was not considered to be sufficient for a stay to be granted.

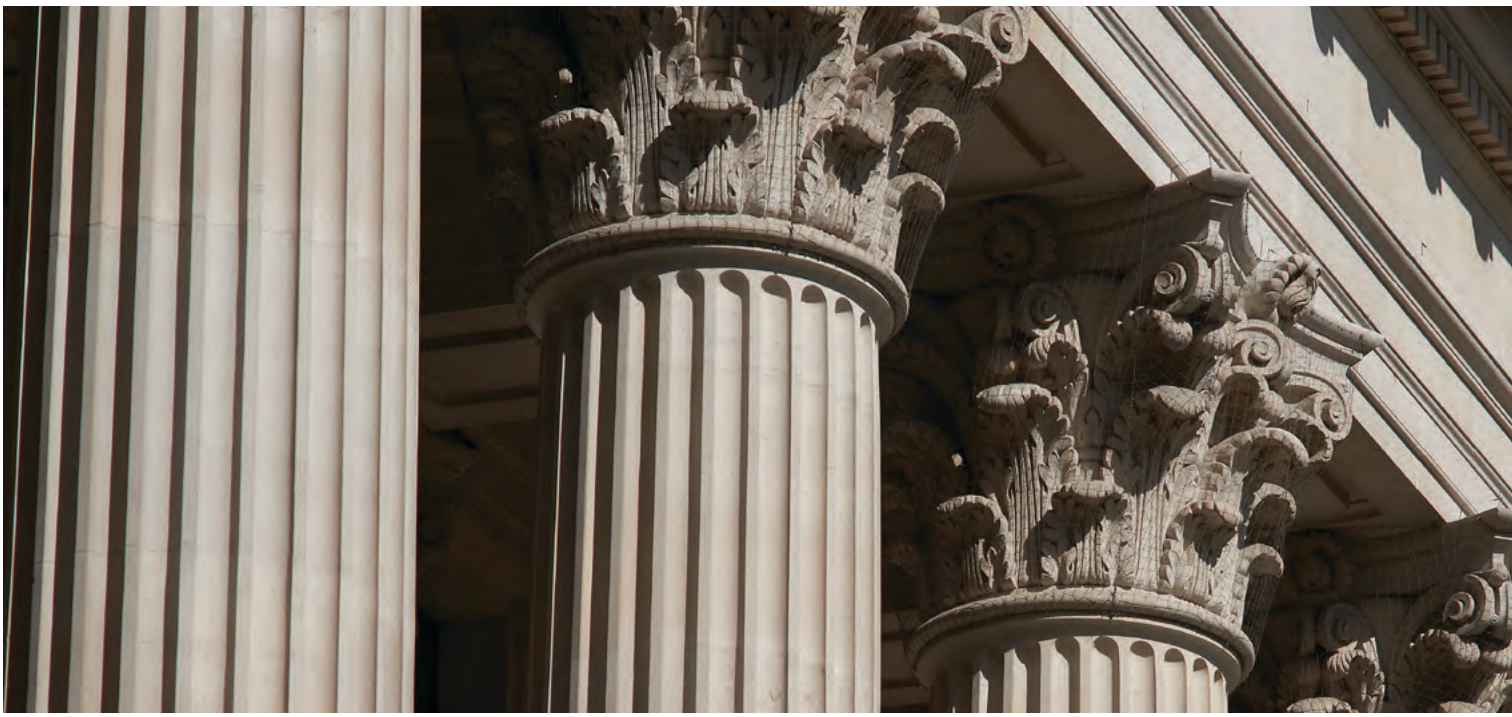
However, another recent decision, *Al Jaber v Al Ibrahim*[11], illustrates that procedural differences can in some cases be significant. In that case the judge took into account a wide range of factors including points such as the proper law, and after referring to the absence of disclosure, concluded that oral evidence and cross-examination would be "absolutely crucial" to determine the issues, which related to events 15 years previously – broadly concerning an alleged oral agreement. The judge concluded that the proceedings should continue in England (rather than Saudi Arabia). This case is currently under appeal.

