HERBERT SMITH FREEHILLS

MANAGING RISK: A DISPUTES PERSPECTIVE

CONFERENCE REPORT
NOVEMBER 2022

Introduction

This annual conference, held on 22 November, was chaired by partner and global head of our insurance disputes practice, Paul Lewis, and explored some key legal and compliance risks facing major corporates in the current global environment, and how those risks can be mitigated.

Sessions looked in particular at risks relating to climate change in commercial relationships, the disputes implications of the war in Ukraine, the current landscape for class actions in the UK, and how to deal with the risks arising from emerging tech and IT disputes.

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Climate change risk in commercial relationships

When it comes to climate change-related disputes, it is the headline-grabbing class actions and claims by NGOs against companies and governments which have tended to be the focus for discussion. But it is disputes between commercial entities which arguably present the most fertile – and most complex – ground for climate change-related disputes. Conflicts within joint ventures, up and down supply chains, with contractual counterparties, lenders and investors, and around M&A activity all present very significant potential for climate change disputes.

In this panel session, the speakers considered the business to business risk arising from the different commercial activities resulting from climate change and decarbonisation drives, explored how companies can protect themselves in the way they draft their contracts now looking to the future, the challenges under existing contractual forms and the types of commercial conflicts we expect to arise from climate change issues in the coming decades.

Chair: Andrew Cannon
Partner, co-head of the public international law practice, and deputy head of the global arbitration practice

Neil Blake
Partner, dispute resolution

Louise Barber
Senior associate, dispute resolution

Risteard de Paor
Of counsel, dispute resolution

Rebekah Dixon
Senior associate (New Zealand), dispute resolution

Climate change risk in commercial relationships

Climate change considerations and the move to decarbonisation have added complexity to how businesses operate and given rise to a significant potential for claims to arise between commercial counterparties.

M&A and finance

In the M&A context, companies considering potential acquisitions will wish to consider the environmental impact of the target business and what that might mean for any climate-change related objectives they have set or public commitments they have made. Increasingly buyers are looking to spell out their expectations about emission levels and environmental impact in warranties and indemnities, and sellers will want to be cautious about what they are promising and how any impacts may be measured.

Banks are increasingly inserting covenants into finance documents relating to climate change mitigation and adaptation. This reflects a concretization of more general ESG-related covenants included in concessional finance documents involving multilateral development banks in what was originally development finance. As public and private sector finance come together in relation to climate-related projects (say, a renewable energy project in a low to middle income country), we are seeing more climate-specific covenants being introduced. This trend is likely to continue as this blended finance becomes more established, especially where accredited implementing entities and institutions, and multilateral climate funds, are involved and introduce emissions-related undertakings and oversight.

The relevant agreements may provide for audits of the underlying projects, and if the project fails to meet its targets (eg because the energy is not as green as it was meant to be) it could give rise to claims between project participants and/or stakeholders.

Construction and planning

Another major area is construction and planning, as market players are under pressure to get new green projects off the ground quickly, or to rush through adaptations to existing projects to reduce their carbon footprint or adapt the relevant infrastructure to fast changing weather conditions. Disputes may arise if a design ends up not being fit for purpose or fails to meet the specifications required to attract subsidies.

The impact of climate change also gives rise to challenges in the drafting of construction contracts. To give one example, the increasingly unpredictable weather patterns caused by climate change can make it difficult to set an appropriate level beyond which rainfall will be considered unforeseeable, such that risk can be allocated appropriately. Standard form construction contracts can have varying approaches which contractors and employers alike should be aware of.

Corporate reporting

Many jurisdictions have put in place corporate reporting obligations around emissions impact, and many companies are publishing decarbonisation and net zero plans. These increasingly require reporting on not only the direct emissions which result from a company's own activities but also the indirect emissions which occur in its value chain, including both upstream and downstream emissions.

