

C/M/S

Law . Tax

Dispute Resolution

CMS Cameron McKenna: Issues for the
New Parliament

2010



Introduction

The appointment of Kenneth Clarke as the Lord Chancellor and Secretary of State for Justice is probably the biggest surprise of the cabinet appointments. Had the Conservatives not needed to form a coalition, it looked as if Mr Clarke would have taken over from Peter Mandelson as Secretary of State for Business, Innovation and Skills, but instead that role was given to Vince Cable. Kenneth Clarke is one of the most experienced ministers in this government and will be able to fight his corner, however, it seems clear that he will have to fight hard to get any government time for the matters in his remit, given the focus on cutting the deficit.

The Queen's speech gave us no clues, save that we might deduce from the silence on the Human Rights Act that the Conservatives' manifesto pledge to replace it with a British Bill of Rights has been a casualty of the coalition.

It remains to be seen whether Mr Clarke and the coalition will press on with reform of arguably the two most pressing issues facing commercial litigation today, namely reform of costs pursuant to the Jackson report (article on page 13) and reform of class action procedures (article on page 22).

Lord Justice Jackson has viewed the high costs of litigation as being a bar to justice and argued persuasively for costs reform. However those with vested interests in the system have reacted strongly. Prior to the election, the Conservatives stated they would evaluate the Jackson report and feed into the review other aspects of civil litigation and civil law reform. Then, after consultation with interested parties, they would decide what, if any, legislation needs to be introduced. However, with so many other pressing issues awaiting the new government, it is uncertain how high legal reform will rank as a priority.

The Financial Services Bill, published by the Labour government in November 2009, initially contained a number of provisions relating to collective redress for financial services related claims. The Civil Justice Council had also published draft rules to assist with the implementation of collective proceedings. However, as part of the "wash-up" process at the end of the last Parliament the collective redress provisions were deleted before that Bill obtained Royal Assent. Again, there are vested interests on both sides of this debate and each side will be lobbying either to introduce or deflect the introduction of these provisions.

Despite a background of unprecedented financial turmoil, the "tsunami" of litigation predicted by Lord Goldsmith to swamp the courts in 2009 and 2010 has not materialised. Many pundits are speculating it may still arrive if the banks start to become more aggressive, pulling the plug on ailing businesses. This has not happened, as yet, and as a consequence there is currently less heat in the system and less insolvency related litigation.

But nothing stands still and, as reported in this edition, the new Bribery Act 2010 received Royal Assent on 8 April 2010 as one of the final bills to be passed prior to the dissolution of Parliament. It will introduce a new strict liability criminal offence for corporates who fail to prevent bribery, unless they can show they had "*adequate procedures in place*" designed to prevent bribery. The impact of the Act and key developments in the Serious Fraud Office's approach to anti-corruption investigations and enforcement are explored in articles on pages 4 and 8 respectively.

Arbitration has continued to grow despite the recession, partly due to the relative ease of enforcement of awards internationally. Even when difficulties arise, bilateral investment treaties and other treaties may be used effectively to give effect to an enforceable arbitration agreement or award, page 17. The interesting and topical question of what happens to an arbitration when your opponent goes into liquidation is explored on page 19.

Articles on important legal developments in defamation on page 30, "follow-on" damages claims on page 35, and contract law on page 41 highlight key issues that are likely to remain topical. Important proposed reforms to the Brussels Regulation on jurisdiction and recognition and enforcement of judgments are discussed on page 38. Finally, how the new Supreme Court has and will change the legal landscape in England and Wales is discussed on page 46.

We have delayed our annual dispute resolution publication in order to provide the most up to date review of the legal issues that the new government will face. I hope you find the articles interesting and informative.



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Bribery Act 2010: the new regulatory landscape

The Bribery Act 2010 received Royal Assent on 8 April 2010, although the offences created by it will only be brought into force when ordered by the Secretary of State for Justice. The legislation creates a new criminal offence for businesses that fail to prevent bribery, with the potential consequence of unlimited fines and debarment from tendering for EU public contracts.

The Act also re-codifies the existing anti-bribery laws into a collection of simpler and clearer criminal offences designed to enable prosecutors to convict wrongdoers more effectively. It is expected that the main offences will come into force shortly now that the new coalition government has been formed, with the new corporate offence following later in the year.

While businesses around the world have for many years been terrified of falling foul of the US Foreign Corrupt Practices Act (FCPA), UK businesses may have been forgiven, until very recently, for being largely unaware of the complex and anachronistic UK bribery laws. Yet UK anti-bribery laws already go much further than the FCPA, as liability does not only arise when bribing foreign public officials - private sector bribery by UK citizens and businesses wherever committed will also be caught.

Following the appointment of Richard Alderman as Director of the Serious Fraud Office some two years ago, a series of high profile investigations, prosecutions and settlements for corruption offences have increased awareness of the law; the SFO's recent activity in this area is considered elsewhere in this publication (page 8). However, while changes of focus and policy within the SFO have increased public awareness, the Act will form a crucial plank in enhancing the UK's reputation for combating corruption and enabling wrongdoers to be brought to account.

The new offences

The Act creates four separate categories of bribery offences:

- two "general" offences of offering, promising or giving a bribe and requesting, agreeing to receive or accepting a bribe anywhere in the world in the public or private sectors
- a discrete offence of bribing a foreign public official to obtain or retain business or a business advantage (the FPO Offence)
- a new offence under which a corporate (whether a company or partnership) will be automatically liable for any act of bribery committed anywhere in the world by someone performing services on its behalf. It will be a defence where the corporate can show on the balance of probabilities that it had in place "*adequate procedures*" designed to prevent such bribery, notwithstanding any failing in those procedures on a particular occasion.

In addition, where a general offence or the FPO Offence was committed by a corporate with the consent or connivance of a "*senior officer*" (i.e. a director, company secretary, manager or similar

officer, or someone purporting to act as such), the senior officer will also be guilty of the same offence as the corporate. However, this is not an absolute offence – where the corporate is liable only because of the extra-territorial effect of the legislation (i.e. none of the relevant acts constituting the offence occurred in the UK), only British or UK resident senior officers can be liable. Whilst the new legislation could create a double standard as between British/resident directors of businesses operating in the UK and foreign directors of the same business, the risk of liability will create a strong incentive for internal policing among senior officers generally.

Unsurprisingly, the Act's main focus has been on the new corporate offence and how the adequate procedures defence can be met. However, the new formulations of the other bribery offences are important, as they are intended to make it easier for prosecutions to be brought successfully. For example, in connection with the general offences, the need for prosecutors to prove corrupt intent has been swept away and replaced with a requirement only to show an advantage being given, promised or received for the improper performance of a relevant public or business function/activity (although this test creates difficulties of its own, as the concept of a "relevant function" is not always straightforward). For the FPO Offence, prosecutors will not have to show any impropriety on behalf of the offeror of the advantage. Instead the key questions will be whether the offeror intended to influence the official to obtain or retain business (which is likely to be the intention behind most kinds of corporate hospitality) and whether the foreign public official was permitted or required by the written law of his country to be influenced by it (which is unlikely). For all the offences, it does not matter whether the "advantage" (which need not be money) is given, requested, offered or received directly or through an intermediary, which should have the effect of ending any practice of paying bribes through local intermediaries while claiming not to know that this was going on.

"Adequate Procedures"

The previous government indicated that the proposed legislation and, in particular, the new corporate offence formed the bedrock of its plan to change the culture of business in this country to one which does not tolerate corruption at any level. The Act introduces the idea that it is a company's duty to prevent bribery in connection with its business, shifting the motivation from trying to avoid capture and punishment for past wrongdoing, to seeking to minimise the risk of wrongdoing in future.

The business community has raised serious concerns about the lack of clarity provided by the previous government as to what sorts of procedures would be "adequate" to meet the defence. In response to these concerns, the previous government confirmed that there is no absolute requirement to prevent bribery, but the procedures put in place must be reasonably proportionate given the nature, size and scope of the relevant business to protect against bribery occurring. As the previous government noted in its Impact Assessment of the legislation, "... a substantial burden remains on the prosecution in establishing the offence. It must first prove to the criminal standard that a bribe was paid for the benefit of the organisation. Only once that direct link to the organisation has been made would the burden (on the civil standard) transfer to the defendant. Given the adequate procedures defence is not prescriptive then it is open to a defendant organisation to adduce evidence which shows that (for example) given the size of the organisation, the particular sector or country in which it operated and foreseeable risks, its procedures employed to prevent bribery being committed on its behalf were likewise adequate"



"...the risk of liability will create a strong incentive for internal policing among senior officers generally."

Potential pitfalls

The Act is drafted on the basis of a zero tolerance policy: unlike the FCPA, there is no exception to permit small facilitation payments to be made, for example. Perhaps more importantly, the Act makes no explicit provision to protect against corporate hospitality falling foul of the legislation. Because of the way in which the offences have been re-codified, in particular the FPO Offence, there is a risk that some behaviour that might normally be considered legitimate corporate hospitality will be criminalized under the new regime. During its passage through the House of Commons, the previous government indicated that this was not its intention: *“Corporate hospitality will invariably be provided to make potential customers, whether foreign public officials or anyone else, more favourably disposed to the provider of the hospitality in the hope that that will lead to a future commercial opportunity or advantage. To the extent that reasonable hospitality is a normal part of business, we are not seeking to discourage such practices... If a case involving corporate hospitality came to the attention of the investigating and prosecuting authorities the public interest might not be best served by a prosecution unless... the hospitality was excessive or unreasonable.”*

The previous government’s position then, as indicated above, is that we can rely on the good judgment of prosecutors in exercising their discretion not to prosecute behaviour that may technically breach the new regime, but which was clearly never intended to be criminalised. This offers scant comfort to businesses who operate in sectors where corporate hospitality is part of the process of winning international contracts, particularly public contracts. It will also make it very difficult for legal advisers to give the sort of definitive comfort that clients will require when considering what they can and cannot do in order to showcase their products and win business.

What should you be doing about this?

Although it is not yet law, in order to be ready for the new offence businesses now need (if they have not already done so) to review and update their policies and codes on gifts, donations and corporate hospitality. Policies and procedures for employing external agents, intermediaries and lobbyists should be reviewed and rules or procedures to prevent corruption, should be put in place, along with appropriate training for staff on all of the above. Otherwise they risk potential liability under the new corporate offence.

However, the obligation is only to take “adequate” (i.e. proportionate) steps to try to prevent bribery in connection with its business. What amounts to adequate procedures will vary, according to considerations such as the organisation’s size, sector and countries in which it operates. So, for example, a small firm in a low-risk sector may be doing enough simply to have a clear set of relevant anti-corruption principles in place that it has communicated to its workforce. However, for bigger organisations operating in high-risk jurisdictions or high-risk industries, far more will be expected.

Some industry bodies and anti-corruption organisations have already begun producing guidance on what will be required. As explained elsewhere in this publication (page 8), the SFO has also produced guidance on what it would expect to see from businesses seeking to rely on the adequate procedures defence. In any event, the Act requires the government to publish guidance on the “adequate procedures” businesses will need to have in place to be able to rely on the defence. In its UK Foreign Bribery Strategy paper published in January this year, the previous government promised to publish the guidance at least three months before the corporate offence comes into force. If the new government, keeps to the same timetable and plan, that guidance will be in the form of broad principles, with illustrative examples rather than detailed, prescriptive standards. During the Parliamentary debates on the Bill the government representatives anticipated that the guidance would cover, among other things *“the responsibilities of an organisation’s board or directors; the identification of a named senior officer with particular responsibility for combating bribery; risk management procedures; gifts and hospitality policy; facilitation payments; staff training; financial controls; and reporting and investigation procedures ...The guidance will also be designed with businesses of all sizes in mind.”*

The true impact of the legislation and, in particular, the corporate offence, may only become clear when the new government publishes its guidance on the Act and the first prosecutions under the new law emerge. Importantly, the proposed legislation is not intended to have retrospective effect and so awareness of the existing law will remain important for some years to come; the full impact of the new legislation will not be felt for some time. In the meantime, businesses would be well advised to ensure their compliance programmes are appropriate for their size and sector, at least meeting any standards recommended by their industry bodies and taking due account of the SFO’s guidance. For further information and a copy of the SFO guidance, go to our anti-corruption zone at www.law-now.com/anticorruptionzone.



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Key developments in the Serious Fraud Office's Anti-Corruption investigation

Following his appointment as director of the Serious Fraud Office (SFO) in mid-2008, Richard Alderman signalled that the SFO's approach to global anti-corruption enforcement would be overhauled and reinvigorated.

This article discusses the key developments in the SFO's approach to anti-corruption investigations and enforcement. It begins with an examination of the new SFO Guidelines and continues by looking at the SFO's treatment of corruption in recent cases¹.

