CLEARY GOTTLIEB

ALERT MEMORANDUM

Looking Forward Into 2024 and Beyond: Seven Trends in UK Disputes

February 7, 2024

The coming year promises to be a pivotal one for litigation in the United Kingdom, with a number of changes on the horizon that will influence the way disputes are administered and resolved. We explore seven trends that will define the litigation landscape in 2024, ranging from the integration of advanced technologies like AI and crypto into both legal and commercial processes, to the complex legal challenges emerging from geopolitical conflicts and climate change.

The first trend examines the continued expansion of collective or class actions in the UK since the landmark *Merricks* decision by the UK Supreme Court in 2020. The second trend delves into the ramifications of the July 2023 UK Supreme Court decision in *PACCAR* and subsequent legislative instruments that Parliament is set to enact this year, in particular addressing their impact on opt-out competition collective action proceedings. Third, the article sheds light on recent court decisions indicating a growing inclination towards judicial intervention through anti-suit injunctions. This intervention has so far aimed to prevent claims from being brought in Russia, even where such actions breach arbitration agreements pointing to seats *outside* of England.

The fourth trend highlights judicial and statutory developments under the Arbitration Act 1996, including some questions raised more broadly for the arbitration community following the high-profile decision in *Nigeria v P&ID* involving corruption during the underlying arbitration proceedings. The fifth trend highlights several novel ways claimants have been seeking to enforce environmental and social issues through the courts, and how ongoing litigation in Europe and the US may shape the UK's legal landscape going forward. Finally, we discuss how technological developments in AI and crypto assets, including their regulation, are likely to feature in English litigation.

1

Continued Growth and Development of Class and Collective Actions

The competition collective actions regime has continued to gain momentum in the UK since the landmark 2020 Supreme Court decision in *Merricks*, and last year was no exception. Several factors, including legislative changes and increased third-party litigation funding, have contributed to this surge in claims and we expect to see this trend continue into 2024 and beyond, even in spite of the setbacks threatened by the *PACCAR* decision (on which, see below).

In the UK, the 2020 Supreme Court decision in *Merricks v Mastercard*[1] resulted in a significant increase in "opt-out" collective action claims brought before the Competition Appeals Tribunal ("CAT"). In 2023, the Court of Appeal clarified opt-out collective action claims in two certification judgments: *Evans v Barclays Bank and O'Higgins FX Class Representative Limited v Barclays Bank* ("*Forex*"),[2] and *UK Trucks Claim Limited v Stellantis NV and Traton SE & Others v Road Haulage Association Limited* ("*RHA*").[3]

In *Forex*, the CAT initially refused two separate applications for opt-out collective proceedings orders but indicated a willingness to certify them if they had been sought on an opt-in basis. In July 2023, the Court of Appeal reversed this decision, emphasizing among other points that opt out proceedings were justified when it was the only practical option to move a claim forward. The *RHA* case, involving a follow-on action against truck manufacturers, raised questions about conflicts of interest within a class, as the class represented both new and used truck purchasers, whose interests potentially diverged on the issue of pass on. The CAT had held that a conflict of interest could arise but could be managed through case management, *i.e.*, by splitting the claimant class into separate sub-classes. The Court of Appeal, agreeing, held that this approach was more cost-effective and efficient than having two entirely separate class action claims.

The CAT also refused to certify two class actions in 2023, based in large part on the methodology requirements known as the *Pro-Sys* test not being met.[4] The *Pro-Sys* test requires the proposed class representative to set out in sufficient detail at the certification stage the methodology by which it proposes to make out its case, in particular how it intends to calculate class-wide damages. Notably, in both cases, the problems with the class representative's methodology were not outright rejected, and the CAT gave significant scope for the proposed class representative to reformulate elements of their claim and try again at gaining certification.

Another development has been the use of competitive collective proceedings in environmental disputes: in August 2023, a substantial, £330 million opt-out collective action was commenced against Severn Trent Water, a water company that provides water and sewerage services to households and businesses throughout the UK. The claimants, led by Professor Carolyn Roberts of Oxford University, are alleging that

[1] *Mastercard Incorporated & Others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51. *See also* Cleary Gottlieb, *Mastercard Incorporated and Others (Appellants) V Walter Hugh Merricks CBE (Respondent)* (11 December 2020), https://www.clearyantitrustwatch.com/2020/12/mastercard-incorporated-and-others-appellants-v-walter-hugh-merricks-cbe-respondent/.

[2] *Mr Phillip Gwyn James Evans v Barclays Bank Plc & Ors and Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC & Ors* [2023] EWCA Civ 876.

[3] *UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrylser Automobiles NV) & Others and Traton SE & Others v Road Haulage Association Limited* [2023] EWCA Civ 875.

[4] *See* e.g., *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and others* [2023] CAT 10 and claims by Commercial and Interregional Card Claims against Visa and Mastercard.

Severn Trent has abused its dominant position in the market by (1) under-reporting the number of sewage spills into the environment, and (2) providing misleading information to Ofwat, their regulator, and as a direct consequence of these acts, has benefitted by charging higher prices than they would otherwise have been able to charge if they had provided accurate reporting. This was the first of six collective action claims raised by Professor Roberts against all of the major water suppliers, each alleging that those companies have failed to comply with environmental standards.

Finally, the first settlement of a collective action was approved by the CAT in December 2023. One of the defendants in the proceedings brought by Mark McLaren on behalf of consumers alleging losses resulting from the *RoRo* cartel settled for £1.5m. Most notably, the class representative, the settling defendant, and the non-settling defendants agreed by consent that no contribution claims would be brought after the determination of the settling defendant's share of the claim at trial. Consent was granted by the non-settling defendants after the class representative agreed that any damages the settling defendant was responsible for over and above the amount settled for would be reduced from the total value of the claim.

