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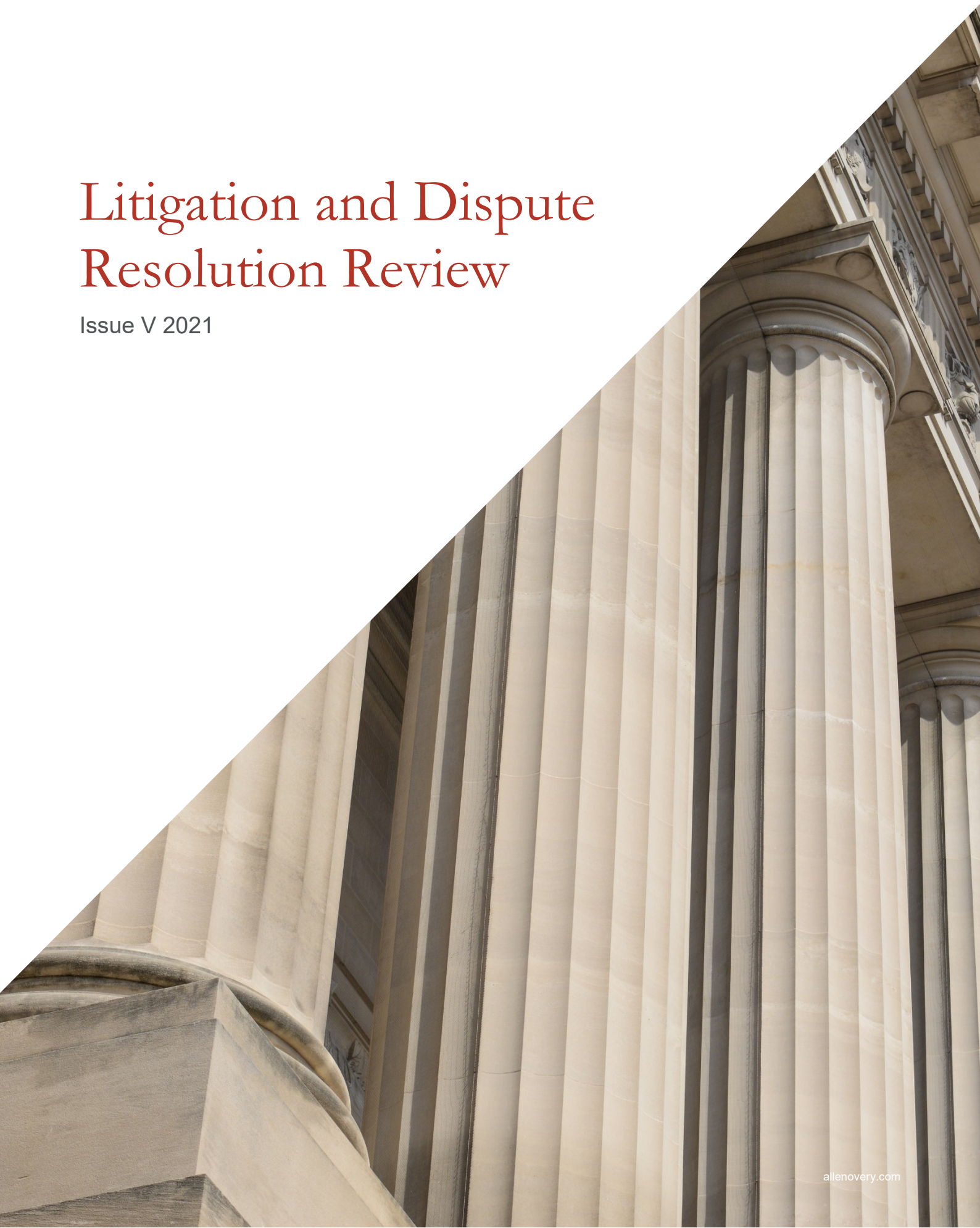

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Arbitration

Effect of non-compliance with a pre-arbitral obligation to mediate: who decides?

NWA & ors v NVF & ors [2021] EWHC 2666 (Comm), 8 October 2021

NWA v NVF, hot on the heels of a similar decision in *Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), confirms that, under English law, non-compliance with a pre-arbitral obligation to mediate is a matter of the admissibility of a claim, which is for the arbitral tribunal to resolve, rather than a matter of jurisdiction. This means that a tribunal's award on the matter is not subject to a s67 challenge under the Arbitration Act 1996 (the **Act**).

A multi-tiered dispute resolution clause

The contract in question contained a multi-tiered dispute resolution clause. Clause 10.2(a) provided that, in the event of a dispute, the parties "shall first seek settlement of that dispute by mediation in accordance with the [LCIA] Mediation Procedure". Clause 10.2(b) followed, which said that "[i]f the dispute is not settled by mediation within 30 days of the commencement of the mediation … the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules".

Clause 10.2 also provided for expedited arbitral proceedings and that, if a further dispute arose once arbitral proceedings were underway, the tribunal could consolidate the disputes, in which case "there shall be no obligation on the parties to first refer those disputes to mediation before they are so consolidated".

