STEPHENSON HARWOOD

Managing litigation risk: Corporate and commercial disputes

Tuesday 15 October 2024

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STEPHENSON HARWOOD

Introduction – Richard Garcia

TIME	TOPIC	SPEAKER
08:30AM – 09:00AM	ARRIVAL AND BREAKFAST	
09:00AM – 09:10AM	Welcome and introduction	**Richard Garcia,** Stephenson Harwood
09:10AM – 09:45AM	Contract formation: fundamentals, complications, and ways to avoid pitfalls	**Dan Smith, Ayo Oketunji** and **Donna Newman,** Stephenson Harwood
09:45AM – 10:20AM	Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses	**Ben Sigler** and **Roland Foord,** Stephenson Harwood
10:20AM – 10:55AM	Damages – minimising your exposure by excluding and limiting liability	**Michael Barron** and **Kyrsten Baker,** Stephenson Harwood
10:55AM – 11:15AM	COFFEE BREAK	
11:15AM – 11:50AM	ESG-related disputes – shareholder activism, securities litigation, and other disputes emerging in this context	**Sue Millar, Adam Culy** and **Siân Whitby,** Stephenson Harwood
11:50AM – 12:35PM	What actually makes a difference in resolving commercial disputes?	**Richard Garcia,** Stephenson Harwood and **Derrick Dale KC,** Fountain Court
12:35PM – 12:45PM	Close	**Richard Garcia,** Stephenson Harwood
12:45PM ONWARDS	LUNCH	

Contract formation: fundamentals, complications, and ways to avoid pitfalls

Dan Smith, Donna Newman and Ayo Oketunji

Contract Formation

Fundamentals, complications, and ways to avoid pitfalls

- Agreement
- Intention
- Certainty
- Consideration
- Formalities
- Variation

Contract Formation: Intention

What is "intention"?

- Usually so easy…

- Sometimes fairly easy…

- Sometimes not easy at all…

Contract Formation: Intention

Why is this so difficult?

- It's determined objectively, based on the "reasonable expectation of honest sensible businesspeople"
- Did the parties intend to contract? Disregarding subjective intent…
- …it's fundamentally an artificial construct
- In practice, need to:
  - Assess what's happening
  - Express the desired intention

Contract Formation: Intention

Is there a legal context at all?

- In ordinary business context, intention is presumed
- But, always fact sensitive (*Blue v. Ashley*)
- An agreement does not entail intention
  - Informal agreement
  - Agreement in principle / Heads of Terms
  - Part-agreement: ongoing negotiations
  - Requirement for formalities
- Presumption of intention to contract can be rebutted

Contract Formation: Intention

Does your agreement have the necessary intent?

- Even supposing an agreement, presumed intent can be rebutted:
  - Express drafting: "SUBJECT TO CONTRACT" or communications
  - Inconsistent Conduct (*Rosalina Investments*)
  - Circumstantial inference (*Cheverny Consulting Ltd v. Whitehead Mann Ltd*)

    > *"Where, as here, solicitors are involved on both sides, formal written agreements are to be produced and arrangements made for their execution the normal inference will be that the parties are not bound unless and until both of them sign the agreement"*
- "Subject to Contract" is not always enough protection
  - It might relate only to particular terms (*Alpenstow v. Regalian Properties*)
  - It can be overridden by conduct
  - It can be waived (*RTS Flexible Systems Ltd*)

Contract Formation: Intention

Have your protections expired?

- Letters of Intent / interim contracts
  - Intention is for "full" contract to supersede: often expiry provisions
  - Comfort Letter (comfort blanket?)
  - Performance based on incomplete full agreement
  - Why does it matter?
    - Claims in unjust enrichment
    - Important "boilerplate" (exclusions, limitations, liquidated damages, etc)
  - Can be worse than no formal contract (*Diamond Build*)

- Court will want to:
  - Assess whether the parties have contracted
  - Hold parties to the limits of what they have agreed

Contract Formation: Intention

The Fundamental Principle

"Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of **what was communicated** between them by words or conduct, and **whether that leads objectively** to a conclusion that **they intended to create legal relations** and had agreed upon all the **terms which they regarded or the law requires as essential** for the formation of legally binding relations."

"Even if certain terms of economic or other significance to the parties have not been finalised, an **objective appraisal** of their words and conduct may lead to the conclusion that **they did not intend agreement of such terms to be a pre-condition** to a concluded and legally binding agreement."

Lord Clarke, *RTS*

Things to remember

"Mismatches generate risk"

1. Paper your intentions
2. Perform based on a documented agreement
3. Beware expiry of Letters of Intent
4. Match your conduct to your documents
5. Set yourself review milestones
6. Say what you want to mean
7. Keep Business close to you
8. Stay close to your disputes lawyers

Contract Formation: Certainty

Introduction

- Key question - could the court enforce the contract?
- *Court the court:*
  - Understand specifically what a party had to do;
  - Assess whether they had done it; and
  - Order a remedy to address any breach.
- *Also strive for certainty because:*
  - Lack of clarity can mean that the parties think the contract means different things. The court could side with the other party.
  - Lack of clarity leads to litigation more generally.