We expect to see further developments on these issues and collective actions more broadly throughout 2024 and beyond.

2

New Challenges and Changes on the Horizon for Litigation Funding

A related area on which we expect to see further development in 2024 is litigation funding, particularly in the context of collective proceedings before the CAT.

The Supreme Court July 2023 decision in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal* ("*PACCAR*") cast serious doubt on the enforceability of certain Litigation Funding Agreements ("LFAs") that provide that the funder will be paid a percentage of the overall damages awarded to the winning party.[5] The specific issue for the Supreme Court in that case was whether those kinds of LFAs constitute damages-based agreements ("DBAs"), which are not prohibited *per se* but which are unenforceable: (i) in opt-out collective proceedings before the CAT pursuant to section 47C(8) of the Competition Act 1998, or (iii) if they do not comply with the requirements set out in the DBA Regulations 2013. Prior to this case, funders and claimants alike had typically proceeded on the basis that LFAs under which a funder is entitled to a percentage of any damages fell outside the definition of a DBA, largely on the basis that it was understood by Claimants and funders that litigation funders do not provide "*claims management services*" within the meaning of section 58AA of the Courts and Legal Services Act 1990 (the statutory provision which defines DBAs).

[5] *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28. *See* Cleary Gottlieb, *Supreme Court Rules Most Litigation Funding Agreements are Unlawful* (8 August 2023), https://www.clearyantitrustwatch.com/2023/08/supreme-court-rules-most-litigation-funding-agreements-are-unlawful/.

The Supreme Court disagreed, and held that those kinds of LFAs *did* constitute DBAs. *PACCAR* therefore puts into question the futures of a substantial number of opt-out class action claims pending before the CAT that are funded by LFAs of this type, and has wider implications for non-CAT claims funded by litigation funders.

Several cases on the issue have followed in the months since *PACCAR*,[6] but the main case addressing the issue so far has been the CAT's decision in *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe Ltd*,[7] which was handed down in November 2023. While the original LFA in those proceedings was unenforceable according to *PACCAR*, it was subsequently amended to provide that the litigation funder would be paid the greater of (1) a multiple of its overall funding contribution, or (2) a percentage of proceeds recovered, but "*only to the extent enforceable and permitted by applicable law*". Here, the CAT broadly found that LFAs which had been amended in light of the *PACCAR* decision, so that the funders' return was based on a percentage of the funds committed and not a percentage of damages, was *not* a DBA and therefore enforceable in opt-out collective proceedings. Likewise, the CAT held that the "*only to the extent enforceable or permitted by applicable law*" language included in the amended LFA was sufficient to allow the funder's return to be expressed as a percentage of damages because the legal effect of that clause was contingent on a change in the law permitting such agreements. Recognizing the importance of the issue to the wider regime, the CAT has however allowed Sony to appeal its judgment to the Court of Appeal.

In the meantime, on 20 November 2023, the Government published a proposed amendment to the Digital Markets, Competition and Consumer Bill which responds to, and seeks to temper the effect of, the *PACCAR* ruling. The proposed amendment to the Bill is focused on opt-out proceedings in the CAT. It provides that the prohibition on the use of DBAs in opt-out collective proceedings (pursuant to section 47C(9) of the Competition Act 1998) should be removed in respect of litigation funders, but not for solicitors or barristers. As such, the changes which the amendments to the Bill would bring about are fairly limited in scope, and do not go as far as stating that third party litigation funding agreements should not be considered DBAs at all. Consequently, litigation funding agreements which fall within the statutory definition of a DBA will still need to comply with the DBA Regulations 2013, whether in the context of opt-out proceedings or other proceedings.

At the time of writing, the amended Bill completed its third reading in the House of Commons and is currently at Committee stage in the House of Lords.

However, in a potential step going beyond the proposed Bill, following remarks made by the former sub-postmaster and founder of the Justice for Subpostmasters Alliance Alan Bates in support of the role of litigation funding in the *Post Office* collective action proceedings, on 15 January 2024, UK Justice Secretary Alex Chalk told the Financial Times that the Government intended to entirely reverse the effects of the *PACCAR* decision "*at the first legislative opportunity*".[8] There is, therefore, the possibility of further developments this year.

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[6] For example, *Therium Litigation Funding AIC v Bugsby Property LLC* [2023] EWHC 2627 and *Omni Bridgeway (Fund 5) Cayman Invt Ltd v Bugsby Property LLC* [2023] EWHC 2755 (Comm).

[7] *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited and others* (Judgment (CPO Application & Strike Out/ Summary Judgment) dated 21 November 2023) [2023] CAT 73.

[8] Financial Times, *UK Government vows to protect litigation funding that helped sub-postmasters* (15 January 2024), https://www.ft.com/content/3d089314-eb97-4e21-9101-962876c7d480.

3

Mixed-Interventionist Approach to Cross-Jurisdictional Issues arising from Sanctions

The English court took a mixed approach to judicial intervention in a number of cross-jurisdictional cases last year, although some further (welcome) clarity has recently been provided by the Court of Appeal. Perhaps the most salient and recent example of this has been the Court's perceived willingness to grant Anti-Suit Injunctions ("ASIs") to restrain foreign proceedings brought in breach of a foreign-seated arbitration clause. These recent cases have largely arisen following Russia's 2020 amendment to Article 248 of the Arbitrazh (Commercial) Procedure Code ("2020 Amendment"), which itself was a direct policy response to Western sanctions against Russian companies and individuals following Russia's invasion of Ukraine.

The 2020 Amendment establishes exclusive jurisdiction in favour of Russian Courts in circumstances where one party to the dispute is Russian and subject to sanctions, and the dispute relates to the imposition of those sanctions. The expansion of sanctions, which may implicate more Russian companies and individuals, has led many of these companies and individuals to seek refuge for their contractual claims in the Russian Courts, often in breach of applicable arbitration agreements.