The seat of the arbitration was evidently London since the eventual award was challenged before the English court; the governing laws of the contract and arbitration agreement were not specified in the judgment.

When a dispute arose, the defendants (claimants in the arbitration) filed a Request for Arbitration. At the same time, they sought an immediate stay of the arbitration, to try to settle the dispute by mediation in accordance with clause 10.2(a). Despite multiple invitations by the defendants to mediate, the claimants refused to engage.

The arbitration eventually proceeded, with the tribunal, in a partial award, holding that it had jurisdiction to determine the dispute – notwithstanding the Request for Arbitration having been issued on the same date as the first invitation to mediate.

Even though they had refused to participate in a mediation, the claimants proceeded to challenge the award under s67(1)(a) of the Act on the basis that the tribunal lacked jurisdiction since no mediation had taken place before the arbitration was started.

Admissibility or jurisdiction?

The key issue was whether the defendants' alleged non-compliance with the requirement to mediate went to: (i) the admissibility of the claim; or (ii) the tribunal's substantive jurisdiction to determine the claim. "Admissibility" refers to whether pre-arbitration procedural requirements have been complied with. This is regarded as an issue for the tribunal; it concerns whether a claim is "ripe" for arbitration rather than whether the tribunal has jurisdiction (the legal right or competency) to decide the claim at all. The distinction between issues of admissibility and jurisdiction is important because only issues of jurisdiction can be the subject of a challenge to the court under s67 of the Act.

In line with numerous academic commentaries which were cited in the judgment, the court was firmly of the view that non-compliance with the requirement to mediate went to admissibility:

- First, when construing an arbitration agreement, one must bear in mind its commercial purpose. Here, the parties clearly intended that, in terms of binding proceedings, their disputes be arbitrated, rather than litigated, and swiftly (hence only a 30-day window for mediation, and provisions for expedited arbitral proceedings). They could not have intended that one party's refusal to engage in mediation should frustrate the arbitral process.
- Second, the tribunal's express power to consolidate an existing arbitration with a new dispute, without the new dispute being referred first to mediation, demonstrated that the requirement to mediate was merely a procedural matter for the tribunal to rule on (and presupposed that the tribunal had jurisdiction to do so).
- Third, non-compliance with the pre-arbitration procedure did not affect whether the dispute was of the kind which could be submitted to arbitration.
- Finally, this accorded with the English court's 2021 decision in *Sierra Leone v SL Mining Ltd*, in which it had been held that non-compliance with a requirement to "in good faith endeavour to reach an amicable settlement" prior to arbitrating was a matter of admissibility for the tribunal to resolve.

Given this ruling in *NWA v NVF*, it was not necessary for the court to consider the tribunal's decision on the alleged non-compliance with the mediation obligation.[1] Nonetheless, the court indicated that even if clause 10.2(a) ("the … parties … shall first seek settlement … by mediation") was enforceable (the tribunal did not think so), it would have held that the tribunal had jurisdiction: the claimants were in breach of the obligation to mediate and could not now rely on that breach to claim the defendants had failed to comply with it; alternatively, the parties had waived compliance with the obligation.

The challenge was therefore dismissed.

Comment

NWA v NVF, in conjunction with *Sierra Leone v SL Mining Ltd*, clarifies that compliance with pre-arbitration procedure is a matter of admissibility, and is therefore a matter for the tribunal. It should now be beyond doubt that a challenge cannot be made to a tribunal's jurisdiction on the basis that the pre-arbitration procedure has not been complied with.

This is not to say that pre-arbitral obligations in a multi-tiered dispute resolution clause are unimportant. On the contrary, it has become increasingly clear (especially since the decision in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm)) that such provisions may well be enforceable. (In this respect, the tribunal's decision may be regarded as controversial, but the court's decision on admissibility meant that it did not have to consider this question.) While regulating compliance is a matter for tribunals rather than courts, one should, at least for caution's sake, assume that tribunals will enforce them.

Complying with these procedural steps also avoids undesirable satellite disputes such as the one seen in this case. The defendants could have commenced a mediation by filing a Request for Mediation, and waited the 30 days before commencing the arbitration. They did not do so and, while they were successful in these court proceedings, they were still arguing about the consequences of their approach before court two and a half years after commencing the arbitration.

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[1] The tribunal had held that the obligation to mediate was insufficiently clear to be enforceable; the defendants (NVF) were arguably not in breach in any event due to their efforts to mediate; and to give business efficacy to clause 10.2(b), it should not be read literally.

Governing law of arbitration agreement

Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48, 26 October 2021

The UK Supreme Court refused to enforce an ICC arbitration award against a Kuwaiti company. Where the governing law of an arbitration agreement was not specified, the governing law of the contract (English law) applied, despite Paris being the arbitral seat. The risk of an inconsistent decision in France (as the courts would likely apply French law) in pending litigation involving the same arbitration award could not, in the Supreme Court's view, be avoided. The case highlights the importance of specifying the governing law clause both of the contract as a whole and also of the arbitration agreement where the seat of the arbitration and the governing law of the contract are different. Otherwise, there is a risk of a prolonged dispute about the governing law of the arbitration agreement, such as happened here.