Guidance on Self-Reporting

In July 2009, the SFO published guidance on its approach to dealing with overseas corruption (the Guide). In a welcome response to requests for clarification from corporations and professional advisors, the Guide sets out a process designed to encourage corporations to self-report suspected corruption, with a view to avoiding criminal prosecutions and debarment from tendering for public contracts.

The Guide closely follows the system of corporate self-reporting implemented by the U.S. regulators, the Securities and Exchange Commission and the Department of Justice, which encourage self-reporting of suspected corruption and negotiated civil settlements.

Key aspects of the SFO's Guidelines:

Testing the water	The Guide expressly acknowledges the possibility of the corporation making informal contact with the SFO to obtain an indication of its likely approach to a particular issue if a report were made.
SFO's expectations following making of report	Once a report has been made, the SFO will want to establish, among other things: <ul style="list-style-type: none">— Whether the Board is genuinely committed to improving the corporate culture.— Whether the corporation is willing to work with the SFO in any further investigations.— Whether the corporation will be willing to resolve the matter transparently and in the public interest through civil penalties, training, and possibly (in a move similar to the approach by U.S. authorities), external monitoring.

¹ Readers may wish to read this article in conjunction with the article on the Bribery Bill (see page 4).

Remedies	Following the investigation, settlement discussions may take place, if appropriate. Remedies that may be considered include: civil recovery; independent monitoring; an agreed programme of culture change and training within the corporation.
Public statement	Where a settlement is reached, a public statement agreed between the SFO and the corporation will always be required to ensure transparency.
Possibility of criminal prosecutions	Whilst the SFO cannot give an unconditional guarantee that a self-referral will not lead to criminal prosecution, it states that the SFO will want to settle such cases through a civil outcome " <i>wherever possible</i> ".
Board members involved in corrupt acts	Civil settlements will not be available where board members were personally involved in the corrupt acts, particularly if they personally benefited from them. In those cases, a criminal investigation seems likely, although the Guide notes that the SFO would be prepared to enter into plea negotiations. (The SFO Director has also suggested in more recent public statements that where a new board has been introduced, with no culpability in the relevant events, the SFO may in future be willing to reach a civil outcome with that company, notwithstanding the involvement of past directors.)
Consequences for liability under other laws and in other jurisdictions	SFO self-reporting will not remove liability for failure to report under other laws in the UK or in other jurisdictions, but the SFO may be willing to assist in negotiations with other prosecutors.
Mergers and acquisitions	The SFO is prepared to provide opinions on its likely enforcement activity to assist corporations in the process of a takeover who discover an historical corruption in the proposed target.

The first prosecution: Mabey & Johnson Limited

The first UK corporate to be successfully prosecuted for overseas corruption was sentenced in September 2009.

The SFO's investigation into Mabey & Johnson Limited (Mabey & Johnson), a UK-based supplier of modular bridges, was prompted by the voluntary disclosure of corruption offences by Mabey & Johnson's management, and the company continued to co-operate with the SFO throughout the investigation. The offences related to sales in Ghana and Jamaica from 1993-2001, and breaches of the UN Oil-for-Food programme in Iraq in 2001 and 2002. In a US-style plea bargain reached with the SFO, Mabey & Johnson agreed to be subject to a corporate compliance monitor, conduct extensive anti-corruption training, and to pay "reparations" to the Ghanaian and

Jamaican governments. The company pleaded guilty to a charge of conspiracy to corrupt; the Southwark Crown Court imposed a penalty of £6.6 million. Mr Alderman noted that the company's willingness to engage constructively with the SFO helped produce a "quick and fair" outcome.

The settlement represented a significant development in anti-corruption investigation and enforcement by the SFO; some commentators wondered whether it would mark the beginning of a trend in the UK of self-reporting and US-style plea discussions and agreements.

A change in approach? Innospec and De Puy

Against these developments, the judgments delivered by Lord Justice Thomas in Southwark Crown Court in *R v Innospec Limited*² and the Lord Chief Justice in *R v John Dougal*³ call into question the efficacy of the Guidelines, and the SFO's stated strategy for dealing with overseas corruption.

R v Innospec

On 18 March 2010, in only the second prosecution of a UK company for overseas corruption offences, Innospec Limited pleaded guilty in Southwark Crown Court to conspiracy to corrupt. The offences concerned corrupt payments made to public officials of an Indonesian state-owned refinery in order to secure contracts for the supply of a fuel additive.

The SFO's investigation into Innospec began in 2008, and was conducted with the full co-operation of the company's independent directors. It was preceded by an investigation by the US authorities, including the Department of Justice (DOJ), the Securities and Exchange Commission (SEC) and the Office of Foreign Asset Control (OFAC), into the activities of Innospec's US parent, Innospec Inc, in connection with corruption offences relating to the Oil-for-Food programme in Iraq. Following lengthy plea negotiations between Innospec, the SFO and the US authorities, the first global plea deal was concluded. Under the plea agreement struck with the SFO, Innospec would pay \$12.7 million: \$6.7 million to be allocated to a fine or confiscation to be imposed in the Crown Court and \$6 million to be the subject of a civil settlement. At the same time, in the US, a plea deal was agreed in which the US parent would pay a fine of \$14.1 million to the DOJ, \$11.2 million to the SEC, and \$2.2 million to OFAC. It was a condition of both plea agreements that Innospec would implement and bear the cost of a compliance monitoring programme for at least three years. It was also agreed that the UK and US Courts would be asked to hand down a sentence on the same day so that a joint announcement could be made.

The matter came before Lord Justice Thomas on 18 March 2010. Whilst commending the "vigorous policy" to stamp out corruption that had been adopted by the SFO, the Judge expressed considerable concern with the way in which the plea negotiations had been conducted, noting that the SFO "had no power to enter into the arrangements made and no such arrangements should be made again".

In a strongly worded judgment, Lord Justice Thomas looked beyond the issues in the instant case and provided guidance: (i) as to how seriously the Court views corruption of foreign public officials; and (ii) on the proper approach to sentencing in cases of multi-jurisdictional investigations where an agreement is reached with the offender on the basis of a plea. The following key points emerge:

- **Plea agreements** – A prosecutor such as the SFO must exercise appropriate discretion as to the charges that should be brought and in relation to any plea agreements; it is for the Court, after being provided with full information, to assess whether any plea agreement is fair (reflecting the full level of criminality) and in the interests of justice. While sentencing submissions should draw the Court's attention to any relevant sentencing guidelines and case-law in this regard, they should not include a specific sentence recommendation or any other agreed range: "The SFO cannot enter into an agreement...with an offender as to the penalty in respect of the offence charged". Sentencing was solely a matter for the court.

² Judgment of the Southwark Crown Court, handed down on 18 March 2010 and published on 26 March 2010.

³ Judgment of the Southwark Crown Court, handed down on 14 April 2010. Court of Appeal hearing took place on 29 April 2010 and judgment was published on 13 May 2010.

- **Fines** - Corruption of foreign public officials is considered *“at the top end of serious corporate offending”*. In line with the UK’s obligations under the 1997 OECD Anti-Bribery Convention, the Court has a duty to impose criminal penalties for such corruption that are *“effective, proportionate and dissuasive.”* The Judge indicated that the level of any fine should be no different from the levels applicable in the US and that, but for the unique features of the case, he would have been inclined to impose a fine in the tens of millions. He noted that such levels of fine were common in cartel cases and corruption was far more serious than that.
- **Monitoring and training** - The Judge was unconvinced of the benefits of monitoring programmes, which he described as *“an expensive form of probation order. For the future, the request for such an order will have to be fully explained in terms of its effectiveness”*.
- **Public statement** - The Judge expressed displeasure that a press notice was intended to be issued by Innospec in a form pre-approved by the SFO: *“This is not a practice which should be adopted...It would be inconceivable for a prosecutor to agree a press statement to be made by a person convicted of burglary or rape; companies who are guilty of corruption should be treated no differently”*.

Whilst he reluctantly approved the terms of the settlement, he emphasised that he did so on the basis of the unique elements of the case; in particular, he considered it would be unjust to impose a penalty that was greater than the settlement that was concluded following the extensive negotiations between Innospec, the SFO and the US authorities.

R v Dougall

The approach of Lord Justice Thomas was fully endorsed by the Court of Appeal in sentencing the first British citizen to be convicted in this country of a corruption offence of overseas corruption of foreign public officials.

In April 2010, John Dougall, a former director of marketing and business development of an orthopaedic products manufacturer (DPI), pleaded guilty to conspiracy to corrupt doctors in the Greek healthcare system between February 2002 and December 2005.

Prior to Mr Dougall’s involvement, DPI had developed a practice of paying sums through a local intermediary to Greek surgeons as inducements or rewards for purchasing DPI’s products. In reality, the payments were used to pay cash incentives or to send doctors on “vanity meetings”. The cost of these payments was ultimately reflected in the price paid for DPI’s products by the Greek healthcare system. Mr Dougall continued the practice for the benefit of DPI, but received no personal benefit from doing so. The amount of bribes totalled around £4.5 million.

The SFO opened its investigation in May 2008, following a referral from the US DOJ. Mr Dougall fully co-operated with the prosecutor, helping to “break open” the investigation and promising to testify in any future trials against other individuals. The SFO said that he *“co-operated fully with and provided substantial assistance”* to them and had sought a lighter sentence for him as a result, arguing a suspended sentence was appropriate in the circumstances.

Despite the recommendations of the SFO, Mr Justice Bean, considered that the minimum sentence should involve a term of imprisonment, and handed down an immediate custodial sentence of 12 months. He said *“I consider the public simply would not understand if someone involved in criminality of that scale were the subject of anything other than an immediate sentence of imprisonment.”* Whilst the Judge recognised the public policy considerations in the SFO’s aim in persuading businesses and individuals to self-report and work with prosecutors, he considered that these *“did not justify a suspended sentence in a case where corruption was systemic and long-term and involved several million pounds in corrupt payments”*. He did however give permission to appeal.

In a judgment delivered by the Lord Chief Justice on 29 April 2010, the Court of Appeal allowed the appeal, and suspended Mr Dougall’s sentence. Whilst this was the outcome sought by the

SFO, the Court of Appeal was at pains to stress that the result was not reached in reliance on the SFO's recommendations; it was solely the result of a pragmatic approach to sentencing in light of the particular circumstances of the case.

The Lord Chief Justice fully endorsed the remarks of Lord Justice Thomas in the *Innospec* case, that *"a plea agreement or bargain between the prosecution and the defence in which they agree what the sentence should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle"*. He noted that neither the Attorney General's "Guidelines on Plea Discussions" nor sections 71-75 of the Serious Organised Crime and Police Act 2005 (SOCPA) (which provide for sentencing reductions where a defendant assists the authorities in pursuing others – i.e. turning "Queen's Evidence") envisage that such an agreement is permissible.

In deciding to suspend Mr Dougall's sentence, the Court considered the relevant mitigating factors and the relevant sentencing rules and guidelines. The Court concluded that there should be no general rule to apply a suspended sentence to "white-collar" criminals who co-operate with the authorities at an early stage, nor was there any rule that the first person to co-operate with investigating authorities should receive the most favourable sentencing outcome. However, the Court noted that sentencing factors could result in the reward for full co-operation in a SOCPA agreement being disproportionately small compared to the substantial burden shouldered by a defendant entering into such an agreement in terms of the ongoing cooperation this entailed. The Court therefore concluded that in cases where the appropriate sentence for an offender would be 12 months or less, the argument for a suspended sentence was *"very powerful"* – albeit not to be seen as an automatic outcome in every case.

This decision clarifies the apparent benefits available to individual offenders who assist and co-operate with the investigating authorities where they are implicated in wrongdoing. However, the case is fact specific and, in terms of sentencing guidance, the application of this decision is limited; the Court has only *"spelled out the appropriate guidance in cases where the appropriate sentence is 12 months or less"*.

Conclusion

The SFO's Guide was a welcome development, particularly for companies suspicious about past improper conduct, and for those looking for prospective acquisition targets.

However, the *Innospec* and *Dougall* judgments will clearly have an impact on the SFO's approach to dealing with overseas corruption, including re-consideration of the approach suggested in the Guide. The Courts have made it clear that the power and responsibility of sentencing lies with the Court, and the Court alone. While it may be appropriate for the SFO to conclude a plea agreement with an offender, it should not seek to make recommendations on sentencing. The cases also raise questions about the efficacy of other key aspects of the Guide, such as the negotiated press release and compliance monitoring. However, it should be noted that these recent decisions all relate to offences prosecuted in the criminal courts and so, to an extent, do not really test the operation of the Guide where the SFO is prepared to negotiate a civil outcome with a wrongdoer.