Notably, in 2023 the English court granted ASIs in support of Paris-seated arbitrations in both *Deutsche Bank AG v RusChemAlliance LLC*[9] (which overturned the High Court's decision in *SQD v QYP*,[10] refusing an ASI) and in *Commerzbank AG v Ruschemalliance LLC* [2023] EWHC 2510 (Comm). Both of those cases arose from the same factual background, following the imposition of sanctions on RusChemAlliance ("RCA") and subsequent breakdown in relations between RCA and Linde Engineering for the construction of an LNG plant in Russia. RCA commenced proceedings in Russian Courts, in reliance on the 2020 Amendment, and in both cases claimants sought an ASI in English courts.

The threshold issue in these cases was whether the arbitration clause (which nominated Paris as the seat of arbitration) was governed by English law, or whether there were any "additional" factors which would displace that general rule which should preclude an English court from granting the ASI. The common reasoning in both of these decisions was that an ASI should be granted because (i) there was a sufficiently strong connection to England, as the governing law of the underlying contracts (and likewise, it was held, the arbitration agreements in the contracts) was English law, and (ii) there was nothing to suggest that the granting of an ASI would be contrary to French public policy, even if those instruments are not part of the French procedural "*toolkit*".

A third case arose in 2023 out of similar facts, in *UniCredit v RusChemAlliance*, in which the underlying arbitration agreement also provided for Paris as the seat of arbitration. The High Court initially took a different approach to the courts in both of the earlier decisions against RCA and caused some judicial uncertainty on the issue. At first instance,[11] Teare J (refusing to grant UniCredit the ASI) held that despite the underlying contractual jurisdiction clause pointing to England, the arbitration agreement in the

[9] *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144.

[10] *SQD v QYP* [2023] EWHC 2145 (Comm).

[11] *G v R* [2023] EWHC 2365 (Comm).

contract was not governed by English law, but rather French law as the seat of arbitration on the basis that "additional factors" displaced the general rule which would have pointed to England. The "additional factor", he concluded, was that as a matter of French law, the law of the seat of arbitration is the default law of the arbitration agreement. Even if he was wrong on this, Teare J held that England was not the proper forum to grant this relief.

On appeal, however, the Court of Appeal disagreed,[12] favouring an interpretation more in line with the Court of Appeal in *Deutsche Bank* and High Court in *Commerzbank*. set out above and drawing a line under the issue at least for the time being. It remains to be seen, however, whether future judicial developments, including amendments to the Arbitration Act 1996 will signal the end of this debate or indeed raise further questions.

A further, related line of developments in 2023 in the realm of sanctions litigation concerned the judicial interpretation of "control" for the purposes of the scope of the UK's sanctions regime. In *Mints v PJSC National Bank Trust*,[13] the Court of Appeal suggested (albeit in *obiter*) that all Russian companies may be considered "controlled" by President Vladimir Putin, and therefore in theory could be subject to sanctions. While this conclusion would have had very significant and unexpected consequences on certain parts of the UK economy, the subsequent High Court judgment in *Litasco SA v Der Mond Oil and Gas Africa SA*[14] adopted a much more restricted interpretation of "control". Moreover, OFSI, together with the Foreign, Commonwealth & Development Office, responded to the *Mints dicta* by issuing guidance that states, amongst other things, that "*there is no presumption on the part of the UK government that a private entity is subject to the control of a designated public official simply because that entity is based or incorporated in a jurisdiction in which that official has a leading role in economic policy or decision-making*".[15]

Looking ahead to 2024, the uncertainty resulting from these somewhat contradictory developments is likely to give rise to further litigation, as disputes involving sanctioned entities continue to crystallise and these issues will continue to arise in litigation. Since liability for sanctions violations is strict, and sanctions issues arise not only in the context of regulatory enforcement, but also, for example, contractual disputes, these are areas of potentially significant risk for parties.

We expect to see further developments on these two lines of cases, and indeed other cases arising from the application of sanctions on Russian entities, and Russia's 2020 Amendment, in the coming year.

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[12] *Unicredit Bank GmbH v Ruschemalliance LLC* [2024] EWCA Civ 64 (2 February 2024).

[13] *Mints v PJSC National Bank Trust* [2023] EWCA Civ 1132. *See* Cleary Gottlieb, *Court of Appeal Gives Judgment on Effect of Russia Sanctions on Pending Litigation* (23 October 2023), https://www.clearygottlieb.com/news-and-insights/publication-listing/court-of-appeal-gives-judgment-on-effect-of-russia-sanctions-on-pending-litigation.

[14] *Litasco SA v Der Mond Oil and Gas Africa SA & Anor* [2023] EWHC 2866 (Comm).

[15] Foreign, Commonwealth & Development Office and Office of Financial Sanctions Implementation, *Ownership and Control: Public Officials and Control guidance* (17 November 2023), https://www.gov.uk/government/publications/ownership-and-control-public-officials-and-control-guidance/ownership-and-control-public-officials-and-control-guidance.

4

Judicial and Statutory Developments under the Arbitration Act 1996

Judicial Developments in Award Challenges

The English courts for the most part followed the usual approach to arbitration award challenges under the Arbitration Act 1996 ("AA96") in 2023, refusing on at least 7[16] occasions to permit claimants' challenges to arbitral awards and their enforcement in England. There were, however, some noteworthy cases handed down under the AA96 last year that bear mention, as they are likely to impact arbitration matters going forward, and the arbitration community more broadly.