English and French applicable laws and parallel proceedings

Kabab-Ji (a Lebanese company) entered into an agreement with Al Homaizi Foodstuff Company (**Al Homaizi**, a Kuwaiti company), giving the latter a licence to operate its restaurant franchise in Kuwait for ten years (the **Agreement**). The Agreement was English law governed and contained an arbitration clause providing for arbitration under the rules of the International Chamber of Commerce (ICC) in Paris. It did not expressly specify the governing law of the arbitration agreement.

Following a corporate reorganisation, Al Homaizi became a subsidiary of Kout Food Group (**KFG**). When a dispute arose under the Agreement, Kabab-Ji brought ICC arbitration proceedings against KFG only (not Al Homaizi). KFG argued that it was not a party to the arbitration agreement, and participated in the arbitration only under protest.

The arbitration tribunal considered that it must apply French law (as the law of the seat) to determine whether KFG was bound by the arbitration agreement; but English law to decide whether KFG had acquired substantive rights under the Agreement. The tribunal found that, under French law, KFG was a party to the arbitration agreement; and under English law, KFG was an "additional party" to the Agreement by "novation by addition" (although the sole English-qualified arbitrator dissented on this point). The tribunal found KFG liable for damages and unpaid licence fees.

Kabab-Ji sought enforcement of this award before the Commercial Court in London. KFG, on the other hand, applied to the Paris Court of Appeal to set aside the award, including on the basis that the arbitrators had no jurisdiction over KFG as it was not a party to the arbitration agreement. KFG also asked the English Commercial Court to refuse recognition and enforcement of the award.

The English Commercial Court held that the validity of the arbitration agreement was governed by English law and that (subject to a point left open) it followed, as a matter of English law, that KFG was not a party to the Agreement or the arbitration agreement. The court postponed making a final decision on enforcement pending the decision of the Paris Court of Appeal.

On appeal by both parties, the English Court of Appeal held that the Commercial Court was correct but should have made a final determination (rather than adjourning pending a decision of the French Court). The Court of Appeal gave summary judgment in favour of KFG, refusing recognition and enforcement of the award. Kabab-Ji appealed to the Supreme Court.

Governing law of the arbitration agreement

KFG's only ground for resisting enforcement was that the award was based on an invalid arbitration agreement. The law governing the arbitration agreement, which had not been specified by the parties, was therefore key.

The UK Supreme Court referred back to its ruling of last year in *Enka v Chubb*: that, where the law applicable to an arbitration agreement is not specified, generally it will be considered to be the governing law of the contract rather than of the seat of the arbitration (unless there is good reason to conclude otherwise).

The court clarified that this principle applies whether the issue is raised before (as in *Enka v Chubb*) or after (as in the present case) an award is made.

As the governing law for the Agreement was English law, the arbitration agreement was also governed by English law.

Parties to the arbitration agreement and impact on enforceability of award in England and Wales

The UK Supreme Court dismissed Kabab Ji's argument that KFG became a party to the arbitration agreement by novation because of the parties' conduct and the performance by KFG of various contractual obligations over a sustained period of time. The Agreement contained a number of provisions which prescribed that it could not be amended save in writing signed on behalf of both parties ("no oral modification" clauses), which are effective under English law as confirmed by the Supreme Court in *Rock Advertising v MWB Business Exchange Centres* [2018] UKSC 24.

The Supreme Court held that under English law there was no real prospect of an English court holding that KFG became a party to the arbitration agreement after Al Homaisi became a subsidiary. As such, summary judgment on the point was appropriate and proportionate.

The Supreme Court also upheld the Court of Appeal's decision not to adjourn the ruling on recognition and enforcement pending determination by the French court. The Court recognised that where the French court applied French law to the question in issue and the English court applied English law, the risk of contradictory judgments could not be avoided, and so an adjournment would serve no purpose.

Comment

The UK Supreme Court's decision is a clear application and confirmation of the rules on determining the governing law of an arbitration agreement (if not specified in the agreement) set out in *Enka v Chubb*. It puts beyond doubt that the same reasoning will apply when the issue arises at the enforcement stage.

The decision also illustrates the risk of inconsistent decisions, in the post-award phase of an arbitration, because of options available to a losing party to challenge an award at the seat of arbitration and to resist enforcement in other jurisdictions. While KFG has prevailed in the English courts, the Paris Court of Appeal rejected KFG's application to set aside the award in June 2020. The Paris Court held that KFG had not shown that the parties intended to apply English law to the arbitration agreement, and so applied French law on the basis that the law of the arbitration agreement should follow the express law of the seat. KFG's appeal is pending before the French Court of Cassation. The risk of inconsistent decisions is particularly acute if there is disagreement between the parties about which law applies to an arbitration agreement because, as this case shows, there is no internationally consistent approach to this issue.