This makes it essential for companies to be aligned with suppliers as to standards of reporting and how the information will be verified. There is an obvious potential for disputes if this goes wrong, either through errors or deliberate misstatements. Disputes may arise as to both the standard of liability, eg whether it is an absolute obligation or subject to best or reasonable endeavours, and as to how far liability for errors extends along the supply chain.

Joint ventures

Parties entering into joint ventures or collaboration agreements may have very different goals relating to decarbonisation and climate change mitigation. And even if their goals are aligned they may have different attitudes as to what they are willing to do to achieve

those goals or how quickly. This issue may be particularly acute where regulation sets a big picture objective, like emissions reduction, but is not prescriptive as to how that objective should be achieved.

Disputes may arise as to how the costs of climate change compliance, or of measures which go further than the strict regulatory requirements, should be allocated between joint venture parties. A party may also find that, as a result of changing regulation, a project is not as profitable as had been envisaged and so may seek to renegotiate the agreement or even back out.

The changing cultural and regulatory landscape around climate change issues may also have an impact on how objective standards are assessed, such as an obligation to act as a reasonable and prudent operator.

Asset disposals

Parties should bear in mind the potential long-tail disputes risk where they dispose of corporate assets which may be said to give rise to dangers to third parties. In a case a couple of years ago the Court of Appeal found that a seller of a tanker owed an arguable duty of care to the widow of a man killed in breaking up that tanker in a Bangladeshi shipyard, where the seller knew it was likely to end up being broken up in unsafe conditions.

The question arises whether the disposal of carbon generative assets could give rise to a similar ongoing tort risk, particularly if the seller is aware that the buyer is likely to manage the assets in a way which does not comply with climate related regulation.

Other contractual terms

Carbon impact is increasingly being included as a factor in choice of supplier or tender conditions when projects are bid for. Where a business has committed to meeting a certain emissions standard as a condition of getting access to the business, disputes may arise if that standard is not met, and those disputes may extend further where the failure is the fault of another business up the supply chain.

There is also the potential for contractual termination rights to be tied to carbon footprint or emissions levels. This may lead to complex disputes, particularly if the contractual provisions are not back to back.

Shareholder claims

Shareholder claims in the climate change space tend to run into difficulties in establishing causation and loss.

So far, we have not seen a successful derivative claim in the English court relating to climate change commitments. Earlier this year, the High Court dismissed a derivative claim brought against the directors of the Universities Superannuation Scheme for failing to satisfy climate change commitments – specifically, for failing to create a disinvestment plan for fossil fuel investments: *McGaughey v Universities Superannuation Scheme Ltd* [2022] EWHC 1233 (Ch). That claim faced the obvious difficulty that, in the current environment, fossil fuel investments are very profitable and therefore it is difficult to argue that investing in such assets is a breach of duty, bearing in mind the directors' duty to maximise investment returns for the pension scheme as a whole.

ClientEarth has attracted a lot of publicity with its announcement that it has acquired shares in Shell for the purpose of launching a derivative claim. It is said that the directors are in breach of duty in failing to prepare the company properly for the net zero transition, putting its long-term value in jeopardy. But again there are likely to be formidable obstacles in establishing causation and loss.

To date we have not seen a claim under section 90A of the Financial Services and Markets Act 2000, in relation to false statements or dishonest omissions in published information by an issuer of securities, which is based on statements relating to climate issues. That may be because corporate statements in this area tend to be phrased in aspirational and rather vague terms, so that proving falsity is difficult, as well as the hurdle of establishing dishonesty or recklessness.

The war in Ukraine: disputes implications

Russia's invasion of Ukraine has had a profound impact in many areas, from the human cost to the economic effects which have been felt globally. It has also led to many new and significant risks for businesses, particularly those trading in the region or with Russian-controlled businesses, including the need to navigate the complex sanctions regimes introduced by the UK and many other countries in response to the invasion.