In the July 2023 case *Payward Inc v Chechetkin*,[17] the Court exceptionally granted a challenge to the enforcement of a foreign (Californian) arbitration award on grounds of public policy, pursuant to section 103(3) of the AA96. The case arose following substantial losses sustained by Mr Chechetkin, a UK-based consumer, on a cryptocurrency exchange. Mr Chechetkin commenced court proceedings in the UK against Payward for breaches of the Financial Services and Markets Act 2000 ("FSMA"), and subsequently Payward commenced arbitration proceedings in California pursuant to the website's terms and conditions (which were governed by Californian law). The tribunal in that arbitration held in favour of Payward, who then sought to enforce the award in England. The High Court ultimately refused to enforce the award, however, on the basis that doing so would be contrary to the terms of the Consumer Rights Act 2015 and FSMA, which it held both formed part of UK public policy. This decision illustrates the potential difficulties which can be faced by companies seeking to enforce awards issued by tribunals in another jurisdiction against a consumer in England.

The most high-profile arbitration challenge in the English courts last year, however, was *The Federal Republic of Nigeria v Process & Industrial Developments Limited*,[18] where judgment was handed down in October 2023. There, Nigeria successfully challenged a USD 11 billion arbitral award made against it in London pursuant to section 68 of the AA96, on the basis that the original contract which was the subject of the arbitration proceedings had been procured by fraud.

Knowles J acknowledged that the facts of this case were somewhat extreme, and so it is tempting to suggest at first blush that it was an isolated case. But Knowles J also spent some time at the end of his judgment remarking on broader reflections about the arbitration process and its appropriateness in cases involving sovereign states. He recognised,

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[16] *Port de Djibouti SA v DP World Djibouti FZCO* [2023] EWHC 1189 (refusing the Claimant's challenge to the jurisdiction of the tribunal pursuant to s 67 AA96); *Emirates Shipping Line DMCEST v Gold Star Line Ltd* [2023] EWHC 880 (Comm) (refusing the Claimant's challenge to the tribunal's award in which the tribunal had determined it did *not* have jurisdiction); *Cipla Limited v Salix Pharmaceuticals, Inc.* [2023] EWHC 910 (Comm) (refusing the Claimant's challenge to an award on grounds that the tribunal had failed to act fairly and impartially pursuant to s 33 AA96, and that there was a serious irregularity pursuant to s 68 AA96); *Radisson Hotels APS Denmark v Hayat Otel Işletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi* [2023] EWHC 892 (Comm) (refusing the Claimant's challenge alleging bias pursuant to s 73 AA96 on the basis that the Claimant had continued to participate in the arbitration after uncovering the evidence which had formed the basis of its challenge); *Eurafric Power Ltd v Bureau of Public Enterprises of the Federal Republic of Nigeria and others* [2022] EWHC 3548 (Comm) (refusing to set aside an order recognizing the arbitration award on the basis that there had been no failure by the claimant to give full and frank disclosure when obtaining the enforcement order without notice); *BPY v MXV* [2023] EWHC 82 (Comm) (refusing the Claimant's challenge pursuant to s 68 that there had been a serious irregularity in how the arbitrator reached its decision, and that the arbitrator had not acted fairly and impartially pursuant to s 33 AA96); *Africa Sourcing Cameroun Limited and another v Société par Actions Simplifiée (Rockwinds) and another* [2023] EWHC 150 (Comm) (refusing the Claimants' challenge pursuant to s 68 AA96 on the basis that the chair of the tribunal was biased). **Cf**: *Pan Ocean Co Ltd v Daelim Corporation* [2023] EWHC 391 (Comm), (upholding an appeal on a point of law brought pursuant s 69 AA96, holding the tribunal had been wrong to find that an implied term in the parties' contract had been breached).

[17] *Payward, Inc & Ors v Chechetkin* [2023] EWHC 1780 (Comm).

[18] *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm).

for example, that the underlying arbitration "*was a shell that got nowhere near the truth*", and that it was almost by chance that on the facts Nigeria was ultimately able to succeed in its challenge in the English courts.

He therefore set out four points for further consideration by the arbitration community more broadly: *first*, there may well be a contractual imbalance in commercial contracts involving states who are "*challenged for resources*", and that this underlined the importance of the role of professional standards and ethics in contract drafting.[19] *Second*, the disclosure available through the court process was a crucial factor enabling Nigeria to argue its case, demonstrating the importance of disclosure, even in arbitration proceedings where the tribunal's powers may be more limited.[20] *Third*, in circumstances where a state's legal advisors or other participants acting on behalf of the state fail to ensure it correctly participates in the arbitration, it is appropriate for the tribunal to take a more interventionist role to overcome those shortcomings.[21] *Fourth*, the fact that arbitration operates behind closed doors could, in some cases particularly involving states (although it was not so found in this case) compromise the integrity of the proceedings. In contrast, the "open court principle" found in litigation can contribute to greater scrutiny of the process and its participants, both by the public and the press.

While some such efforts are already underway in some arbitral institutions like the ICC, these points will require careful consideration and reflection by the arbitration community more broadly going forward. We expect further developments throughout 2024, as parties and the arbitration community develop their responses to the issues thrown into sharp relief by the P&ID case, which will inevitably cause careful reflection on some of the core tenets of the arbitration process.

Arbitration Act 1996 Reform

Finally, following publication of the Law Commission's consultation on the AA96, in November 2023, the Government introduced the Arbitration Bill to Parliament.[22] The Bill updates the current arbitral framework set out in the AA96 in line with the Law Commission's recommendations. Some notable proposed amendments include: (i) the express ability for arbitrators to summarily dispose of issues where there is no real prospect of success, (ii) the introduction of a statutory duty on arbitrators to disclose circumstances which may give rise to doubts about their impartiality, and (iii) a new provision that the law governing an arbitration agreement will be the law of the seat chosen for arbitration *unless* parties expressly agree otherwise (displacing the current common law rule set by the UK Supreme Court in *Enka v Chubb*[23] and which sparked the conflicting line of cases involving RCA and discussed above). The Bill states that its provisions will apply in relation to any arbitration agreement (whenever it was made), but it will not apply in respect of arbitral or court proceedings which are underway before the Bill comes into effect.

