CorporateLiveWire

LITIGATION & DISPUTE RESOLUTION 2024

VIRTUAL ROUND TABLE

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James Drakeford
Editor In Chief

In this roundtable we speak with experts from Brazil, Germany, Panama, Russia, Ukraine and the United Kingdom to find out more about the latest trends and interesting developments relating to litigation and dispute resolution in their jurisdiction. Amongst the highlighted topics, we discuss instances of new case law precedent, best practice procedures for international litigation and enforcement, contractual disputes, and the impact of sanctions on proceedings.

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Meet The Experts

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Maxim Kulkov specialises in commercial, insolvency, shareholder, investment, and construction disputes, disputes related to international trade, and conflict of laws and jurisdictional disputes. For almost 30 years, Maxim has represented clients in international arbitration centres (SCC, the ICC, the ICAC and the LCIA), in Russian state courts of all levels (including the Supreme Court and the Constitutional Court), and in foreign courts (England, USA, Jersey, BVI, Hong Kong, Cyprus and Switzerland). He has extensive experience leading teams of international and local advisers in multi-jurisdictional disputes. Maxim also acts as a legal expert in foreign proceedings and as an arbitrator and a mediator.

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Anke Nestler is a Senior Managing Director at FTI Consulting with more than 20 years of experience in the valuation of companies with a special focus on the valuation of intangibles. She provides clients with expert opinions in contentious and non-contentious contexts. Based on her broad experience, she has a strong focus on litigation work regarding the quantification of damages based on company values, value of intangibles and licensing at German courts.

Anke's work covers several types of intangibles, such as trademarks, know-how, patents and software. She also advises in licensing of intangibles and is involved in Fair, Reasonable and Non-Discriminatory ("FRAND") expert work in Germany for standard-essential patents. A number of her IP valuation projects are related to restructurings, disputes or are tax-related, as, for example, in transfer pricing or tax litigations. Additionally, Anke has broad experience in several IDW S1 valuations required in German corporate law transactions for the compensation of minority shares, such as in squeeze-outs or for mergers, often followed by court proceedings.

Anke is a publicly appointed and sworn expert for the valuation of businesses and intangible assets, Certified Licensing Professional ("CLP") and Certified Valuation Analyst ("CVA"). After graduating with an M.B.A. from the University of Passau, she received her Ph.D. in Business Studies from the Technical University of Berlin.

Anke joined FTI Consulting after 15 years as Managing Partner of VALNES Corporate Finance, a highly specialized valuation boutique. VALNES was a spin-off of a magic circle law firm, where Anke was Managing Director of the corporate finance segment. Anke started her career as an external auditor, from where she moved to the corporate finance division of a Big Four company.

Anke is regularly recommended by Who's Who Legal in Germany as a Consulting Expert for Quantum of Damages, Arbitration Expert Witness and Corporate Tax Expert Witness. She is a member of the Board of the Licensing Executive Society in Germany, Chair of the IP Valuation Working Group and member of the international IP Valuation Committee at LES International. Besides her experience as a valuation expert, Anke is Deputy Chairwoman of the Supervisory Board of Medios AG and also of the Supervisory Board of GK Software SE.

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Kateryna's expertise involves provision of legal aid to companies with foreign investments, to its top management and private clients in criminal proceedings. Due to her understanding of the relevant business processes Kateryna effectively defends clients at all stages of criminal proceedings.

Kateryna deals with cross-border cases, represents her clients before international investigative bodies, incl. Interpol. Since the introduction of sanctions legislation in Ukraine (2014), Kateryna has been advising its clients on various sanctions-related matters. She also practices complex litigation and has extensive expertise in tax and customs litigation.

Meet The Experts

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Giuliana Bonanno Schunck joined the Firm in 2000 as law clerk, became a lawyer in 2003 and became partner in 2016. She works in the civil and commercial litigation and advisory area, with experience in lawsuits involving contractual law, intellectual property, corporate, commercial and judicial recovery, bankruptcy and insolvency. Giuliana coordinates the issues of Family and Inheritance Law within the Dispute Resolution group and in conjunction with the interdisciplinary Wealth group. She works in strategic consultancy in pre-litigation in order to prevent and avoid litigation. She is also the co-coordinator of the Gender Affinity Group within the Office (one of the pillars of Diversity and Inclusion). Giuliana has been recognized for her work by the main legal directories such as Chambers, LACCA Approved, The Legal 500 and Leaders League.

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Known for his advocacy skills and thorough knowledge of Panamanian legal framework and proceedings, Mr. Claudio De Castro specializes in representing foreign clients and multinational companies facing complex arbitration or litigation proceedings in Panama or involved in multijurisdictional disputes that include a Panamanian component.

Claudio developed his international experience working in the International Arbitration Departments of Shearman & Sterling in Paris and Wilmer Cutler Pickering Hale and Dorr in London.

Claudio has a Postgraduate Degree in International Commercial Litigation from Université Paris Est and an LLM in International Commercial Law from Université Paris 1 Panthéon-Sorbonne. He has been a contributor for the World Bank's Doing Business Report since 2015.