This case demonstrates the value of expressly specifying not only (1) the governing law applicable to a contract, and (2) the seat of arbitration, but also (3), where (1) and (2) are different, the law applicable to the arbitration agreement. Sometimes the seat is chosen for being a safe and predictable place for resolving international disputes, but the governing law is a less predictable local law. In these circumstances, it would be prudent to specify the law of the seat that will govern the arbitration agreement too. This case shows that the law applicable to the arbitration agreement can be decisive in the outcome of a dispute, so it is worth paying attention to.

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Enforcement of arbitration awards against States – court documents must be served through diplomatic channels

General Dynamics v Libya [2021] UKSC 22, 25 June 2021

The UK Supreme Court confirmed that diplomatic service of court documents on a State's Ministry of Foreign Affairs is mandatory when enforcing an arbitral award against a foreign State. The only exception to this is where the State has agreed that service may be effected by another mechanism. This is a helpful decision for State parties. For non-State parties, it reinforces the importance of including a process agent clause when contracting with a State counterparty.

Section 12 of the UK State Immunity Act 1978 (**SIA 1978**) governs service of process against a State. It provides for diplomatic service of "any writ or other document required to be served for instituting proceedings against a State" through the UK Foreign, Commonwealth and Development Office (**FCDO**) on that State's Ministry of Foreign Affairs. The question arose in *General Dynamics v Libya* as to whether this requirement could be dispensed with in circumstances where a State faced political unrest.

General Dynamics seeks permission to dispense with formal service on Libya

In 2016, General Dynamics obtained a GBP16 million ICC (International Chamber of Commerce) arbitral award against Libya for breach of contract in relation to a contract for the supply of communications systems. General Dynamics sought enforcement of the award in England and Wales and issued proceedings under s101 Arbitration Act 1996, obtaining a court order granting permission to enforce the award. The court order also granted permission to dispense with the need for formal service due to the British embassy in Tripoli having closed and uncertainty as to whether the FCDO could effect service in light of the civil unrest and political instability in Libya at the time.

In the Supreme Court Libya argued that diplomatic service by the FCDO was mandatory under s12(1) SIA 1978, even if service was impossible or unduly difficult. General Dynamics argued that Libya's position would infringe the right to a fair trial and of access to the courts, including under Article 6 of the European Convention on Human Rights.

Section 12 State Immunity Act 1978 covers applications to enforce arbitral awards

On 25 June 2021, the UK Supreme Court confirmed by a majority of 3-2 that, absent any agreement by the State to service by a different method (provided for in s12(6) SIA 1978), documents instituting proceedings against a State must be served through the FCDO on a State's Ministry of Foreign Affairs.

The majority found that the words "other document required to be served for instituting proceedings against a State" in s12(1) SIA 1978 were wide enough to apply to enforcement applications. In the context of enforcing arbitral awards, the relevant document was held to be the arbitration claim form (if the court orders that it must be served), or otherwise the order granting permission to enforce the award.

The Supreme Court rejected Libya's argument that, under Article 22 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 (the **Convention**), there was a rule of customary international law requiring service of documents instituting proceedings against a foreign State to be effected through the diplomatic

channel or in a manner agreed by the defendant State. The Convention article cited by Libya (which was also not yet in force) was not declaratory of customary international law, as State practice was too diverse. Nevertheless, the fundamental principles of comity and sovereign equality of States provided support for the wider reading of s12(1) SIA 1978 being adopted.

Dispensing with service not permitted, even in exceptional circumstances

The Civil Procedure Rules (the **CPR**) include provisions permitting a court to dispense with formal service. CPR 6.16 is limited to claim forms, and requires "exceptional circumstances" for the court to dispense with service. CPR 6.28 (which sets out a general power to dispense with service) applies to any other document, and contains no express provision limiting the circumstances in which the court's discretion may be exercised. However, the majority found that CPR 6.1(a) makes clear that the provisions on service of documents contained in the CPR do not apply where any other enactment or a practice direction makes different provision. This would include s12(1) SIA 1978.

The majority held that, where s12(1) SIA 1978 applies, the procedure it establishes is mandatory and exclusive. Such primary legislation cannot be overridden by the rules of the court and service cannot be dispensed with, even in exceptional circumstances.

Right to a fair trial not infringed

The Supreme Court majority rejected General Dynamics' argument that the requirements of s12(1) SIA 1978 may, by preventing a claimant from pursuing its claim, infringe Article 6 of the European Convention on Human Rights and the constitutional right of access to the court. The majority held that s12(1) SIA 1978 is a proportionate means of pursuing the legitimate objective of providing a method of service consistent with international law and comity. Although exceptional circumstances had prevented the effective operation of the procedure in the present case, this was not a sufficient basis to justify the making of alternative directions for service.