Contract Formation: Certainty

General Principles

- The courts will be very reluctant to conclude that an entire contract is too uncertain.
- The court's role is giving effect to what the parties have agreed.
- Particularly where there was clearly an intention that the agreement should govern the relationship or task and there has been some performance.
- A particular clause or part of an agreement may be unenforceable.
- The courts may be willing to "fill the gap" if they can do so objectively.
- Help the court with:
  - Objective Criteria; and/or
  - Machinery.

Contract Formation: Certainty

Binding Third Party Adjudication

1. *In the event of [X] the parties will seek to agree [Y].*
2. *In the event that the parties cannot reach agreement, either party shall be entitled to refer the dispute to an independent King's Counsel, whose identity is to be agreed between the parties or, in lieu of such agreement, to be nominated by the Chair of the Bar Council. Such King's Counsel shall be deemed to be jointly instructed by both parties.*
3. *The King's Counsel shall be instructed to provide an opinion as to [X]. The Parties agree that the King's Counsel's opinion on [X] shall be final and binding on each of them.*
4. *In giving any opinion pursuant to this clause, King's Counsel shall also be instructed to determine which one or more of the parties should bear King's Counsel's fees (and, if more than one party, the shares in which they are each to bear those fees) and the parties agree to be bound by this determination as to liability for King's Counsel's fees.*

Contract Formation: Certainty

Agreements to Agree

- Generally unenforceable.
- Red flag wording:
  - “On the terms to be agreed between us”
  - “To be agreed”
  - “We agree to negotiate in good faith”
  - “Use reasonable endeavours to agree to …”
  - “Such further period as shall be reasonably agreed”.
- The key is to have fall back wording – “If the parties fail to reach agreement …”.

Contract Formation: Certainty

Reasonable endeavours and Best endeavours

- Reasonable endeavours
  - One reasonable course
  - Can consider your own perspective and circumstances.
- Best endeavours
  - All reasonable courses
  - Fulfil an obligation with the other party’s interests/perspective in mind.
- All reasonable endeavours
  - Often seen as a middle ground
  - Likely closer to best endeavours.
- Focus on the object of the clause.
- Dispute resolution clauses.

Contract Formation: Certainty

Conclusion

- When you consider “certainty” – think about whether you are communicating to the court with enough specificity.
- Could a court:
  - Understand specifically what a party had to do;
  - Assess whether they had done it; and
  - Order a remedy to address any breach.
- If you need to improve a clause:
  - Objective criteria; and/or
  - Machinery.
- Still include uncertain things if you want. There is no rule against it.
- It’s also more likely that the other party will comply if it’s clear.
- Clearer contracts = fewer disputes.

Variation

No oral modification

No variation of this agreement shall be effective unless it is in writing and signed by the parties

(or their authorised representatives).

- *Rock Advertising v MWB Business Exchange Centres Ltd*
  - Variation had to meet formal requirements under the contract – cannot be orally waived
  - If contract not varied, parties left with estoppel defence, but that had to be applied narrowly – focus was on certainty:

    "At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself"

Variation

Estoppel – the bar is high

- *Some detriment needs to have been suffered by the defendant*
- *Course of conduct v one-off communication*
- *"Something more"*
  - *Active Media Services Inc v Burmester Duncker & Joly GmbH*

Variation

Is it a variation at all?

- Has a new contract been created?
- Novation or rescission ≠ Variation
  - Novation by conduct (*Musst Holdings v Astra Asset Management*)
  - Rescission - What did the parties intend?
    - Do the changes go to the root of the contract?
    - Is the new contract fundamentally inconsistent with the old one?

Things to remember

1. **Consider if variation formalities match risk level** (e.g. in writing, signed, by authorised representatives and/or by directors, variation form).
2. **Is "authority" clear from contract? Is it worth setting out who / which role constitutes an "authorised representative"?**
3. **Beware scope creep**. Periodic check-ins to see if parties are operating within contract terms.
4. **Document any "informal" communications.**

Any questions?

Dan Smith
Partner

T: +44 20 7809 2369
M: +44 7968 826 433
E: dan.smith@shlegal.com

Donna Newman
Partner

T: +44 20 7809 2357
E: donna.newman@shlegal.com

Ayo Oketunji
Managing associate

T: +44 20 7809 2202
E: ayo.oketunji@shlegal.com

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Ben Sigler and Roland Foord

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Introduction

- There are three main issues in any dispute each of which ought to be carefully considered when drafting a dispute resolution clause ("**DRC**"):
  - **Jurisdiction / arbitration:** which Courts, arbitral tribunal, or expert will have jurisdiction to deal with the dispute?
  - **Applicable law:** which law governs the parties' obligations?
  - **Recognition / enforcement:** in what circumstances will a judgment or award be recognised / enforced in England or elsewhere?
- All of these need to be carefully considered to ensure that the DRC is as effective as possible.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Introduction

