# Global perspectives

## International Trends in Commercial Disputes

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# Introduction

## Welcome to the May 2021 edition of our Global Perspectives publication.

The one-year anniversary of the COVID-19 global pandemic just recently passed. This issue comes to you as we reflect back upon the tremendous changes that the past year has brought to all of us – not only in the way we live but also in the way we conduct our business. We've all faced new restrictions of all sorts – including limitations on travel, particularly international travel – but our business and yours has remained robust across borders as we all adjusted, adapted and adopted new ways of doing things.

We see tremendous opportunity for continued innovation and growth in this interconnected global economy. Where there is opportunity, there is there is both agreement and disagreement, creating the potential for business disputes to arise in one or more jurisdictions.

In this issue we explore a host of issues that arise regularly when dealing with cross border disputes. Our global contributors offer what we hope is useful information about the law surrounding issues as diverse as the German Corporate Sanctions Act, a view on people trafficking and modern slavery in the UK and Australia, the use of force majeure provisions, issues around attorney-client privilege and key elements of injunctive relief, including practical insights, hints and tips, that we hope you can apply in your business as you deal with cross border issues.

We are grateful for our relationship with all of you and wish you continued health as we move forward toward a post-pandemic world.

**Karen Braje**
Partner
San Francisco

**Douglas E. Cherry**
Editor
Partner, London

*This is product of a collaborative effort by many.*

# Modern slavery

## Increasing obligations on businesses in respect of their supply chains

### – a view from the UK and Australia


**Rosanne Kay**
Partner
London

**Peter Glover**
Partner
Hong Kong

**Emma Shafton**
Associate
London

“These requirements pose particular challenges for companies with global operations.”

Slavery has been abolished in all countries over the course of the last two centuries. In the majority of countries it has also been criminalised (although as of last year in 94 countries there is no criminal law penalising either slavery or the slave trade).[1] Notwithstanding criminal prohibitions, slavery routinely occurs in the modern world in both developed and undeveloped countries.

In recent years, countries around the world have taken steps to impose obligations on companies to play their part in eradicating slavery and human trafficking, for example by requiring companies to publish statements about their efforts and/or to have relevant and effective due diligence plans. These requirements pose particular challenges for companies with global operations, which may need to comply with different and sometimes, competing obligations in their countries of operation.

## The UK Modern Slavery Act 2015

In 2015, the UK became the first country in the world to require businesses to report on their progress in identifying and addressing modern slavery risks in their operations and supply chains. Section 54 of the Modern Slavery Act 2015 (the UK Act) mandates that commercial organisations that carry on business in the UK and have a total turnover of £36 million or more must publish an annual statement setting out the steps they are taking to prevent modern slavery in their operations and supply chains (a modern slavery statement). Statements must be approved by the company board and signed by a director (or equivalent) and must be made available on the homepage of the company’s website.

Under the current regime, there is no criminal enforcement. The Secretary of State may enforce a duty to prepare a modern slavery statement in civil proceedings by way of injunction and a company failing to comply with an injunction would be liable to an unlimited fine if held in contempt of court, although the authors are not aware of any such applications by the government to date to enforce compliance.

The lack of enforcement also means that section 54 of the UK Act has not yet been interpreted by the UK courts, most notably what is meant by “carrying on business in the UK”. Although the UK government has issued guidance setting out its views, ultimately it will be for the UK courts to determine the point.

## Increasing obligations

While section 54 was welcomed as a positive step in the fight against modern slavery generally, since its introduction, its scope has been met with widespread criticism by commentators, who have condemned the measures commercial organisations are subject to as being weak and ineffectual.

In response to that criticism, the UK government opened a consultation in 2019. In September 2020, the government published its response and indicated an intention to strengthen the obligations by:

- extending the ambit of section 54 to qualifying public bodies;
- introducing a single reporting deadline and a central registry for publication of the statements in order to better monitor and enforce compliance;
- mandating topics that must be covered in the modern slavery statement; and
- considering whether to introduce civil penalties for non-compliance.

1. https://theconversation.com/slavery-is-not-a-crime-in-almost-half-the-countries-of-the-world-new-research-115596.

“If the entity fails to provide an explanation or fails to undertake the remedial action, then the government may publicise information about its failure to comply.”

On 11 March 2021, the government began to put the proposed reforms into action. A central registry for modern slavery statements was launched by the Home Office in a bid to improve transparency and invite scrutiny over what organisations are doing to prevent slavery in their supply chains. Although uploading the statement to the new registry is currently voluntary, all organisations are being strongly encouraged by the Home Office to submit their most recent statement to demonstrate they have reported. The government has also signalled its intention to make it mandatory for organisations required to publish an annual modern slavery statement to upload their report to the registry. However, this will require legislative change and will be introduced as soon as parliamentary time allows.