In this session, the speakers considered the disputes implications of the conflict, including the effect of the UK sanctions regime, the impact on contractual obligations, the issues for those litigating or arbitrating against sanctioned persons, and the international law issues that arise.

Susannah Cogman
Partner, dispute resolution

Ajay Malhotra
Partner, dispute resolution

Hannah Ambrose
Senior associate, dispute resolution

The war in Ukraine: disputes implications

Sanctions against Russia

Russia's invasion of Ukraine has led to the imposition of broad and complex sanctions regimes by a range of jurisdictions, including the UK, EU and US.

UK and EU sanctions apply on both a nationality and a territorial basis. So, for example, UK persons must comply with UK sanctions wherever they are in the world, and foreign persons must comply with UK sanctions when they are within UK territory. However, the UK and EU regimes do not include purely extraterritorial sanctions that would apply, for example, to a non-UK person in respect of non-UK activity.

The US regime is different, in particular in relation to US export controls (which "follow the goods" in certain cases), and in relation to so-called "secondary sanctions", which are wholly extraterritorial.

The UK and EU have imposed asset freeze (list-based) sanctions, which designate particular individuals and entities, as well as extensive trade and services restrictions, restrictions on investment, and restrictions specific to particular sectors. There are also territorial-based sanctions relevant to the non-controlled areas of Ukraine (eg Donetsk and Luhansk).

The asset freeze restrictions prohibit: (i) making available funds or economic resources, directly or indirectly, to or for the benefit of designated persons; and (ii) dealing with funds or economic resources owned, held or controlled, directly or indirectly, by a designated person. For these purposes, funds and economic resources are very broadly defined. Transactions may be licenced, but licensing grounds are set out in the regulations and usually relatively narrow.

A particular challenge in determining who is subject to the asset freeze restrictions is that they apply not only to the listed individuals and entities but also entities owned or controlled by them, which makes it essential to conduct proper due diligence on contractual counterparties. Further, the tests for ownership/ ownership and control are different in each of the US, EU and UK regimes.

The complexity and volume of the sanctions against Russia have been completely unprecedented. The new measures are often introduced with immediate effect and no prior notice, and the drafting, particularly of some of the novel measures, is often very unclear.

Recent English cases

The legal fall-out from the war in Ukraine and, in particular, the sanctions imposed on Russian persons and businesses, is likely to continue for some time.

We are already seeing a number of trade finance disputes relating to Russian sanctions going through the English courts, which is perhaps not surprising as these disputes are often the first to arise where there are issues affecting global trade.

For example a claim has been brought by Eurochem, a Russian chemical fertilizer company, against banks which issued on-demand bonds relating to the construction of a fertiliser plant. The banks rejected a claim for payment under the bonds, arguing that it was excused from paying out because Eurochem's ultimate beneficial owner (as beneficiary of a trust) was subject to EU sanctions. The dispute is at an early stage, but it already potentially raises issues that may be important for other sanctions-related disputes, including ownership of entities, implied terms relating to sanctions compliance, and place of performance.

We are also seeing a number of cases where one limb of a transaction is affected by sanctions, and the question arises as to whether there is a single transaction which is frustrated by the imposition of sanction, or whether the two limbs are separate and independent of one another so that the other limb of the transaction must be performed.

Difficult issues may also arise for administrators of companies affected by sanctions. *Re Petropavlovsk (in administration)* [2022] EWHC 2097 (Ch) involved an application by the administrators of a gold mining and exploration group operating in Russia, whose business had been severely impaired by the impact of sanctions. The administrators secured a potential sale of the company but wanted court guidance as to whether they would be acting unlawfully by selling the company in circumstances where the US, UK, Japan and Canada had announced a ban on new imports of Russian gold. The court's view was that the sale did not appear to breach sanctions regulations, and it would not be inappropriate for the administrators to enter into the proposed sale. However, the court was careful to state that it would not be proper for it to make a decision that was binding on OFSI in circumstances where the court had not heard a full contrary argument and OFSI was not represented. This may suggest that the court will be reluctant to give blanket confirmations of the sort that administrators may be seeking, particularly in light of the fact that OFSI is unlikely to provide timely guidance in the majority of cases.