- Failing to include a DRC clause in a contract can lead to all sorts of risks, including, but not limited to:
  - Uncertainty as to which jurisdiction any dispute might end up in and which law might be applied;
  - A race to jurisdiction, with each party trying to gain an advantage; and
  - An inability to enforce any judgment, depending on the circumstances.
- Choosing the appropriate DRC can have a big impact on where and how any dispute is dealt with and may mean the difference between winning and losing and, at the least, the extent to which the dispute is resolved in a cost effective and efficient manner.
- Brexit has only served to heighten the importance of DRCs as the regimes governing both jurisdiction and enforcement have become more complex as a result of the changes in the law this has precipitated.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Introduction

- For these reasons, DRC ought not to be treated as a boilerplate clause (as it often is); although they are at the end of a contract by custom, DRCs should not be relegated to the end of the list of provisions on which the parties focus in considering and negotiating their contracts.
- There is no "one size fits all" when it comes to deciding on the appropriate content of a DRC. It is necessary to consider the options carefully, look closely at what kinds of dispute might come out of the parties' relationship (including which side of any dispute you might be on), and to try to draft the DRC accordingly.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Jurisdiction / arbitration

- A central consideration when drafting a DRC is whether disputes are to be determined by way of litigation or arbitration or some other form of dispute resolution mechanism (e.g. expert determination or adjudication).
- The most common reasons to choose arbitration over litigation are:
  - **Ease of enforcement:** arbitration awards are generally easier to enforce than court judgments, and, in the case of English judgments, this has been exacerbated by Brexit:
    - A choice of arbitration does not guarantee the ability to enforce, as different countries will enforce arbitration awards under the New York Convention to different degrees. However, subject to where the relevant assets are located, it gives an excellent legal starting point for enforcement in the 153 countries that have ratified the convention;
    - By contrast, the enforceability of judgments turns on the reciprocal arrangements in place between the jurisdiction of the Courts giving judgment, and that in which enforcement is to be sought.
  - **Neutrality of tribunal:** opting for a neutral venue and avoiding either party having a "home" advantage;

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Jurisdiction / arbitration

- A central consideration when drafting a DRC is whether disputes are to be determined by way of litigation or arbitration. The most common reasons to choose arbitration over litigation are (continued):
  - **Confidentiality:** subject to the relevant venue, arbitral rules and contract terms, arbitration is generally private, in that details of the case are not available to the public as they may be in Court proceedings (although enforcement action in national Courts may impact this (as for example was the case in ***Manchester City Football Club Ltd v Football Association Premier League Ltd and others*** **[2021] EWCA Civ 1110).** By contrast, commercial secrets and dirty laundry may, in principle, need to be aired in litigation, although in some disputes there may be an advantage to being able to deploy the threat of this occurring, or of a precedent setting judgment;
  - **Perceived speed and efficiency:** arbitration is, of course, governed by the principle of party autonomy; it is for the contracting parties to select the tribunal and the procedure applicable to the determination of the disputes referred to arbitration. However, given the indulgences typically granted to parties by arbitral tribunals, this advantage is, in our view overstated;

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Jurisdiction / arbitration

- A central consideration when drafting a DRC is whether disputes are to be determined by way of litigation or arbitration. The most common reasons to choose arbitration over litigation are (continued):
  - **Market knowledge:** if issues of a technical nature are likely to arise, arbitration permits the parties to choose a tribunal with the relevant technical expertise, whereas in litigation it is unlikely that the parties will have any control over the identity of the decision maker;
  - **Cost:** arbitration has historically been seen as a cheaper alternative to litigation. However, this is certainly by no means always the case and again, this advantage is, in our view overstated. That said, it is generally true that arbitral tribunals are more willing to award a successful party a higher proportion of their costs than would be the case in Court proceedings; and
  - **Finality:** arbitration generally involves very limited grounds of appeal by contrast to litigation. However, at least in England, rights of appeal in litigation are considerably more constrained than used to be the case so appeals cannot be used as a delay tactic.
  - **Sovereigns or parastatals:** sovereign immunity to jurisdiction (as distinct from enforcement) is often waived automatically if arbitration is chosen by the parties, but the extent to which this is the case needs to be verified with local lawyers.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Jurisdiction / arbitration

- On the other hand, potential advantages of litigation over arbitration include:
  - **The availability of summary determination:** however, it should be noted that most institutional arbitration rules now permit arbitral tribunals to determine claims summarily (e.g. this is now provided for, in, amongst others, arbitrations administered by the ICC, LCIA, SIAC, and SCC) albeit arbitral tribunals may be more reticent than Courts to exercise these powers.
  - **The availability of default relief:** Courts are generally far more willing to deal with parties who are unwilling to engage with the proceedings than arbitral tribunals who are far more willing to grant indulgences in these circumstances. Furthermore, the party seeking relief against a party refusing to engage with arbitral proceedings is likely to have to bear the other party's share of the arbitrators' fees to obtain an award.
  - **Multi-party or multi-contract claims:** although many institutional arbitration rules now include provisions permitting the consolidation of arbitrations, the ease of dealing with claims involving multiple parties and/or multiple contracts generally remains far greater in litigation than in arbitration (where consolidation may require the consent of all the parties to all of the relevant contracts).