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Konrad is a leading commercial disputes practitioner, with expertise focusing on cross-jurisdictional litigation and fraud, and international arbitration matters. He has over 17 years' experience (six as partner) in acting for a broad range of corporates, financial institutions and HNWIs on high value civil fraud, banking, shareholder and insurance matters. Konrad has particular expertise in Eastern Europe and Eurasia related disputes and has frequently acted in cases involving worldwide freezing orders, other interlocutory relief and enforcement measures.

Konrad is ranked by Legal 500 (2024) as a "Leading Practitioner" in Civil Fraud Disputes, is recognised by Who's Who Legal and Legal 500 (2024) for Commercial Litigation and recognised by Legal 500 (2023) for International Arbitration. In 2024 he was the sole winner of the Lexology Client Choice award for Litigation in the UK, an Award nominated by corporate counsel, which recognises partners "that stand out for the excellent client care they provide and the quality of their service." Konrad has been described in various legal directories as "hugely intelligent and incredibly hardworking", "an exceptional partner who combines intelligence with a great commitment to the client's needs ", "a standout partner", "a top quality litigator", "very committed to getting excellent results for his clients", as being "distinguished by his responsiveness, efficiency, and superb legal instincts" and as "really taking a case to heart, thinking about it and the next lesson or step around the clock."

Konrad graduated from the University of Oxford with an MA in Jurisprudence (First Class Honours) and a Bachelor of Civil Law. After training in chambers and spending two Court terms as a Judicial Clerk in the Court of Appeal, Konrad practised at US international law firms prior to joining Enyo as a partner in 2018. Konrad is a barrister with full rights of audience and has acted as counsel in both Court hearings and across an array of arbitral institutions.

Q1. What areas of law have you been predominantly working on over the past 12 months?

Giuliana Schunck

Schunck: The litigation scenario in Brazil is very consolidated and we normally represent clients in cases involving contractual disputes (i.e. construction, distribution, services, M&A, etc.), disputes for indemnification in general (including torts), product liability, insolvency, and family law, amongst others.

Dr. Anke Nestler

Nestler: Being an expert for IP valuation and licensing, I have a specific focus on disputes around IP infringements like violation of trademarks or patents. Nevertheless, the value of IP is not only relevant in infringements or in connection with claims, but also for brands or patent portfolios in connection with an asset deal or for licensing reasons. Intangible assets are a very important value driver in today's business models, which often have to be evaluated.

Konrad Rodgers

Rodgers: A variety of commercial arbitration disputes (across a series of institutions but particularly under the Rules of the LCIA or the ICC) and international litigation matters, predominantly in the banking, energy and insurance sectors. Also, several cross-jurisdictional fraud cases with associated enforcement and asset recovery issues.

Notwithstanding the diverse nature of the cases, there are certain central themes which have been evident across a number of these disputes. These themes include that: (i) often cases have involved a sanctions related element or complication, particularly given this is a field which is evolving at rapid pace in light of the number of recent designations resulting from Russian sanctions; (ii) there has (unsurprisingly) been a significant increase in disputes concerning non-traditional asset classes such as cryptocurrency, a trend which is only likely to continue in the next 12 months given recent regulatory reforms in this area; and (iii) similarly, there is an increase of matters involving insolvency issues arising within a wider commercial dispute.

The disputes market in London has been notably active over the past 12 months and I would expect this to continue during the remainder of 2024, especially given the novel types of claims and redress mechanisms which are frequently developing.

Claudio De Castro

Castro: Over the past 12 months we have been predominantly working on disputes related to government contracts (with arbitration clauses) regarding environmental matters, oil and energy, corporate governance, and family estates.

Q1. What areas of law have you been predominantly working on over the past 12 months?

Kateryna Gupalo

Gupalo: Despite Russia's on-going full-scale invasion in Ukraine, legal practice in Ukraine is still in demand. Dispute resolution practice, in its broadest sense, remains one of the busiest. My commentaries below focus on developments in white-collar crime and anticorruption practices, which are predominantly spheres of my interest.

Firstly, the growing level of anticorruption enforcement should be noted. After all, the fight against corruption is one of the preconditions put forward for Ukraine to join the EU, and it is also usually indicated as a condition for the provision of financial and other types of assistance by international donors. As a result, a significant part of the practice is devoted to defence in corruption cases.

The growing number of criminal proceedings related to tax evasion is also worth noting. Due to the fact that Ukraine is at war with Russia, the economy of our country is weak. As a result, controlling and law enforcement agencies begin to look closely at the issue of paying taxes.

Another area that is actively developing now is sanctions-related practice. It is important to emphasise that we do not work for clients from Russia. At the same time, sanctions-related regulation should be taken into consideration by businesses working in Ukraine. Moreover, although Ukrainian sanctions do not have an extraterritorial effect, from a reputational point of view, they are often taken into consideration in other jurisdictions.

Maxim Kulkov

Kulkov: The area of sanction-related disputes, which is currently booming in Russia. In particular, I have defended major Western banks in disputes caused by the blocking of the Russian claimants' funds and non-performance of obligations due to sanctions.

