

Insights

DISPUTES IN FOCUS: QUICK Q&A ON INTERNATIONAL DISPUTES - IMPORTANT POINTS TO NOTE

CLARE REEVE CURATOLA SPEAKS TO MEGAN APPEGARTH AS PART OF HER QUICK Q&A SERIES

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SUMMARY

According to data released by the Ministry of Justice 63% of cases listed in 2022 and 69% of cases listed in Q1/Q2 2023 in the Commercial Court involved at least one non-UK registered party. Despite the increasing frequency of such litigation, issues which arise specifically in the context of international litigation can often catch litigants by surprise.

In this blog, Clare Reeve Curatola outlines some of the challenges and, she asks her Litigation and Investigations colleague, Associate Megan Applegarth, about her recent experience of managing these challenges. Megan provides examples of key issues that can arise when parallel proceedings are ongoing in different jurisdictions.

Short on time? [Jump to our summary of issues in international disputes.](#)

QUICK Q&A WITH MEGAN APPEGARTH

Megan Applegarth is an Associate in the firm's Business and Commercial Disputes department. Megan advises a variety of clients, from financial institutions to individuals, and deals with a wide range of general commercial and contractual disputes, as well as regulatory matters.

ADDITIONAL CHALLENGES FACING PARTIES MANAGING INTERNATIONAL LITIGATION IN THE ENGLISH HIGH COURT

Challenges that are more common and/or trickier in disputes involving either a non-UK registered party or international business include:

- Securing documentary evidence

- Securing witness evidence
- Managing language barriers

IN YOUR RECENT EXPERIENCE HOW CAN PARTIES BEST MANAGE THE ADDITIONAL CHALLENGES THAT CAN ARISE DURING INTERNATIONAL DISPUTES?

SECURING DOCUMENTARY EVIDENCE

This is particularly important where the custodian or owner of the documents is, or will shortly be, located outside of the jurisdiction.

- **Witnesses at risk of leaving employment and/or jurisdiction:** secure data from any laptops or other devices, and carry out initial searches to assess whether any gaps in evidence can be explored with that employee before they leave. Consider taking a witness statement before they conclude their employment.
- **Data protection – local laws:** the ability to obtain documents from a party outside of the jurisdiction may also be impacted by local laws on data protection. Regulatory regimes such as the UK GDPR can impose restrictions on how certain data can be transferred internationally and the interplay between these restrictions and disclosure obligations is not always clear cut.
- **Local laws – generally:** Local laws can even come into play prior to the commencement of litigation, for instance, when a formal demand is being made. It is important to recognise when it might be prudent to obtain advice from a lawyer based in the relevant jurisdiction who can ensure compliance with local requirements.

SECURING WITNESS EVIDENCE

There are obvious and expected additional practical challenges around securing witnesses' attendance at trial but there can be substantive challenges.

- For example: it is not a given that all foreign governments are willing to allow their nationals or others within their jurisdiction to give evidence in an English court via video conference (see Practice Direction 32, Annex 3). This means an additional application will be required in good time before the hearing.
- While it may sound obvious, making sure a good record of employees' contact details once they leave employment and keep in touch periodically (if the dispute is long running). The Disclosure Certificate under PD57AD now requires parties to confirm that, in relation to disclosing all adverse documents of which they are aware, reasonable steps have been taken to check the position with relevant persons who have left the company.

- Consider whether it might be helpful to re-hire a departing employee as a consultant. Whilst care should be taken in respect of the risks of paying for evidence and weight/credibility issues, this can be a helpful and important acknowledgement of the amount of work which can go in to being a witness.
- If the witness might be unwilling - consider issuing a letter of request to a court in the relevant jurisdiction to order that evidence to be taken and provided to the Courts in England and Wales. The relevant procedure differs depending on which jurisdiction the witness is based in.

MANAGING LANGUAGE BARRIERS

- **Witnesses:** Interpreters can obviously play a critical role in conveying oral evidence to the Court. But it's important to ensure your interpreter has the requisite legal or technical expertise to match your witness' evidence to accurately translate technical or legal jargon for the Court.
- **Documents:** where there are large volume of foreign language documents, obtaining translations of documents can be costly and time-consuming. Machine translations are cheaper, but less accurate, than human translations. Either way, working cooperatively and agreeing the process with your counterparties sooner rather than later is recommended to avoid any surprises or disputes nearer to trial.

IN INTERNATIONAL COMMERCIAL LITIGATION, IT'S COMMON TO HAVE PARALLEL PROCEEDINGS IN MULTIPLE JURISDICTIONS. WHAT ISSUES CAN ARISE THERE?

A whole host of issues can arise where rules and obligations differ across jurisdictions. A lot of these issues relate to the proper management and treatment of documents and obtaining local law advice early on is important. For example:

1. **Privilege:** While many jurisdictions recognise the concept of privilege (and the ways in which it can be waived), the precise boundaries can differ. For instance, in France and Germany, there is no concept of legal professional privilege per se, and communications between lawyer and client are only protected by certain professional confidentiality obligations. The divergences in approach are particularly stark when it comes to in-house lawyers, as some jurisdictions do not recognise that privilege subsists in communications from in-house counsel. In France, a law reform process on this very issue is ongoing. In July of this year, the French National Assembly voted in a draft bill which recognises, for the first time, a concept of privilege over documents produced by in-house counsel who provide legal advice (see Article 58-1, inserted into Law No. 71-1130 of December 31, 1971).
2. **Disclosure:** Similar divergences exist with respect to disclosure. Whereas common law countries such as Hong Kong SAR or Australia have similar rules as England and Wales, civil law

jurisdictions take a very different approach. For instance, in France and Germany there is no real process of disclosure and parties tend to only produce those documents on which they intend to rely.

3. **Collateral use:** While English lawyers are cognisant of the restrictions upon the collateral use of documents disclosed in proceedings, quite a number of jurisdictions have no equivalent rule. It is therefore very important to ensure that robust document management practices are implemented to avoid any intermixing of disclosed documents. While use of such documents might be possible in some jurisdictions, it can constitute contempt of court in others.

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