(iii) Difficulty obtaining funding

The difficulty of obtaining financial assistance or funding for complex litigation is another factor that the courts have been willing to take into account.

An early example is the leading case of *Lubbe v Cape Plc*[12], where a group of claimants sought damages arising from mining activities in South Africa. The novelty of the action and the lack of available funding in South Africa were factors weighing in favour of the House of Lords' decision to allow the claims to proceed in England, as there was otherwise a risk that substantial justice would not be done.

In much more recent times, these arguments have been raised in group claims concerning allegations emanating from events in Africa. In each case the claimants commenced proceedings in England against the English parent company and received permission to serve out of the jurisdiction on the African-operating subsidiary. The parents and subsidiaries each made applications challenging jurisdiction and in each case the courts have considered issues concerning access to justice, taking into account factors such as the availability of funding.[13]



(iv) Substantive legal obstacles in the foreign forum

The prospect of substantive legal obstacles in the foreign forum is another factor upon which the English courts have been willing to exercise their discretion. In *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd*[14] one of the reasons for the judge's decision that England was the appropriate forum to try the action relating to an English law contract was that there were mandatory provisions of Indian law that would effectively override the contract if the case had been heard in India.

A further illustration of this point is provided by the *Kyrgyz Mobil*[15] case, a Privy Council decision relating to the Isle of Man. The claim was a conspiracy claim for which the natural forum was Kyrgystan. However, the Privy Council ruled in favour of proceedings in the Isle of Man. One ground for the decision was that, under Kyrgyz law and procedure, a necessary step in the action would be to secure a criminal conviction, which was something outside the control of the claimants, who thus risked being time barred. There was therefore a risk that substantial justice would not be achieved in Kyrgystan.

(v) Personal safety

Considerations of personal safety have been cited to support proceedings taking place in England, such as an increased risk of assassination or the possibility of an arrest on trumped up charges in the foreign court. This was one of the reasons for the decision in *Cherney v Deripaska*[16] in which the judge granted permission to serve the claim out of the jurisdiction so that the proceedings would take place in England (a decision upheld by the Court of Appeal). The court emphasised there that its focus was not on the applicant's perception of the risk, but on whether there was cogent evidence to show an increased risk in Russia. In relation to arrest, there can be difficult decisions over whether the charges might be legitimate under the foreign law or whether they can truly be said to be trumped up.

(vi) Corruption and the prospect of political interference

Most controversial is where the English courts are asked to decide whether a foreign court is likely to be influenced by corruption or political interference. The general point is that a risk of corruption is not generally sufficient without a link to the particular circumstances of the case or the parties.

The *Cherney* case (above) is the leading example concerning consideration of corruption and politics in a foreign court. The underlying dispute concerned the claim that Mr Cherney was entitled to a stake in the Russian aluminium company, Rusal. The judge held that there was sufficient risk of political interference in the trial.

In his judgment, the judge observed that courts should have considerable circumspection when considering allegations about improper interference or corruption. He said there should be a working assumption that foreign courts are free from improper interference - a requirement of international comity. However, in this case, it was common ground between the experts that the Russian courts could not necessarily be expected to perform their task fairly and impartially, at least where material strategic interests of the Russian state were at play. Against this background, the judge then considered the nature of the issues, including the significance of Rusal to the Russian state and its apparent relationship with the defendant, Mr Deripaska, and concluded that there was indeed a significant risk of improper government interference.

The Court of Appeal emphasised that this was a case of judicial discretion, that this was not a normal case and that it turned on cogent evidence of risk in the circumstances of the particular case. This was not a general finding that the Russian courts could not be relied upon to give a just result.