Furthermore, as an expert in Russian law, I prepared several expert reports for foreign courts and arbitral tribunals encompassing a wide range of issues, such as tort law, corporate law, recognition and enforcement of foreign judgments and arbitral awards in Russia. Moreover, I have represented clients in a few high-profile disputes pertaining to the breach of contracts.

Q2. Have there been any recent regulatory changes or interesting developments?

Giuliana Schunck

Schunck: Yes, in terms of commercial litigation, the law no. 14.711/2023 was enacted, known as the Legal Framework for Guarantees. The purpose is to make it easier to locate the debtor's assets and to speed up the procedures for their seizure and attachment, establishing, for example, the possibility of extrajudicial sale of mortgaged property and the powers of the guarantee agent.

There is also a commission of scholars established by the Senate to prepare a reform to the Civil Code. This commission will likely propose changes to be voted by parliament this year. However, it is not possible to predict if or how long it will take for the changes to be approved.

Dr. Anke Nestler

Nestler: The Unified Patent Court ("UPC"), a common patent court of 17 countries of the European Union, which opened on 1 June 2023 has brought significant changes in patent litigation. While many cases can already be observed, the question of how to calculate a damage award under UPC procedure rules is an exciting question.

Claudio De Castro

Castro: Through Law No. 402 of 9 October 2023, the Panamanian National Assembly enacted the new Code of Civil Procedure of the Republic of Panama, which will enter into force on 9 October 2025. The new Code of Civil Procedure changes entirely the rules of civil procedure and is aimed at making proceedings more expedite and less bureaucratic.

Kateryna Gupalo

Gupalo: Sanctions-related regulation is one of the most dynamic these days. Almost 8,000 individuals and legal entities were sanctioned in Ukraine in 2023.

Moreover, 2023 is a year of active implementation of the new type of sanction – the state's appropriation of assets of sanctioned persons. This type of sanction was introduced in May 2022 and provides for the appropriation to the state's ownership of assets belonging to a sanctioned individual or legal entity, as well as assets in respect of which a sanctioned person can directly or indirectly (through other natural or legal entities) perform actions identical to exercising the right of disposition. Respective appropriation may be done via court procedure only.

So-called quasi-sanctions should also be mentioned. Namely, the National Agency on Corruption Prevention extended the International Sponsors of War list, adding more than 30 international companies. Also, the NACP added new chapters to its War&Sanctions website. These are 'Candidates for Sanctions', "War&Sport", "Foreign Components in Weapons", and War&Arts. Although these are not sanctioning lists, respective data is quite often taken into consideration by compliance specialists from different jurisdictions.

Q2. Have there been any recent regulatory changes or interesting developments?

Maxim Kulkov

Kulkov: Recent changes in Russian legislation made the enforcement proceedings for foreign claimants more difficult. In January 2023, amendments to the Law on Enforcement Proceedings stipulated that the funds recovered under the enforcement proceedings can be transferred only to the judgment creditor's accounts opened in the Russian banks. Since foreign companies are prohibited to move funds abroad (the Russian Central Bank prolonged this ban for another half a year in September 2023), the foreign litigants essentially lost the opportunity to move finances awarded in court proceedings out of Russia.

Moreover, directly opening an account in a Russian bank may pose compliance risks for the Western judgment creditors, because many major Russian banks are sanctioned. As a result, foreign litigants must employ Russian representatives to recover the funds received through the enforcement proceedings.

However, sometimes court bailiffs adopt the literal interpretation of the Law on Enforcement Proceedings: that funds can be transferred to a Russian bank account of a judgment creditor itself and not to its representative. This further complicates the enforcement proceedings, because the judgment creditor has no other choice but to challenge the court bailiffs' refusal in courts. Some courts grant such claims (*Entertainment One UK Limited v. Federal Court Bailiff Service*, Judgment of the Second Commercial Appellate Court dated 18 December 2023 in Case No. A28-4674/2023), whereas others support the court bailiffs' position (e.g., in Judgment of the Fifth Commercial Appellate Court dated 16 February 2024 in Case No. A51-18856/2023 the similar claim of Entertainment One UK Limited was dismissed).

Furthermore, this January, the Russian President amended the regulation on the Type C accounts (special blocked accounts to which Russian persons should perform certain obligations, e.g., under loans, derivatives, aircraft lease agreements, etc.). Changes to Decree No. 95 dated 5 March 2022 prohibited to write off funds from Type C accounts under the enforcement proceedings. Thus, the lack of clarity as to whether it was possible to recover funds from Type C accounts by means of court judgments was finally removed.

Q3. Are there any compliance issues or potential pitfalls that firms need to be cautious about?

Kateryna Gupalo

Gupalo: We notice two large blocks from practice in the direction of compliance work and consulting clients. As mentioned, this is sanctions compliance and state procurement.

Regarding sanction compliance, the legal regime of application of special economic and other restriction measures is regulated by the Law of Ukraine "On Sanctions" ("the Law on sanctions"), which was adopted on 14 August 2014, aimed at protecting national interests, national security, sovereignty and territorial integrity of Ukraine, and in order to counter the terrorist activities, prevent violations and restore infringed rights, freedoms and legitimate interests of Ukrainian people and the State.