Comment

While practitioners who struggle to serve States via the FCDO may have preferred the minority Supreme Court view that s12(1) SIA 1978 could be dispensed with in certain circumstances, this ruling demonstrates the critical importance of following notice requirements when enforcing arbitral awards or bringing proceedings against foreign States in the UK. It also demonstrates the importance to non-State parties of expressly agreeing with State counterparties' alternative methods of service, specifically process agent provisions in transaction documents. Absent such provisions, if service via diplomatic channels proves to be impossible, this is likely to be a significant barrier to pursuing litigation or enforcement actions against State parties. In the event, the FCDO did in fact succeed in serving Libya by diplomatic means in this case, shortly before the Supreme Court's judgment was issued and three years after General Dynamics had commenced its initial enforcement proceedings.

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Class actions

Lloyd v Google: a sigh of relief for data controllers

Lloyd v Google [2021] UKSC 50, 10 November 2021

In unanimously refusing to allow a representative action to proceed, the UK Supreme Court may have sounded the death knell for opt-out class actions in England for data breaches.

The Safari workaround

Back in 2011 Apple's Safari web browser on iPhones blocked all third party cookies. This prevented popular websites from working, so Apple introduced some exceptions. Lloyd, a former executive director of the consumer group *Which?*, alleges that Google used these to enable its "DoubleClick Ad" cookie to be put on users' devices without their knowledge or consent whenever the user visited a site with Google content: the Safari workaround. This, according to Lloyd, allowed Google to tell, among other things, the date and time of any visit, how long the user spent there, which adverts were viewed and for how long, and the approximate geographical location of the user (from the IP address). Over time, the allegation was that Google was able to build up profiles of the users who were grouped as, for example, "football lovers" or "current affairs enthusiasts".

Permission to serve out of the jurisdiction

Lloyd was trying to bring a representative action on behalf of more than 4m iPhone users in England for claimed breaches of data protection legislation arising from the use of the Safari workaround, specifically s13 Data Protection Act 1998 (being a pre-GDPR cause of action). To serve a claim form on Google in the U.S., Lloyd needed to show that the claim had a reasonable prospect of success.

Representative action – a form of opt-out class action?

Lloyd was trying to use a longstanding procedural mechanism to fashion an opt-out class action for the claim. Outside of the relatively new collective proceedings mechanism in the Competition Appeal Tribunal, where you can bring opt-out antitrust class actions, we have not seen this in England before. Representative actions were developed by the Courts of Chancery in the 16th and 17th centuries and have since found their way into the modern Civil Procedure Rules (CPR 19.6). The obstacle for claimants trying to bring a representative action has always been the requirement to show that all members of the class have the "same interest" in the claim. Many attempts have been rejected for failing to meet this exacting prerequisite. *Jalla v Shell* is a recent example where the Bonga community in Nigeria were not able to show sufficient identity of interest in a claim relating to an oil spill: limitation, causation and damage all varied between the 28,000 or so members of the group. Claimants wishing to bring group actions have therefore tended to rely on group litigation orders (**GLOs**) to pursue their claims. The requirement for a GLO is only that there are common or related issues of fact or law. GLOs are opt in, however, which can be a less favourable option for claimants seeking to exert pressure on a defendant: the economics and administrative burdens are far less advantageous. The unsuccessful claim by around 5,500 employees (out of 100,000 potentially affected) against Morrisons for claimed data breaches that went to the Supreme Court in 2020 was brought under a GLO.

Google said that Lloyd had not shown any basis for claiming compensation (no actual damage had been suffered). Google also said that, in any event, the court should not permit the claim to continue as a representative action. The claimants did not have the "same interest" and could not be identified. So, by definition, Lloyd had no reasonable prospect of success.

Lloyd (and his team of three QCs, backed by a litigation funder) sought to counter this by deliberately framing the claim as one for uniform, per capita, compensation for "loss of control" of personal data and not a claim for material damage or distress, the quantum of which could be different for different claimants. He argued that:

- all that was needed was to show a loss of control of the personal data. This was the only "damage" required to pursue the claim. The claim did not depend on showing, in addition, pecuniary loss or distress; and
- there was no variation in the "damage" that the claimants suffered since, it was claimed, they all suffered the same loss of control. The claimants all had the "same interest".

As a result, Lloyd said, there was a reasonable prospect of success.

Interveners

There were six interveners. Among them was the Information Commissioner's Office (the **ICO**), taking Lloyd's side. At the two-day hearing in April, the ICO was asked why it had not taken regulatory action. The gist of its answer was that the regime was different ten years ago.

Supreme Court conducts an extensive review of representative actions

The court undertook a detailed review of representative actions both in England and the Commonwealth. Acknowledging that the world had changed beyond recognition since their inception, it nonetheless had to reconcile the cases and interpret the meaning of "same interest" in the light of the overriding objective of the CPR.

Conceptually the court noted that a representative action is not founded on consent; it is based on community of interest.

Bifurcated process would have been okay

The court saw no objection in principle to the case being brought in two stages: a representative action on liability seeking a declaration that damage had been suffered; and then separate actions by individual claimants or by opt-in group litigation, where appropriate, pursuing damages for material damage or distress. The court accepted that this may well not be economically viable.

The court referred to the Judge's finding at first instance that in fact the class members were not impacted uniformly by the Safari workaround. There were 17 distinct categories of personal data. Some were sensitive personal data (eg sexuality or ethnicity). Users would also have had quite different attitudes to the use of the data by Google.