While the SFO has welcomed the decisions it will need to re-visit its strategy to encourage whistle-blowing and to promote self-reporting, in light of the legal and procedural limitations it faces. With the introduction of a new corporate offence under the Bribery Act 2010⁴, the need for clear guidance on the SFO's approach to investigating corruption offences is all the more pressing. However, the Government has indicated in its Coalition Agreement that responsibility for investigating and prosecuting all serious economic crime – which currently rests, depending on the nature of the crime, with the SFO, Financial Services Authority and Office of Fair Trading – is to be moved into a new agency. This will require primary legislation and we will see what effect that legislation may have on the ability of the new agency to fulfil the pragmatic intentions expressed in the Guide.

⁴ For a discussion of the Bribery Act, see page 4.

Lord Justice Jackson's Costs Review

Last year the cost of civil litigation was under the microscope more than ever before. Lord Justice Jackson, a Court of Appeal judge, spent all of 2009 reviewing litigation costs, with a view to making recommendations to reform the civil litigation system to ensure that justice can be attained by litigants at a more proportionate cost.

Although the Woolf reforms of the 1990s brought about improvements in civil justice by modernising court procedures, they did not make litigation any less expensive, indeed they arguably made it more expensive by front loading costs and by making litigation more complex procedurally in certain respects. Lord Justice Jackson's remit was to review the costs and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at a proportionate cost. CMS Cameron McKenna seconded an associate, Julian Bailey, to assist Lord Justice Jackson's work.

On 14 January 2010, Lord Justice Jackson's Final Report, containing his recommendations, was published (the report is downloadable at www.judiciary.gov.uk). Some of the key points emerging from the Final Report are as follows:

Conditional Fee Agreements (CFA)

Lord Justice Jackson has recommended reforming the current environment of "no win / no fee" agreements, where unsuccessful defendants are required to pay the "success fee" of the claimant's lawyers, as well as "after-the-event" (ATE) insurance premiums payable by the claimant to cover it against the risk of having to pay the defendant's costs.

CFAs are common in personal injury litigation. However, Lord Justice Jackson found that frequently, when such agreements are used in personal injury litigation, the legal costs that an unsuccessful defendant may be required to pay can be out of proportion with the amount in dispute. Lord Justice Jackson's proposed reforms will put a stop to that, by only requiring defendants to pay reasonable and proportionate costs if they lose. Lord Justice Jackson's proposal is that success fees and ATE insurance premiums should not be recoverable under costs orders from losing parties. This would have the effect of making CFAs far less attractive to claimants.

Contingency fees

The Final Report recommends that lawyers be permitted to act on a contingency fee basis in contentious business, but with unsuccessful defendants only paying costs equivalent to "*what would be chargeable under a normal fee agreement*" to the successful claimant. A contingency fee agreement is one where the claimant's lawyer is only paid if the claim succeeds, and then he or she is paid out of the damages awarded (for example 25% of the damages). Lawyers in

England and Wales are currently prohibited from acting on a contingency fee basis in “contentious business”, which means court and arbitration proceedings.

Contingency fee agreements are used commonly for contentious business in the United States and Canada, and Lord Justice Jackson’s view is that there is no good reason why they should not also be available for use in England and Wales, should parties wish to use them. One of the attractions of contingency fee agreements is that they allow for a sharing of risk between a client and his or her lawyer.

While the availability of contingency fees may give an impecunious claimant access to the courts, Lord Justice Jackson’s recommendation that a further “*independent solicitor*” be required to advise the party entering into the agreement is more problematic if it extends to commercial claimants. This appears to add an unnecessary cost and a further procedural burden for a commercial claimant. It is hard to justify why a commercial client experienced in dealing with litigation should not be free to contract as it sees fit.

Disclosure

In larger commercial cases the cost of disclosure can be substantial. But in smaller cases, which may involve only a few relevant documents, disclosure should be a simple and relatively inexpensive exercise. Given the spectrum of cases that the courts deal with, Lord Justice Jackson does not propose that there be any further prescriptive rules on disclosure. Instead, he proposes that there be a flexible system introduced, to allow judges in larger cases to choose from a “menu” of disclosure options which allow the extent of disclosure to reflect the needs of the case. The idea is that in such cases the judge will choose the most appropriate form of disclosure, which does not lead to costs being incurred disproportionately. This is a positive development, although there is obviously the scope for a dispute between the parties as to the extent of the disclosure that should be ordered in a particular case.

Expert evidence

Lord Justice Jackson’s terms of reference required him to look at overseas jurisdictions. One of the jurisdictions he looked at and visited was Australia, where a procedure for “hot tubbing” expert witnesses is used. “Hot tubbing” involves all of the experts in a case giving evidence together, where they are asked questions by the judge, and indeed the experts may ask their opposing experts questions. “Hot tubbing” can save court time by cutting out the traditional cross-examination of expert witnesses, one by one. Lord Justice Jackson proposes that there be a “hot tubbing” pilot in England and Wales, to see whether it would be worthwhile introducing it more widely.



The idea is that in such cases the judge will choose the most appropriate form of disclosure, which does not lead to costs being incurred disproportionately.

The Commercial Court

Much large commercial litigation, particularly those cases involving international commercial disputes, is conducted through the Commercial Court. The Commercial Court (and its users) have in recent years spent a considerable amount of time reflecting on how cases proceed through the Court, and how to streamline them. This has led to cases in the Commercial Court generally being run on a time and cost efficient basis.

Recognising this, Lord Justice Jackson has not made any major recommendations for changing the workings of the Commercial Court other than the introduction of “menu” disclosure referred to in point 3 above. One point, however, that he has emphasised is that cost savings can occur if cases are allocated (or “docketed”) to a particular judge, rather than for the judge who deals with procedural matters to change throughout the case. Lord Justice Jackson therefore recommends the increased use of docketing in the Commercial Court. This is a helpful proposal as it would avoid the cost of different judges being required to familiarise themselves with both the case and the previous tactics and behaviour of the parties before proceeding with the matters in issue.

Pre-Action Protocols

There are ten specific Pre-Action Protocols which generally work well (to encourage the early settlement of cases), and Lord Justice Jackson recommends that they all be retained. However, Lord Justice Jackson found a majority view among commercial litigators and Commercial Court judges that pre-action protocols were unwelcome in large scale commercial litigation because they generated additional costs and delay for no useful purpose. As a result, Lord Justice Jackson has recommended that the existing general pre-action protocol be repealed.

Claimant’s settlement offers

One of the points that was frequently made to Lord Justice Jackson during his costs review was that claimant’s settlement offers do not have enough teeth (i.e. the disincentives to defendants for not accepting a reasonable settlement offer are not sufficient) meaning that more cases go to trial than should do so. Lord Justice Jackson has accepted this criticism, and recommends that the rules on settlement offers be strengthened so that if a defendant refuses to accept a settlement offer and then fails to “beat the offer” at trial, he or she will be ordered to pay an additional 10% of the claimant’s damages or other monetary recovery. This measure will provide defendants with a much greater incentive to accept reasonable settlement offers.

Case management & Costs management

The view was expressed by many people to Lord Justice Jackson that judges sometimes do not do enough to take charge of a case, or give directions and other orders to ensure that costs do not get out of hand. Lord Justice Jackson has accepted this criticism, but recognises also that it is not possible to be prescriptive about what judges should and should not do in any particular case. His recommendations therefore take a “gradualist approach”, which among other things promote the courts standardising their directions (potentially so as to do away with the need for case management conferences), and for judges and practitioners to be trained in the management of costs in court proceedings. The recommendation for increased allocation of individual cases in the Commercial Court to particular judges for the life of the dispute discussed above should help judges become better case managers.

The future

Although some of the changes recommended by Lord Justice Jackson will require both primary and secondary legislation, other recommendations can and probably will be introduced by the courts themselves. Following the election and the formation of the new coalition government, there is uncertainty as to what will happen with the recommendations that require legislation. However, the senior judiciary – including the Lord Chief Justice and the Master of the Rolls – have given their full support to Lord Justice Jackson’s recommendations, and will be negotiating with the new coalition government to have his recommendations implemented. Given this, we should expect significant changes to the civil litigation system along the lines of those set out in the final report. The proposed changes are on the whole welcome.



Following the election and the formation of the new coalition government, there is uncertainty as to what will happen with the recommendations that require legislation.

International law protection of commercial arbitration

Research⁵ shows that commercial arbitral awards are generally complied with voluntarily and the need to resort to enforcement occurs only exceptionally. The high degree of voluntary compliance is largely attributed to the effectiveness of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), now ratified by 144 states.

The New York Convention sets minimum standards for the enforcement of arbitration agreements and foreign arbitral awards. Article II, paragraph 1 of the New York Convention imposes on the Contracting States an obligation to recognise arbitration agreements and Article III sets out the obligation to recognise arbitral awards as binding and to enforce them in accordance with national procedural rules and subject to the conditions set out in the New York Convention.

Nevertheless, national courts apply the New York Convention according to their standards, which occasionally leads to distinct judicial interpretations. In two recent decisions⁶ international tribunals sanctioned states for their national courts' non-enforcement of an arbitration agreement and commercial arbitration awards, holding that such actions were in breach of the respective states' international treaty obligations. One may assume that certain national courts may be more inclined to adopt obstructive attitudes against a private arbitration process when a state enterprise is involved, as the facts of these two cases indicate.

In principle, international law protection may be available to any arbitration user confronted with the national courts' undue interference in the arbitration or unjustified refusal to enforce an arbitration award. As the two decisions demonstrate, bilateral investment treaties and human rights treaties, such as the European Convention on Human Rights (the Human Rights Convention), may be used effectively to give effect to an enforceable arbitration agreement or award in such circumstances.

In *Saipem* the claim was lodged before the International Centre for Settlement of Investment Dispute (ICSID) pursuant to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and the bilateral investment treaty between Italy and Bangladesh. The ICSID Tribunal in *Saipem* held that the contractual right to arbitrate and the rights determined by a commercial arbitration award are capable in theory of being expropriated, and, thus constitute rights capable of protection by an investment treaty. The claimant resorted to investment treaty arbitration after engaging in a commercial arbitration under the rules of the International Chamber of Commerce (ICC) with the seat of arbitration in Dhaka, Bangladesh. The national courts revoked the authority of the arbitrators and subsequently considered the ICC arbitration award a nullity, thus frustrating its enforcement in the jurisdiction where the respondent's assets were located. It is recognised that the courts at the seat of arbitration are entitled to exercise supervisory jurisdiction over the arbitral process. However, the ICSID Tribunal determined that the courts exercised their supervisory jurisdiction in an abusive manner, contrary to Article II of the New York Convention,

⁵ "International arbitration: Corporate attitudes and practices 2008", Queen Mary School of International Arbitration and PricewaterhouseCoopers report

⁶ *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07; *Regent Company v Ukraine*, European Court of Human Rights judgement dated 3 April 2008

and stated that the illegal judicial actions (which were attributable to the State under international law) substantially deprived the foreign investor of its ability to enjoy the benefits of the ICC award. In the Tribunal's view, the courts' intervention was tantamount to expropriation. The Tribunal considered that the amount awarded by the ICC award represented the proper measure of compensation for the unlawful expropriation. It is noteworthy that the Tribunal did not hold the claimant to an obligation to exhaust local judicial remedies considering that such requirement applies only where there are effective local remedies. The *Saipem* decision follows the ruling in *MidAmerican Energy Holdings Company (formerly CalEnergy Company Inc) v Indonesia* (decision of 1 November 1999), an arbitration conducted under the UNCITRAL rules, where the Tribunal held that the "non-payment of the arbitral award is a violation of international law" and the quantum of the damage is the full amount of the unpaid award.

The elevation of unsatisfied commercial claims against a state enterprise to international investment claims appears to be a growing trend in international dispute resolution. In 2008 a large German investor filed a claim against Ukraine at ICSID⁷ alleging that Ukraine has breached the terms of the Germany-Ukraine bilateral investment treaty by virtue of the Ukrainian courts' failure to enforce an ICC arbitration award. The case is pending before an ICSID Tribunal with a final award expected by the end of 2010 at the earliest.

In *Regent*⁸, the claimant had obtained a domestic arbitration award for damages against a state-owned company, but then failed to obtain enforcement over the next ten years due to procedural hurdles attributable to the Ukrainian authorities, including the insolvency of the respondent. In view of the continued non-enforcement of the award, the claimant lodged an application against Ukraine with the European Court of Human Right (ECHR). The ECHR recognised that an enforceable claim constitutes a possession capable of protection under the Human Rights Convention and found that the national court's ongoing failure to enforce the arbitration award amounted to a breach of the right to a fair trial and of the right to the peaceful enjoyment of possessions, protected within the framework of the Human Rights Convention. The ECHR held that the state must pay the applicant company the outstanding amount of the arbitration award within three months and the award was indeed satisfied by the state in full.

Proceedings conducted under investment and/or human rights treaties will add to the already incurred costs of the claimant without the certainty of full recovery. Therefore, resort to such remedies is likely to be commercially effective when the recoverable award debt is significant and the process can be conducted in a cost effective manner. The record of compliance with awards or decisions rendered under international investment treaties or the Human Rights Convention has generally been good. Therefore, with the development of international law, alternative aids are now afforded to commercial arbitration users in the enforcement of arbitration agreements and awards.