As previously mentioned, the Law on sanctions was adopted in 2014, making it a relatively new law for Ukraine. Additionally, the Law on sanctions provisions were not effectively enforced until 2018-19, resulting in a lack of law enforcement practice, some ambiguity, and uncertainty.

One more challenge, Ukraine has not assigned a state body that would be responsible for sanctions policies. In practice, in cases of uncertainty, there is no competent authority one could refer to for clarification.

Q4. Have there been any recent landmark cases or examples of new case law precedent?


Giuliana Schunck

Schunck: Recently, the Brazilian landscape has had some interesting decisions.

One of them is a decision from the Superior Court of Justice (our final court on Federal Law issues) reinforcing the possibility of limitation of liability in contracts (decision from Special Appeal No. 1.989.291-SP, issued in Nov. 2023). Under Brazilian statute, limitation of liability is not regulated and therefore we still have some court decisions that are not so modern in terms of accepting it according to the frameworks established by scholars.

Another decision worth commenting on is from our Supreme Court that interpreted article 1.641, II, of the Brazilian Civil Code (decision from appeal called "ARE" No. 1.309.642, issued in Feb. 2024), and decided that the mandatory separation of property regime (provided for people over 70 years old) is not really mandatory, and the spouses are free to decide which marital property regime they prefer. This is a big change in terms of marital property regime and impacts in wealth management and succession planning.


Konrad Rodgers

Rodgers: There were a number of landmark cases in England over the past 12 months including:

- The Supreme Court decision of *Philipp v Barclays Bank Uk plc* [2023] UKSC 25 on the scope of the Quincecare Duty, i.e. the duty on a bank not to comply with a payment instruction given by an agent of its customer without making inquiries, in circumstances where there are reasonable grounds for believing the instruction is an attempt to defraud the customer. The Supreme Court, in reversing the decision of the Court of Appeal, concluded that this duty did not extend to cases where the payment instruction came from the customer itself rather than from an agent;
- The decision of the Court of Appeal in *James Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA 1416, which held that Courts have the power to order the parties to a dispute to engage in alternative dispute resolution provided this was proportionate and did not impair the claimant's right to proceed to a judicial hearing; and
- The Supreme Court decision of *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal et Ors* [2023] UKSC 28 which had significant implications for the enforceability of litigation funding agreements by concluding that they could, in certain circumstances, amount to damages based agreements and which has led to proposed new legislation in the Litigation Funding Agreements (Enforceability Bill).

The next 12 months is expected to be no less significant in terms of landmark cases with important decisions likely forthcoming during this period from the Supreme Court on the scope of force majeure in *RTI Ltd v MUR Shipping BV* and from the High Court in the Section 90A FSMA securities group action in the Serco litigation.


Claudio De Castro

Castro: On 27 November 2023, all the Justices (reunited) of the Supreme Court of Justice of Panama declared the unconstitutionality of Law No. 406 of 2023 (which approved the Mining Concession contract between the Republic of Panama and Minera Panamá, S.A.).

Q4. Have there been any recent landmark cases or examples of new case law precedent?

Kateryna Gupalo

Gupalo: I would like to focus on the brand-new types of cases on the appropriation of assets of sanctioned persons. In 2023, the Higher Anticorruption Court granted 23 respective claims of the Ministry of Justice of Ukraine. Some cases are straightforward, others are of professional interest, namely, these are the following types of cases:

On appropriation of assets not directly owned by a sanctioned person. In two cases, the court stated that the Ministry of Justice of Ukraine has not proven that a sanctioned person can perform actions identical to the right to dispose of part of the assets belonging to the family members of the sanctioned persons.

In one case, the Appellate Chamber partially denied the Ministry of Justice claims, stating that the claimant has not proven that the sanctioned person can directly or indirectly execute the right of disposal of corporate shares of a legal entity that owns a sandstone quarry.

The court has also established a practice of identifying transactions aimed at evading appropriation of the property of a sanctioned person by the state.

- Namely, in case No. 991/6606/22[1] of 3 February 2023, the Appeal Chamber of the Anti-Corruption Court overruled the decision that was in favour of the respondent and identified the agreement of sale of assets as a fraudulent agreement based on the following:
- Below-market price of shares, and other imbalanced conditions of the sale-purchase agreement.
- The discreet motive of the transaction is aimed at sanctions evasion.
- The court finds the third parties' explanation of the corporate conflict as an unconvincing precondition for the share alienation.
- Reasonable doubts as to the date of the transaction.

In case No. 991/1914/23[2] of 20 March 2023, the Anti-Corruption Court also came to the conclusion that the agreement was fraudulent and aimed at sanctions evasion. The court based its findings on the following indicators:

- beneficial owners of companies are difficult to identify, and/or they are located in offshore jurisdictions;
- use of a "fictitious" or nominal person as a registered representative of a legal entity;
- non-typical money transfer: using different jurisdictions in the money flow from the country of origin;
- transactions that are not consistent with the usual activities of a person/entity;
- usage of a currency that is not typical for the exact state;
- money takes a roundabout route through different bank accounts/jurisdictions;
- lack of explanations regarding money transfers;
- use of foreign bank accounts without a due reason;
- usage of 'shell companies', 'technical companies' or 'transit companies'; and
- a business entity that does not have sufficient or proper staff or equipment for carrying out the declared activity, etc.