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Jurisdiction / arbitration

- On the other hand, potential advantages of litigation over arbitration include:
  - **The availability of appeals**: arbitration lacks the additional layer of protection afforded by an appeal system. This is an issue of particular importance given that arbitral tribunals do not always have the competence of professional judges. This requires particular consideration where the dispute could be referred to the Courts of a jurisdiction where the quality of the judiciary is of a high standard and decision making is predictable and reasoned (which is, of course, not always the case) as an alternative.
  - **Publicly available judgments**: where a party may wish to obtain a judgment of precedent value (e.g. on a standard form contract), litigation is likely to offer advantages over arbitration.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Jurisdiction / arbitration

- It is also important to note that certain forms of DRC may not be enforceable against certain types of contractual counterparty. Some examples include:
  - **Contracts with Consumers:** in ***Chechetkin v Payward Ltd & Ors*** **[2022] EWHC 3057** and ***Soleymani v Nifty Gateway LLC*** **[2022] EWCA Civ 1297** the English Courts have recently demonstrated a willingness to ignore contractual agreements to arbitrate agreed between consumers and businesses, where consumers have been compelled to consent to arbitration going so far as to find those arbitration agreements void for unfairness; and
  - **Employment contracts:** in ***Clyde & Co LLP v Bates van Winkelhof*** **[2011] EWHC 668 (QB); [2012] I.C.R. 928** the English Courts found that a clause in a limited liability partnership providing for disputes to be settled by arbitration could not be relied upon to enforce a stay of employment tribunal proceedings for discrimination or whistleblowing as it offended s. 203 of the Employment Rights Act 1996.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Expert determination and adjudication

- As previously noted, expert determination or adjudication are forms of alternative dispute resolution ("**ADR**") which are open to parties to resolve their disputes on a binding basis as an alternative to either arbitration or litigation.
  - **Expert determination:** this an ADR mechanism pursuant to which an independent third party, acting as an expert rather than a judge or arbitrator, is appointed by the parties to determine the dispute. It can be a very quick, and there are very limited rights of appeal (typically only in the event of a "manifest error" by the expert), meaning it is cost-effective way of achieving final determination of a dispute, albeit enforcement may be more protracted than in respect of judgments or awards. Expert determinations tend to be used only in disputes of a technical nature (e.g. valuation of an earn out) and are generally therefore only used to determine a limited range of disputes under a contract, rather than all such disputes.
  - **Adjudication:** this is a similar ADR mechanism to expert determination which is typically used in construction disputes; an independent third party, the adjudicator, makes a binding decision on a contractual dispute. The right to refer the dispute to the adjudicator can be provided by contract or statute (in England adjudication applies to all construction contracts entered into after 1 May 1998).
- As these forms of dispute resolution are less commonly included in DRCs than arbitration or litigation they are not considered further in this talk.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Arbitration (further considerations)

- If opting for arbitration, it is very important to get the drafting of the arbitration clause right. Fundamental features include:
  - An unequivocal agreement to submit disputes to arbitration;
  - The identification of the seat of arbitration;
  - The institutional rules that will apply (it is possible to have a purely ad hoc arbitration, but generally institutions are worth the cost);
  - The governing law of the arbitration agreement;
  - The language of proceedings; and
  - The number of arbitrators and how to select them.
- The arbitration agreement should make clear whether it extends only to contractual claims, or, more likely, to both contractual and non-contractual claims.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Arbitration (further considerations)

- Other factors which may need to be considered in drafting the arbitration agreement are:
  - **Multi-party / multi-contract situations:** where there are multiple parties or a suite of agreements, it is important to think about whether the clauses are consistent with one another, and also (where the choice is arbitration) empowering the tribunal to consolidate different proceedings or join different parties.
  - **Confidentiality:** as attitudes to confidentiality vary between jurisdictions, if the parties are selecting arbitration for privacy reasons, they should include an express confidentiality provision in the arbitration agreement.
  - **Exclusion of rights of appeal:** although many institutional arbitration rules exclude rights of appeal, it would be worth considering excluding any rights of appeal which would otherwise arise in the Courts of the seat of the arbitration.
  - **Interim measures:** the parties may wish either to specifically empower the arbitration tribunal to order interim measures and/or exclude any powers which would otherwise be available to the Courts of the seat of the arbitration, or any other relevant national Courts, to make orders of this nature.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Jurisdiction (further considerations)

- If opting for Court jurisdiction, rather than arbitration, there are three basic choices:
  - Exclusive jurisdiction clauses provide maximum certainty but lack flexibility, for example if the counter-party moves its assets to a country which does not permit enforcement of judgments from the Courts of the chosen jurisdiction. They also attract the recognition and enforcement benefits conferred by the Hague Convention on choice of court agreements (if relevant) by contrast to non-exclusive jurisdiction clauses.
  - Non-exclusive jurisdiction clauses provide flexibility but also uncertainty, as other Courts may take jurisdiction as well as the chosen Court.
  - One-way or unilateral clauses are also possible and are frequently seen in the banking context. These clauses provide that one party is restricted to suing in the chosen jurisdiction, but the other party has a choice where to sue. In theory these provide the best of both worlds, but they do not always work. Such clauses have been held to be unenforceable for example in proceedings in France, Russia and China.
- In either event, the DRC should make clear whether it extends only to contractual claims, or, more likely, to both contractual and non-contractual claims.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Jurisdiction (further considerations)