The elevation of unsatisfied commercial claims against a state enterprise to international investment claims appears to be a growing trend in international dispute resolution.

⁷ *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No. ARB/08/16

⁸ *Regent Company v Ukraine*, European Court of Human Rights judgement dated 3 April 2008

Insolvency and arbitration

But what do you do when your opponent in arbitration falls into administration or has a liquidator appointed to oversee its affairs? What effect does this have on an arbitration and its continuation?

Domestic arbitration

The process that applies to insolvent parties in arbitration differs depending on whether the insolvent party is an individual or a corporate body.

If you have a contract with or are involved in arbitration proceedings with an individual who falls into bankruptcy, a trustee will take over his affairs. This trustee has wide powers including the power to disclaim onerous contracts (which can include arbitration agreements). A trustee can choose to adopt contracts and, where such a contract includes an arbitration agreement, this will bind the trustee. If the trustee does not adopt the contract, disputes that arise in relation to that contract (such as existing debts) can still be resolved through arbitration, but this will require the permission of the court.

If arbitration proceedings have already begun, the court has the power to stay the proceedings, and they can only be continued with the court's permission.

If, however, the insolvent party is a company, there are a number of different routes that can be taken if it is facing financial difficulties. The different procedures have different consequences in relation to arbitration.

Administration

Strictly speaking, administration is not an insolvency procedure, but rather an attempt to rescue a failing company. This is reflected in the fact that on entering administration, a moratorium is put in place, meaning that no arbitration proceedings can be brought against the company, and any proceedings that have been brought cannot be continued without the consent of the administrator or the court. Once an administrator has been appointed, he takes over the company's affairs and may bring arbitration proceedings in the company's name.

Winding up

There are two forms of winding up processes available⁹ and both result in a liquidator being appointed to oversee the company's affairs. Liquidation is a broadly similar process to bankruptcy in relation to individuals, and a liquidator has similar powers to a trustee. If the arbitration has not been formally commenced, the liquidator can disclaim an onerous contract and the arbitration agreement contained in it. The liquidator is empowered to bring arbitration proceedings on behalf of the company.

⁹ A Voluntary Winding Up (either a Members' or a Creditors' Winding Up) or a Compulsory Winding Up

In a compulsory winding up, the court may stay any existing arbitration proceedings before the winding up petition is granted. If it does, the proceedings can only be continued with the court's permission. Once the winding up order has been made, the stay happens automatically and no additional proceedings can be commenced against the company.

If the court gives permission for the proceedings to continue, then they will be resolved before the company is wound up. However, if permission is not given and the company is wound up, the insolvent company will cease to exist; the proceedings, and any arbitration agreement, will fall away.

International arbitration

Conflicts of law issues frequently arise in international arbitration. In relation to insolvency, the issue is often which insolvency regime should govern the parties where the insolvent party is based in one jurisdiction, but the arbitration is taking place in another.

This question was considered by the Court of Appeal in 2009 in *Elektrim S.A. v Vivendi Universal S.A.*¹⁰ In this case, Elektrim (a Polish company) had been a shareholder in a Polish telecoms company (PTC) and entered into an agreement with Vivendi to enable Vivendi to acquire an interest in PTC. This agreement contained an arbitration clause that was governed by English law, but the agreement itself was governed by Polish law. A dispute arose between the parties in relation to this agreement and the dispute was referred to arbitration on 22 August 2003.

On 21 August 2007, Elektrim was declared insolvent by the Polish court. Under Polish insolvency law, an arbitration agreement made by the insolvent company is automatically void and any pending arbitration proceedings are discontinued.¹¹ In English law, by contrast, there is no provision automatically annulling the actual arbitration agreement.¹² Therefore, under English law, the arbitration agreement would continue and the arbitrators would be free to determine their own jurisdiction. The conflicting insolvency regimes produce drastically different results.

The court referred to European legislation¹³ (the Regulation) to determine the correct law, which it held to be the law of the state in which proceedings have been brought, in this case English law. Therefore, the arbitrators were free to decide the issue before them.

This case highlights the importance of selecting the appropriate seat in an arbitration agreement. There are a myriad of factors involved, but the effect of insolvency on one of the parties should be a key concern in the current climate. The judgment also draws a distinction between mere disputes on the one hand and commenced proceedings on the other. The court was clear that if the proceedings had not commenced then there was no reason to apply the law of the state where the proceedings would have been heard. On the facts in *Elektrim*, if the claim had not been commenced the arbitration agreement would have been subject to Polish law, and therefore void. However, once proceedings have been commenced, then the law of the state of the proceedings takes precedence.

This interpretation leaves a potential gap that arises from the operation of the Regulation. Under English insolvency laws, once a company enters into administration there is a moratorium on legal proceedings, and existing proceedings can only be continued with the consent of the administrator. However, the automatic moratorium does not apply to companies incorporated outside the England and Wales. These countries will have their own laws governing what happens to legal actions on insolvency, but these laws will be ineffective due to the operation of the Regulation.

¹⁰ [2009] EWCA Civ 677

¹¹ Article 142 of the Polish Bankruptcy and Reorganisation Law

¹² Although the court can stay proceedings (see above).

¹³ Council Regulation 1346/2000

Under English law, the insolvent company would need to apply to the court to stay the arbitral proceedings, but this application would rely on the court choosing to exercise its discretion in support of the foreign insolvency process.

Whilst, increasingly, there is positive news about the global economy, the difficult conditions of the last few years will continue to give rise to disputes and insolvencies. Embarking on arbitration with a party on the verge of insolvency carries with it inherent uncertainties, but it may be unavoidable. The principles behind the English insolvency regime have been in place for some time¹⁴ and have been tested and refined so that they are well understood. However, when dealing with foreign parties, the combination of differing local laws and the relatively recent European legislation brings uncertainty.

Following the decision in *Elektrim*, there are two key points to be aware of when entering into arbitration agreements with international parties where there is an appreciable risk of insolvency during the term of the contract. The first is to give consideration to the national insolvency regime when selecting the seat of an arbitration. Second, if you believe that the party with which you are in dispute is on the verge of insolvency, then commencing proceedings as early as possible may limit the risk that your choice of seat will be superseded. Delaying the arbitration proceedings could mean being exposed to an unfamiliar legal system that the parties never intended to govern their dispute.



“...if you believe that the party with which you are in dispute is on the verge of insolvency, then commencing proceedings as early as possible may limit the risk that your choice of seat will be superseded.”

¹⁴ The Insolvency Act itself is over 20 years old.

Class actions: is substantive reform on the agenda?

Class actions in any form are, at present, relatively uncommon in England and Wales. However, many proposals for reform have been put forward in recent months at both a national and European level. There remains significant uncertainty over the timing and prospect of reform but presently reform in some form looks more likely than not and has the potential to transform some areas of civil litigation in England and Wales.

Civil Justice Council recommendations

In December 2008, the Civil Justice Council (CJC) published its recommendations as to how to improve access to justice through collective actions.¹⁵ The report proposed the introduction of a generic collective action, capable of being brought by a wide range of representative parties, from individual representative claimants to designated or ad-hoc bodies. Whilst the proposals did not call for the wholesale adoption of the US-style class action, the CJC did propose that in some instances an opt out procedure would be appropriate. An “opt out” basis claim is brought on behalf of a defined class of claimants unless individual claimants within that class actively choose not to be included in the action.

The CJC’s proposal for a generic opt out class action was largely dismissed by the UK Ministry of Justice (MoJ) in its response publication published in July 2009. The MoJ favoured a sector by sector approach, with rights of action only where there is evidence of need following an assessment of economic and other impacts against alternative approaches.

Department for Business, Innovation and Skills – “A better deal for consumers”

The MoJ’s position was largely consistent with the Treasury’s white paper on reforming financial markets and the Department for Business, Innovation and Skills’ (BIS) white paper entitled “A better deal for consumers” also published in July 2009. This represented a significant shift away from the focus on legal action and a move to the establishment of alternative forms of redress. Pilot schemes for enforcement authorities with enhanced powers are due to be established in autumn 2010/spring 2011. Also, the BIS white paper proposes the appointment of a consumer advocate in 2010, who will be given powers to take collective actions to obtain compensation on behalf of a group of consumers and to undertake the receiving and distribution of compensation across the UK. The consumer advocate will have some regulatory powers, although these are yet to be determined.

¹⁵ Copy available at www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf

Treasury's White Paper on Reforming Financial Markets

In its July 2009 paper "*Reforming Financial Markets*", the previous Government identified a number of reasons why existing processes for collective redress have not been successful, including the fact that in most cases a representative body without its own cause of action cannot bring a claim; the FSA and Financial Ombudsman Service (FOS) not being designated to bring representative actions and the procedures not being well understood. Therefore, there have been a series of attempts and recommendations to reform this area, which culminated in the publication of the Financial Services Bill.

Financial Services Bill

The Financial Services Bill (the Bill), published in November 2009, initially contained proposals for collective redress which would, if enacted, have had significant implications for the financial services industry in England and Wales. The Bill proposed, for the first time, collective action that would have enabled a representative claimant to bring a financial services claim on behalf of a class of consumers, as well as giving the Financial Services Authority the power to impose schemes on the industry to provide collective redress, not only to consumers but also potentially to institutional investors. The Bill also, controversially, envisaged the possibility of class actions being taken on an "opt out" basis (as in the United States). The potential for secondary legislation to be implemented in this area without sufficient consultation was also of concern to many, and representations were made to the previous government by many bodies and organisations. In April 2010, Gordon Brown announced that a general election would take place on 6 May 2010. As a consequence, all bills pending before Parliament were required to be dropped or rapidly finalised as part of the "wash-up" process. The Bill was rapidly amended, approved and given royal assent. During this process the class action provisions in the Bill were deleted in their entirety.

CJC publishes draft court rules for collective proceedings

In November 2009, a CJC working group was established, as a consequence of a recommendation contained in the government's response to the CJC's report on improving access to justice through collective redress, in order to prepare draft court rules for collective proceedings. On 2 February 2010, the CJC published a set of generic court rules that could be used for different models of collective proceedings that might be permitted by primary legislation.¹⁶

The draft rules anticipate that an English court may make a collective proceedings order if it certifies the proceedings as appropriate for collective proceedings, approves the applicant as the class representative and is satisfied that any conditions required by any enactment for authorisation have been met. The order would set out the details of the claim, the class representative, the class, the defendant, the remedy sought and whether the proceedings are opt in or opt out (the working group decided not to provide any specific guidance on the factors to take into account and considered that it was best left to the court to decide).



The Bill also, controversially, envisaged the possibility of class actions being taken on an "opt out" basis (as in the United States).

¹⁶ Available to download at www.civiljusticecouncil.gov.uk



However, in a surprise turnaround, in October 2009 the Competition Commission withdrew the controversial directive, with rumours circulating that Commission president Jose Manuel Barroso intervened personally.

With the abandonment of the collective redress proposals in the Financial Services Bill, the CJC proposals are unlikely to be taken further in the immediate future.

Collective redress in the EU

Two major initiatives have been pursued on a European level in recent years, the first in the area of competition and the second dealing with consumer protection.

Competition

In April 2008, the European Commission published a White Paper on competition law. The White Paper aimed to fix the perceived difficulty in achieving compensation for victims of competition law infringements before national courts and to facilitate the methods by which victims of competition law infringements in Europe could bring a civil damages action.

The proposals set out in the White Paper included allowing collective redress via representative actions (for example led by recognised consumer groups), requiring the procedure to be largely opt in, permitting judge-controlled disclosure of relevant evidence and providing that any final infringement decisions of the competition authorities of Member States were to be considered sufficient proof of that infringement in subsequent actions for damages. However, the White Paper failed to provide any framework for deciding the jurisdiction, leaving open the prospect of forum shopping in Europe. In such instances claimants would have the ability to seek redress in the forum that is most likely to provide them with the best remedy. Whilst providing a potential advantage to claimants, this could have presented an additional burden for defendants being subjected to more litigation originating from other states. It is possible therefore, that a certain level of internal competition would develop between Member States in order to offer mechanisms that attract claimants to their jurisdiction.

Following publication of the White Paper, a draft directive was circulated by the Competition Commission during 2009 that permitted joint action for parties suffering harm by the same infringement, allowed representatives to bring such actions on behalf of a defined group on an opt out basis, and envisaged court ordered disclosure against defendants and third parties (a very significant development to the procedural law of most civil law countries). However, in a surprise turnaround, in October 2009 the Competition Commission withdrew the controversial directive, with rumours circulating that Commission president Jose Manuel Barroso intervened personally.