In light of the Law Commission's extensive consultation regarding the reforms embodied in the Bill, it is possible that the Bill will pass into law in relatively short order. It is currently at the second reading at the House of Lords at the time of writing.

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[19] *Ibid*, para. 585.

[20] *Ibid*, para. 586.

[21] *Ibid*, para. 588.

[22] Arbitration Bill, https://bills.parliament.uk/publications/53038/documents/4018.

[23] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

5

Private Enforcement of ESG Issues

Environmental, Social and Governance ("ESG") issues continue to be prevalent in the disputes space, and claimants are continuing to employ creative legal tools to hold companies accountable for their actions.

Applicants have tried – and in 2023 twice failed – to bring derivative claims against directors in relation to climate change issues. In *ClientEarth*,[24] the Applicant alleged that Shell's directors had failed to set an appropriate emissions target and had failed to manage climate risk to reasonably achieve Shell's own net-zero targets and, thereby, had breached some of their directors' duties under the Companies Act 2006. The High Court refused to grant ClientEarth permission to pursue its claim.[25] Importantly, after a hearing on costs, ClientEarth was also ordered to pay the company's and the directors' costs in connection with all aspects of the action.[26]

In *McGaughey & Anor v Universities Superannuation Scheme Limited*,[27] the applicants alleged, among other things, that the defendant Scheme's directors had breached their duties under the Companies Act 2006, in that they invested in fossil fuels in spite of the Scheme's commitment to be carbon neutral by 2050. The High Court and Court of Appeal dismissed the application, largely on the basis that (i) they lacked standing and (ii) the derivative claim against directors should not be used to circumvent direct actions.

Following these judgments, similar claims will now carry significant financial risks for applicants. That being said, by pointing out the shortcomings of the various applications noted above, the Court might have provided guidance to future litigants regarding how such claims must be framed to overcome the procedural hurdles applicable to derivative claims.

Another trend has been an increased scrutiny of companies' listing particulars. For example, multiple investors have filed claims for compensation against Glencore under section 90 of the FSMA, alleging that they have suffered loss as a consequence of misleading or untrue statements Glencore made in certain of its listing particulars. The claims were brought in the wake of bribery admissions on Glencore's part. ClientEarth explored a different avenue, bringing an application for judicial review of the Financial Conduct Authority's decision to approve a prospectus of Ithaca Energy. ClientEarth alleged that the prospectus did not adequately describe the climate-change related risks Ithaca's business faced. However, the High Court has refused ClientEarth permission to bring the claim.[28]

Another area to watch going forward in the UK will be greenwashing. So far, attention in this area has been focused on the actions of regulators, in particular, the Advertising Standards Authority,[29] the Competition and Markets Authority,[30] and the

[24] *ClientEarth v Shell plc & Ors* [2023] EWHC 1137 (Ch); *ClientEarth v Shell plc* [2023] EWHC 1897 (Ch)

[25] *See* Cleary Gottlieb, *High Court Reaffirms Decision to Refuse Permission for Derivative Claim Against Shell's Board of Directors* (31 July 2023), https://www.clearygottlieb.com/-/media/files/alert-memos-2023/high-court-dismisses-clientearth-claim-against-shell-board-of-directors.pdf.

[26] *See* Cleary Gottlieb, *ClientEarth Ordered to Pay Shell's Costs After Dismissal of Derivative Claim Against Shell's Board of Directors* (6 September 2023), https://client.clearygottlieb.com/63/3002/uploads/2023-09-06--clientearth-ordered-to-pay-shell-s-costs-after-dismissal-of-derivative-claim-against-shell-s-board-of-directors.pdf.

[27] *McGaughey & Anor v Universities Superannuation Scheme Ltd & Ors* [2023] EWCA Civ 873.

[28] *R (on the application of ClientEarth) v Financial Conduct Authority* [2023] EWHC 3301 (Admin)

[29] *See* Advertising Standards Authority, *ASA Ruling on Shell UK Ltd t/a Shell* (7 June 2023), https://www.asa.org.uk/rulings/shell-uk-ltd-g22-1170842-shell-uk-ltd.html.

[30] *See*, e.g., Competition and Markets Authority, *CMA to scrutinise 'green' claims in sales of household essentials* (26 January 2023), https://www.gov.uk/government/news/cma-to-scrutinise-green-claims-in-sales-of-household-essentials; and the recent announcement by the CMA that it would scrutinise 'green' claims made by Unilever: Competition and Markets Authority, *Unilever's 'green' claims come under CMA microscope* (12 December 2023), https://www.gov.uk/government/news/unilevers-green-claims-come-under-cma-microscope.

Financial Conduct Authority.[31] It may well be, however, that companies will face a broader range of claimants in greenwashing-based disputes. In California, for example, Delta Airlines is facing a new class action based on allegedly misleading claims that it is a "carbon-neutral" airline.[32] More specifically, the claimants argue that Delta's claims were based on its participation in voluntary carbon offsets, but that the projects on the basis of which these offsets had been issued did not achieve the alleged carbon removals (and, accordingly, that the claims as to the emissions that were offset were false). Similar actions are seen in Europe, for example in the Netherlands,[33] and a claim challenging the validity of carbon-credit based carbon-neutrality claims was upheld in the Düsseldorf Regional Court in Germany.[34] That greenwashing claims can, in principle, give rise to civil liability in courts was shown several years ago by the class action brought by Altroconsumo against VW before the Court of Venice.[35] We expect that it is only a matter of time before similar issues arise before the English courts.