- It is, of course, possible for the parties to agree a hybrid clause which permits some disputes to be referred either to litigation or arbitration at the election of one or both parties. Again, such clauses are often found in the banking context (where the lender will be entitled to make the election as to forum selection). As such clauses may be held to be unenforceable for similar reasons to unilateral jurisdiction clauses, if such a clause is proposed consideration will have to be given to its validity both pursuant to the law of the contract and in any Courts in which enforcement of any judgment or award may be pursued.
- Provisions relating to service of process should be considered if the counterparty has no presence in the relevant country (whether it is a jurisdiction or arbitration clause). That will avoid the need to serve any proceedings abroad, which can take time and add to the cost. Nominating an address for service within the jurisdiction or setting out some mechanism for service, which could even be service by email on some nominated individual, is easily done and can save a lot of time and hassle.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Applicable law

- An express choice of law should also be included. In the vast majority of cases a choice of law will be respected and given effect. However, there are some limitations which may apply, for example, if the chosen law differs from the parties' country of incorporation, or the jurisdiction in which the proceedings take place, or the place of performance of the contract. If any of these apply, advice should be taken before the contract is entered into.
- As a matter of best practice, DRCs and governing law clauses should be dealt with separately, in particular in the context of contracts where there is any risk of the DRC being struck down (e.g. in the context of consumer contracts where a jurisdiction clause or arbitration agreement may be held unenforceable).

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Recognition / enforcement

- It is essential to think about enforcement from the outset:
  - Where are the counterparty's assets?
  - Will that jurisdiction enforce relevant Court judgments / arbitration awards?
  - Are there restrictions on the types of judgment that will be enforced – e.g. only money judgments?
  - It is important to be aware of local laws, customs, quirks or requirements which may affect enforceability, and to take local advice.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Other considerations: Tiered Dispute Resolution Clauses

- It may be appropriate to include ADR mechanisms in the contract that may help the parties to come to a mutual resolution of a dispute before it is escalated to litigation or arbitration, including, amongst others (whether alone or in combination):
  - Structured negotiation (e.g. a requirement that issues are raised to senior management of each party for negotiation);
  - Mediation (where a neutral third party facilitates the parties to reach a negotiated settlement);
  - Early neutral evaluation (where the Court provides a without prejudice, non-binding, early neutral evaluation at the request of the parties); or
  - Expert determination or adjudication.
- Such clauses are known as Tiered Dispute Resolution Clauses ("**TDRs**").

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Other considerations: Tiered Dispute Resolution Clauses

- If drafted carefully TDRs can support a commercial and cost-effective mode of dispute resolution.
- The key advantages of enshrining a contractual obligation to use ADR before escalating a dispute to arbitration or litigation are:
  - **Confidentiality:** ADR processes are generally all conducted confidentially. Additionally, negotiation and mediation are conducted on a without prejudice basis, enabling a frank exchange of views with knowledge that neither party may use or refer to any matters arising during the ADR in subsequent proceedings.
  - **Flexibility:** ADR processes other than expert determination or adjudication allow parties to seek solutions which accommodate their commercial objectives, and all ADR processes allow the parties to tailor the procedure to suit their needs.
  - **Time and cost-effective:** ADR used properly should provide parties with a quick and relatively cost-effective dispute resolution mechanism.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Other considerations: Tiered Dispute Resolution Clauses

- Whilst TDRs put ADR on the parties' agenda before a dispute is escalated to arbitration or litigation with the attendant costs consequences, avoiding this opportunity being missed, it is worth noting that, in English litigation, the parties are obliged to consider ADR.
- The Civil Procedure Rules 1998 ("**CPR**") were recently updated to encourage the use of ADR and now provide:
  - **Overriding objective:** in dealing with cases justly and at proportionate cost, the Courts are obliged to consider "*promoting or using alternative dispute resolution*" (CPR 1.1(f)). Furtherance of the overriding objective by actively managing cases now includes "*ordering or encouraging the parties to use, and facilitating the use of, [ADR]"* rather than simply encouraging ADR (CPR 1.4(2)(e)).
  - **Courts' case management powers:** the Courts' powers of case management have been expanded to include the power to, "*order the parties to engage in alternative dispute resolution*" (CPR 3.1(o)) and, when giving directions, the Court is obliged to consider, "*whether to order or encourage the parties to engage in alternative dispute resolution*" (CPR 28.7/28.14/29.2/PD29.4.10(9)).