We are also seeing cases going through the courts relating to aircraft or vessel leasing contracts which have been affected by sanctions. These have raised a number of interesting issues including the application of the principle that a party is not permitted to benefit from its own wrong and the arguments based on duress.

In another sanctions-related case, *MUR Shipping BV v RTI Ltd* (considered in this post on our Litigation Notes blog), the Court of Appeal found that where a contract provided that an event would not amount to force majeure if it could be overcome by reasonable endeavours on the part of the party affected, the exercise of reasonable endeavours may in some circumstances require a party to accept non-contractual performance (here payment in euros rather than US dollars).

International law remedies

Russia's actions have interfered considerably with private rights and investments in both Russia and in Ukraine.

Russia has imposed a number of "countersanctions" or measures against so-called "unfriendly states". These include cancelling or amending existing contracts; redenominating contractual payment obligations in Russian rubles; overriding foreign owned IP rights without compensation; and frustrating the exit of foreign parties from Russian projects. The threat of expropriation/nationalisation of foreign-owned interests in Russia remains prevalent.

Further, in Ukraine, a number of foreign-owned assets have been expropriated, there has been extensive physical damage, and foreign businesses have also been subjected to cyber-attacks.

With domestic remedies unlikely to be fruitful, many investors are turning to international law for remedies to seek to recover their investment or mitigate their loss – in particular, claims under Bilateral Investment Treaties (or BITs). These are agreements between two or more states containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the state signatories in each other's territories.

Each treaty must be considered on its terms, but BITs commonly include: protection from unlawful expropriation of an investment without adequate compensation; a guarantee of fair and equitable treatment; and a guarantee of free transfers. The investor will generally have the right to refer a dispute to arbitration before an independent tribunal.

Russia has entered into BITs with major economies including the UK, Germany, France, the Netherlands, UAE and Japan. It has also entered into a BIT with Ukraine. There is no BIT in force between the US and Russia, but US investments may nonetheless benefit from the protection of a BIT if they have been made through a corporate structure with a company in a state which does have a BIT with Russia.

A number of claims were initiated against Russia following Russia's invasion and annexation of Crimea. Tribunals found that investments made in Crimea prior to its annexation were protected under BITs with Russia, including under the Ukraine-Russia BIT, by virtue of the fact that Russia was in de facto control of the territory in Ukraine in which the investments had been made.

Early consideration should also be given to enforcement. Russia has been highly active in challenging the awards of investment treaty tribunals in the local courts of the seat, and in resisting enforcement eg on grounds of sovereign immunity. Sanctions regimes may also lead to challenges in enforcing against Russian assets in some jurisdictions – though if sovereign immunity considerations can be overcome, it may be possible to enforce against such assets if the relevant national authorities are prepared to grant a licence.

Class actions: the current landscape

Class actions have been a growing risk for UK corporates for a number of years, and that trend is continuing, with businesses increasingly facing high value and high profile claims brought by large groups of claimants.

In this session, the speakers looked at the landscape for class actions and the sorts of claims we are seeing, and expect to see more of, in the UK and elsewhere, and talked about two important areas of class action risk, namely competition and employment.

Alan Watts
Partner, global co-head of class actions, head of commercial litigation UK and co-head of partnerships

Kim Dietzel
Partner, competition, regulation and trade

Andrew Taggart
Partner, head of UK employment

Class actions: the current landscape

Class actions have become an increasingly important feature of the litigation landscape in England and Wales over the past 10 to 15 years.

A major factor driving this growth has been the increased availability of litigation funding. It is estimated that currently UK litigation funders have £2.2 billion in assets, which is an 11% increase on the previous year. Class actions are attractive to funders as they tend to be high value and therefore offer a good return.