Lastly, there are a number of international developments (including outside the realm of private enforcement) that could have significant implications in this area in the UK. For example, the State of California filed cases against several major oil companies,[36] alleging that these companies have misled consumers and the public about climate change for decades. If California is successful in obtaining discovery in those proceedings, this could elicit potentially damaging material and could herald a new era of litigation globally against oil majors, akin to key cases brought against tobacco companies. Likewise, there is a rapidly developing body of research on modelling climate change scenarios, including the attribution of specific extreme weather events to climate change,[37] and the increasing availability of such evidence may prove critical in enabling litigants to establish causal connections necessary to succeed in courts.

A number of requests for advisory opinions on climate-change related matters have also been put to international tribunals. For example, the United Nations General Assembly has requested an advisory opinion from the International Court of Justice,[38] including on the scope of States' obligations under international law in connection with climate change / greenhouse gas emissions, and what liability exists where States have caused significant harm to the climate and the environment. Similar requests have been submitted to the International Tribunal for the Law of the Sea (on specific obligations to prevent, reduce and control negative impacts on the marine environment resulting from climate change),[39] and the Inter-American Court of Human Rights (on the scope of the

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[31] *See*, e.g., the FCA's recent consultation on guidance on a new anti-greenwashing rule: Financial Conduct Authority, *Guidance on the Anti-Greenwashing rule* (28 November 2023), https://www.fca.org.uk/publication/guidance-consultation/gc23-3.pdf.

[32] Berrin v. Delta Air Lines Inc., https://climatecasechart.com/case/berrin-v-delta-air-lines-inc/#:~:text=(Delta)%20filed%20a%20class%20action,%E2%80%9Ccarbon%2Dneutral%E2%80%9D%20airline.

[33] FossielVrij NL v. KLM, https://climatecasechart.com/non-us-case/fossielvrij-nl-v-klm/.

[34] Deutsche Umwelthilfe v. TotalEnergies Wärme & Kraftstoff Deutschland GmbH, https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-v-totalenergies-warmekraftstoff-deutschland-gmbh/#:~:text=This%20case%20is%20part%20of,of%20climate%20neutrality%20were%20misleading.

[35] Altroconsumo v. Volkswagen Aktiengesellschaft and Volkswagen Group Italia S.p.A, https://climatecasechart.com/non-us-case/altroconsumo-v-volkswagen-aktiengesellschaft-and-volkswagen-group-italia-spa/.

[36] *See* Complaint for Abatement, Equitable Relief, Penalties, and Damages, https://oag.ca.gov/system/files/attachments/press-docs/FINAL%209-15%20COMPLAINT.pdf.

[37] *See*, e.g., the World Weather Attribution initiative, https://www.worldweatherattribution.org/.

[38] *See* UN General Assembly Resolution, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change* (1 March 2023), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230301_18913_na.pdf; and the ICJ's order fixing deadlines for submission of written statements and comments by the UN and its Member States: *Obligations of States in Respect of Climate Change (Request For Advisory Opinion)* (20 April 2023), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230420_18913_order.pdf.

[39] *See* Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)", https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

state obligations for responding to the climate emergency).[40] Developments such as these generate the kind of momentum that, for example, allowed the Dutch court in *Milieudefensie et al. v Royal Dutch Shell plc* to interpret Dutch tort law to require Shell to reduce its scope 1, 2, and 3 CO2 emissions,[41] and we expect that these international developments may, in time, impact climate change litigation in the UK.

[40] *See* an unofficial translation of the advisory opinion request by Colombia and Chile: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230109_18528_petition-2.pdf.

[41] *See* Cleary Gottlieb, *Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company* (30 June 2021), https://www.clearygottlieb.com/-/media/files/alert-memos-2021/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company.pdf.

6

Nexus of AI, AI Regulation and Dispute Resolution

The rapid development of AI is introducing new opportunities and challenges to dispute resolution. AI is already impacting the document review and production process, legal research, and the drafting of court submissions. It is expected that the use of AI will expand into other areas, including predicting case outcomes and adjudicating disputes. However, the use of AI in litigation also bears risk, as highlighted by a recent First-tier Tribunal (Tax) decision, where an appellant had sought to rely on precedent authorities that, in fact, were fabricated by AI (a known risk with AI using large language models, referred to as hallucination).[42] While, in this particular case, no further consequences seemed to follow (in light of the fact that the appellant, a litigant in person, "*had been unaware that the AI cases were not genuine and that she did not know how to check their validity*"[43]), the Tribunal did highlight that "*providing authorities which are not genuine and asking a court or tribunal to rely on them is a serious and important issue*",[44] suggesting that litigants may incur certain risks by relying on authorities suggested by AI, unless these are independently verified. On 12 December 2023, a group of senior judges, including the Master of the Rolls and the Lady Chief Justice, issued guidance on AI for judicial office holders, which, amongst other things, discourages the use of AI for legal research and analysis and highlights the risk of AI being relied on by litigants to provide legal advice and/or to produce evidence.[45]

Globally, countries are at varying stages in enacting rules governing AI, signalling a range of approaches to the technology's regulation across jurisdictions.[46] In the UK, the government published a white paper, which proposes leaving it to individual regulators to lay down sector-specific rules or guidance regarding AI, subject

[42] *Harber v Commissioners for His Majesty's Revenue and Customs* [2023] UKFTT 1007 (TC).

[43] *Ibid*, at para. 3.

[44] *Ibid*, at para. 5; *see also* paras. 23 and 24.

[45] Courts and Tribunals Judiciary, *Artificial Intelligence (AI): Guidance for Judicial Office Holders* (12 December 2023), https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf.