No action for "loss of control" under s13 DPA 1998

Fundamentally, the court did not accept, as a matter of statutory interpretation, that the DPA 1998 gave an individual a right to compensation without proof of material damage or distress whenever a data controller commits a non-trivial breach of any requirement of the DPA 1998 in relation to any personal data of which that individual is the subject. A claim could not exist for mere loss of control under the DPA 1998, in the way that it could for misuse of private information (see the phone-hacking case *Gulati*).

Unlike the Court of Appeal, the Supreme Court did not believe that EU law changed the meaning of damage" to cover a simple loss of control. Neither the DPA 1998, nor the Data Protection Directive behind it, contemplated compensation for infringement of a legal right which causes no material damage or distress.

The need to evidence individual unlawful processing

The claim against Google was (deliberately) pleaded on a generic basis. Lloyd said all that was required was that a claimant had an iPhone during the relevant period and accessed a website via the Safari browser that participated in Google's DoubleClick advertising service while present in England. This was insufficient. Lloyd needed to show actual, unlawful processing of each individual's data to enable the court to decide the amount of damages, if any, that should be awarded.

No permission to serve out

The court decided for all the above reasons that Lloyd had no reasonable prospect of succeeding in his claim and so permission to serve out was not given.

Comment

Given the case law, it was always going to be a stretch to fit a class action of this size and with this potential variance among the members within the representative action regime. Lloyd did his best to craft a claim specifically to do this but the Supreme Court was not persuaded.

Claimants are likely to revert to GLOs, which are opt in and collective proceedings (if there is an antitrust angle). As the Morrisons case showed, where fewer than 10% of the class opted in, the economics of GLOs may make them less attractive than opt-out class actions. Alternatively, some claimants may be able to make the bifurcated approach work.

It was not put in these terms but the emphasis on damages being for compensation contrasts with what lies behind regulatory fines, which have a significant punitive element.

The decision also makes clear that, individually or collectively, there is no cause of action for mere "loss of control" under the DPA 1998.

For those who read my note on the **Court of Appeal decision**, it turns out it did not matter, after all, that I had a BlackBerry back in 2011.

A sigh of relief then for data controllers.

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Representative actions – "same interest" test proves a high bar

Jalla & anr v Shell International Trading and Shipping Co Ltd & anr (Appeal (2): Representative Action) [2021] EWCA Civ 1389, 29 September 2021

The UK Court of Appeal endorsed a strict approach to the "same interest" test when it upheld a decision to strike out the representative element of a claim brought on behalf of 27,800 individuals and 457 communities in Nigeria, seeking redress for damage allegedly caused to land and water by a 2011 oil spill in the Bonga oilfield. Even though the court agreed that the claims of Messrs Jalla and Chujor, and those they represented, raised some common issues of law and fact, it held that the group of claimants did not share the "same interest" as required by the UK Civil Procedure Rules (**CPR**) rule 19.6 in order to bring a representative action.

The second respondent operates a Floating Production Storage and Offloading facility in the Bonga oilfield, 120km off the coast of Nigeria. During an oil transportation operation in December 2011, something went wrong and a significant amount of oil spilled into the sea, an act for which the second respondent is alleged to be liable. The first respondent is alleged to be liable for the conduct of the master and crew of the relevant vessel.

The appellants are two individuals from the Nigerian Bonga community. They issued a claim on behalf of themselves and 27,800 individuals and 457 communities based along the Bonga coastline as "represented parties" under CPR 19.6, for damage to the land and water caused by the oil spill. They are seeking remediation relief either in the form of an injunction for the respondents to clean up the damage or for compensation for the represented parties to do the clean-up themselves.

The respondents applied to strike out the proceedings on various grounds, including that they could not properly constitute a representative action because the two appellants and those they purported to represent did not all have the "same interest" as required by CPR 19.6.

Representative actions

CPR 19.6 allows a claim to be brought by or against one or more other persons who have the same interests as those being represented. The principles behind the regime are to save time and costs and to facilitate efficient case management.

It is 'opt out' in nature, meaning that it does not require individual claimants to be joined as parties to the claim or even identified. Represented parties therefore are not automatically subject to disclosure or costs obligations and do not need to participate actively in the proceedings at all. The representative claimant has full control over the conduct of the case. However, any judgment or order will be binding on all represented persons.

It is the closest mechanism under English law to the U.S. style "class action", but mass tort litigations remain uncommon before the English courts, in contrast to the U.S., as the English courts have traditionally applied a restrictive approach to interpreting the "same interest" requirement. Claimants wishing to bring group actions in the UK courts therefore have typically tended to rely on Group Litigation Orders (**GLOs**), which only require "common" or "related" issues of fact or law. The economic and administrative burden is greater, though, given the need for upfront book-building and still having to deal with individual claims.