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Other considerations: Tiered Dispute Resolution Clauses

- The Civil Procedure Rules 1998 ("**CPR**") were recently updated to encourage the use of ADR and now provide (cont):
  - **Costs sanctions:** when exercising its discretion as to costs, the Court may take into account: *"whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution"* (CPR 44.2(5)).
- Caution needs to be taken when drafting TDRs as, if drafted poorly, they:
  - Can lead to inefficiencies and, at worst, deprive parties of proper recourse to litigation or arbitration (e.g. by inadvertently referring all disputes to expert determination); or
  - May be unenforceable (and therefore a Court or arbitral tribunal may refuse to stay proceedings to compel a party to comply with the provisions of the relevant TDR).
- There are various examples of the English Courts finding TDRs unenforceable:
  - ***Sulamerica v Enesa Engenharia*** **[2012] EWCA Civ 638** in which a provision which directed the parties to "*seek to have the dispute resolved amicably by mediation*" was not enforceable as it did not specify the mediation process or mediation provider.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Other considerations: Tiered Dispute Resolution Clauses

- There are various examples of the English Courts finding TDRs unenforceable (cont):
  - ***Kajima Construction Europe (UK) Ltd & Anor v Children's Ark Partnership Ltd* [2023] EWCA Civ 292** in which a TDR was held unenforceable as, amongst other things there was "*no minimum definable duty of participation*" identified.
- What these authorities demonstrate is that where the steps which the parties are required to take are sufficiently clear TDRs will be held to be enforceable.
- In ***Tang Chung Wah v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch)** the Court made clear that, as long as the basics are there the court could imply the details in order to reach a construction consistent with the parties' intentions.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Other considerations: Tiered Dispute Resolution Clauses

- Although no minimum requirements have been identified in that regard, to be enforceable, a TDR must:
  - Use mandatory language; and
  - Referring to a clearly defined procedure, preferably in an institution with a set of rules that can be adopted wholesale into the contract by incorporation (e.g. the CEDR Rules on mediation), which specifies:
    - A minimum level of participation required from the parties in order to comply with the procedure; and
    - How to initiate the procedure, what process is to be followed thereafter, and how and when the procedure is to conclude.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Other considerations: potential multi-contract disputes

- Given the risk of a multiplicity of proceedings (and consequently conflicting judgments), where the parties are entering into a suite of contracts in respect of a relevant transaction, consideration should be given either to:
  - Conforming the DRCs across the various contracts; or, alternatively,
  - To agreeing an umbrella clause which deals with the resolution of disputes across the full suite, or some proportion, of the relevant contracts.

Arbitration vs litigation and other key issues to consider when negotiating dispute resolution clauses

Other considerations: sovereign immunity

- As previously touched on, given the immunities afforded to foreign states before national Courts (e.g. in England pursuant to the State Immunity Act 1978), careful thought needs to be given when contracting with a state or parastatal.
- Ideally, a party contracting with a state or parastatal will want to obtain an express waiver of both immunity from suit and from enforcement from their contracting counterparty.

Any questions?

Ben Sigler
Partner

T: +44 20 7809 2919
M: +44 7584 237 401
E: ben.sigler@shlegal.com

Roland Foord
Consultant

T: +44 20 7809 2315
E: roland.foord@shlegal.com

Damages – minimising your exposure by excluding and limiting liability

Michael Barron and Kyrsten Baker

What liabilities can’t you exclude?

- Fraud by a contracting party – “fraud unravels all”
- Most liability to anyone other than a contracting party
- All liability such that the contract is rendered unenforceable
- Death or injury caused by a lack of reasonable care (where a contract is subject to UCTA)
- Supplying goods without the right to do so (where a contract is subject to UCTA)

What liabilities can be limited

- Negligence and other breaches of duties of care
- Breach of statutory implied terms in supply of goods
- Interest on late payment for goods and services
- Vicarious liability for fraud of agents
- Misrepresentation
- Rights arising by the operation of law

Common law limits on limitation clauses

- Incorporation
- Interpretation
- Public policy of limiting liability for fraud
- Privity of contract

Incorporating limitation clauses into contracts

- If the limitation is an express written term of a signed contract, incorporation may be straightforward.

- If, however, a term in a party's standard terms is considered to be "onerous and unusual", that term may not be deemed to be incorporated into the contract: Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1987] EWCA Civ 6).

Interpretation of limitation clauses

Strict interpretation

- The courts apply principles of “strict interpretation”, requiring:
  - Clear words needed to restrict rights
  - Specific reference to the particular types of liabilities that are being excluded

Interpretation of limitation clauses

Avoid the pitfalls if excluding or limiting “indirect losses”

- A common drafting mistake is to exclude specified types of loss but describe them as “indirect” or “consequential” loss:

"Neither party will be liable to the other for any indirect or consequential loss, **(both of which include, without limitation, pure economic loss, loss of profit, loss of business, depletion of goodwill and like loss)“**

Polypearl Ltd v E.On Energy Solutions Ltd [2014] EWHC 3045 (QB)

- To avoid this, limit each branch of loss as a separate category of loss without identifying one loss as a subset of another.

Statutory restrictions on limitation

Unfair contract Terms Act 1977

- Applies to most business to business contracts, with some exceptions (such as contracts of insurance and charterparties).
- If UCTA applies, the parties cannot limit liability for injury or death caused by negligence or supplying goods without the right to do so.
- The parties can limit certain other liabilities, subject to a reasonableness test (including breach of standard terms, breach of duty of care or skill, negligence).
- To be reasonable, the clause must be “fair and reasonable” considering everything the parties knew or should have contemplated when contracting.

