

## 2022 YEAR IN REVIEW COMMERCIAL DISPUTES

2022 has been an eventful and dynamic year in the world of commercial dispute resolution, with a number of important decisions in key areas of English law and developments in civil procedure. In this newsletter, we offer our views on the key developments which shaped the 2022 legal landscape and what is ahead in 2023. We also take the opportunity to reflect on the highlights of another busy year for Hausfeld's Commercial Disputes group.

### HOW DID 2022 CHANGE THE LEGAL LANDSCAPE?

#### Continued impact of COVID-19

The pandemic has continued to make its presence felt, as further claims arising out of the myriad COVID-19 disruptions to commercial arrangements filtered through to the courts:

#### Force Majeure

2022 kicked off with two contrasting judgments in media rights disputes arising from the

widespread disruption of sporting events during the pandemic. In *Football Association Premier League Ltd v PPLive Sports International Ltd* [2022] EWHC 38 (Comm), summary judgment for US\$213 million was awarded against a Chinese broadcaster which failed to convince the court that the suspension and reinstatement of the Premier League 2019/20 football season constituted a “*fundamental change which would have a material adverse effect*” on the exercise of its rights. Despite the presence of force majeure provisions in the contracts, force majeure did not arise on the broadcaster's pleaded case – any such analysis may well have led back to the judge's decision on the lack of a “*fundamental change*”, with the same result. Conversely, in *European Professional Club Rugby v RDA Television LLP* [2022] EWHC 50 (Comm), the court agreed the threshold for force majeure was met under a contract to broadcast European Champions Cup and Challenge Cup rugby matches. The court found the reference to “*epidemic*” in a list of force majeure events included the pandemic and also that the general wording of the force majeure clause covering circumstances “*beyond the reasonable control of a party affecting the performance by that party of its obligations*” included the pandemic in any event. These cases are fact specific, but both reiterate the courts will place paramount importance on the wording of the underlying contracts. [For more info.](#)

In August 2022, the High Court handed down its judgment in *KD Maritime Limited v Bart Maritime (No. 2) Inc* [2022] EWHC 1615 (Comm), holding that a force majeure clause was not triggered

when the arrival of a vessel was delayed by government restrictions in India. The case confirms that the courts will generally be reluctant to find that a contract can be terminated on force majeure grounds, even in the exceptional circumstances existing at the early stages of the Covid pandemic. As well as a strict approach to contractual interpretation, the case also illustrates that the courts will carefully scrutinise both the importance of timing in the contract and the impact that COVID-19 restrictions had on comparable businesses and activities. [For more info.](#)

### COVID-19 debt recovery restrictions removed

On 28 March 2022, the Insolvency Service [announced](#) the end to all COVID-19 temporary measures. Most measures had previously been revoked with the last of these measures being the restriction on winding up companies. This restriction was partially lifted in October 2021 in the course of the gradual phasing out before being lifted in its entirety from 1 April 2022. Practitioners expect the increase in creditor activity following the inability to pursue most winding up petitions for a period of approximately two years to continue, particularly given the challenging economic climate in the UK. [For more info.](#)

### Cryptoassets

A new body of case law continues to emerge around cryptocurrencies and other alternative assets. The courts have reacted robustly to the challenge of novel assets and there is now a growing body of judicial precedent confirming that longstanding English law property principles will apply to cryptoassets. Hausfeld published a summary of trends arising from the key decisions to date. [For more info.](#)

In October 2022, the Court of Appeal explored how jurisdiction operates in consumer cryptoasset transactions in *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297. The Court also provided a helpful analysis of the interplay between the UK legal framework for consumer protection and arbitration. Both the Court's decision and the Competition and Markets Authority's intervention emphasise the extent of consumer protection in the context of

arbitration agreements included in standard terms and conditions. [For more info.](#)

### Arbitration

Staying with arbitration, the clash between the French Court of Cassation and the UK Supreme Court made arbitration headlines this year. In September 2022, the Court of Cassation judgment affirmed that French law governed the arbitration agreement, upholding the ICC award in this case, despite the UK Supreme Court denying enforcement after finding that English law applied to the arbitration agreement. The matrix contract included both an English governing law clause and a No Oral Modification (NOM) clause, which had led the UK Supreme Court to find that the non-signatory award debtor was not party to the arbitration agreement. The UK Supreme Court's observation a year earlier in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 that the "risk of contradictory judgments cannot be avoided" turned out to be prophetic. The decision emphasises the need to ensure that arbitration clauses contain a choice of governing law for the arbitration agreement itself.

