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Insights

LITIGATION TRENDS FOR 2025: WHAT WILL THIS YEAR HOLD FOR BUSINESS AND COMMERCIAL DISPUTES?

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SUMMARY

We explore the trends for Business and Commercial Disputes in the UK, US and France/EU in 2025. Here's what you should know.

UK

- In the spotlight: corporates asserting privilege against shareholders
- Continued focus on litigation funding
- Increase in open justice
- Easier enforcement
- Court-compelled Negotiated Dispute Resolution – watch this space

France

- Rise of mass claims in France and rise of class actions in France and the EU
- The new EU product liability directive adopted on October 11, 2024
- Rise of ESG related claims

US

- More M&A deals means more post-closing disputes?
- Head off rising number of workplace issues with internal investigations
- Disclosure of litigation funding in the United States

UK

IN THE SPOTLIGHT: CORPORATES ASSERTING PRIVILEGE AGAINST SHAREHOLDERS

2025 will see the Shareholder Rule put to the test: does it have a place in the modern world? The Supreme Court will be considering the issue of whether companies should continue to be allowed to assert privilege against their shareholders: a key issue to keep a watch over.

The so-called "Shareholder Rule" was jettisoned in 2024 by the English High Court in *Aabar Holdings SARL v Glencore Plc and others [2024] EWHC 3046 (Comm)*. It has been regarded by some as anachronistic that in our world of multi-national public companies with multi-jurisdictional reach, corporates could not assert privilege against their own shareholders (except in relation to documents that came into existence for the purpose of hostile litigation against that shareholder), especially when the company is a separate legal entity to its shareholders and its shareholders are diverse and of differing opinions and interests. The High Court agreed. The Supreme Court/Privy Council will consider this issue in the *Aabar Holdings* appeal and in the *Jardine Strategic Holdings* case being appealed from Bermuda on 6 March 2025. These decisions may lead to a key development in the law of privilege and should be closely watched by corporates.

CONTINUED FOCUS ON LITIGATION FUNDING

The questions on everyone's lips in 2025 in relation to litigation funding are will PACCAR be reversed and will litigation funding be formally regulated. There are differing views and differing perspectives but what is clear is that 2025 will be a year of increased focus on litigation funding by the government, courts and Competition Appeals Tribunal. The test they all need to meet though is to ensure that any changes maintain the access to justice which litigation funding undeniably brings and to bring back certainty to the litigation funding market for our clients.

Access to justice is a much-used phrase and it has become synonymous with litigation funding. Funding undeniably does promote such access, particularly and most-recently in group litigation. Indeed, the government delayed the re-introduction of the Litigation Funding (Enforceability) Bill to allow the Civil Justice Council (CJC) to conclude its review and provide its report in 2025 on third party civil litigation funding with Lord Ponsonby saying that the government recognised the "critical role" that third party litigation funding has in ensuring access to justice. Whether such access, particularly to facilitate and enable group litigation is a good or bad thing however depends on your individual position and perspective. In the Merricks/Mastercard litigation, the parties appear currently to differ as to whether the funder was too involved and controlled the litigation. While PACCAR may be reversed by legislation in 2025, giving much-needed certainty, the key development to watch is whether the government perceives any tension between access to justice and the consumer's interests and informed by that, what decision will be made as to whether litigation funding should be formally regulated. 2025 will certainly see an increased focus – by the

government, the Competition Appeals Tribunal and the courts - on the role of funding and its benefits.

INCREASE IN OPEN JUSTICE

Non-party access to additional court documents including witness statements, expert reports and skeleton arguments was a hot potato in 2024 and promises to continue to be so in 2025. Change is inevitable in 2025 and we welcome the increased access to justice that this will bring. Changes were clearly needed to the proposals for the amendments to CPR part 5 (public access to documents) however, as the Civil Procedure Rules Committee consultation demonstrated. But the objections to change seem overblown. Increased access to justice and a public which understands a corporate or bank's position in a dispute is important to our clients. And it can be managed: the courts can be relied on to weigh up the competing interests of commercial confidentiality and privacy, which are also often of concern to our clients, if the arguments before them are properly formulated and presented.