Contracts survive the failure of a limitation clause

- If a clause is not incorporated into the contract, the contract normally survives on its other terms without the limitation.
- Restrictive interpretation of a limitation clause does not invalidate the clause or the contract.
- An ineffective limitation is normally severed; the principle of severance applies even without an express severance clause.
- The Court won’t substitute a valid limitation.

Practical tips for drafting limitation clauses

- Use clear language and identify specific liabilities that you are proposing to limit.
- Consider capping a liability, rather than excluding it.
- Make severance of the clause easy.
- Be careful how you exclude or limit loss of profits.
- If you have an expansive limitation provision, raise it with the other party during the contract negotiations.

Any questions?

Michael Barron
Managing associate

T: +44 207 809 2428
M: +44 792 072 4886
E: michael.barron@shlegal.com

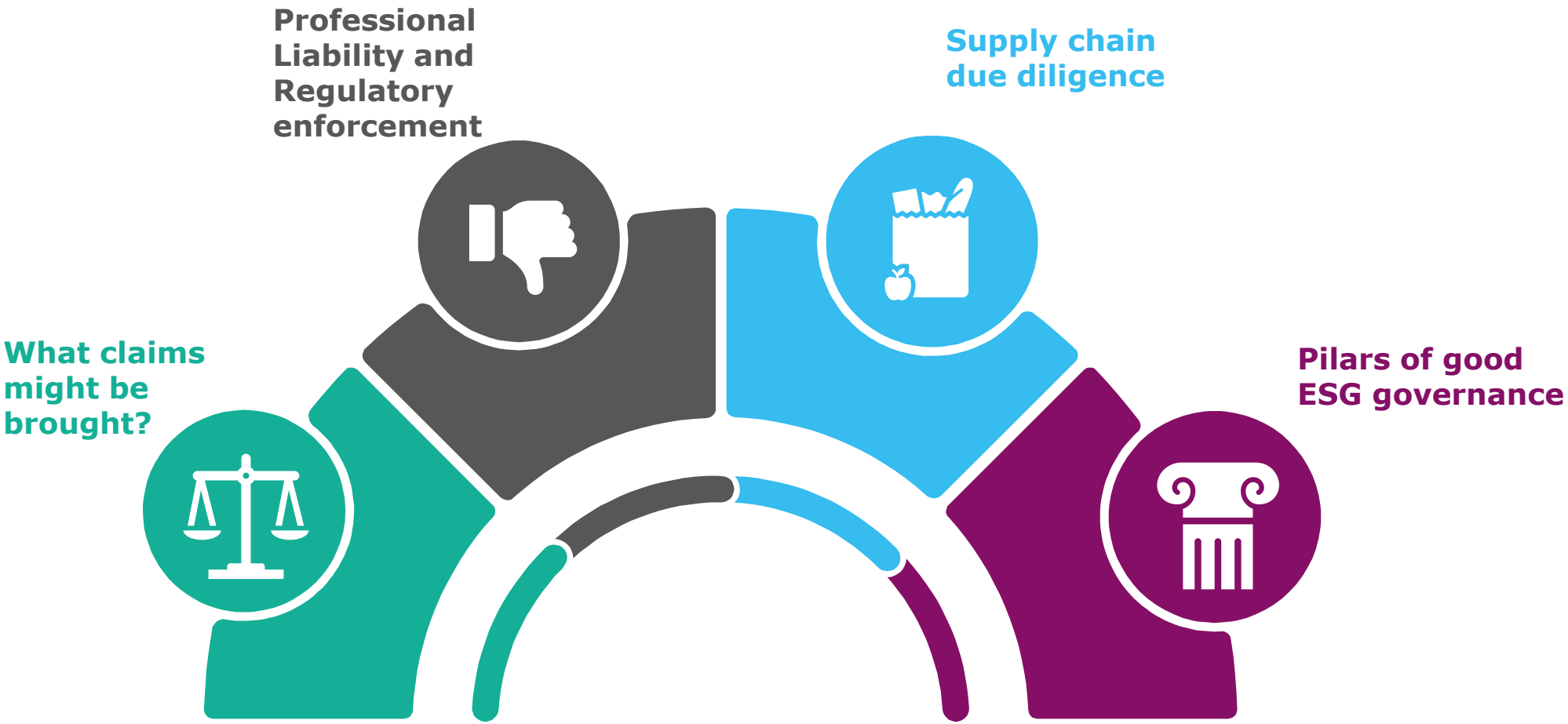
Kyrsten Baker
Associate

T: +44 20 7809 2873
M: +44 7469 356555
E: kyrsten.baker@shlegal.com

ESG–related disputes – shareholder activism, securities litigation, and other disputes emerging in this context

Sue Millar, Adam Culy and Siân Whitby

Today’s agenda



"Data from the Ministry of Justice shows that 27% of working-age adults have a criminal conviction."