There has, however, been renewed focus on representative actions since the case of *Lloyd v Google* entered the UK courts and in particular when the Court of Appeal allowed a representative action brought by Mr Lloyd on behalf of 4.4m iPhone users for damages for loss of control of their data to proceed (this decision has since been overruled).[1] It is clear that the claimants and *Jalla* took inspiration from this decision – much of the argument in *Jalla* was about trying to distinguish *Lloyd*.

The strike-out application in *Jalla v Shell*

The first instance judge adopted the restrictive interpretation approach, finding that the represented parties did not have the "same interest" and so the case could not proceed as a representative action. There were some common issues such as the fact of the oil spill and how and why it occurred, but the judge found that issues such as causation, loss and damage would have to be considered on an individual basis.

Each represented party would have to prove that this particular oil spill had caused them damage (as there were numerous other cases of oil pollution in the area) and the degree of that damage (as some individuals may have suffered more extensive damage than others). Some of the represented parties may also have had limitation issues. Even the causation issues were different as there was the possibility that other forms of pollution, as well as pollution by other parties, had caused the alleged damage. As such, it could not be said that the represented parties had the "same interest". Instead, the judge concluded that the claim represented a very large number of individual claims requiring individual consideration and proof of damage and the generation of individual defences.

The appellants appealed on the grounds that:

- the judge had erred in finding that the appellants and the represented parties did not have the "same interest"; and
- the judge had erred by holding that this case was materially distinguishable from *Lloyd*.

The represented parties did not have the "same interest"

The Court of Appeal upheld the first instance decision in respect of the "same interest" test and agreed with the first instance judge that the case was materially distinguishable from *Lloyd*.

[1] [2019] EWCA Civ 1599.

It should be noted here that, shortly after the Court of Appeal's decision in *Jalla*, the Supreme Court overturned the Court of Appeal's decision in *Lloyd* and unanimously refused to allow Mr Lloyd's claim to proceed as a representative action. However, *even* though the Court of Appeal had proceeded in *Jalla* on the basis that its decision in *Lloyd* was good law and that the case could proceed as a representative action, it was not persuaded that *Jalla* could do so as the position of the claimants in *Jalla* was too different.

The Court of Appeal observed that the primary purpose of CPR 19.6 is to save time and cost because a representative action avoids the "granularity" of considering the individual claims of each of the represented parties. The court held that the primary purpose of a representative action could not be achieved in this case because the issues of limitation, causation, loss and damage would each have to be addressed on a case-by-case basis. This was, in the Court of Appeal's view, in contrast to *Lloyd* where the claim was deliberately formulated so that the represented parties were claiming for a uniform amount of damages, based on the same cause of action of loss of control of their browsing information. No claim was brought based on personal circumstances that might vary among class members, such as distress or the volume of data abstracted. Instead, Mr Lloyd had argued that damages should be awarded for mere infringement (effectively strict liability).

The existence of "individualised claims" would not always preclude a representative action but the Court of Appeal held that it is a question as to whether those individualised claims can be regarded as subsidiary to the main issue that is the subject of the proceedings. The individualised issues raised in *Jalla* went to loss, damage and causation and therefore were not subsidiary issues at all. They were just as critical as the common issues to any prospects of success or relief.

The Court of Appeal also held that there is a need for certainty from the outset about the membership of the represented class. In this case, there was not sufficient certainty as each represented party could only become one if they could show that they had suffered damage as a result of the oil spill, which would require a trial.

Comment

The case of *Jalla v Shell* provides a useful distillation of the principles behind the representative action regime. However, it also highlights the difficulties in bringing claims under CPR 19.6 given the requirement for the "same interest" between the representative claimant and the represented parties. Between this decision and the Supreme Court's decision in *Lloyd*, the regime is likely to stay confined to a very narrow group of cases and with the floodgates to mass tort litigations remaining firmly closed for now.

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Contract

Interpretation of contractual releases in settlement agreements

Maranello Rosso Ltd v (1) Lohomij BV (2) Bonhams 1793 Ltd (3) Bonhams & Butterfields Auctioneers Corporation (4) Evert Louwman (5) Robert Brooks (6) James Knight (7) Anthony Maclean [2021] EWHC 2452 (Ch), 6 September 2021

In striking out claims for fraud, dishonesty and conspiracy, the court confirmed that the normal principles of construction apply to the interpretation of contractual releases in settlement agreements.

Maranello purchased a collection of classic cars, using financing provided by Lohomij. The terms of the financing arrangement required Maranello to sell the cars through an auction house, Bonhams, and prohibited Maranello from disposing of the collection without Lohomij's consent. Following allegations that Lohomij and Bonhams had acted negligently in conducting the sale, the parties entered into a settlement agreement in respect of Maranello's complaints.

Maranello subsequently issued proceedings for unlawful means conspiracy, fraudulent misrepresentation, breach of fiduciary duty and the duty of good faith, and dishonest assistance.

The main issue was whether these claims had been compromised and released by the settlement agreement.