In September 2022, the London Chamber of Arbitration and Mediation (LCAM) launched a revised set of [Rules](#) and [Model Clauses](#). In other LCAM news, LCAM was appointed by the UK Government as an approved arbitration institution for the UK Government's Covid-related commercial rent arrears scheme, under the Commercial Rent (Coronavirus) Act 2022.

### Procedural developments in the Business & Property Courts

#### PD 57AC Witness Evidence

As expected, there have been a stream of decisions around the requirements of the recent Practice Direction 57AC on trial witness statements. Although the courts have so far proven reluctant to strike out non-compliant witness statements in their entirety due to the draconian nature of the sanction, they have not held back in their criticisms of both sides of interim applications. Applicants have been warned against using PD 57AC "as a weapon for the purpose of battering the opposition" (*Curtiss and others v Zurich Insurance Plc and*

ors [2022] EWHC 1514 (TCC)). Respondents have been chastised for non-compliance for producing a witness statement which “*was clearly the product of very long hours by a team of lawyers attempting to put together a watertight narrative of those events and certain documents that advanced [the Respondent’s] case*” (*Elias v Mamistvalov and another* [2022] EWHC 1930 (Ch)).

Even in serious instances of non-compliance, parties have to date been given the opportunity to prepare replacement witness statements (*Greencastle MM LLP v Payne and others* [2022] EWHC 438 (IPEC)), or alternatively had limited passages struck out, rather than the full statement (*Primavera Associates Ltd v Hertsmere Borough Council* [2022] EWHC 1240 (Ch)). A key theme emerging from the growing body of decisions is the emphasis on the parties to act reasonably and proportionately in raising concerns promptly and attempting to reach a compromise before troubling the court. Satellite litigation and excessive costs building on either side has been discouraged in strong terms.

#### PD 51U and PD 57AD Disclosure

In April 2022, the High Court handed down its judgment in *PJSC CB PrivatBank v Kolomoisky & others* [2022] EWHC 868 (Ch), a case concerning a dispute over redactions in WhatsApp chats. The Court ruled that the first Defendant had taken an overly narrow approach by only disclosing the messages in heavily redacted form. In particular, messages regarding certain commercial transactions were not necessarily irrelevant to an issue in the proceedings for the purposes of disclosure, even though the proceedings did not directly concern the transactions in question. While it remains that a court will generally be satisfied by a statement from a solicitor with conduct of the case that redactions have been properly made, where there have been heavy redactions of many documents, the court will adopt greater vigilance to ensure that relevance is not being approached too narrowly and the right to redact is not being too liberally applied. [For more info.](#)

On 18 July 2022, it was announced that the Disclosure Pilot Scheme was taking on permanent status from 1 October 2022 and migrating from PD 51U to PD 57AD.

#### Updated Chancery and Commercial Court Guides

New editions and updates of the [Commercial Court Guide](#), [Circuit Commercial Court Guide](#), [King’s Bench Guide](#) and the [Chancery Guide](#) were published in 2022. There are some substantial changes, particularly to the latter, which practitioners may be relieved to hear has been updated to align Chancery Division practice with the other courts in the Business and Property Courts.

## HAUSFELD COMMERCIAL DISPUTES HIGHLIGHTS

### Growth and recognition

Hausfeld’s Commercial Disputes team has continued to grow from strength to strength over 2022. [John McElroy](#) took over as Head of Commercial Disputes from [Lianne Craig](#) who stepped up as London Managing Partner.

In January 2022, [Simon Bishop](#) was promoted to Partner. Simon’s expertise in financial services disputes, especially in connection with securities markets, complex financial products, and the management of opt-in group claims, have proven especially important as the firm continues to expand its practice in these areas. [Duran Ross](#) was promoted to Counsel, with [Frances Jenkins](#) and [Jonothan Broadbent](#) promoted to Senior Associate. The team also welcomed 5 new associates over the course of the year: [Adrian Langley](#), [Demica Nettleford](#), [Hannah McEwen](#), [Lida Tsakyraki](#) and [James Hilton](#), the latter two qualifying after successfully completing their Hausfeld training contracts.