Spain's Joaquin Almunia became the EU's new Competition Commissioner in February 2010. Prior to taking up his position, when speaking to the European Parliament in January 2010, he stated that he was keen to develop new proposals on collective compensation, but stressed that he wanted to avoid the "excess" of class actions models that have been adopted in countries such as the US. He also confirmed that the European Parliament would be involved in shaping the legislative proposals, through the ordinary legislative procedure. As Mr Almunia is still relatively new in his position as Competition Commissioner, it is not surprising that he has not put forward any proposals as yet.

Consumers

Within DG SANCO (the Directorate-General for health and consumers in Europe) a more moderate and consultative position was taken from the start. In their Green Paper, DG SANCO recognised the value of alternative dispute resolution methods and proposed four options ranging from no action to a court based collective action, recognising the importance of ADR to complement any formal legal process as well as regulatory oversight of reparation. DG SANCO issued a consultation paper in May 2009, by way of follow-up to its Green Paper, setting out five options:

- No action: which means leaving the development of collective redress to individual member states.
- Developing self-regulation: which envisages a model for collective alternative dispute resolution, accompanied by self-regulation measures for traders in the form of an internal complaint handling system (many of which already exist in the UK).
- A non-binding recommendation on Member States to set up collective ADR and a judicial collective redress scheme: giving greater powers to the relevant regulatory authorities to encourage or require reparation. It would be non-binding to encourage Member States to introduce such ADR and judicial schemes to complement existing schemes.
- A binding obligation on Member States to set up collective ADR and a judicial collective redress scheme: as with the previous option save that Member States would be required to establish specific ADR and judicial mechanisms.
- An EU wide judicial collective redress scheme and collective ADR, which would require the introduction of generic legislation on an EU wide basis.

The new Commissioner for Consumer Affairs and Public Health, John Dalli of Malta, also took up his position in February 2010. While it is not clear whether Mr Dalli will push the proposals forward, a senior member of DG SANCO has been quoted in the press¹⁷ as stating that he anticipates that a White Paper along the lines of the earlier proposals will be produced.

Conclusion

This summary of the proposals for reform of class actions highlights the current uncertainty surrounding the future shape of class actions. Proposals for reform in Europe have currently stalled, although it is expected that both the consumer and competition initiatives will be back on the agenda before too long. For England and Wales, political inertia means it remains unclear whether proposed reforms will ever be implemented. What is abundantly clear is that the position is far from settled and the debate over collective redress in England and Wales and in the EU as a whole is set to continue.

¹⁷ www.commercialriskeurope.com/cre/15/56/New-Commission-is-expected-to-issue-White-Paper-on-class-actions/

British Airways/Air Cargo: the Back Door to US-Style Class Actions in England?

There is at present much uncertainty concerning the legislative development of class actions in England and Europe.¹⁸ In the meantime the English courts have proved unwilling to step in to make class actions any easier, despite some claimants seeking to push the envelope by stretching what is allowable under existing procedures. An example is the English High Court striking out the representative element of an action in respect of an alleged cartel in the air cargo sector.¹⁹

Emerald Suppliers Limited (Emerald) imported cut flowers from Colombia and Kenya using the air freight services of British Airways (BA) and other international airlines. Emerald alleged that BA had been party to agreements to fix the prices at which air freight services were supplied, or to control or share the market for the supply of those services in breach of the EC and UK competition rules (the Claim). It was further asserted that Emerald were *“direct or indirect purchasers of air freight services the prices for which were inflated by one or more of the agreements or concerted practices. As such, they are representative of all other direct or indirect purchasers of air freight services, the prices for which were so inflated”*. It was claimed that there was no need to identify all the claimants before judgment and that that could be done at the time of the judgment.

Under Rule 19.6 of the Civil Procedure Rules (CPR), a party can bring a claim on behalf of itself and others (a “representative action”) where he/she shares the same interest as those others in the claim. BA applied for an order that the representative element of the Claim be struck out, arguing that it did not fulfil the conditions of CPR Rule 19.6 because it was not possible to identify other persons with the same interest in the Claim and there was an inherent conflict of interest between the members of the class (in so far as they were identifiable). Emerald’s strategy in launching the claim against BA appears to have been to try to stretch CPR 19 to its advantage to create a US style “opt out” class action by claiming to represent the interests of undescribed (and unidentified) claimants not involved in the litigation, unless they individually decided to decline to bring claims against BA. If successful, this would have been an enormous claim, as it was made on behalf of all potential claimants anywhere in the world. To give an idea of the potential scale of the claim, during the period of the alleged cartel, BA flew approximately 3.5 million cargo flights.

BA argued that the “class” of people contained in the Claim *“is not only unidentified, but unknowable, potentially comprising every conceivable so-called direct and indirect purchasers worldwide who at one stage or another were arguably affected...by the cost of air transport shipping services”*. This meant that the class was not limited to air freight services provided by BA, but could equally apply to any other undertaking providing such services within the alleged cartel (BA would theoretically be joint and severably liable for damage caused by the other suppliers of air cargo services).

¹⁸ See article (page 22).

¹⁹ *Emerald and others v British Airways plc* [2009] EWHC 741(Ch)

BA also argued that there was a conflict of interest between members of the class. In particular, BA argued that members of the class could not have the same interest due to the question of whether or not there was “passing on” of inflated costs between indirect purchasers. The alleged claims of individual members of the class would vary depending on whether the increased cost was absorbed or passed on to customers. To the extent the increased cost was absorbed by a party it would have a claim against BA. If all the additional cost was passed on, only the subsequent purchaser would have a claim. Due to this not all members of the class Emerald identified could recover damages. Emerald’s response to this argument was that passing on was a complex matter and not something that was appropriate to deal with in a strike out application and that, in any event, BA’s points were only relevant to quantum. Further, Emerald objected to BA’s application on the basis that the size of the class forming the representative element of the Claim was “*unavoidable*” due to the global nature of the infringements alleged, and that class size is irrelevant to any assessment of the application of CPR Rule 19.6.

The judge concluded that the application of Rule 19.6 was dependent on two essential pre-conditions. Namely, there should be more than one party which should have the same relevant interest at the time the claim is begun. The judge held that Rule 19.6 does not place any limit on the number of people that can be represented and a representative action is not precluded by a class that is numerous and geographically wide. However, he remarked that the more extensive the class the more clearly the second pre-condition should be satisfied. On this point, the judge, relied on the principles in a 1901 English Court of Appeal decision²⁰ that the claimants and the class must have “*a common interest and a common grievance*” and “*the relief sought [must] in its nature [be] beneficial to them all*”.

The judge concluded that neither pre-condition was satisfied in this instance and, therefore, that the claimants could not represent the class described in the Claim. He held: (i) the criteria for inclusion of a person in the class depended on the outcome of the action itself; (ii) whether the prices were, in fact inflated must be proved by the claimants; it was, therefore, “*impossible*” to say whether a given person was a member of the class at the time the Claim was issued - it would not be until the final judgment that those persons could be identified, if at all; and (iii) the relief sought was not equally beneficial to all members of the class – it would depend on where a particular purchaser sat in the chain of distribution. The judge accepted BA’s argument that there was an inevitable conflict of interest between class members, with some purchasers having absorbed the increased prices, and some having passed the increases on to their customers. As a result, the judge granted BA’s application and struck out the representative element of the Claim.

In his judgment, the judge considered that a class action of this type might be “*more conveniently accommodated*” under the Group Litigation Order or “*GLO*” procedure under CPR Rule 19.11. GLOs differ from representative actions in that rather than one claimant bringing a single action on behalf of a group of others, claimants are required to issue individual claims, although those claims may ultimately be heard together. Claimants do not need to have the same interest, but merely a common or related interest, and whereas the claims of all claimants in a representative action will succeed or fail together, in a GLO there may be different outcomes for different claims. It is unlikely that a GLO would suit Emerald, or to be accurate its lawyers, as the firm could only represent those claimants that individually instructed it to act rather than a broad class.

This decision has now been appealed to the Court of Appeal. The Court’s judgment is awaited. Given the difficulties Emerald faced in meeting the criteria for a representative action at first instance, it is likely that the Court of Appeal will also be unwilling to allow Emerald to bring a representative action on behalf of the broad class of claimants it has identified. In relation to the development of class actions more generally, see article on page 22 .

²⁰ *Duke of Bedford v Ellis* [1901] AC 1

Is evidence of pre-contract negotiations admissible to interpret contracts?

Often when the construction of a contract is in dispute, one party or both seek to introduce evidence of what was said or agreed in pre-contractual negotiations in order to try to improve its position.

In 2009 the House of Lords in *Chartbrook v Persimmon Homes*²¹ reviewed the existing law on this subject and decided that there were no grounds to depart from the long standing rule that excluded evidence of what was said or done during the course of negotiating a contract for the purpose of drawing inferences about what the terms of the contract actually mean.²²

The Persimmon Homes case concerned the interpretation of a contractual definition which would determine whether Persimmon's liability to Chartbrook ran to millions of pounds or merely thousands. At first instance and in the Court of Appeal the courts held in favour of Chartbrook's interpretation. The House of Lords unanimously favoured Persimmon's.

Persimmon argued that evidence concerning the negotiation of the particular definition should be admissible as it would help demonstrate the true commercial purpose of the clause. Whilst, in the event, such an argument proved unnecessary, the Lords took the opportunity to consider whether the negotiations ought to be admissible.

Giving the leading opinion, and his final judgment as a Law Lord, Lord Hoffman concluded that evidence relating to the negotiations would be unhelpful or inconclusive more often than not. However he observed that occasionally "*among the dirt of aspirations, proposals and counter-proposals there may gleam the gold of a genuine consensus on some aspect of the transaction expressed in terms which would influence an objective observer in construing the language used by the parties in the final agreement*".²³

Despite that observation, Lord Hoffman concluded that on pragmatic grounds such material should remain excluded. In his view, it is undesirable for the interpretation of a contract to turn routinely on matters outside of the four corners of the agreement; so far as possible the agreement should speak for itself.

In summary

- The key question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.
- When a document is unclear, the court will not allow evidence as to pre-contract negotiations to be admitted.
- The rule may mean that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. But a system which sometimes allows this to happen may be justified in the more general interest of economy and predictability in obtaining evidence and adjudicating disputes.²⁴

²¹ [2009] UKHL 38

²² *Prenn v Simmonds* [1971] 1WLR 1381

²³ *Chartbrook v Persimmon Homes* ([2009] UKHL 38 at paragraph 32

²⁴ *Chartbrook v Persimmon Homes* [2009] UKHL 38 at paragraph 41



The court will not allow evidence of pre-contractual negotiations to be admitted for the purpose of drawing inferences as to what terms in the contract mean.

- In Lord Hoffman’s view, it is usually possible to avoid unpleasant surprises by carefully reading documents before signing them. In addition, there remain the safety nets of rectification and estoppel by convention (as to which see below).

However, as Lord Hoffman said, whilst the rule:

“excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish a fact that may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it”.

Therefore, while evidence of pre-contractual negotiations cannot be used to interpret the meaning of terms in a contract, it is worth remembering that such evidence will be admissible in the following situations:

- Estoppel by convention: this may arise where both parties to a transaction act on an assumed state of facts or law, the assumption being either shared by both or acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it.
- Rectification: the long established rule that where a contract has by reason of a mistake common to the contracting parties been drawn up so as to militate against the terms intended by both as revealed in their previous understanding, the court will rectify the contract so as to carry out those intentions.

In conclusion, it is vitally important to check that the language used in a contract mirrors that agreed in pre-contractual negotiations and meets the requirements of the parties prior to signing a contract. The court will not allow evidence of pre-contractual negotiations to be admitted for the purpose of drawing inferences as to what terms in the contract mean.

Interestingly, in a subsequent case concerning contractual construction, the Supreme Court²⁵ overruled both the High Court and the Court of Appeal on the correct interpretation of the terms of a security trust deed governing the rights of the secured creditors of Sigma Finance Corporation, a structured investment vehicle. This decision is an illustration of the extent to which senior judges may be prepared to depart from the ordinary meaning of the words used where that leads to an interpretation which is contrary to the judges’ perception of the commercial purpose of the agreement. The Supreme Court’s judgment has been criticised as stepping dangerously close to the court substituting a different bargain rather than merely construing the contract. By doing so the court risks generating uncertainty which is itself a profoundly uncommercial outcome.

²⁵ Re Sigma Finance Corporation (in administrative receivership) [2009] UKSC2

Web-crawling robots: Google off the hook for defamation

As technology and, in particular, the internet develops, the law of defamation continues to face new challenges. Last year we reported on the case of *Applause Store Productions Limited v Raphael*²⁶ in which Matthew Firsht and his company were awarded damages for defamatory postings made about them on the social networking website, Facebook.

In September 2009, a “super-injunction” was obtained by law firm Carter Ruck on behalf of Trafigura (a London-based oil trader at the centre of a toxic waste scandal in Africa). Carter Ruck tried to use the injunction to prevent the Guardian from reporting a question to the House of Commons by Paul Farrelly MP. However, Farrelly’s question, which could be found on parliament’s website and was printed on the House of Commons order paper, was available online within minutes. The injunction, accordingly, was rendered ineffective as a consequence of the rapid dissemination of information through the internet.