The court confirmed the approach taken in *BCCI v Ali*, emphasising that the normal principles of construction applied to the interpretation of contractual releases, such as those contained in settlement agreements. There was no rule of law requiring that express words referring to claims based on fraud or dishonesty had to be used if a release was to extend to them. Although the courts may be slow to infer that a party intended to surrender rights of action of which it was not aware and could not have been aware, or that a party intended to release fraud-based claims, in this case the words used in the settlement agreement were sufficient to cover such claims. The language of the settlement agreement was held to be clear, precise, wide-ranging and comprehensive. The claims for dishonesty, fraud and conspiracy clearly fell within the scope of the release according to its natural meaning, and the facts of the case reinforced that interpretation.

The settlement agreement was held to have effected a release of all claims, and Maranello's claims were therefore struck out by the court.

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Onerous cancellation clause in mobile phone supply contract

Blu-Sky Solutions Ltd v Be Caring Ltd: CC-202-MAN-000097, 30 September 2021

A cancellation clause in a signed mobile phone supply contract was considered unduly onerous and not fairly and reasonably drawn to the purchaser's attention to be incorporated by reference.

A mobile phone supplier, Blu-Sky, entered into a mobile phone supply contract with a social care provider, Be Caring, for the supply of 800 mobile phone connections with a monthly rental fee which the purchaser sought to cancel prior to connection to the network.

The supplier sought a cancellation fee of GBP180,000 (GBP225 per connection) for the purchaser's early cancellation of the contract under a clause the supplier argued was included in its Ts & Cs, on the basis that they were incorporated into the contract as they were referred to in the signed order form.

The court held that although the Ts & Cs were incorporated into the contract (as they were easily accessible online), the cancellation clause was not incorporated since it was unduly onerous (given the exorbitance of the total cancellation fee being eight times the amount of any actual loss of profit by the supplier) and was not fairly and reasonably drawn to the purchaser's attention before contract formation.

While the court acknowledged the terms were reasonably clearly brought to the purchaser's attention in the order form, the cancellation clause was not and was "cunningly concealed in the middle of a dense thicket which none but the most dedicated could have been expected to discover and extricate" which made it difficult to "see the important from the unimportant". Even if the cancellation clause were incorporated by reference, the court held that it was out of all proportion to any legitimate interest of the supplier in the performance of the primary obligation such that it was penal in nature and therefore a void penalty clause.

This decision reinforces the courts' approach to onerous terms in that even if such terms are included in Ts & Cs which are incorporated by reference, this will not be sufficient if these terms are not fairly and reasonably drawn to the counterparty's attention prior to contract formation.

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Meaning of "all reasonable action" to mitigate loss

Equitix Eeef Biomass 2 Ltd v (1) Michael Fox (2) The Estate of Michaela Harrison-Fox (3) Dickinson Alexander (4) David Botterill (5) Tönnis Van Der Sluis (6) Sarah-Jane Graham-Pedel (7) Carolyn Jackson-Smith (8) Thomas Fox (9) Aqua Ventures International FZE: HT-2018-000335, 27 September 2021

A contractual requirement for taking "all reasonable action" to mitigate loss will not oblige a victim to embark on uncertain litigation on behalf of a third party.

Equitix bought the entire issued share capital of Gaia, an energy company supplying steam from biomass boilers to Greenergy. Greenergy terminated its contract with Gaia shortly after, citing performance failures.

Equitix claimed that the warranties made by the sellers in the share sale agreement had been false. Plant and equipment were not in good repair. They had not been operated correctly nor properly serviced.

The sellers denied breach of warranties. They argued that Equitix ought to have mitigated its loss, and, to do so, Equitix ought to have claimed against Greenenergy and enforced Gaia's rights.

The court gave a long and considered judgment, of which I shall consider one aspect: did the onus on Equitix to mitigate (if any) require it to sue Greenenergy?

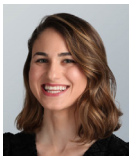
The sellers argued that Equitix had a common law and contractual duty to mitigate. For the former, they pointed to the formulation in *McGregor on Damages*: a claimant cannot recover reasonably avoidable loss. For the latter, they relied on the contract, which said that Equitix shall (and make sure that Gaia shall) take "all reasonable action" to mitigate any loss suffered by it or Gaia which would, could or might result in a claim against the sellers.

The contractual provision is expansive, the sellers argued, wider than common law doctrine. If the clause did nothing more than codify common law, why draft it at all? "All reasonable action", they said, effectively meant "best endeavours".

The court disagreed. There was no common law "duty" to mitigate. The doctrine merely said: if you could have avoided loss but, because you acted unreasonably, you didn't, then you can't claim for it. Importantly, mitigation of loss after purchase was irrelevant in a share valuation. Loss crystallised on purchase. It was simply too late.

The court did agree, however, that the contractual provision should be given some meaning, lest it be otiose. But how far away was that from the doctrine?

Turns out, not very. The provision operated in the usual way. It did not beef up the obligation to "best endeavours". It did not require the victim to embark on expensive and uncertain litigation. If it meant to create such an extensive obligation, then the drafting should have been explicit.



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Key contacts

If you require advice on any of the matters raised in this document, please call any of our Litigation and Dispute Resolution partners, your usual contact at Allen & Overy, or Karen Birch.

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