That point is underlined by the later judgment of the same judge concerning alleged Russian corruption in *Yugraneft v Amramovich*,[17] where no stay was granted because the evidence was not sufficiently cogent. The judge said that he had "no doubt that Russia has had, and has, corruption problems with some of its judges and that there is a widespread public perception of judicial corruption and political interference in the judicial process"[18] but no sufficient link had been shown to the particular parties.

There have been a number of other cases which have also considered these principles. The threshold remains a high one. Thus, in the *Pacific International Sports Clubs*[19] case, concerning ownership of Dynamo Kiev, the judge expressed "grave doubts" about the impartiality and honesty of the court in Ukraine but was nonetheless not persuaded that the evidence quite crossed the threshold of cogency. The Court of Appeal upheld that decision. A similar conclusion was reached in the recent *Ferrexpo*[20] case, again about Ukraine.

In the *Mengiste v Endowment Fund*[21] case, the judge referred to areas of concern in relation to Ethiopia, but he noted that efforts were underway to address those concerns and found that there was no cogent evidence of any impact on particular claimants. That case concerned a series of proceedings in Ethiopia and the judge was not satisfied that the claimants had taken all the steps they could to bring appeals and challenges within Ethiopia. He therefore granted a stay but on terms making clear that the stay might be lifted if the subsequent course of the proceedings in Ethiopia showed the concerns to be well founded. The Court of Appeal has recently upheld the judge's decision.[22]

Points about corruption may also arise indirectly. For example, in a 2017 case concerning ethnic violence on tea plantations in Kenya,[23] it was common ground between experts that there was a continuing problem with judicial corruption. Given the context of ethnic violence, the judge concluded that anonymity orders would have been appropriate and, based upon those concerns about judicial corruption (for example in files going missing), she would have held that there was a risk of any Kenyan anonymity order being breached.

Evidence

All of the cases make clear a requirement for positive and cogent evidence as to the risk of injustice. Expert evidence is often central. It is clear that particular allegations need to be put clearly and distinctly rather than as tenuous innuendos. That said, the court does not need to be satisfied on the balance of probabilities that a risk will eventuate, it simply needs to be satisfied that there is a real risk.[24]

"The court is not blind to the fact that unfairness and partiality may arise from something behind the scenes rather than centre stage"– which was an observation made by Mr Justice Clarke in the *Cherney* case.[25] However, he also warned of what he termed "the echo chamber effect" amongst commentators – in other words, a situation where each commentator cites the other, which can then spiral to create a misleading impression[26]. In that same case, the judge noted that he would have regard to any consensus of academic opinion, particularly when backed by specific instances. The reference to "consensus" is significant – several of the leading cases, such as *Cherney* itself, have been based in significant part on common ground between experts.

Mr Justice Clarke, in *Yugraneft*, gave examples of what he regarded as indicia of impropriety, such as departures from normal practice and irrational conclusions.[27] The evidence will typically go into considerable detail analysing any such instances and, in response, attempting to explain them by reference to benign factors.

"The court is not blind to the fact that unfairness and partiality may arise from something behind the scenes rather than centre stage"

By contrast, statistical evidence showing breaches of the right to a fair trial under Article 6 of the European Convention is not generally sufficient in itself; nor is mere press or political comment – these points were made, in particular, by Mr Justice Andrew Smith in *Ferrexpo*, who also said that courts should be cautious about relying upon material drawn from the internet from organisations about which it is given no information – even from seemingly reputable names. In that case the judge sought to clarify the "cogent evidence" requirement, making clear that evidence must be "sufficiently detailed and focused".[28]

All that said, the court has also stressed that jurisdiction challenges and, in particular, *forum non conveniens* matters, should not become a state trial but should be controlled by case management powers. There was a powerful message to this effect by Lord Neuberger in *VTB v Nutritek*.[29] The issues are often complicated and will generally require expert reports.

[1] Questions of jurisdiction among EU Member States are largely governed by EU regional arrangements (principally the recast Brussels Regulation) and are beyond the scope of this article.