The role, and potential liability in defamation, of internet search engines has also recently been examined by the courts in a case brought against Google.²⁷

Background

The claimant, Metropolitan International Schools Limited (MIS), provided adult distance-learning courses. It sued a number of defendants, including a website owner, in respect of certain allegedly defamatory bulletin board postings that appeared on its website. These postings included a thread which alleged that MIS was fraudulent and that its courses were a scam. Internet users who entered certain search terms in the Google search engine were, in the usual way, offered hyperlinks to the postings as well as a “snippet” of text from the discussion thread as follows: “*Train2Game new SCAM for Scheidegger*” (MIS’ current and former trading names respectively). That snippet was returned by Google as the third and fourth highest search result on www.google.co.uk and www.google.com when “*Train2Game*” was entered as the search term.

MIS notified the website owner and Google of its complaint and requested that the offending material be removed. However, when they did not comply, MIS brought proceedings against the website owner, Google UK and its US parent company, Google Inc. MIS obtained permission to serve proceedings out of the jurisdiction on Google Inc. who then sought to have the Master’s order set aside, principally on the basis that Google Inc. was not responsible for the publication of the words complained of, and MIS was therefore unable to demonstrate that it had a real prospect of success.

²⁶ [2008] EWHC 1781 (QB)
– see pages 23 – 24 of our publication *Dispute Resolution: Issues in 2009*

²⁷ *Metropolitan International Schools Limited v Google Inc.*
[2009] EWHC 1765 (QB)
16 July 2009

Google a “facilitator” not a publisher

The central issue in the case was whether Google could be considered the publisher of a defamatory statement at common law and whether it could therefore be liable to MIS in “publishing” the snippet. The court held that Google was not a publisher because it “*had no role to play in formulating the search terms*”; it was a “*facilitator*” and not a publisher at common law.

In giving judgment, Mr Justice Eady relied on his earlier decision in the case of *Bunt v Tilley*²⁸ in which he had found that an ISP was not a publisher at common law because it was the operator/provider of access to a communications system over which it had no effective control. He noted that there was no authority in English law dealing with this “*modern phenomenon*” but considered that an analogy could be drawn between an internet search engine and a conventional library where a scholar consults a library catalogue:

“On doing so, he may find that there are some potentially relevant books in one of the bays...It is hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue. On the other hand, if the compilers have made an effort to be more informative by quoting brief snippets of the book, the position may be different”.

However, where the compiler of the library catalogue will consciously have prepared the wording of the snippet, the same could not be said of a search engine such as Google where there was no “*human input*”; and “*it has all been done by the web-crawling robots*”.

Notification

Under English law, a person can be liable for publishing a libel by acquiescence i.e. by permitting the continuing publication of a libel once that person has the power to remove it. Therefore, having found that Google had not actually published the snippet, Mr Justice Eady went on to consider whether Google was liable for the defamatory snippet by acquiescence. He held that it was not.

While Google could prevent searches returning links to specific website addresses which MIS had identified, it was not technically able to put in place a more effective block on the words complained of without at the same time disabling access to a huge amount of other material on the internet. Mr Justice Eady found that Google’s “take down” procedure might not have been as fast as it could have been but, he said, that did not mean as a matter of law that between notification and “take down” Google was, or continued to be, liable as a publisher of the offending material.

It is somewhat frustrating that the judgment does not directly deal with the issue of what an internet search engine such as Google is expected to do if it is put on notice of a defamatory snippet but does not take it down. On the one hand, it may be argued that since it would be practically impossible to impose an effective block on offending websites in the search results, Google would not be liable if it failed to take any steps when put on notice of a defamatory snippet. The better view, however, seems to be that Google is still expected to impose blocks on webpages that specifically contain allegedly defamatory statements, but would not be expected to take any further steps in that regard.

²⁸ [2007] 1 WLR 1243



Mr Justice Eady could not see how Google could be expected to exercise reasonable care in publishing a statement if publication had taken place without any human input.

Defences

Although it was unnecessary for the court to consider whether Google had any defence to publication, Mr Justice Eady expressed the view that the defence of innocent dissemination at common law would not have assisted Google because that defence “*would almost certainly not be available to a defendant who has had it drawn to its attention that the words are defamatory or, at least, arguably so*”.

The judge also could not see how the statutory defence of innocent dissemination contained in section 1 of the Defamation Act 1996 would apply to Google. This provides a person with a defence to a defamation action if he can show that:

- he was not the author, editor or publisher of the statement complained of
- that he took reasonable care in relation to its publication
- he did not know, and had no reason to believe, that what he did caused or contributed to the publication of the defamatory statement.

In particular, Mr Justice Eady could not see how Google could be expected to exercise reasonable care in publishing a statement if publication had taken place without any human input.

Conclusion

This decision will no doubt be welcomed by Google and other search engine providers. However, the case will be of little comfort to individuals and corporates alike whose reputation is threatened online, especially because the courts have not clearly dealt with the issue of what steps a search engine provider is required to take when put on notice of a defamatory snippet. While the case has not been appealed, it seems unlikely that this decision will mark the end of the debate as to search engine provider liability and it is likely that we will see more cases this year in relation to internet libel.

When is a Duty of Care not a Duty of Care?

Where professional services firms fail to do their job properly and their client company incurs loss, they expect to be sued. But things are not always that straightforward.

What if the company boss is fraudulent and the loss stemmed from that? Should the firm still be liable for failing to prevent his fraud or can it be excused? That was the \$170m question before the House of Lords in *Moore Stephens (the "Auditors") v Stone & Rolls*.²⁹

Facts

The Auditors allegedly failed to spot that the man behind Stone & Rolls, Mr Stojevic, was using the company to extract money from a bank fraudulently. The bank successfully sued both Stone & Rolls and Mr Stojevic but neither could pay, since the proceeds of the fraud had by that stage been dissipated. Stone & Rolls went into liquidation and the liquidator sued the Auditors in the name of the company. The case was really brought for the benefit of the creditor bank but it had no standing to make a claim for itself, since auditors owe no duties of care to creditors. The claim alleged that the judgment the bank got against Stone & Rolls was a liability the company would not have incurred had the Auditors not breached their duty of care to it.

Illegality Doctrine

An early-established principle of English law is that you cannot bring a claim that is based upon your own illegal act (referred to by the Latin maxim "*ex turpi causa non oritur actio*"). The Auditors relied on this, citing that Stone & Rolls would in effect be relying on the fact that it had committed fraud in order to sue the Auditors for failing to spot it. However, that assumes that the fraud should also be considered Stone & Rolls' illegal act, rather than just that of Mr Stojevic. The Lords therefore considered this point in some detail.

Sole actor

Both parties to the action agreed that Mr Stojevic was the sole directing mind and will and the beneficial owner of Stone & Rolls. No one else was involved; he was the only human embodiment of the entire company. In that context, the Lords considered whether Mr Stojevic's fraudulent behaviour could be "*attributed*" to the company. This is different to the "*vicarious*" liability a company may incur for the actions of a junior employee – it is imputing a mindset to the company itself.

²⁹ [2009] UKHL 39

Case law says that a company cannot have the fraudulent mindset of its director imputed to it where it is the victim of the fraud. The liquidators of Stone & Rolls argued that the company was a victim of the fraud (albeit secondary to the bank) because it now faced a huge judgment and had to go into liquidation. The majority of the Lords disagreed. The fact that the fraud had “*come home to roost*”, to Stone & Rolls’ disadvantage, did not make it a victim. The Lords placed particular emphasis on the fact that there were no innocent third parties involved in the company, either as shareholders or directors, and the fact that the company was not in the business of anything but fraud.

The Auditors’ duty was owed to Stone & Rolls as a whole, not to Mr Stojevic as an individual shareholder or to the bank as a creditor. However, if the sole human embodiment of that company already knew all about its fraudulent activities, there was little protection the Auditors could give it.

“Very thing”

So, Mr Stojevic’s illegal acts could be considered to be Stone & Rolls’ illegal acts. That brings us back to the original question: whether Stone & Rolls should be allowed to bring the claim by relying on such illegality. There was one final argument to be considered. Stone & Rolls argued that, even accepting the illegality of the company itself, the Auditors could not escape liability for their failure to detect the fraud because it was the “*very thing*” they were tasked to prevent. The Lords disagreed. The “*very thing*” argument was only relevant when considering to what extent the defendant “caused” the wrongdoing. It did not provide an exception to the rule that you cannot base a claim on your own illegal act.

Decision

The House of Lords struck out Stone & Rolls’ claim by a narrow majority of three to two. There were strong dissenting arguments, however, and the Lords were obviously reluctant to set a precedent that might allow auditors to escape liability for their failure. Given recent high profile examples of frauds going unchecked for many years, the dissenting Lords may have had a sound policy basis for their judgments. Ultimately, however, that policy comes second to the distaste for allowing wrongdoers to base a claim on their own wrongdoing and the wider implications for professional advisors and insurers.

Third Party Funding

The liquidators of Stone & Rolls were funded to pursue the litigation by a third party, the most high profile of claims to have been brought in this way. It will be interesting to note whether the loss of the funded party’s very expensive case will discourage other funders from getting involved in such high stakes litigation.

Follow-up case

The limits of the illegality doctrine that underpinned this case were soon explored in the case of *Lincoln v CB Richard Ellis Hotels Limited*.³⁰ The claimants allegedly paid too high a price for hotels, having relied on the defendants’ over-valuation. The defendants pointed out that 8% of that price was paid to an agent for the purposes of tax evasion, which meant the whole claim was tainted with illegality and should not be allowed. The judge disagreed. He found that the claimants principally relied on their contract with the defendant to provide valuations. They did not rely on or seek to enforce the separate contract alleged to be illegal, i.e. the hotel purchase contract, and such illegality was therefore too remote to affect the claim as a whole. The judge did say, however, that the defendant might still have a valid defence in respect of the 8%.

³⁰ [2009] EWHC 2344 (TCC)

Developments in “follow-on” damages claims

Section 47A of the Competition Act 1998 enables a company who has suffered loss as a result of the infringement of EC or UK competition rules to bring a claim before the Competition Appeals Tribunal (CAT) in reliance on a decision of the EC or UK competition authority establishing the infringement in question (“follow-on” actions).

There is a two year time limit for bringing such a claim. This two year limitation is independent of any traditional limitation periods (for example those arising in contract or tort) which might have already expired. Follow-on actions can also be brought in the High Court but do not benefit from the additional two year limitation period. The Court of Appeal and High Court have given important judgments further developing what remains a relatively new area of law.

Background

A claim for damages under section 47A of the Competition Act must be brought within two years from the latest of:

- the end of the time period during which the decision can be appealed to the CAT, another higher court, or the European courts;
- the final determination of any appeal; or
- the date on which the cause of action accrued.

The CAT previously considered the position under section 47A where the European Commission had found an infringement and some, but not all, of the addressees had applied to annul the decision. In *Emerson I*³¹ it was held that where any of the addressees of a Commission decision had brought proceedings in the European Court, the permission of the tribunal was required for the bringing of a claim under section 47A even against an addressee which had not itself brought such proceedings. In *Emerson II*³², the CAT granted permission for a claim to be brought against an addressee which had not applied to annul a decision. In *Emerson III*³³, the CAT refused permission for claims to be brought against addressees which had applied to annul the decision.

The start date of the limitation period

In *BCL Old Co Limited and others v BASF SE and others*³⁴ the Court of Appeal clarified the method for calculating the start date for the two year limitation period to initiate a follow-on action.

The case concerned claims for damages in reliance on a European Commission decision in relation to a vitamins cartel.³⁵ In this instance the defendants had appealed against the fine imposed by the Commission, but not its finding of infringement. The defendants argued that the two year time period for bringing the claims had passed and that, therefore, the claims were time barred.

³¹ *Emerson Electric and others v Morgan Crucible and others* [2007] CAT 28

³² *Emerson Electric and others v Morgan Crucible and others* [2007] CAT 30

³³ *Emerson Electric and others v Morgan Crucible and others* [2008] CAT 8

³⁴ [2009] EWCA Civ 434

³⁵ COMP/E-1/37.512



“...for the purposes of the action for damages, the two year time limit had begun from the expiry of the time when an appeal against the infringement decision itself could have been brought.

The claimants argued that the two year time period would not start to run until appeal proceedings against the fine in the European Court of First Instance (now, following the Lisbon Treaty, the “*General Court*”) had concluded and the time period for appealing further to the ECJ had expired. In 2008, the CAT handed down a judgment³⁶ in which it found that the damages claim had been brought within the limitation period. The CAT decided that the two year limitation period had not started to run until the time limit for bringing an appeal against the CFI’s decision on the level of fine had expired. The CAT considered that no distinction should be made between appeals against the level of fine and appeals against the finding of infringement for the purposes of determining when the limitation period begins to run.