At the beginning of last year, the Civil Procedure Rules Committee consulted on amendments to CPR part 5 (public access to documents). Whilst its proposals were not roundly welcomed, and work following the consultation has been paused pending the Transparency and Open Justice Board carrying out the first phase of its work, the direction of travel is clearly – and rightly - towards greater public access to more documents including skeleton arguments, witness statements and expert reports. The Supreme Court's decision in *Cape Intermediate Holdings v Dring* made clear the importance of open justice, including the provision of documents, in holding courts and judges to account and enabling the public to understand how the justice system works and why decisions are made. The Transparency and Open Justice Board, created by the Lady Chief Justice last year, is also now seeking views on its proposed key objectives which were published in December 2024, and which include "*ensuring proceedings and decisions of courts and tribunals are open and accessible to the public and the media. This includes "timely and effective access" to information about pending cases, core documents relating to proceedings, and hearings of courts and tribunals held in public*".

Whilst there are apparent obstacles and concerns about open justice – such as concern about access to witness statements before they have been put into evidence – these seem overblown and manageable. The Supreme Court in *Dring* made it clear that on any application the court would have to carry out a fact-specific balancing exercise to take account of any countervailing principles, such as the need to protect privacy interests or commercial confidentiality and that a non-party seeking access must explain why they seek it and how granting access will advance the open justice principle. It is inevitable that access to documents will be extended in 2025 – but such access will be tempered by the need for a court application and the court's ability to weigh up competing interests. This should be welcomed.

EASIER ENFORCEMENT

Those in dispute often forget that obtaining judgment is just half the battle. Parties must always have a strategy for the ultimate enforcement of that judgment. That strategy begins when commercial contracts are drafted – and in terms of enforcement in the EU, the parties needed to choose a jurisdiction for the determination of their disputes, on an exclusive basis, if they were to rely on the Hague 2005 enforcement procedure. 2025 will see the return of choice to contracting parties. Contracting parties may agree non-exclusive or (often the preference of institutional clients) asymmetric jurisdiction clauses and will be able to employ the relatively easy and cheap route to enforcement under Hague 2019 when it comes into force in the UK in July 2025. We welcome this return to freedom of contract and we look to the future as more countries worldwide ratify Hague 2019.

The UK's ratification of the Hague Convention on the Recognition and Enforcement of Foreign Judgments 2019 will ease the obstacles to enforcement of judgments in civil and commercial matters in the EU (and other Convention countries) from July 2025. The straight-jacket imposed by the Hague Convention on Choice of Court Agreements 2005 requiring the parties to have exclusively chosen an applicable jurisdiction – and therefore excluding asymmetric clauses often preferred by institutions – will remain but Hague 2019 will provide an enforcement route for parties who have chosen non-exclusive or asymmetric jurisdiction clauses. This is a welcome development going some way to removing post-Brexit obstacles for commercial parties seeking to assert their rights under an English judgment in the EU, by almost certainly reducing the time and costs of the enforcement process. The implications of Hague 2019 go beyond EU/UK relationships and there is reason to be positive in 2025 and beyond, as the Convention countries increase worldwide.

COURT-COMPELLED NEGOTIATED DISPUTE RESOLUTION – WATCH THIS SPACE

The old adage was that Negotiated/Alternative Dispute Resolution (NDR/ADR) was only successful because it was voluntary. The courts disagreed in *Churchill v Merthyr Tydfil CBC*, and the rules changed in October 2024. The courts can now compel, even represented commercial parties, to enter into an NDR/ADR process. In 2025 we will inevitably see the extent to which the courts choose compulsion over encouragement or whether they continue, particularly in the context of commercial disputes, ultimately to leave the choice to the parties but to impose costs consequences if they consider a party unreasonably refused to participate. While we welcome the appropriate use of NDR/ADR processes in the interests of our clients, we expect the courts to acknowledge that in the majority of commercial cases it is the parties, and not the courts, which are best-placed to decide when is the best time to engage in NDR/ADR with the best possible chance of a successful outcome.

NDR or ADR (alternative dispute resolution) has historically been defined as a voluntary dispute resolution process sitting outside the court process. While the parties had to consider NDR and the court could impose costs consequences if they refused to participate in NDR unreasonably, the process was, at its heart, a voluntary process. Following *Churchill v Merthyr Tydfil CBC*, and the consequent rule changes, particularly the amendment to PD 29.4.10(9) allowing the court to give

directions "*ordering or encouraging the parties to engage in alternative dispute resolution*", this is no more. The courts may now order the parties to engage in an NDR process. The jury is still out on the extent to which this will have a practical impact on multi-track commercial cases where parties would generally engage in NDR at an appropriate stage of the proceedings in any event, to seek to avoid the costs of trial. It is however certain that we can expect the courts in 2025 to give a very clear indication as to the extent to which they will employ compulsion as opposed to encouragement. We would not invite the courts to mandate NDR except in exceptional circumstances as the value and success of the NDR process historically was driven by the very fact that it was a voluntary process.