1. https://reyestr.court.gov.ua/Review/108772467
2. https://reyestr.court.gov.ua/Review/109643500

Q4. Have there been any recent landmark cases or examples of new case law precedent?

Maxim Kulkov

Kulkov: I would like to name two cases.

IS TEX v. MInBank, Judgment of the Supreme Court of Russia (SC) dated 20 November 2023 in Case No. A40-179021/2022.

MInBank (the Bank) transferred its client's funds through the Bank of New York Mellon, which froze the monies, because the Bank was sanctioned. The lower courts concluded that the Bank breached the correspondent account agreement with its client by wiring the funds through the U.S. intermediary bank and recovered losses in the amount of the blocked funds. SC quashed the judgments and held that foreign sanctions can be considered a force majeure event, if impeded the defendant to perform its obligation. Furthermore, SC pointed out that the claimant could not demand the frozen funds as losses from the Bank until it tries to unblock the funds by applying to the U.S. Office of Foreign Assets Control (OFAC) for a license. Eventually, SC sent the case for retrial.

In my view, *IS TEX v MInBank* may impact the way the disputes on recovery of funds frozen by foreign banks are considered, because SC required the courts to establish whether the party claiming the monies is able to apply to foreign sanction authorities for permission to unblock the funds. Therefore, *IS TEX v MInBank* may pave the way for the more nuanced approach to the sanction-related disputes, which the courts used to predominantly resolve in favour of Russian claimants.

Sovcombank v. Citibank N.A. and JSC Citibank, Judgment of the Commercial Court of the City of Moscow dated 17 October 2023 in Case No. A40-167352/2023

Sovcombank and Citibank N.A. (CBNA) concluded an ISDA agreement (standartised contract for derivatives transaction). After Sovcombank was sanctioned, CBNA transferred the funds owed Sovcombank into a special blocked account. The court upheld by the appellate court granted the Sovcombank's claim for the recovery of the withheld funds and established joint and several liability of CBNA and its Russian subsidiary (which was not a party to the ISDA agreement) to Sovcombank. Thus, the court disregarded the fact that the subsidiary is a separate company. Moreover, the court concluded that the subsidiary should have paid Sovcombank instead of its parent company and its inaction violated the principle of good faith.

This judgment represented a worrisome development, because the court prioritised the interest of the sanctioned company over such fundamental legal principles as the presumption of good-faith and autonomy of a legal person.

Q5. Are you noticing any trends in industry-specific litigation?

Dr. Anke Nestler

Nestler: From my point of view, IP related litigation is an important current trend. Based on rapid technological advancements – particularly in areas like software, biotechnology, artificial intelligence, autonomous driving, and pharma – disputes over patents, copyrights and data are increasing. Intellectual property rights are often crucial for new business models, providing a competitive advantage. So, protecting those rights is a strategic priority for many companies.

Konrad Rodgers

Rodgers: One of the most discernible trends in energy litigation in 2023 concerned the number of high-profile disputes in the ESG space. This included the attempts of (i) ClientEarth to pursue a derivative action against the Board of Shell, alleging that they breached their duty as Directors under the Companies Act by failing, amongst other matters, to implement a strategy to manage climate risk (*ClientEarth v Shell Plc & Ors* [2023] EWHC 1137 (Ch)) and (ii) two members of a pension scheme to bring a derivative claim against the Directors of a large pension scheme for breach of duty arising out of the alleged failure to have in place a plan to divest the fund from investments in fossil fuels (*McGaughey & Anor v Universities Superannuation Scheme Limited* [2023] EWCA Civ 873).

Although these claims were rejected and reflect the hurdles involved in bringing these types of actions (particularly where they do not have significant shareholder support), they nevertheless reflect a trend of such claims now being focused on corporates and their Directors. The London market is likely to see significant further activity in ESG litigation in 2024, particularly given the rise of litigation funds focused primarily on this field.

Claudio De Castro

Castro: An increasing trend that we are noticing in government contracts is the inclusion of arbitration clauses, to avoid disputes to be decided by local judicial courts.

Maxim Kulkov

Kulkov: In *Posuda Centre v. EURIPUS B.V.* (former Russian branch of EY) (SC's Judgment dated 13 February 2024 in Case No. A40-111577/2022) the SC provided important clarifications about responsibility of a consultant for the advice it has given.

In the case, the consultant advised the claimant how to optimise its tax expenses. However, subsequently, the tax regulator imposed liability on the claimant because of the application of methods developed by the consultant. As a result, the claimant claimed for damages citing that the consultant's advice was defective.

The lower courts dismissed the claim on formal grounds and the SC sent the case for retrial. The SC held that the consultant, as a general rule, could not be held liable if its services did not achieve the result provided by the contract. Thus, the SC did not endorse the claimant's position and alleviated fears of some members of legal community that the SC would allow consultants to be held liable if their services did not provide the desired outcome.