There are many still calling for more stringent obligations on businesses. On 16 March 2021, a parliamentary committee called for tougher enforcement of section 54 after concluding that many UK companies were displaying “wilful blindness” to the potential use of slave labour from China’s Xinjang region. The committee said the UK Act was “out of date and has no teeth”. In response, the Department for Business, Energy and Industrial Strategy indicated that financial penalties for non-compliance would be introduced. The message is clear; obligations on businesses in respect of their supply chains are increasing.

## The Australian Modern Slavery Act

Others have followed the UK’s lead. The Australian Modern Slavery Act 2018 (Cth) (the Australian Act) came into force on 1 January 2019. Similar to the UK Act, it requires entities based, or operating in Australia, which have an annual consolidated revenue of more than AUD 100 million to report annually on the risks of modern slavery in their operations and supply chains, and actions to address those risks.

There are some interesting differences between the two Acts. Unlike the UK Act, which does not define what is meant by “carries on business in the UK”, creating a considerable grey area for many international businesses, the Australian Act defines the phrase “carries on business in Australia” and sets out non-exhaustive, specific criteria that either determine or make it more likely that an entity will be considered to be carrying on business in Australia and therefore caught by the Australian Act.[2] Enforcement powers are more robust. Where an entity fails to comply with the reporting requirements, a minister may give a written request to it to either provide an explanation for the failure to comply, or undertake specified remedial action within a specified period. If the entity fails to provide an explanation or fails to undertake the remedial action, then the government may publicise information about its failure to comply (i.e., a ‘name and shame’ list).[3] While there is no criminal enforcement under the Australian Act, it is of note that territorial scope is more tightly defined and the enforcement powers are greater, consistent perhaps with an ever-increasing lack of tolerance of modern slavery on a global level.

As a federation, the Australian state of New South Wales has passed the Modern Slavery Act 2018 (NSW) (NSW Act), but the NSW Act has not yet commenced and its directions are not in force. If the NSW Act enters into force, it will impose stricter requirements on companies compared to the Australian Act, including lowering the reporting threshold for companies with annual revenue exceeding AUD 100 million to AUD 50 million, and establish penalties of up to AUD 1.1 million for failing to publish a modern slavery statement or for publishing false or misleading information.

These two examples illustrate the global importance of the issues surrounding human trafficking and modern slavery in all its forms. Many other jurisdictions have conceptually similar approaches, and the underlying social and societal issues associated with modern slavery will continue to be given prominence and importance around the world. It remains to be seen however, how stringently these regimes are applied and whether they prove to have the desire deterrent effect.

1. Modern Slavery Act 2018 (Cth) section 5(2), with reference to the Corporations Act 20021 (Cth) section 21.
2. Modern Slavery Act 2018 (Cth) section 16A.

# Criminal responsibility of legal entities in Germany

## A new step in the prosecution of corporate crime

**Christian Stempfle**
Partner
Munich/Frankfurt

Unlike many states, Germany has historically had no criminal sanctions regime in place for companies committing or involved in corporate crime. Instead, the authorities have targeted criminal prosecutions at individuals within such companies. A public authority has traditionally had the discretion (but not the obligation) to investigate a company for breach of an administrative requirement.

This historical position is set to change.

To date, the maximum fine for such an investigation has been €10 million, which whilst a large number in itself, may be a less significant sum for a major multi-national organisation, and as a matter of policy, this limit has not been seen as a genuine deterrent to such organisations. Also, to date, it has been difficult, if not impossible, to pursue a company in Germany for a corporate crime committed in another jurisdiction. As a result, the German government is keen to introduce a wider regime designed to ensure that effective deterrent corporate criminal sanctions are in place.

In order to achieve its objectives, the German government presented a draft bill[1] that, if enacted, will allow a criminal prosecution directly against the legal entity involved in a corporate crime (normally a public or private limited company). This will strengthen the armoury of German public prosecutors against corporate crime. We explore this important development below.

## The scope of the liability

The bill defines a corporate crime as an offence by which duties of the legal entity have been violated, or by which the legal entity has been enriched.[2]

It increases potential fines[3] for legal entities with a yearly turnover of more than €100 million to:

- A maximum of 10 per cent of the average yearly turnover in the last three years in cases of intentional corporate crime.
- A maximum of 5 per cent of the average yearly turnover in the last three years in cases of negligent corporate crime.