FRANCE

RISE OF MASS CLAIMS IN FRANCE AND RISE OF CLASS ACTIONS IN FRANCE AND THE EU

Ten years after its introduction in French law and despite several subsequent laws that have broadened its scope, class actions are still little used to solve mass claims in France. It could soon evolve as a result of a recent bill presented on October 31, 2024 whose aim is to transpose the EU Representative Actions Directive 2020/1828.

The previous bill presented on February 15, 2023, which was discussed heatedly before the dissolution of the French National Assembly on June 9, 2024, envisaged simplifying access to the French-style class action regime and unifying the different regimes applicable to health, consumer, environment, and personal data class actions. It now appears that this bill will not be re-examined, as the government has decided to opt for simple transposition of the EU Representative Actions Directive, without the over transposition and adjustments envisaged in the 2023 draft bill. An amendment presented within the previous 2023 draft was voted on on 27 November 2024. It introduces the creation of a universal system of class actions, opening up standing to associations that have been legally registered for at least two years and to ad hoc associations, broadening the material scope of class actions, abolishing prior formal notice, and creating a civil penalty to punish fraudulent behaviour.

It remains to be seen whether this upcoming bill will be sufficient to revive the class actions regime in France, but the transposition in all EU members states of the EU directive could lead to a risk of forum shopping.

THE NEW EU PRODUCT LIABILITY DIRECTIVE ADOPTED ON OCTOBER 11, 2024

On October 10, 2024, the Council of the EU adopted the new EU directive on liability for defective products (known as the "new PLD"), which will substantially change the EU product liability landscape which has existed for the last 40 years. The text aims at updating liability rules to reflect the nature of products in the digital age and their associated risks, to ensure that individuals are

better protected and can prove their claim in complex cases. The new PLD may lead to an increase in product liability litigation across the EU in many areas including AI. Indeed the new PLD will make it easier for claimants bringing claims on a individual or collective basis and bodies representing collective claimants to bring claims related to allegedly defective products.

RISE OF ESG RELATED CLAIMS

At a time when the Draghi report on European competitiveness and the upcoming Omnibus simplification package highlight the need to strengthen European attractiveness and competitiveness and call for a simplification of standards, what are the current ESG-related litigation risks in EU and France?

In recent years, the European Union (EU) has adopted numerous regulations to protect the environment. These include the Green Taxonomy in 2020, which classifies economic activities according to their environmental sustainability; the Corporate Sustainability Reporting Directive (CSRD) in 2023, strengthening the extra-financial reporting obligations of companies; as well as Corporate Sustainability Due Digilence Directive (CS3D) of 2024. France has long been a forerunner in the field of ESG. In particular, the French corporate law on duty of care imposes a duty of care on large companies headquartered in France with regard to a wide range of risks relating to human rights and environmental damage that their activity may generate via their subsidiaries and suppliers and subcontractors with whom a commercial relationship is established, in France or abroad.

The purpose of ESG-related claims in France relate to the failure of companies to report on ESG-related initiatives (based on the EU CSRD and EU Taxonomy transposed into French law), failure of companies of their corporate duty of care (based on the French corporate duty of care law dated 2017 and the EU CS3D not yet transposed) and to greenwashing allegations. Such actions may be brought either based on the mass claims regime or by way of criminal complaints.

As regards the risk of litigation, several cases are already underway. Seven years after the adoption of French corporate law on duty of care, more and more multinationals in all sectors - energy, water, banking, distribution, services, transport and cosmetics - are being targeted by actions brought by NGOs, local authorities and trade unions. In December 2023, the French court rendered its first decision on the merits based on the aforementioned law. The court emphasized the degree of precision expected of the risk mapping, which must make it possible to identify the risk factors in concrete terms in order to determine all the due diligence measures to be implemented. Regarding greenwashing, high profile actions have been brought by non-governmental organizations and consumer associations against a French oil group and the world leader of coffee for misleading commercial practices, challenging the legality of several claims promoted by groups in their advertising concerning their "carbon neutral" strategy. This risk of greenwashing litigation could increase once the EU directive 2024/825 empowering consumers for the green transition has been

transposed into national law and once the EU green claims directive is adopted by the EU member states.

The creation in 2024 of dedicated to climate litigation chambers before the Paris 1st Instance Court and the Paris Court of Appeal acknowledge the growth, importance and complexity of climate litigation.

THE US

MORE M&A DEALS MEANS MORE POST-CLOSING DISPUTES?