The team consolidated its directory rankings. The [Legal 500](#) acknowledged the team’s litigators as having “an impressive ability to deliver results for clients on even the most difficult of cases” with “a very well trained and educated team, with excellent leadership from partners”, while the international arbitration team was commended for being “strong on litigation strategy and methodical”. [Chambers UK](#) recognised the team as being a go-to firm for banking and commercial litigation. The team was also commended for Commercial Disputes Resolution in the [Times Best Law Firms 2023](#).

Hausfeld partners [John McElroy](#), [Ned Beale](#) and [Lucy Pert](#) were this year [appointed](#) to the LCAM commercial rent arrears panel. [Rebecca Warder](#), Hausfeld's Head of Knowledge Management, was appointed Deputy Chair of LCAM's Advisory Board.

## Our case highlights

The Commercial Disputes team continued to represent our clients in both complex and high-value litigation and commercial arbitrations across multiple sectors in 2022, bringing to bear our depth of expertise and experience in financial services disputes, M&A and post-completion disputes, boardroom and shareholder disputes, insurance, intellectual property, restructuring and insolvency, civil fraud and more. Highlights include:

- Acting for a Spanish technology group and affiliated parties in an ongoing copyright infringement claim against a major travel conglomerate for the alleged misappropriation of airline fare costs saving software.
- Defending a renewable energy group against a multimillion-dollar claim brought by an investment bank relating to foreign exchange swaps. The claim raises important questions on the interpretation of provisions of the 2002 International Swaps and Derivatives Association (ISDA) Master Agreement.
- Defending a post-acquisition breach of warranty claim against the seller of shares in the care sector and pursuing negligence claims against the seller's former advisers on the sale.
- Representing the defendant in a claim by a multinational commodity trading company for a multimillion-dollar break fee payment following the alleged breach of an exclusivity clause in a mandate letter for a major financing transaction. The claim was settled at a mediation following the first CCMC.
- Acting for a global service provider in the pharmaceutical, biotech and medical industries in a claim against its insurers under a buyer-side warranty and indemnity insurance policy. The claim involved complex issues of quantum as well as a novel claim under s13A of the Insurance Act 2015.
- Acting for the All Party Parliamentary Group on Fair Business Banking, a cross-party group of MPs and Peers, in a [judicial review](#) against the FCA, requiring the FCA to give bank customers access to IRHP compensation of c. £1 billion, an action widely covered in the national press.
- Representing a claimant in a high value LIBOR misrepresentation claim against a major retail bank in a case involving some of the most prestigious assets in London.
- Acting for an eDisclosure service provider in High Court proceedings against parties connected with a major Bulgarian gas supplier in relation to unpaid fees. The proceedings were settled, with enforcement activity then undertaken in order to recover the full unpaid sum.
- Instructed by the former CEO of a FTSE 100 company in a claim against the company's auditors, alleging breaches of regulatory obligations following the auditor's involvement in the director's removal.
- Bringing a pre-action disclosure application in the UK Courts in connection with multi-jurisdictional proceedings on behalf of a lender to a fraudulent construction scheme.
- Acting for a global conglomerate in a range of commercial disputes, including advising on their exit from the Russian market and successfully negotiating the termination of their Russian joint venture.
- Acting for institutional investors bringing various claims under FSMA s90/s90A.
- Acting for a class of users of online spread betting platforms in relation to their trading losses.
- Acting in a range of confidential and high-value cross-border commercial arbitrations under ICC and LCIA rules, including disputes in the aerospace, financial services, manufacturing, sportswear and broadcasting sectors. We regularly act in various roles including as sole advocates, progressing through memorials, document production, witness/expert evidence, trial and consequential matters.
- Acting for a fund manager in a dispute with a listed US counterparty, navigating through threats of a claim in ICC arbitration seated in London and offshore insolvency proceedings.

## It's personal

At Hausfeld we aspire to nurture diversity, inclusivity and collegiality within the firm. We want to continually learn and improve so we can produce the best results for both our clients and the communities we represent. We explored these themes with a variety of events and publications this year. Highlights include:

- In June 2022, Head of Commercial Disputes [John McElroy](#) shared his experiences with *The Lawyer*, featured as part of the '[My Pride Story](#)' series to celebrate Pride.
- As part of the firm's social inclusion initiative London Managing Partner [Lianne Craig](#) and [Rebecca Warder](#) spoke at the Government and City of London Social Mobility Taskforce Roundtable at LCAM. Lianne and our DEI Partner [Lucy Pert](#) then organised a presentation from the Taskforce in September.
- To mark October's UK Black History Month, Senior Associate [Ami Ndukwe](#) hosted a talk with the Rt. Hon. David Lammy MP, who shared his thoughts and suggestions on how to address the over and under representation of Black people in the UK in the criminal justice system and the legal/professional services sector respectively.