Another factor is the increased presence of claimant firms who work closely with funders in identifying and pursuing such claims and building books of claimants.

The high profile nature of these claims has also led to growth. Consumers receive numerous emails and messages inviting them to join class actions, which has led to greater public awareness of class actions and greater willingness to join them.

In the UK, the opt-out procedure introduced in 2015 for competition actions in the Competition Appeal Tribunal (CAT) has also led to growth. This took some time to get going but following on from the Supreme Court's decision in the MasterCard litigation in late 2020, which clarified the certification threshold for such claims, we are now seeing lots of cases being brought.

In the EU, the Directive on consumer collective actions, which applies to claims brought on or after 25 June 2023, may also lead to an increase in claims. Some member states already have class actions regimes which go beyond the requirements of the Directive – notably the Netherlands which introduced a class actions regime in 2020 that has been seeing a lot of activity.

The main class action mechanism in the UK, the Group Litigation Order (GLO) is an opt-in regime, which means claimants have to take steps to join the action, and be named in it, if they want to benefit from it. There are only two opt-out procedures for class actions in England and Wales: competition claims in the CAT; and representative actions under CPR 19.6.

The representative actions regime is quite restrictive as all represented parties need to have the "same interest" in the claim, and in most cases loss will differ between claimants even if they have suffered the same wrong.

The high profile *Lloyd v Google* case last year established the possibility of a “bifurcated process” in which a representative action is used to determine common issues (such as whether there has been an actionable breach), leaving any individual issues to be dealt with subsequently. However, there are question marks over whether this is economically viable for funders.

So for the moment, outside the competition space, class actions in England and Wales will generally require claimants to take active steps to join in.

Some of the key areas for class action risk, apart from competition claims, include employment cases, shareholder actions, environmental and human rights claims, product liability claims, and data class actions.

Competition class actions

There has been massive growth in competition class actions in the UK, and we are also seeing growth in other key jurisdictions.

In the UK there have been 11 applications for a Collective Proceedings Order (CPO) this year alone, compared to 27 in total since the regime was introduced in 2015. This is in large part due to the Supreme Court's decision in *Merricks v Mastercard* [2020] UKSC 51, which established quite a permissive approach to certification, as illustrated by the fact that all but two of the certification hearings so far have resulted in a CPO being granted.

Some have argued that the certification stage is becoming an expensive rubber-stamping exercise, and in some recent cases defendants have not even contested certification, given the low bar for claimants and the high costs involved.

Surprisingly, a significant number of these CPO applications relate to "standalone claims", where the claimants have to establish a competition law breach, as opposed to "follow-on" claims where a competition authority has already found a breach and so the claimants need only establish causation and loss. And many are based on alleged abuse of dominance, rather than anti-competitive agreements, contrary to most people's expectations when the regime was introduced.

In some cases claimants have sought to challenge the identity of the proposed class representative or the funding arrangements at the certification stage. Such challenges have generally been unsuccessful, but this process has often led to improvements in the funding arrangements from the defendant's perspective. Other challenges have led to refinements in the class definition.

It is clear from the Court of Appeal's decision in *BT v Le Patourel* [2022] EWCA Civ 593 that the CAT has a wide margin of discretion in deciding whether a CPO should be certified on an opt-in or opt-out basis. The Court of Appeal will not interfere with the CAT's weighing up of relevant factors, even if it might have reached a different conclusion if it had conducted the exercise itself. In addition, there is no presumption in favour of opt-in, and the CAT can take into account the likely take-up of an opt-in class action when determining whether opt-out is more suitable.

Employment class actions

The main types of claim brought as class actions in the employment space are claims for: collective consultation failure (eg where there are mass dismissals or TUPE transfers); assertion of employee/worker status (to obtain benefits such as holiday pay, minimum wage and pension contributions); unlawful inducement to prevent collective bargaining; and equal pay.