The Court of Appeal reversed the CAT’s decision. It accepted the defendants’ argument that the wording of section 47A of the Competition Act and its wider statutory context showed a clear distinction between a decision that the competition rules had been infringed and a decision imposing a fine. The Court found that the Commission’s finding that the defendants to the claim had been involved in a cartel (which had not been appealed) was separate from the decision to impose a fine (which had been). Therefore, for the purposes of the action for damages, the two year time limit had begun from the expiry of the time when an appeal against the infringement decision itself could have been brought.

Based on that decision, the two year period during which a follow-on action can be brought commences after the deadline for appealing the finding of an infringement or the conclusion of any such appeal; any appeals lodged which contest only the fine imposed are irrelevant for limitation purposes.

Follow-on actions before appeal determined

The case of *National Grid Electricity Transmission plc v ABB Limited*³⁷ concerned whether a claim for follow-on damages in the High Court³⁸ should be allowed to proceed when appeals against the substance of the underlying Commission infringement decision had yet to be concluded. Here the High Court decided that the claims should be allowed to proceed at least until the close of pleadings before the action was stayed to allow appeals against the underlying decision to be determined.

In the earlier case of *Emerson III*³⁹, the CAT ruled that it would not be appropriate for the Tribunal to grant permission for proceedings to be commenced for follow-on damages against addressees who had appealed, until all such appeals were determined. The High Court, in contrast, decided in the circumstances of the *National Grid* case that the proper balance would be to allow the action to proceed “*at least until close of pleadings*”. Further the Court held that it was “*premature to decide that no disclosure should take place before the conclusion of the applications and appeals to the CFI and ECJ*” (a decision on this point was put off until a later date). The Court’s reasoning was that, in the particular circumstances of the case, the need for the follow-on action to be ready for trial as soon as possible after the conclusion of the appeals

³⁶ [2008] CAT 24

³⁷ [2009] EWHC 1326 (Ch)

³⁸ The right to bring a claim for follow-on damages in the CAT does not affect the right of the claimant to bring proceedings in respect of the claim in the High Court.

³⁹ *EmersonElectric and others v Morgan Crucible and others* [2008] CAT 8

outweighed the need to avoid expenditure which may be wasted. In particular, the High Court considered that unless preparation for the follow-on action continued, the parties would not be on an equal footing as the claimant would not know all the relevant issues raised in defence to its claim or what documents relating to those issues were available.

The Court stated in its judgment that it did not “*quarrel*” with *Emerson III*, but distinguished it on the basis that the CAT was dealing with the question of whether to allow a claim to be commenced, whereas the Court was considering whether an existing action should be stayed.

The decision in *National Grid* confirms that it is possible to bring follow-on damages claims in the High Court before an appeal against the infringement decision the action is based on has finally been determined. This may result in tension between the High Court, which may become the preferred venue for follow-on damages actions, and the CAT, where claimants are constrained by the inability to commence claims before the conclusion of infringement appeals, save in exceptional circumstances. Notwithstanding the High Court’s distinction of *Emerson III*, there is now a clear disparity in the practice of the High Court and that of the CAT. As competition claims increase, so to will the constant probing of the boundaries in this area.



Notwithstanding the High Court’s distinction of *Emerson III*, there is now a clear disparity in the practice of the High Court and that of the CAT.

Reform of Regulation 44/2001 (the “Brussels Regulation”)

Article 73 of the Brussels Regulation (which deals with jurisdiction and recognition and enforcement of judgments between EU member states), required the European Commission to present a report on the application of the Regulation no later than five years after the Regulation came into force. In compliance with this obligation, in 2006 the Commission commissioned the Heidelberg Report, which was published in September 2007.

The primary aim of the Heidelberg Report was to analyse practical problems with the Regulation and to indicate possible ways forward for improvement. The scope of the Heidelberg Report did not include advice on specific amendments to the Regulation. The Heidelberg Report did not suggest any fundamental amendment to the structure of the Regulation – only improvements to the general function of the Regulation as an instrument of European procedural law.

In April 2009, the Commission adopted a Green Paper which set out proposals for various amendments to the Regulation and invited all interested parties to send their comments on the points addressed in the Green Paper – the consultation closed on 30 June 2009.

The Commission’s Green Paper on the review of the Regulation has attracted significant attention from, amongst others, the House of Lords EU Committee, the Law Society of England and Wales, the International Bar Association’s (IBA) Arbitration Committee, the French Committee on Arbitration and various law firms because of the wide ranging breadth and, to a certain extent, controversial nature of the amendments proposed by the Commission. An outline of the Commission’s most interesting proposals is set out below.

The abolition of intermediate measures to recognise and enforce foreign judgments (*exequatur*)

The Commission believes that in a free market it is difficult to justify the time and costs incurred in asserting rights established in one member state in another. The Commission also appreciates that, recognition and enforcement of foreign judgments is very rarely refused within the EU. Therefore, the Commission proposes the abolition of the *exequatur* procedure, whilst recognising that important safeguards need to be put in place.

The Commission also proposes a uniform standard form available in all Community languages in which to include the relevant extract of the judgment and all the relevant information (e.g. interest) to assist with the recognition and enforcement of judgments in the Community.

The House of Lords EU Committee supports this proposal on the basis of the Commission’s evidence that applications for enforcement orders are rarely challenged. However, the House of Lords EU Committee emphasises the need to maintain safeguards along the lines of those

currently found in the Regulation (Articles 33 – 37, which deal with recognition of a judgment) and also the need to put in place procedures to give sufficient notice to a defendant to give him the opportunity to challenge enforcement of the judgment.

Lis alibi pendens: “the court first seized rule” and choice of court agreements

The Commission strongly believes that choice of court agreements should be given the “fullest effect” and proposes various solutions to strengthen the effect of such agreements under the Regulation. The solutions put forward by the Commission include:

- releasing the court chosen by the parties from its obligations to stay proceedings under the “court first seized rule”
- giving the chosen court priority to determine its jurisdiction, and requiring any other court seized to stay their proceedings until the chosen court’s jurisdiction is established
- excluding the application of the “court first seized rule” in situations where parallel proceedings are proceedings on merits of the case on one hand and proceedings for (negative) declaratory relief or proceedings to stop the limitation time-clock from running out, on the other.

In support of its approach, the Commission also proposes a damages remedy for breach of choice of court agreements and suggests that the communication and co-operation between the courts seized in parallel proceedings should be strengthened.

The House of Lords EU Committee “firmly believe” that the current rules on the “court first seized” principle should be reformed and see merit in the second option (i.e. exclusive jurisdiction of the chosen court) proposed by the Commission, although they believe that the desired result would also be achieved by the first option stated above. However, the House of Lords EU Committee is critical of the damages remedy.

The arbitration exception – The *West Tankers* dilemma

Although the Commission state that arbitration agreements should be given their fullest effect and enforcement of arbitral awards should be encouraged, the Commission’s proposals in this regard appear to be contrary to this intention.

The Commission proposes to delete the arbitration exception (currently set out in Article 1(2)(d) of the Regulation) in order to bring arbitration within the scope of the Regulation. Although, the Commission also proposes special rules governing arbitration (e.g. giving exclusive jurisdiction to courts of the Member State of the place of arbitration, subject to any agreement between the parties to the contrary), respondents to the Green Paper are not convinced this is the correct approach.

The IBA’s Arbitration Committee and the French Committee on Arbitration believe that there is no justification for deletion of the arbitration exception from the Regulation and that this would adversely affect the effectiveness of arbitration agreements and lead to more difficulties than currently exist. However, the House of Lord EU Committee recognises that the present blanket exclusion of arbitration from the Regulation does not provide the best solution and supports the idea of giving exclusive jurisdiction to the courts of the Member States of the seat of the arbitration and also suggests that rules should be introduced to identify the seat in cases of doubt.

The extension of uniform jurisdiction rules to defendants domiciled outside the EU

The Commission raises the possibility of either extending the scope of the rules governing “special jurisdiction” to apply to defendants domiciled outside the EU or creating a new uniform jurisdictional regime catering to cases involving defendants outside the EU.

The Commission believes that lack of uniformity in the jurisdictional rules applicable in Member States in such situations gives rise to unequal access to justice for Community citizens and may have an adverse impact on the enforcement of mandatory EU laws, such as rules on consumer protection.

However, the Commission recognises the risk that such rules will lead to parallel proceedings before Member and non-EU States. For this reason and the difficulties raised by the *Osuwu v Jackson*⁴⁰ case, the House of Lords EU Committee is not convinced about the merits of this proposition and believes that the scope of this discussion needs to be broadened.

In addition to the proposals discussed above, the Green Paper also contains other proposals relating to patent litigation, ways to improve provisional measures and some further proposals by the Commission to improve the operation of the Regulation.

Conclusion

The Commission’s ambitious proposals have attracted a substantive amount of attention and constructive feedback, which the Commission will consider in detail before it issues the draft amendments, expected in the second half of 2010.



Although the Commission state that arbitration agreements should be given their fullest effect and enforcement of arbitral awards should be encouraged, the Commission’s proposals in this regard appear to be contrary to this intention.

⁴⁰ [2005] ECR I 1383
(C-281/02)

Rome I: What you need to know

In an attempt to standardise and modernise the rules on the law applicable to contractual obligations, the EU has adopted Regulation EC No. 593/2008, commonly described as "Rome I". Rome I came into force in the UK on 17 December 2009, replacing the Rome Convention as the law applicable to governing law issues arising out of contracts concluded after this date.

As a Regulation, Rome I is directly applicable and will need no enabling legislation from Member States. The aims of Rome I are to improve certainty as to the applicable law in contract, the predictability of the outcome of litigation, and the free movement of judgments - all of which are crucial in helping to ensure that the parties can be certain about the legal effect and value of their contract. In particular, the European Council was keen to ensure that, whilst the substantive law of the EU countries may be different, in situations involving a dispute as to which law applies, all courts of the Member States will apply the same law (whether it is their own or that of another Member State) to the contract in question.

Initially the UK government was sceptical of the new proposals and decided to opt out of Rome I, whilst continuing to take part in negotiations with the aim of securing amendments that could enable it to participate in the proposal in the future. Following consultations with businesses and some modifications (which brought Rome I closer to the original Rome Convention), the government opted back in.

In what circumstances is Rome I applicable?

The starting point is that Rome I preserves parties' freedom of choice and when parties have chosen the law applicable to their contract, that law shall apply. Where there is no agreement between the parties regarding the law applicable to contractual obligations in civil and commercial matters, Rome I sets out the rules for determining the applicable law. There are some specified exceptions, relating mainly to revenue, customs or administrative matters. Arbitration agreements, questions governed by company law, and questions of whether an agent is able to bind a principal are also excluded from Rome I (article 1). Rome I will not apply to dealings prior to the conclusion of a contract. Where Rome I does apply, any law specified by it shall be applied, whether or not it is the law of a Member State (article 2).

What's new?

The general rule under the Rome Convention was that, where there is an absence of choice by the parties, the law applicable to the contract was to be governed by the law of the country with which it is "*most closely connected*" (article 4(1)). However, there was an exception at article 4(5) that such a presumption "*shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country*".

Rome I takes a different approach. Eight types of contract are identified at article 4(1)(a)-(h), including, for example, contracts for the sale of goods or services, consumer contracts, insurance contracts and employment contracts. For each type of contract, a test is specified to establish the applicable law. For instance, typically, a contract for the sale of goods shall be governed by the law of the country where the seller has their “habitual residence”. A similar test is applied for distribution agreements, franchise agreements and contracts for the provision of services.

Contracts falling outside the categories of article 4(1)(a)-(h) are to be governed “by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence” (article 4(2)).

Article 19(1) of Rome I defines habitual residence for companies and other bodies, incorporated or not, as “the place of central administration”, while the habitual residence of a natural person acting in the course of their business activity is defined as being their “principal point of business”. For contracts concluded in the course of operations of a branch, agency or any other establishment, the habitual residence will be the place of the branch, agency or other establishment (article 19(2), Rome I). In determining the habitual residence, “the relevant point in time shall be the time of the conclusion of the contract” (article 19(3)).

Rome I provides that the “habitual residence” test specified under articles 4(1) and 4(2) will not apply where it is clear from the circumstances that a contract is “manifestly more closely connected” with another country. In these circumstances the “law of that other country shall apply” (article 4(1)(3)).

As a final catch all provision, if it is not otherwise possible to determine the applicable law using article 4(1) or (2) the “contract shall be governed by the law of the country with which it is most closely connected” (article 4(1)(4)).

A further substantive change under Rome I is that, notwithstanding any express choice of law or the applicable law pursuant to article 4, effect may be given to any overriding mandatory provisions of law of the country where the obligations arising out of the contract will be, or have been, performed insofar as those provisions render the performance of the contract unlawful (article 9.3).