[46] For example, in August 2023, China formally enacted the world's first legislation targeting generative AI (*see* an open source translation of the law: *Interim Measures for the Management of Generative Artificial Intelligence Services*, https://www.chinalawtranslate.com/en/generative-ai-interim/); the EU's AI Act was adopted by the European Parliament in June 2023, and its precise wording is currently being negotiated between the Parliament, Council and EU Member States (*EU AI Act: First Regulation on Artificial Intelligence* (8 June 2023), https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence); and on 30 October 2023, the US Administration issued a landmark Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, directing the establishment of new standards for AI safety and security (*see* Cleary Gottlieb, *White House Unveils Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (15 November 2023), https://www.clearygottlieb.com/news-and-insights/publication-listing/white-house-unveils-executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence).

to certain overarching guiding principles.[47] For example, the CMA published an initial report on AI foundation models in September 2023.[48] In October, the Bank of England and the Financial Conduct Authority ("FCA") released a Feedback Statement[49] concerning AI and machine learning, which summarises responses received to a previous Discussion Paper,[50] but the regulators did not make any policy proposals at this stage, nor did they signal how they were considering clarifying, designing, or implementing future regulatory proposals on this topic. Another development was the publication of the G7 voluntary code of conduct for developers of advanced AI systems.[51]

Aside from regulatory developments, AI raises a number of difficult legal questions which will need to be explored over the forthcoming years.

So far, a significant proportion of cases involving AI have centred around privacy, data protection intellectual property issues. For example, in October 2023, the First-tier Tribunal decided the appeal of Clearview AI, a US provider of facial recognition software, against a fine issued by the Information Commissioner for breaches under the EU and UK data protection regimes.[52] While the tribunal overturned the fine on the basis of a narrow exception that meant that the Commissioner did not have jurisdiction, a number of findings illustrated the broad scope of the data protection regimes and that the maintenance and search of data bases could amount to (potentially unlawful) processing of data. In December 2023, the High Court refused to grant reverse summary judgment against Getty in respect of its claim against Stability AI, an open-source generative AI company, in connection with various IP infringement claims based on the allegation that, amongst other things, Stability "scraped" images from Getty images websites, without Getty's consent, and used those images unlawfully as input to train and develop Stable Diffusion.[53]Another question that has garnered significant attention relates to the patenting of an invention created by an AI system (and, similarly, the copyright in content created by AI). In a recent judgment, the UK Supreme Court held that an 'inventor' within the meaning of the Patents Act 1977 must be a natural person (*i.e.*, that an AI system cannot qualify as 'inventor' for these purposes), and that ownership of an AI system does not entitle a person to apply for and obtain a patent for any technical development made such AI system acting autonomously.[54]

More generally, AI raises a number of other complicated issues regarding the assigning of responsibility and liability, and, from the claimants' perspective, the establishing of all the elements of various causes of action. In the EU, legislators are seeking to address this issue through the proposed AI Liability Directive[55]

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[47] UK Government Policy Paper, *AI regulation: a pro-innovation approach* (29 March 2023), https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach.

[48] *See* Cleary Gottlieb, *CMA Publishes Initial Report on AI Foundation Models and Guiding Principles for Firms* (20 September 2023), https://client.clearygottlieb.com/63/3025/uploads/2023-09-20-uk-cma-publishes-initial-report-on-ai-foundation-models.pdf.

[49] *FS2/23 – Artificial Intelligence and Machine Learning* (26 October 2023), https://www.bankofengland.co.uk/prudential-regulation/publication/2023/october/artificial-intelligence-and-machine-learning. *See also* Cleary Gottlieb, *Artificial Intelligence in the Financial Services Sector: UK Regulators Publish Feedback Statement* (30 October 2023), https://client.clearygottlieb.com/63/3069/uploads/2023-10-30-artificial-intelligence-in-the-financial-services-sector-uk-regulators-publish-feedback-statement.pdf.

[50] *DP5/22 - Artificial Intelligence and Machine Learning* (11 October 2022), https://www.bankofengland.co.uk/prudential-regulation/publication/2022/october/artificial-intelligence.

[51] *See* Cleary Gottlieb, *G7 Leaders Publish AI Code of Conduct: A Common Thread in the Patchwork of Emerging AI Regulations Globally?* (1 November 2023), https://www.clearygottlieb.com/-/media/files/alert-memos-2023/g7-leaders-publish-ai-code-of-conduct-a-common-thread-in-the-patchwork-of-emerging-ai-regulations-globally.pdf.

[52] *Clearview AI Inc v The Information Commissioner* [2023] UKFTT 819.

[53] *Getty Images (US) Inc and Ors v Stability AI Ltd* [2023] EWHC 3090 (Ch).

[54] *Thaler v Comptroller-General of Patents, Designs and Trade Marks* [2023] UKSC 49.

[55] See the European Commission's proposal: *Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive)*, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0496. *See* also Cleary Gottlieb, *Modernising Liability Rules for Products and AI in the Digital Age* (25 April 2023), https://www.clearyiptechinsights.com/2023/04/modernising-liability-rules-for-products-and-ai-in-the-digital-age/.

which, among other things, seeks to clarify how to prove fault on the part of certain AI providers and/or users, and introduces a rebuttable presumption of a causal link in the case of fault as well as certain disclosure rules. With regard to the UK, however, the government's white paper suggests that there will be no immediate legislative intervention to address accountability across the AI life cycle, so that development of adequate rules might be left to the courts. The same might be true of issues of jurisdiction and evidentiary considerations that arise in the context of AI-related claims.

7

Crypto & Digital Assets

The crypto space has witnessed significant activity over the last year and is expected to continue generating new litigation risks in 2024 and beyond. The volatility of cryptocurrency values, the complex nature of the technology, the lack of regulation, and lack of understanding by regulators all contribute to this trend. Crypto-related actions span a wide spectrum, involving regulatory issues to claims brought by individuals or as class actions.