Q5. Are you noticing any trends in industry-specific litigation?

Maxim Kulkov

I should note that less than a year earlier, the SC underlined the importance of achieving results for legal services contracts in *ConsultJurist v City Building Company* (SC's Judgment dated 4 April 2023 in Case No. A40-67639/2021). In this case, the SC quashed the judgments of the lower courts which recovered the consultant's fees though the result of legal services was not achieved. The SC held that legal services "on their own are of no interest to the customer, and they should aim at achieving certain result". However, in *Posuda Centre v EURIPUS B.V.* the SC did not pursue the same line of reasoning in respect to consultant's liability. The SC explained that to incur liability on the consultant, the court should establish that it rendered services in an unprofessional way and without due care, thus removing the focus on achieving the result.

Furthermore, the SC introduced a special standard of conduct for "high-qualified consultants" (i.e., top market players). Their services, in SC's view, should be measured by higher standards (which can make imposition of liability on them easier).

Most importantly, the SC did not object to establishing the limit on a contractual liability and, in fact, endorsed this practice by stating that such provisions encourages consultants to render services at a lower price (since they know that in any case their liability is restricted to a certain amount).

Q6. What is the most effective means of litigation or dispute resolution in your jurisdiction?

Giuliana Schunck

Schunck: Arbitration is really consolidated in Brazil for around two decades. Normally, the judgment of the case happens in a more consistent and sophisticated manner than in court cases. State judges usually have a huge workload and therefore the attention and care with each case is more limited than in arbitration. In addition, in arbitration the appointed experts are typically more qualified and dedicated than court experts and this tends to produce better expert reports/findings than in court cases. Hearings are more sophisticated in arbitration than in court cases, as the arbitrators have more time to dedicate to the evidentiary phase. Arbitration also tends to be faster than judgments in State Courts.

However, it is important to bear in mind that arbitration is much more expense in Brazil than court cases and, therefore, it is not the solution for all types of disputes, especially those involving lower amounts. Moreover, the award in arbitration is not subject to appeals so once it is issued normally the losing party will need to comply quickly.

Mediation is beginning to grow in Brazil, especially for more technical and sophisticated subjects.

Dr. Anke Nestler

Nestler: This is difficult to say, as I am quite often involved in disputes at a later stage when litigation is about the volume of damage awards. From my personal experience, the expected costs of a dispute and the length of the process quite often encourages the parties to settle.

Q6. What is the most effective means of litigation or dispute resolution in your jurisdiction?

Konrad Rodgers

Rodgers: There is no straightforward answer to this question and it very much depends on the context of the specific dispute.

The potential advantages of litigation over arbitration including generally much more wide ranging obligations to disclose relevant documents (including documents which adversely affect a party's case) together with more established procedures for the early resolution of disputes and judgments which are binding and public. Moreover, the Courts offer particularly effective tools for interim relief, although in many instances they are also available in support of arbitration.

The potential advantages of arbitration over litigation include the confidentiality of arbitral processes, the flexibility of arbitration which may enable a dispute to be determined in a more cost effective and quicker manner, the more limited grounds on which it is possible to appeal awards and also the potential easier route to cross-jurisdictional enforcement of a decision, in a New York Convention state.

Equally, alternative dispute resolution mechanisms such as mediation, expert determination (frequently seen in post M&A disputes), or early neutral evaluation (which is a without prejudice and non-binding evaluation of the merits of a dispute by a senior independent figure and which may ultimately prove an aid to settlement) all have their place for the right kind of dispute.

Claudio De Castro

Castro: The most effective way of litigation in Panama is arbitration, because of the reduced time that it takes in comparison to regular litigation before local courts. Arbitration in Panama is administered by local arbitration centres (e.g., CeCAP or CESCON) or by international arbitration centres (e.g., ICC).

Maxim Kulkov

Kulkov: The state commercial courts are the most effective means for litigation in Russia, because they are relatively swift (the average time for the case consideration by all instances up to the SC is about 12-18 months) and cheap. The commercial courts primarily review cases pertaining to business activities. The general jurisdiction courts hear cases involving private citizens and are generally considered more sluggish and less competent than the commercial courts.

The international commercial arbitration once popular among big businesses is currently giving up positions due to the recent political events. The state courts actively encroach on its competence using Articles 248.1 and 248.2 of the Commercial Procedure Code of the Russian Federation (CPC) (please see my answer to question 8 below) to disregard arbitration clauses. In some extreme cases, the courts even grant the Russian parties' claims to swap the arbitration clauses for prorogation clauses in favour of state courts.

Furthermore, it has become more difficult to recognise and enforce foreign arbitral awards issued in favour of creditors from jurisdictions that imposed sanctions on Russia. For example, in *Louis Dreyfus Company Swiss SA v. Infotech Novo LLC* (Judgment of the Commercial Court of the North-Caucus Circuit dated 16 October 2023 in Case No. A32-47144/2022) the court held that recognition and enforcement of a LCIA arbitral award would violate Russia's public policy. The court referred to a few anti-sanction decrees of the Russian President which, in fact, do not restrict the recognition and enforcement of the arbitral awards. Such an approach represents a 'protectionist' trend prioritising the interests of Russian parties over foreign ones.