M&A and private equity deal activity rose in 2024 and is predicted to increase in 2025 because of geo-political certainty, improved macroeconomic sentiment, regulatory loosening, and capital availability. But with deal volume expected to increase, buyers and sellers will likely face increased risks of post-closing disputes and therefore the high-stakes dispute resolution process.

We expect three areas of post-acquisition disputes to increase in 2025:

Earnout disputes

Earnouts are useful for deal parties to bridge a valuation gap, and to potentially protect buyers from overpaying for a business. But earnouts are ripe for dispute for many reasons, including the subjectivity in the operation of the business post-closing and ambiguity in the earnout provisions themselves.

Breaches of representations and warranties

The American Bar Association has estimated that approximately one-third of M&A deal disputes are due to an alleged breach of a seller’s representation and warranty. The increased litigation involving representations and warranties has resulted in a sharp increase in buyers using materiality scrape clauses to successfully assert a claim for breach and damages. As deals increase, companies are at risk of potential losses.

Working capital disputes

Buyers and sellers frequently disagree over the post-closing working capital adjustment to the purchase price. Disputes often arise related to the change in working capital because a buyer reviews financial information before a deal closes but working capital is frequently adjusted at closing, and the deal agreement language is not clear or precise enough on the components to be included in the calculation.

HEAD OFF RISING NUMBER OF WORKPLACE ISSUES WITH INTERNAL INVESTIGATIONS

2025 will see an uptick in the already rising number of employee complaints and conduct issues across industry sectors. What can employers do to counteract this trend? Create an environment in which employees feel comfortable coming forward because they are confident the company will conduct a prompt and unbiased internal investigation to understand the facts and take disciplinary and/or remedial steps to address workplace issues.

In recent years, employee complaints and conduct issues across industries have been on the rise. With significant shifts in DEI regulations and antidiscrimination laws anticipated in 2025, we predict even more workplace issues may be triggering the need for employer action in the coming year. Employers already have been handling more workplace issues by conducting internal investigations using either human resources professionals, in-house counsel, or outside counsel. With an uptick in complaints anticipated, employers need to be prepared to handle an increased volume of internal investigations without sacrificing either promptness or thoroughness. What can employers do to be ready? Be sure your internal team has guidelines on how to conduct unbiased internal investigations of issues quickly as they are reported or discovered. Regularly-conducted internal investigations trainings and development of a framework for how your organization will decide who will conduct an investigation and how those investigations will be handled can ensure your team is competent and prepared before a crisis arises. Maximize your chances of a prompt and consistent response to workplace complaints by creating templates for investigators to use. Preparation and planning for internal investigations and disciplinary and/or remedial measures, understanding when outside counsel should be retained, and having relationships with trusted counsel who can assist you promptly will best position your organization to timely and credibly respond to and remedy workplace complaints and mitigate the associated risks. If your employees trust that the issues they raise will be taken seriously and addressed promptly, they will be more likely to come forward promptly, assisting you in creating a better workplace in 2025.

DISCLOSURE OF LITIGATION FUNDING IN THE UNITED STATES

Originally billed as a means of empowering financially impoverished parties to bring lawsuits to vindicate their rights, litigation funding has grown to also serve the interests of financial conglomerates who seek profits and to serve, on rarer occasion, those who seek to use litigation funding to advance controversial or dangerous goals. 2025 may see mounting pressure for disclosure of litigation funding agreements both under the existing civil rules and through proposed changes to the civil rules as the ethical dilemmas and national security risks for undisclosed litigation funding becomes even clearer.

This year may include pressure on courts to order disclosure of litigation funding under the current rules. Because litigation funding agreements disclose parties who necessarily have a financial interest in the outcome in the case, courts may be compelled to decide whether they must order disclosure of litigation funding agreements under the existing rules to screen for judicial conflicts of interest. Courts may also face requests to order disclosure under the public's First Amendment right to transparency in judicial proceedings, especially in the face of increasing evidence that foreign

powers fund litigation in the United States. See, e.g., *Christopher M. Carr et al., Letter to Hon. Merrick Garland re: Threats Posed by Third-Party Litigation Funding (Dec. 22, 2022)*, (14 State attorneys general raising their "*grave concern*" that "*foreign adversaries could [use strategic lending] to threaten our economic and national security by weaponizing the U.S. judicial system*"). The next year may also see enhanced attention from the U.S. Judicial Conference on whether the Federal Rules of Civil Procedure should explicitly require parties to disclose litigation funding agreements.

RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Business & Commercial Disputes
- M&A Disputes

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