In response to fluctuating cryptocurrency values, regulators, law enforcement, as well as individuals, have initiated various actions against crypto companies in 2023. Due to the absence of comprehensive regulation, these claims often rely on traditional causes of action, such as breach of securities law, misleading investors, fraud, and theft.[56]

The English courts have adopted an increasingly open approach to crypto-based litigation. For example, in October 2022, a new jurisdictional gateway known as "Gateway 25" came into effect to facilitate claimants seeking information orders related to potential defendants outside English jurisdiction. This measure aimed to empower victims of potential crypto fraud. In the same month, the UK's Law Commission began a consultation process to address conflicts of law issues arising from crypto-based litigation, including jurisdiction and governing law.[57] The English High Court has allowed service by Non-Fungible Token ("NFT") last year, as an alternative means of serving defendants, where it was more likely to put the defendant, whose identity may not be known to the claimant, on notice of the claim.[58]

The proliferation of claims related to crypto assets has raised novel legal questions within a continuously evolving technical landscape.[59] These claims have dealt with various issues, including (i) theft of NFTs;[60] (ii) fiduciary duty of software

[56] In the United States for example, the Securities and Exchange Commission has, as of 11 December 2023, filed at least 31 crypto assets and cyber enforcement actions, including actions against major exchanges like Binance for numerous alleged securities law violations such as misleading investors.

[57] Law Commission Consultation, *Digital assets: which court, which law?*, https://lawcom.gov.uk/project/digital-assets-which-court-which-law/.

[58] See *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch) and *Osbourne v. Persons Unknown* [2023] EWHC 39 (KB). We have also seen a similar trend in other jurisdictions, including in the United States: *e.g.*, *LCX AG v John Doe Nos 1-25*, Order to Show Cause and Temporary Restraining Order (Index No 154644/2022, Supreme Court of the State of New York, 2 June 2022).

[59] *See* generally the speech by HHJ Pelling KC: *Issues in Crypto Currency Fraud Claims – an update* (29 June 2023), https://www.judiciary.uk/speech-by-hhj-pelling-issues-in-crypto-currency-fraud-claims-an-update.

[60] See *Osbourne v. Persons Unknown* [2023] EWHC 39 (KB) (where it was held that NFTs could be considered property as a matter of English law).

developers overseeing crypto asset networks;[61] and (iii) liability for crypto exchanges.[62]

In the United States, some state courts have begun permitting claims against Decentralised Autonomous Organizations ("DAOs"),[63] which function without central leadership or hierarchy, relying on their members through smart contracts or similar software protocols. DAOs have various applications, including investment purposes. The UK is still investigating the nature of DAOs alongside relevant stakeholders with a view to determining how to regulate them going forward.[64] We expect these complex issues, and the novel approaches taken by the Courts faced with them, will continue to feature in future crypto asset litigation.

In June 2023, the UK's Law Commission published several recommendations for the government regarding the regulation of digital assets, including crypto assets.[65]

The UK is also seeing a number of regulatory developments relating to cryptoassets. The Financial Services and Markets Act 2023 has laid the foundations for the regulation of 'digital settlement assets', with the government and the FCA aiming to enact legislation and rules in 2024 to regulate issuance and custody of fiat-backed stablecoins in or from the UK under this regime. In September 2023, the FCA adopted the "Travel Rule" in cooperation with the global Financial Action Task Force (FATF).[66] This rule aims to enhance transparency in crypto asset transfers across borders, necessitating that crypto asset businesses in the UK collect, verify, and share information about crypto asset transfers into and out of the UK. In October 2023, HM Treasury has published its consultation response regarding the future financial services regulatory regime for crypto assets (stating its aim to lay relevant legislation in 2024), and the marketing of 'qualifying cryptoassets' in the UK has become subject to the financial promotions restriction.[67] In the EU, rather than adopting a phased approach, the enactment of the Markets in Crypto-Assets Regulation (MiCAR) in May last year introduced a single, uniform new framework for regulating cryptoasset-related financial services. While both regulatory frameworks and the regulators' approach to supervision in this area are still developing, the FCA, for example, has already expressed its dissatisfaction with certain aspects of cryptoasset financial promotions. It might therefore be that, as has been observed in the US, the UK will see increased enforcement activity in this area in 2024.

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[61] *Tulip Trading Ltd v van der Laan and others* [2023] EWCA Civ 83 (where the Court of Appeal held that such individuals may owe fiduciary duties to crypto asset owners). *See* Cleary Gottlieb, *English Court of Appeal: Cryptoasset Network Software Developers May Owe Fiduciary Duties to Token Holders* (21 February 2023), https://www.clearygottlieb.com/news-and-insights/publication-listing/english-court-of-appeal-cryptoasset-network-software-developers-may-owe-fiduciary-duties-to-token-holders.

[62] *Piroozzadeh v. Persons Unknown* [2023] EWHC 1024 (Ch) (where the High Court discharged an injunction made against cryptocurrency firm Binance which had originally been granted on the basis that Binance had received traceable proceeds of a fraud against the claimants).

[63] See, for e.g., *CFTC v Ooki DAO*, No. 22-05416 (N.D. California December 20, 2022). https://storage.courtlistener.com/recap/gov.uscourts.cand.400807/gov.uscourts.cand.400807.63.0.pdf.

[64] *See* Law Commission Consultation, *Decentralised Autonomous Organisations (DAOs)*, https://lawcom.gov.uk/project/decentralised-autonomous-organisations-daos/.

[65] Law Commission, *Digital Assets: Final Report* (27 June 2023), https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/06/Final-digital-assets-report-FOR-WEBSITE-2.pdf.

[66] Financial Conduct Authority, *FCA sets out expectations for UK crypto asset businesses complying with the Travel Rule* (17 August 2023), https://www.fca.org.uk/news/statements/fca-sets-out-expectations-uk-cryptoasset-businesses-complying-travel-rule#revisions.

[67] See the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023.

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23.1023.06_020724