## WHAT'S ON THE HORIZON FOR 2023?

We predict that 2023 will be an interesting year for commercial disputes, with a number of high-profile cases and legislative developments in the pipeline.

### Supreme Court decisions

In November 2022 the Supreme Court handed down its unanimous 5-panel judgment in the reference of the Lord Advocate of [devolution issues](#) under paragraph 34 of Schedule 6 to the Scotland Act 1998, deciding the Scottish Independence Bill "*relates to reserved matters*" and falls outside of the legislative competence of the Scottish Parliament. Another high profile case of constitutional significance, with judgment anticipated in 2023, is the [judicial review against the Secretary of State for Northern Ireland](#) as to the lawfulness and constitutionality in

negotiating, implementing and operating the Northern Ireland Protocol, a protocol of the Brexit withdrawal agreement between the UK and the European Union.

Another highly anticipated Supreme Court judgment with potentially far-reaching consequences will be handed down in [Canada Square Operations Ltd v Potter](#), expected to provide guidance on the interpretation of s32 of the Limitation Act 1980, which postpones the commencement of a limitation period where a fact relevant to the claimant's claim has been "*deliberately concealed*".

In the arbitration sphere, the Supreme Court has granted permission to appeal in *Republic of Mozambique v Credit Suisse International and others* [2021] EWCA Civ 329. The Court of Appeal had found fraud and conspiracy allegations fell within the scope of Swiss law arbitration agreements, overturning a High Court decision to stay proceedings under s9 of the Arbitration Act 1996, on the basis that the trial judge had erred in failing to consider reasonably foreseeable defences.

### Quincecare

After an eventful year in the development of the Quincecare duty, we expect this trend to continue into 2023. There is still relatively little guidance on how the duty should work in practice. It is hoped that the final outcome of any trial in *Philipp v Barclays Bank* will provide clarification on whether the duty extends to authorised push payment fraud (where victims are manipulated into paying fraudsters). The issue of whether and how a gross negligence threshold might apply to banks may be developed if permission to appeal is granted in *Nigeria v JP Morgan Chase Bank* [2022] EWHC 1447 (Comm).

### Securities Litigation

We anticipate the growth of collective shareholder actions under FSMA s90/90A will continue. The progress in three high profile cases will be closely observed by claimants and practitioners for guidance on how to proceed in this relatively novel area of litigation. First are the claims against the major outsourcer G4S in relation to alleged overbilling and falsified financial models for government contracts. Two other key cases are *Allianz Global Investors*

*GmbH & Ors v RSA Insurance Group Limited* [2021] EWHC 2950 (Ch), in relation to the alleged late disclosure of misconduct by a subsidiary and the group litigation against Barclays Bank which follows the complaint filed by the New York Attorney General in June 2014 regarding Barclays' 'dark pool' trading platform, Barclays LX

## **Brexit legislation**

Brexit remains a source of uncertainty on the legislative side. The UK's application to join the 2007 Lugano Convention remains pending; at the time of writing the EU has not yet indicated when it will reconsider the UK's application. Practitioners will no doubt be keeping a watchful eye on the progress of the Retained EU Law (Revocation and Reform) Bill 2022-23, which was introduced to the House of Commons on 22 September 2022. The Bill proposes considerable changes to the status and effect of retained EU law.

## **ESG Litigation**

2022 has been a busy year for cases in the Environmental & Social Governance space, a trend which is set to continue into 2023. In their 2022 Year in Review newsletter, our environmental team reviews the developments at COP27, what the notable legal trends are from a regulatory, commercial and public law angle and what should be on businesses' radar. [More info.](#)

*With special thanks to John McElroy, Jonathan Amior and Rebecca Warder for their contributions.*



**'They attract interesting, serious work, often in innovative and emerging areas of litigation, and have an impressive ability to deliver results for clients on even the most difficult of cases. The ethos of the firm is in my experience unique. The associates are really valued, wellbeing is taken seriously and there is a real sense that everyone enjoys working together.'**

Legal 500 2023

Commercial Litigation Premium