[2] There are a number of other contexts in which related issues can arise, including in relation to anti-suit injunctions and enforcement or recognition of foreign judgments. In addition, there are a number of ways in which these issues might arise tangentially, for example when dealing with security for costs.

[3] (1892) 19 R. 665.

[4] [1987] AC 460.

[5] *Owners of the Las Mercedes v Owners of the Abidin Daver* [1984] AC 398

[6] Ibid at [411].

[7] [1998] AC 854.

[8] *889457 Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679.

[9] [2016] EWCA Civ 1066.

[10] [2017] EWHC 1198 (Comm).

[11] [2016] EWHC 1989 (Comm).

[12] [2000] 1 WLR 1545.

[13] *Lungowe & Ors v Vedanta Resources Plc and Anor* [2016] EWHC 975 (TCC); [2017] EWCA Civ 1528; *Okpabi v Royal Dutch Shell* [2017] EWHC 89 (TCC); *AAA v Unilever Plc* [2017] EWHC 371 (QB).

[14] [2011] 1 WLR 2575.

[15] *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd and others* [2012] 1 WLR 1804.

[16] *Michael Cherney v Oleg Vladimirovich Deripaska* [2008] EWHC 1530 (Comm).

[17] *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm).

[18] Ibid at [496].

[19] *Pacific International Sports Clubs Limited v Igor Surkis & Ors* [2010] EWCA Civ 753.

[20] *Ferrexpo AG v Gilson Investments Limited and Ors* [2012] EWHC 721.

[21] *Mengiste v Endowment Fund for the Rehabilitation of Tigray* [2013] EWHC 599 (Ch).

[22] [2017] EWCA Civ 1326.

[23] *AAA v Unilever Plc* [2017] EWHC 371 (QB).

[24] *Ahmed v Khalifa* [2017] EWHC 1198 at [8].

[25] Supra note 17 at [238].

[26] Supra note 17 at [237].

[27] Supra note 18 at [496].

[28] Supra note 21at [44].

[29] *VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337

INDIA RELATED COMMERCIAL CONTRACTS
DISPUTE RESOLUTION AND GOVERNING LAW CLAUSES

Herbert Smith Freehills has launched the latest (sixth) edition of its guide to **dispute resolution and governing law clauses in India-related commercial contracts**.

The Guide is intended to assist in-house counsel who handle India-related commercial contracts on behalf of non-Indian companies and who need to have a practical understanding of the nuances of drafting dispute resolution and governing law clauses in the Indian context.

Our aim is to give a practical introduction to:

- what works and what does not
- traps to avoid and
- practical drafting solutions

This issue is important: given that resolving a dispute in the Indian courts can take a decade or more, time spent on securing effective dispute resolution and governing law clauses will invariably be time well spent.

We hope that the guide is helpful as a framework for finding workable solutions, deciding when to compromise and when to stand firm, and spotting when an issue has arisen on which advice is required.

The full digital edition can be downloaded in PDF by visiting: hsf.com/IRCC.

Nick Peacock
Partner, London
T +44 20 7466 2803
nicholas.peacock@hsf.com

Donny Surtani
Partner, London
T +44 20 7466 2216
donny.surtani@hsf.com

Alastair Henderson
Partner, Singapore
T +65 6868 8058
alastair.henderson@hsf.com

KEY CONTACTS

EMEA

Adam Johnson QC
Partner, London
T +44 20 7466 2064
adam.johnson@hsf.com

Julian Copeman
Partner, London
T +44 20 7466 2168
julian.copeman@hsf.com

Mathias Wittinghofer
Partner, Frankfurt
T +49 69 2222 82521
mathias.wittinghofer@hsf.com