These are often an aggregation of relatively modest claims, but the overall value may be very large due to the number of individuals taking part.

Historically, many large-scale employment claims were brought or supported by trade unions. More recently these claims tend to be brought by specialist group action claimant firms and backed by litigation funders.

These claims tend to be brought in organisations where there are lots of employees, eg traditionally health trusts and local authorities. More recently, private sector employers with medium to large workforces (250+) have become targets.

Large-scale equal pay claims are particularly prevalent in the retail sector. They started against Asda and are now being brought against various other vertically-integrated retailers.

In the UK companies with 250 or more employees are required to report on their gender pay gap. Although a gender pay gap does not necessarily mean there is discrimination, a significant gender pay gap which is not addressed will often lead claimant firms and funders to consider whether there may be scope for discrimination claims.

There are organisations which offer equal pay audits, but employers should be cautious around the potential for creation of non-privileged documents which may be disclosable in any subsequent litigation.

It may be possible to pre-empt workplace issues by effective communication and consultation through workplace bodies, but again employer should keep in mind issues of privilege and disclosure should a dispute later arise.

Emerging Tech and IT disputes

The modernisation of business IT infrastructure and the latest emerging digital technologies pose novel disputes risks to businesses across a wide spectrum of sectors and industries. These developments impact upon traditional legal risk analysis and introduce new challenges for businesses.

This panel session looked at mitigating legal risk in this disruptive environment. In particular, the speakers considered issues around standard form contracts, consumer regulations, exclusions of liability and the apportionment of commercial risk. They also considered the key developments in software/IT outsourcing, AI, ransomware attacks, and blockchain and digital assets disputes and the associated risks.

Chair: Chris Bushell
Partner, dispute resolution

Rachel Lidgate
Partner, dispute resolution

Heather Newton
Senior associate, dispute resolution

Charlie Morgan
Senior assoicate, dispute resolution

Philip Lis
Senior associate, dispute resolution

Emerging Tech and IT disputes

Tech contracts and the disputes they give rise to are growing in value and strategic importance to businesses. Some of the biggest commercial disputes we have seen in the past decade or so have related to failed tech projects.

IT projects can be very long and complex, and the requirements of new, bespoke or customised solutions are particularly liable to change over time, requiring multiple variations. Disputes can arise where there is a lack of documentation relating to these changes, so that arguments emerge for example about oral variation or variation by conduct.

A major cause of tech disputes is the "contract in the drawer" syndrome, where the parties enter into a detailed contract but it is not referred to enough as the project progresses and there is then a divergence between what the contract says and what happens in practice.

Conversely, some contracts in the IT space may be light on firm obligations, particularly where a project is following an agile methodology. Such methodologies require robust governance processes if the project is going to be a success.

Any assumptions underlying a project should be carefully considered and (where possible) set out in the contract, together with what happens if those assumptions need to be reviewed or prove to have been incorrect. Otherwise this can be fertile ground for disputes.

Disputes can also arise where a customer alleges that a supplier has misrepresented the capabilities of particular software or hardware. Such disputes will generally turn on whether the customer can identify a false statement of fact by the supplier that led the customer to enter into a contract (or to agree particular amendments to it).

Issues will often be spotted only after wide-scale roll–out. Particularly if the supplier is not retained to manage the system on an ongoing basis, there may be disputes about whether the poor performance of the system is due to latent design flaws or maladministration by the customer.

Cyber disputes

As well as the increasing sophistication and high stakes of cyber attacks and incidents, we are seeing an increased interest in pursuing cyber risks through the supply chain, for example where a third party IT supplier's products or actions have enabled or contributed to a vulnerability that has led to a cyber attack suffered by the customer.

Customers have become increasingly sophisticated in including cyber standards in supplier contracts, and may require certification or formal penetration testing diligence before entering into arrangements with suppliers. These levers may enable a breach of contract claim to be brought in the event that a third party has contributed to any cyber incident.