Q7. How does third-party litigation factor into the legal landscape?

Dr. Anke Nestler

Nestler: Third-party litigation funding has several effects on litigation and arbitration. It improves justice by enabling small firms with low financial resources to pursue legal claims against larger and more financially powerful opponents. It can also enhance disputes, as the interest of those practices is to identify and finance disputes.

Claudio De Castro

Castro: Third-party litigation funding has gained prominence in international arbitration and litigation in the region. However, in Panama, third-party litigation funding is very incipient and has not had any mayor impact in the legal landscape of local litigation.

Q8. What are the biggest challenges for clients pursuing international litigation and what best practice procedures would you recommend to improve the likelihood of a positive outcome?

Giuliana Schunck

Schunck: When pursuing international litigation, it is always important to analyse the most convenient forum – also from the perspective of enforcement. Sometimes clients prefer to litigate outside Brazil because there is a higher likelihood for a successful verdict. However, we may face challenges in enforcing foreign decisions before Brazilian courts. Thus, we usually advise clients that some cases are better placed in Brazil than in other jurisdiction as it will help to facilitate enforcement.

Dr. Anke Nestler

Nestler: Jurisdictional issues and cultural barriers are two of the biggest challenges when enforcing decisions across borders. It is very important to engage legal advice with expertise in international litigation. It is also important to be familiar with the respective legal systems that are part of the litigation.

Konrad Rodgers

Rodgers: The biggest challenge for clients remains in ensuring that it is possible to pursue international litigation in a manner which is proportionate to the cost and where the relief obtained will prove to be effective in practical terms.

Litigation in England can be expensive and when an international element is added to that (with the potential for disputes across a number of forums) this can clearly add further complications to achieving results in a manner proportionate to the cost. It is therefore critical to have a coordinated strategy between the different legal teams working in the various jurisdictions on an international litigation and to consider the different tools available to progress disputes in an efficient manner, where practical (such as seeking early disposal of issues, if appropriate, and targeted disclosure processes).

Q8. What are the biggest challenges for clients pursuing international litigation and what best practice procedures would you recommend to improve the likelihood of a positive outcome?

Konrad Rodgers

As regards ensuring the relief is effective, this requires consideration at an early stage of where assets may be located, the manner in they are held and what steps (such as injunctive relief, whether directed at the counterparty or at third parties) can be taken to ensure that they are preserved pending the determination of the dispute.

Claudio De Castro

Castro: In our experience, one of the biggest challenges for clients pursuing international litigation is possessing or located the evidence to support their case, especially when the dispute arises out of a long-term contract. Therefore, in our experience, it is always convenient to document all the issues arising out of the performance of a contract. For example, keeping an orderly record of all letters sent to the other party and an effective document management system is a practice that will likely improve the likelihood of a positive outcome in a litigation.

Maxim Kulkov

Kulkov: International litigation is currently facing significant challenges. A good example is the ever-widening application of Article 248.1 of the CPC. This article allows Russian courts to establish their exclusive jurisdiction over disputes involving sanctioned entities and/or caused by sanctions. Further, the courts can disregard the contractual prorogation and arbitration clauses if foreign sanctions restrict the access of sanctioned persons to justice.

Under the dominant approach it is nearly impossible for a foreign party to prove that nothing, in fact, impedes the right of its Russian counterpart to fair trial in a foreign jurisdiction. Moreover, last year saw the active development of even more radical approach – that the mere presence of sanctions introduced against Russia means that its residents can obtain justice only at home.

Another provision of CPC – Article 248.2 – allows parties to seek anti-sanction injunction from a Russian court aiming at blocking or preventing the foreign proceedings commenced against such party. Since foreign parties sought the same remedy in their jurisdictions, it has led to the clash of anti-suit junctions of Russian and foreign courts.

Recently, Russian court started adopting anti-anti-suit injunctions and prohibiting foreign litigants to seek anti-suit injunctions abroad (for example, *VTB Bank JSC v VTB Bank* (Europe), Judgment of the Commercial Court of Saint Petersburg and the Leningrad Region dated 2 November 2023 in Case No. A56-103943/2023). In case of non-compliance with such an injunction, a foreign litigant can be subjected to the fine up to the full amount of dispute.

Foreign parties litigating in Russian courts encounter further challenges, such as problems with paying the state fees to apply to court (because the payments should be made through the Russian Central Bank sanctioned by the U.S.) and more relaxed attitude of some Russian judges to the service issue, which may lead to the quick consideration of the case before a foreign litigant could even react.

On the other hand, Russian parties also face difficulties while litigating abroad, because sanctions have curbed their opportunities to pay legal fees and many international law firms declined to represent their interests.

In light of these challenges, I would recommend parties pursuing international litigation to plan for the sanction-related contingencies beforehand and react proactively, especially if the opponent initiates the proceedings in its home jurisdiction.

Q9. What are the most common contract disputes arising today?