(see https://www.personnelchecks.co.uk/)

Introduction to ESG Litigation risk

Tsunami of ESG regulation

- 155% increase since 2014
- 647% increase since 2000

Grantham Institute on Climate Change and the Environment

- 230 new cases in 2023

  US: 129
  UK: 24
  Brazil: 10
  Germany: 7

Backlash & Greenhushing

- Pro-ESG tactics used in anti-ESG claims
- SLAPP suits
- Institutions resiling from green investments

What claims might be brought?

Statements and Representations

- FSMA 2000 – section 90/90A
- Misrepresentation (statutory and at common law)

Duties and strategy

- Shareholder derivative actions
- Fiduciary duties

Statements and Representations?

FSMA 2000 – Section 90/90A

- Shareholders v public companies
- Misleading statements in published information
  - Section 90: prospectuses
  - Section 90A: any untrue/misleading statement in published information
- Person discharging managerial responsibility ("**PDMR**"):
  - *knew* the statement was untrue/misleading; OR
  - *reckless* as to that fact
- Reliance on the misleading information was reasonable in the circumstances

Misrepresentation (statutory and at common law)

- Statement of fact/law inducing entry into a contract which causes loss

Duties and strategy

Derivative actions

- *Client Earth v Shell* – s260(3) Companies Act 2006
    - Shareholder
    - relate to actual proposed act or omission by a director, involving negligence, default, breach of duty and/or breach of trust
- Directors should have: based climate risk decisions on a reasonable scientific consensus, adopted strategies to meet Shell's climate targets, and taken steps to ensure compliance with climate-related obligations

Fiduciary Duties

- Loyalty to principal: trustee/beneficiary, directors/shareholders
- Acting in best interest – consideration of climate risks
- Commonwealth Climate and Law Initiative

What does this mean for businesses?

Statements

Be Specific

Fact check everything

Gather evidence

Use caution with third-party statistics

Strategy

Develop an ESG protocol

Document everything

Adapt as needed

ESG Professional Liability and Regulatory Enforcement

Environmental: considers how a company manages its impact on the environment, including issues like carbon emissions, resource use, pollution, and climate change.

Social: evaluates how a company manages relationships with employees, customers, suppliers, and the communities where it operates, covering topics like labour practices, human rights, and diversity.

Governance: focuses on the company's leadership, executive pay, audits, internal controls, and shareholder rights, assessing how well the company is managed and whether it adheres to ethical business practices.

Impact of Regulators

Toyota, Volkswagen and Deutsche Bank / Goldman Sachs fines

"green", "sustainable", "environmentally friendly", "eco", "net zero", "carbon neutral"

Advertising Standards Authority (ASA)

The Competition and Markets Authority (CMA)

Financial Conduct Authority (FCA)

Professional body guidance and standards

- The Law Society
- Financial Reporting Council (FRC)
- Task Force on Climate-Related Financial Disclosures (TCFD)
- Corporate Sustainability Reporting Directive (CSRD)
- Corporate Sustainability Due Diligence (CSDD)
- “Don’t blame me, I relied on my auditors!”

Greenhouse gas emission measurement consultancies

Scope 1 – direct emissions

Scope 2 – energy use emissions

Scope 3 – indirect suppy chain emissions

Normative

More than carbon accounting

Normative isn’t just about hard science and data. It’s about revolutionising how businesses collect, report, and understand their carbon emissions. First, our carbon accounting engine empowers you with clear and actionable insights. Then our Climate Strategy team helps you define a trajectory for sustainable business growth. With us, you’re not just planning emissions reductions – you’re leading the charge into the net-zero frontier.

Conclusion on Professional Negligence

- Myriad of advisers with duties of care

Supply chain due diligence

Modern Slavery Act 2015

- Toothless beast
- Requires urgent update
- Only applies to certain companies
- No mandatory DD – yes/no reporting

Proceeds of Crime Act

- World Uyghur Congress ("**WUC**"), an NGO, brought judicial review against the NCA for failing to investigate use of Xinjiang cotton in UK
- High Court upheld NCA's decision
- CoA – held handling Xinjiang cotton was potentially a money laundering offence
- Perverse incentive not to do supply chain DD

Wrap up: the pillars of ESG governance

The four "S"s

Statements

- Be specific
- Fact check
- Gather evidence
- Use caution with of third-party statistics

Strategy

- Develop an ESG protocol
- Document everything
- Adapt as needed

Suppliers

- Information gather
- Business intelligence

Essential

- Stay up to date with mandatory reporting requirements
- Ensure you comply!

Any questions?

Sue Millar
Partner

T: + 44 20 7809 2329
M: + 44 7825 625 898
E: sue.millar@shlegal.com

Adam Culy
Partner

T: +44 20 7809 2371
E: adam.culy@shlegal.com

Siân Whitby
Associate

T: +44 20 7809 2579
M: +44 7818 527 928
E: sian.whitby@shlegal.com

What actually makes a difference in resolving commercial disputes?

Richard Garcia and Derrick Dale KC

Closing remarks

Richard Garcia

Please scan this QR code to view our event hub.

Any questions?

Richard Garcia
Partner

T: +44 20 7809 2346
M: +44 7811 409 216
E: richard.garcia@shlegal.com

Derrick Dale KC

T: +44 207 583 3335
E: dd@fountaincourt.co.uk