The risks for suppliers may be increased by the GDPR which contains specific provisions designed to apportion liability for claims between a processor and controller of information, and the Information Commissioners' Office (ICO) can fine data processors directly.

A further trend we are seeing in the cyber space is the need to address the actions of employees and ex-employees who may cause or enable cyber attacks on their employer organisation, either maliciously or inadvertently. This risk is heightened by remote and flexible working, as the more informal work environments and often increased use of personal devices may give increased opportunity for cyber criminals to target businesses and present challenges when seeking to establish the source of cyber incidents.

Mitigating the risks

Parties entering into IT contracts should be clear and realistic about what resources, and governance, are needed through the life of the contract. This should reduce the risks of cost overruns, delays, and performance issues – and the disputes those issues cause.

It is worth spending time at the outset setting out "dependencies" between the parties' respective obligations as thoroughly and objectively as possible, and agreeing on the process and consequences if particular dependencies are not achieved on time. This should help to avoid disputes where the parties disagree on who bears contractual responsibility for a particular overrun.

IT contracts often involve staggered completions over long periods of time, during which the costs and project itself are liable to change, so it is important to set clear milestones and clear processes for acceptance. Otherwise questions can arise as to whether a milestone has been accepted by default or whether rights have been waived.

Active contract management is another mitigating factor, ensuring that what's happening on the ground is monitored and that any changes are properly documented if performance diverges from the contractual processes.

It is important to think carefully about limitations of liability, which are often a disputed area in these contracts. Contracts should set out as clearly as possible what is or is not included, but there is often inherent uncertainty and litigation risk with such clauses.

It is also key to include a tailored dispute resolution clause which reflects commercial drivers – for example including an expert determination clause for the quick resolution of certain technical disputes (perhaps even with a standing expert who is familiar with the contract), or requiring the parties to engage in negotiations or mediation ahead of initiating legal proceedings, and thinking carefully about whether litigation or arbitration will be most appropriate.

There can be significant challenges for a party to a tech dispute in evidencing its case. With long-running contracts, agile methodologies and numerous changes over the life of a project, identifying who did what and when can be challenging, particularly when teams have changed. Although it is not always front of mind for teams working on these projects, it is important to put in place a clear paper trail to avoid problems later.

In relation to cyber disputes specifically, clear processes should be put in place in advance to deal with a cyber incident, including for example the use of play-books or running test scenarios. Any cyber incident is likely to exert considerable immediate pressure on a business and require quick decisions, so clear processes can help ensure appropriate steps are taken to deal with the immediate aftermath whilst also ensuring that any claims against third parties are preserved.

Blockchain and crypto disputes

Cryptoassets and blockchain technology increasingly permeate the financial and digital landscape, and are the source of considerable commercial, political and regulatory focus.

There is currently considerable distress in the crypto market and we are seeing significant write-downs of investments in crypto companies. Even before the recent FTX bankruptcy, we saw a number of high-profile insolvencies in the crypto space across a broad range of jurisdictions from the Caribbean, to US, Europe, Singapore and others. Some commentators see this as a brief "crypto winter", whereas others think it is a longer term trend which may have a broader systemic impact across the market.

The potential risks associated with crypto assets may affect a broad range of players, not limited to "pure" crypto businesses themselves and their lenders, investors or shareholders, but also businesses which have exposure to the crypto market eg because they are contractual counterparties to crypto businesses.

Crypto assets continue to carry legal uncertainty, given that their legal status remains a new and relatively untested question. The English courts have generally held that cryptoassets are a form of property, capable of being the subject of a proprietary injunction. However, the UK Law Commission has suggested that reform is needed and have proposed the creation of a new third category of property called a "data object", in addition to the existing categories of "things in possession" and "things in action".