Clément Dupoirier
Partner, Paris
T +33 1 53 57 78 53
clement.dupoirier@hsf.com

Eduardo Soler-Tappa
Partner, Madrid
T +34 91 423 4061
eduardo.solertappa@hsf.com

Alexei Panich
Partner, Moscow
T +7 495 36 36515
alexei.panich@hsf.com

Stuart Paterson
Partner, Dubai
T +971 4 428 6308
stuart.paterson@hsf.com

US

Thomas Riley
Partner, New York
T +1 917 542 7801
thomas.riley@hsf.com

APAC

Donald Robertson
Partner, Sydney
T +61 2 9225 5523
donald.robertson@hsf.com

Richard Garnett
Consultant, Melbourne
T +61 3 9288 1289
richard.garnett@hsf.com

May Tai
Managing Partner, Greater China,
Hong Kong
T +852 21014031
may.tai@hsf.com

Alastair Henderson
Partner, Singapore
T +65 68688058
alastair.henderson@hsf.com

David Gilmore
Partner, Tokyo
T +81 3 5412 5415
david.gilmore@hsf.com

BANGKOK
Herbert Smith Freehills (Thailand) Ltd
T +66 2657 3888
F +66 2636 0657

BEIJING
Herbert Smith Freehills LLP Beijing Representative Office (UK)
T +86 10 6535 5000
F +86 10 6535 5055

BELFAST
Herbert Smith Freehills LLP
T +44 28 9025 8200
F +44 28 9025 8201

BERLIN
Herbert Smith Freehills Germany LLP
T +49 30 2215 10400
F +49 30 2215 10499

BRISBANE
Herbert Smith Freehills
T +61 7 3258 6666
F +61 7 3258 6444

BRUSSELS
Herbert Smith Freehills LLP
T +32 2 511 7450
F +32 2 511 7772

DUBAI
Herbert Smith Freehills LLP
T +971 4 428 6300
F +971 4 365 3171

DÜSSELDORF
Herbert Smith Freehills Germany LLP
T +49 211 9755 9000
F +49 211 9755 9099

FRANKFURT
Herbert Smith Freehills Germany LLP
T +49 69 2222 82400
F +49 69 2222 82499

HONG KONG
Herbert Smith Freehills
T +852 2845 6639
F +852 2845 9099

JAKARTA
Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm
T +62 21 574 4010
F +62 21 574 4670

JOHANNESBURG
Herbert Smith Freehills South Africa LLP
T +27 10 500 2600
F +27 11 327 6230

KUALA LUMPUR
Herbert Smith Freehills LLP
LLP0010119-FGN
T +60 3 2777 5000
F +60 3 2771 3041

LONDON
Herbert Smith Freehills LLP
T +44 20 7374 8000
F +44 20 7374 0888

MADRID
Herbert Smith Freehills Spain LLP
T +34 91 423 4000
F +34 91 423 4001

MELBOURNE
Herbert Smith Freehills
T +61 3 9288 1234
F +61 3 9288 1567

MOSCOW
Herbert Smith Freehills CIS LLP
T +7 495 363 6500
F +7 495 363 6501

NEW YORK
Herbert Smith Freehills New York LLP
T +1 917 542 7600
F +1 917 542 7601

PARIS
Herbert Smith Freehills Paris LLP
T +33 1 53 57 70 70
F +33 1 53 57 70 80

PERTH
Herbert Smith Freehills
T +61 8 9211 7777
F +61 8 9211 7878

RIYADH
The Law Office of Nasser Al-Hamdan
Herbert Smith Freehills LLP associated firm
T +966 11 211 8120
F +966 11 211 8173

SEOUL
Herbert Smith Freehills LLP
Foreign Legal Consultant Office
T +82 2 6321 5600
F +82 2 6321 5601

SHANGHAI
Herbert Smith Freehills LLP Shanghai Representative Office (UK)
T +86 21 2322 2000
F +86 21 2322 2322

SINGAPORE
Herbert Smith Freehills LLP
T +65 6868 8000
F +65 6868 8001

SYDNEY
Herbert Smith Freehills
T +61 2 9225 5000
F +61 2 9322 4000

TOKYO
Herbert Smith Freehills
T +81 3 5412 5412
F +81 3 5412 5413