Rome I also includes specific conflict-of-law rules for particular cases involving weaker parties, such as consumer contracts – one of the few areas to undergo fundamental change under Rome I. Under the Rome Convention, the consumer was protected by the mandatory laws of his habitual residence if he had entered a contract as a result of a specific invitation addressed to him or by way of advertising, and if the consumer had taken all the steps necessary on his part for the conclusion of the contract in that country. Under Rome I, the focus has changed. Now, subject to the overriding right for the parties to choose the law applicable to their contract, the default



For each type of contract, a test is specified to establish the applicable law.



As it is a directly applicable legal instrument, it is hoped that Rome I will remove differences in implementation that arose between Member States under the Convention.

position is that the entire contract will be deemed to be governed by the law of the consumer's habitual residence, provided that the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence, or directs such activities to that country or to several countries including that country, by any means (providing the contract in question falls within the scope of such activities). Whilst the aim no doubt was to simplify and enhance protection for the consumer, this change may have significant implications for those serving consumers, particularly those who are internet-based. Providers will have to ensure their contracts are effective under the law of the country in which they are pursuing activities. If the activities are provided to consumers in more than one country, this could be a time-consuming and costly business. Further, even if a specific governing law is chosen by the parties, this will be subject to any provisions that cannot be derogated from by agreement by virtue of the law which would have been otherwise applicable under Rome I (usually the consumer's habitual residence).

In other areas, such as individual employment contracts (article 8), the rules are consistent with those contained in the Rome Convention. Specifically, the parties may choose the applicable law but to the extent such law is not chosen, the law should be the law of the country in which the employee habitually carries out his work in performance of the contract. The employee is protected against a choice of law that would have the effect of depriving him of the benefit of laws that cannot be derogated from.

Rome I also consolidates the Rome Convention with various insurance Directives by making specific provision for insurance (but not reinsurance) contracts (article 7). In respect of so-called "large risk" contracts (as classified by Directive 73/239/EEC, such as those governing goods in transit, and certain of those concerning fire and natural forces, credit and miscellaneous financial loss), the parties' freedom of choice is unrestricted and Rome I applies whether or not the risk covered is situated in a Member State. To the extent that the applicable law has not been chosen by the parties, such insurance contracts shall be governed by the law of the country where the insurer has his habitual residence unless it can be shown that, given all the circumstances of the case, the contract is manifestly more connected with another country, in which case the law of that country shall apply. For other types of insurance contract covering risks situated inside the territory of member states, the freedom of the parties to choose is limited to a list of prescribed options, failing which such contracts shall be governed by the law of the member state in which the risk is situated at the time of the conclusion of the contract.

As it is a directly applicable legal instrument, it is hoped that Rome I will remove differences in implementation that arose between Member States under the Convention. The previous government's view was that Rome I improved upon the Rome Convention, containing important clarifications which secure greater predictability for parties operating in multiple jurisdictions. Certainly there is an advantage to UK business in continuing to apply uniform choice of law rules and ensuring a consistent approach across as wide an area of Europe as possible, theoretically promoting certainty and assisting with the reduction of legal and transaction costs.

Mediation in Europe

Within this jurisdiction at least, mediation has made a real impact on the dispute resolution landscape and is here to stay. When it comes to mediating cross-border disputes, however, there is still uncertainty over the legal classification and consequences of mediation in other European legal systems. Its use also varies significantly from country to country and there is a lack of a legal framework or any integration with other civil law provisions.

In June 2008, the European Parliament approved the European Mediation Directive⁴¹ (the Directive). The Directive is an attempt to redress uncertainty and encourage the use of mediation as a cost-effective and quicker alternative to civil litigation in cross-border commercial disputes. Intended to improve access to European justice, each Member State (excluding Denmark) has until June 2011 to incorporate the Directive into their national laws.

What are its objectives?

Article 1 of the Directive states that its objective is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. In other words, the Directive recognises the advantages that mediation has to offer and wants to see greater use of it as a dispute resolution tool in Europe.

What is its scope?

The scope of the Directive is restricted to mediation in civil and commercial matters. It does not, for example, cover tax, customs or administrative law disputes or those relating to the liability of the state. In addition, it does not apply to pre-contractual negotiations or to processes of an adjudicatory nature, such as arbitration and expert determination. Instead, it applies where two or more parties to a cross border dispute of a civil or commercial nature attempt by themselves, on a voluntary basis, to reach an amicable settlement with the assistance of a mediator. For the purposes of the Directive, a cross-border dispute is a dispute where one party is domiciled in a Member State other than that of any other party.

What are the key provisions?

The Directive covers five broad areas:

- Encouragement by Member States of mediator training and the development and adherence to a voluntary code of conduct and other quality control mechanisms (article 4). This is intended to increase confidence in the mediation process by ensuring consistent quality.

⁴¹ Directive 2008/52/EC

- The right for judges to invite parties to mediate, at any stage of proceedings, if they consider it appropriate in the circumstances (article 5). This is intended to encourage greater use of mediation.
- Imposing an obligation on Member States to ensure mediation settlement agreements are directly enforceable as if they were court judgments, if both parties so request (article 6). The ability of parties to enforce any settlement is crucial to give mediation the same standing as judicially determined disputes and arbitral awards.
- Guaranteeing the confidentiality of the mediation process (article 7). Parties will often only agree to mediation if they can be sure that the mediation and its outcome will remain confidential. The Directive supports this by providing that neither mediators nor those involved in the administration of the mediation process can be compelled to give evidence in subsequent judicial proceedings or arbitration.
- Suspension of the limitation period during mediation (article 8). The Directive obliges Member States to ensure that the subsequent proceedings are not derailed as a result of claims becoming statute-barred during the mediation process. In this way, the parties' rights are still preserved even if mediation is unsuccessful and an imminent expiry of a limitation period becomes no disincentive to mediate.

What next?

The Directive entered into force on 11 June 2008. Member States have three years to convert it into their national laws. It remains to be seen whether States will do so by 2011 and how the Directive will be implemented. In any event, the Commission has stated that it will closely monitor the implementation of the Directive by the Member States and ensure that the requirements of the Directive are met.

Given that mediation is well established and widely used in the UK, it is not expected that the Directive will have a great effect on mediation practice here. Most commercial parties are already familiar with the benefits of mediation and the English courts encourage and facilitate the use of ADR if appropriate. Nevertheless, implementation of parts of the Directive will still require legislative change in the UK. For example, mediation does not, at present, stop the running of time for limitation purposes in the underlying dispute. This will have to change in light of article 8 of the Directive. Further, although mediations in the UK are invariably subject to a formal mediation agreement that provides for confidentiality of the mediation process, in certain circumstances it is still possible to call a mediator as a witness to give evidence in proceedings (see *Farm Assist Limited (in liquidation) and the Secretary of State for the Environment, Food and Rural Affairs (No.2)*⁴²). Article 7 of the Directive aims to restrict this.

Elsewhere in Europe, the impact of the Directive will depend on the existing national laws of each Member State. French law, for example, already deals with many of the issues provided for in the Directive. Spain, on the other hand, would need to implement most of the Directive's provisions. Similarly, Dutch law does not provide that any settlement agreement resulting from mediation is enforceable.

Parties contemplating cross-border mediation should be aware of the key principles that the Directive creates. These are fundamentally designed to encourage and facilitate mediation within the EU. It remains to be seen whether the Directive will have that effect.

⁴² [2009] EWHC 1102 (TCC)

The new Supreme Court: all change for the UK's highest court?

On 1 October 2009, the United Kingdom's new Supreme Court was opened with the swearing in of its 11 justices in a ceremony in London. Set up under the Constitutional Reform Act 2005, the Supreme Court is housed in Middlesex Guildhall and replaces the House of Lords as the highest court of appeal in the UK. The House of Lords' judicial business had previously been conducted by the 12 Lords of Appeal in Ordinary (the "Law Lords") sitting as the Judicial Committee. Indeed, the House of Lords have presided over appeals in one form or another for over 600 years.

The major change is constitutional; Parliament's law makers and the judges charged with overseeing legislation have finally been separated. As the chairman of the bar council wrote in the Times newspaper in 2003 when criticising the previous system *"Judges should have no part of the legislature. It is very difficult to understand why our Supreme Court (the Law Lords) should be a committee of the second house of parliament"*. Further, the considerable growth of judicial review cases in recent years has brought the judges further into the political arena and forced them to make frequently controversial decisions. It was not always understood that decisions of the "House of Lords" were in practice decisions of an appellate committee and that non-judicial members of the House never sit as judges. Equally it was not widely known that the Law Lords (usually) refrained from getting involved in political issues concerning draft legislation on which they might later have to adjudicate.

There has been some concern expressed that the new court might become more powerful than the House of Lords Judicial Committee it replaces. One of the former Law Lords, Lord Neuberger, has stated that there was a real risk of the new justices in the Supreme Court *"arrogating to themselves greater power than they have at present"*. Lord Neuberger in October 2009 stepped down from the House of Lords to return to the Court of Appeal as head of its civil division (Master of the Rolls). The first president of the Supreme Court, Lord Phillips, however, views the Supreme Court as very much continuing the work of the Law Lords *"I can't predict quite how we are going to function in the new world, but I don't myself see that it is going to see a change of that nature [as suggested by Lord Neuberger]"*. As the Supreme Court does not have any powers that were not previously exercised by the Law Lords, other than gaining the devolution jurisdiction of the judicial committee of the Privy Council, in practice, it is unlikely to be any more (or less) confrontational than the old House of Lords.

Further, the Supreme Court's appointment process was crafted to try to immunise the selection process from partisan politics. Lord Phillips has a powerful position as he will chair the selection commissions for new members of the court and also for his own replacement. The choice of members of the court and the selection of its two lead judges, the president and deputy president, will be made by a five man commission chaired by the president of the court. They carry out their task in private along with three further members drawn from the judicial appointments commission. The names of the new justices will then emerge after private soundings. The public simply learns the identity of a new justice at the end of the decision

making process with the issue of a brief press release. However, this lack of outside scrutiny may well become controversial as there are wide differences in judges' approaches to important issues of legal policy such as the proper scope of judicial review and the width of discretion that should be accorded to public bodies in applying the Human Rights Act. Lord Phillips himself has acknowledged that there is likely to be more interest in who is appointed to serve in the new Supreme Court. Contrast the American President's power to select Supreme Court justices, exercised with the "advice and consent" of the Senate. For four days in the summer of 2009 president Obama's first nominee for the US Supreme Court appeared before the judicial committee of the United States Senate. Judge Sonia Sotomayor answered questions from senators concerning her appointment live on television and on-line. The UK appointment model certainly protects the independence of the process from the danger of partisan meddling, but as the function of the Supreme Court includes the review of legislative and executive action, the question arises as to whether the UK appointment process provides an appropriate level of accountability. By contrast, newly selected members of the Bank of England's Monetary Policy Committee appear before the Treasury Select Committee, providing both written responses to a standard questionnaire and oral evidence. The Treasury Select Committee explains the rationale of this process as enhancing "*the transparency of the appointment process and [increasing] the level of information available to the public and to parliament about the functioning of the MPC*". Decisions of the Supreme Court can be at least as important as MPC decisions, thus appearances by prospective Supreme Court justices before a Parliamentary Committee would arguably enhance confidence in the appointment process and the new court.

A problem that has not been resolved by the creation of the Supreme Court is the amount of time the justices are likely to spend on Privy Council matters. Lord Phillips has accepted that this is "disproportionate" and he has stated he is searching for ways to curb the time spent on Privy Council business (mostly hearing legal appeals from a number of small independent commonwealth countries). During their previous incarnations as Law Lords, typically 40% of their working hours were spent on Privy Council business. The problem is intensified because there is often little filtering of cases before they reach the Privy Council, meaning that the Law Lords are sometimes hearing cases that would not have even reached the Court of Appeal if they had originated domestically. Lord Phillips has stated that he is looking to take some pressure off the Supreme Court by drafting in Court of Appeal judges to help out, although he has stated that "in an ideal world" former Commonwealth countries would stop using the Privy Council and set up their own final courts of appeal instead.

The new Supreme Court will handle appeals in a similar way to the House of Lords. Greater separation of the judiciary from the legislature is to be applauded, as is the greater transparency that the new Court will allow. Whether this is worth the estimated £60 million cost of setting up the Supreme Court is another matter. Since its formation the Supreme Court has been busy. For example, some 21 judgments were handed down before the end of 2009. Questions regarding the lack of scrutiny of the appointment process for Supreme Court justices and the "disproportionate" amount of time they are likely to spend on Privy Council business, however, remain unanswered. Do not expect any further change any time soon as this is not a fast reforming institution: the House of Lords heard appeals for over 600 years yet the first female Law Lord was only appointed in 2004!



Questions regarding the lack of scrutiny of the appointment process for Supreme Court justices and the "disproportionate" amount of time they are likely to spend on Privy Council business, however, remain unanswered.

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