There is also considerable uncertainty as to the duties owed by the various participants in the crypto market, which is a question that remains largely untested by the courts, although the Court of Appeal is expected to consider some of these issues in the *Tulip Trading* case involving Dr Craig Wright who claims to be the founder of Bitcoin.

There are also novel questions which will be tested in the insolvency context, for example as to whether those whose crypto assets are held by insolvent trading platforms or exchanges can recover only as unsecured creditors or, alternatively, can make a proprietary claim. This may make a huge difference in financial terms.

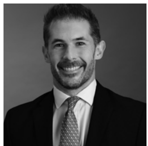
There are also novel issues that arise from the "decentralised" nature of these assets, which flow over international borders – for example as to which courts have jurisdiction over a dispute or where or how a judgment can be enforced. Difficult questions also arise due to the intrinsic pseudonymity of owners within this asset class.

There has already been considerable class action activity in the US involving crypto assets, and it remains to be seen to what extent that trend will be replicated in England and Wales.

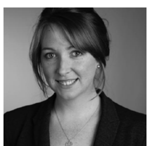
Contacts

Paul Lewis
Partner, Global Head of the Insurance Disputes Practice
T +44 20 7466 2138
paul.lewis@hsf.com

Andrew Cannon
Partner, Co-Head of the Public International Law Practice, and Deputy Head of the Global Arbitration Practice
T +44 20 7466 2852
andrew.cannon@hsf.com

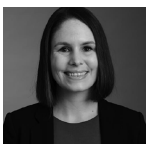


Neil Blake
Partner, Dispute Resolution
T +44 20 7466 2755
neil.blake@hsf.com



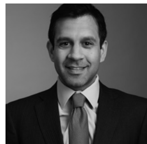
Louise Barber
Senior Associate, Dispute Resolution
T +44 20 7466 2140
louise.barber@hsf.com

Risteard de Paor
Of counsel, Dispute Resolution
T +34 91 423 4106
risteard.depaor@hsf.com

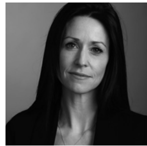


Rebekah Dixon
Senior Associate (New Zealand), Dispute Resolution
T +44 20 7466 2958
rebekah.dixon@hsf.com

Susannah Cogman
Partner, Dispute Resolution
T +44 20 7466 2580
susannah.cogman@hsf.com



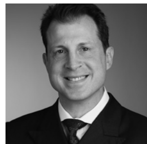
Ajay Malhotra
Partner, Dispute Resolution
T +44 20 7466 7605
ajay.malhotra@hsf.com



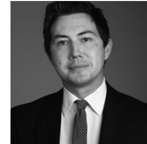
Hannah Ambrose
Senior Associate, Dispute Resolution
T +44 20 7466 7585
hannah.ambrose@hsf.com

Alan Watts
Partner, global co-head of class actions, head of commercial litigation UK and co-head of partnerships
T +44 20 7466 2076
alan.watts@hsf.com

Kim Dietzel
Partner, Competition, Regulation and Trade
T +44 20 7466 2387
kim.dietzel@hsf.com



Andrew Taggart
Partner, Head of UK Employment
T +44 20 7466 2434
andrew.taggart@hsf.com

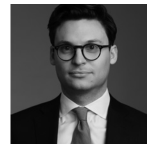


Chris Bushell
Partner, Dispute Resolution
T +44 20 7466 2187
chris.bushell@hsf.com

Rachel Lidgate
Partner, Dispute Resolution
T +44 20 7466 2418
rachel.lidgate@hsf.com

Heather Newton
Senior Associate, Dispute Resolution
T +44 20 7466 2984
heather.newton@hsf.com

Charlie Morgan
Senior Associate, Dispute Resolution
T +44 20 7466 2773
charlie.morgan@hsf.com



Philip Lis
Senior Associate, Dispute Resolution
T +44 20 7466 2286
philip.lis@hsf.com

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