Giuliana Schunck

Schunck: Distributors and sales reps are a constant struggle. We also see lots of disputes involving services agreements, M&A issues, construction disputes, and franchises, amongst others.

Konrad Rodgers

Rodgers: A common area of dispute arising today concerns the implications of sanctions on a contract, particularly in the context of the Russia (Sanctions) (EU Exit) Regulations 2019. Sanctions can potentially affect a contract in a number of ways and disputes often occur in the following contexts:

- There may be a question as to whether a corporate counterparty to a contract who is not designated is nevertheless subject to sanctions on the basis that a designated person would, in significant respects, be able to control the conduct of its affairs;
- Whether and in what circumstances termination of a contract is permissible as a result of sanctions;
- If there is a force majeure clause which requires an affected party to exercise reasonable endeavours to overcome the force majeure, whether this means that in certain circumstances the party must agree to non-contractual performance (see *RTI Ltd v MUR Shipping BV*);
- There is significant litigation arising in the anti-suit context as a result of provisions in the Russian procedural code which allow Russian courts to assume jurisdiction over a dispute impacted by sanctions, irrespective of the terms provided for in the jurisdiction clause;
- The implications under an English law contract of sanctions designations on a counterparty in other jurisdictions, where that counterparty is not designated in the UK.

Even if these issues are resolved by the Court in the coming months, contractual disputes arising out of sanctions are expected to continue at pace over the next 12 months given the complexities of the sanctions regime and the frequency of designations.

Claudio De Castro

Castro: The most common contract disputes arising today in Panama are disputes related to construction and infrastructure, energy, distribution, and disputes among shareholders.

Kateryna Gupalo

Gupalo: While discussing the most common disputes arising from contracts, it is worth mentioning disputes related to applying the force majeure clause. There are very frequent cases when the party cannot fulfil its obligation due to the full-scale invasion of Russia into Ukraine. There may be quite apparent cases of destruction of property as a result of shelling, drone attacks, etc. At the same time, there might be other not-so-straightforward examples, such as failure to comply with contract obligations due to the seaport blockade, especially during the period when the Grain Corridor temporarily ceased to exist.

Q9. What are the most common contract disputes arising today?

Kateryna Gupalo

Along with that, business entities should remember that referring to the very fact of a full-scale invasion as proof of the existence of force majeure is not sufficient. It is necessary to prove the impossibility of performing the contract in each specific case.

Maxim Kulkov

Kulkov: The last two years saw a sharp spike in sanction-related disputes. One of the most common categories of cases became the disputes caused by the unilateral termination of contracts by foreign companies because of sanctions. Their Russian counterparts actively challenge such terminations in Russian court proceedings and usually win, because the courts consider sanctions contradictory to Russia's public policy and thus their introduction could not serve as valid ground for contract termination.

A good example of this category of cases are disputes against Siemens. For example, in *Russian Railways v. Siemens Mobility GmbH and Siemens Mobility LLC* (its Russian affiliate) the courts declared the unilateral termination of contracts by Siemens due to sanctions invalid and obliged Siemens and its affiliate to perform obligations to the claimant in kind (see Judgment of the Ninth Commercial Appellate Court dated 17 July 2023 in case No. A40-258467/22). Despite that, the contracts were governed by the German law, the courts applied Russian law to declare Siemens and its affiliate joint and several debtors. To stimulate the defendants to perform their obligations the courts imposed the untypically high court penalty exceeding USD 6,800 per day (in disputes involving only Russian parties this amount rarely is more than USD 2,100 per day). This case demonstrates that Russian courts can be creative in making foreign parties perform their obligations, e.g., by disregarding the choice of law clauses and imposing obligations on the affiliates which did not participate in the disputed contracts (see also my answer to question 4).

This category also comprises other disputes caused by the foreign parties' non-performance of their contractual obligations. If such non-performance was due to sanctions the courts tend to grant the claims (e.g., damages in favour of Russian parties). Such disputes relate to works, services, supply, sale and purchase contracts and reflect the general trend of winding up of economic cooperation between Russian and Western businesses.

Disputes caused by infringement of the intellectual property rights constitutes another widespread category of cases. Many Western companies left Russia since February 2022, and some unscrupulous entrepreneurs were selling infringing goods hoping that they would go unpunished. However, Western companies often successfully sought protection from the courts. Nevertheless, there were some worrisome precedents like the *Peppa Pig Case* (Case No. A28-11930/2021), in which the court dismissed the claim of a UK rightsholder considering it an "abuse of rights", because the claimant originated in the country "unfriendly" to Russia. Luckily, the judgment was quashed by the appellate court which granted the claim. Thus, this approach did not take hold.

Q10. What are the key elements of effective conflict management?

Giuliana Schunck

Schunck: Conflict management is a difficult area. Humans tend to have conflicts, and this is natural. Conflicts can normally be well managed with good communication and trust. In addition to good communication and trust between parties in commercial relationships, other initiatives may avoid or mitigate conflicts. Cooperation is a key area to bring the parties to a closer and more trustworthy environment. Contract management is also an important factor to avoid or minimise conflicts in contractual matters.

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