In calculating the yearly turnover, the criminal court can take into account the worldwide turnover of all legal entities of a group of companies where these operate as an economic unit. As with antitrust proceedings, the wider scope of the turnover calculation could lead to very significant fines.

It is worth emphasising that the draft bill also provides for the possibility that a conviction will be made public in cases where there have been a substantial number of damaged parties.[4] However, if the conviction is publicised on the internet, it has to be removed within one year of publication.

This public attention will be unwelcome to any convicted company, and, in addition, as with antitrust proceedings, publication of convictions may become a source of follow-on claims by affected parties.

## Mitigating the fine

A corporate entity can seek to reduce the level of the fine if it investigates the matter internally and assists in a successful investigation. However, the court will only reduce the fine if it is satisfied that the internal investigation followed the ‘fair trial principle’.[5]

This requires the following steps:

- Interviewed employees must be informed that their answers might be used in criminal prosecution against them.
- Interviewed persons must be given the right to seek legal representation or assistance by a member of the workers’ council when interviewed.
- Interviewed persons must be given the right to refuse to answer questions in case of the risk of self-incrimination.

The defendant company has to document its adherence to the fair trial principle during the internal investigation.

The bill precludes a fine reduction in circumstances where the defendant only produces the results of an internal investigation after the decision of the criminal court to open the trial.[6] The maximum reduction is 50 per cent, which, in the case of an intentional corporate crime by an entity with a turnover of more than €100 million, would reduce the maximum fine to 5 per cent of the average yearly turnover, or, in case of negligent corporate crime, 2.5 per cent of the average yearly turnover.

However, the reduction of the fine is entirely at the discretion of the criminal court and there is no mandatory reduction, even if an internal investigation in strict adherence with the fair trial principle has assisted in successfully investigating a corporate crime.[7]

## Procedure

According to the bill, if a prosecutor brings proceedings against a corporate entity, the members of its board have the same rights as legal defendants in a normal criminal prosecution.[8] They have the right to remain silent in personal examinations and have to be made aware of their right to seek legal representation. Furthermore, members of the board have the right to remain silent in any other kind of proceedings in which they are involved, if the answer to such questions might create the risk of criminal liability for "their legal entity".

An interesting aspect of the process is that the prosecutor has the discretion to hold off from a criminal investigation if a legal entity informs the prosecutor that it has started an internal investigation into the relevant matters.[9] In such a case, the prosecutor can set a deadline for the production of the report arising from the internal investigation. However, this is discretionary and the public prosecutor may, at any time, withdraw the "hold off", start an investigation, and take the legal entity by surprise by searching it while the internal investigation is still ongoing.

As the value of the potential fine depends on the average turnover of the relevant legal entity or group of companies, the legal entity is obliged to disclose these figures.[10] Accordingly, although members of the board have the rights of defendants in criminal prosecution, the bill treats them as witnesses with regard to investigation of the average yearly turnover of the corporate defendant. This means that, although these persons shall have, in general, the rights of the corporate defendant (and therefore the right to remain silent), they will be forced to answer questions regarding the yearly turnover.

Finally, if enacted, the bill will establish a register for corporate crime, which would record details of the final conviction, including the name of the legal entity, its address, all members of the board, the date of the decision, the nature of the offence and the fine.[11] The authorities would retain data on the register for 15 years in a case of serious corporate crime and 10 years otherwise.

## Conclusion

The bill is currently in draft form, and it is not yet clear when it will receive legislative approval and come into legal effect. The bill may not be passed until the 2021 summer break, and, according to the bill's current wording, it would become binding and legally effective two years thereafter.

However, it is apparent that the criminal legal framework will be extended to prosecute corporate entities and that companies should prepare for this possibility.

An intriguing aspect in due course will be the extent to which the 'fair trial principle' might adversely influence the effectiveness of the fine reduction scheme. The process provided for in the draft bill is not standardised and may prove an obstacle to the successful conclusion of internal investigations. This is because the correct application of the fair trial principle will, in practice, mean that interviewed persons, in the light of them being required to have access to advice and/or representation will likely seek their own legal representation, and answers to questions and responses to document requests during the internal process will likely not be given as 'voluntarily' in the absence of such representation.

1. See the draft bill: www.bmjv.de.
2. Section 2, paragraph 1, sentence 3 of the VerSanG.
3. Section 9, paragraphs 1 and 2 of the VerSanG.
4. Section 14 of the VerSanG.
5. Section 17 of the VerSanG.
6. Section 17, paragraph 3, sentence 2 of the VerSanG.
7. Section 17, paragraph 1 of the VerSanG: "the court shall reduce the sanction if […]"
8. Section 33, paragraph 1, sentence 1 of the VerSanG.
9. Section 41, paragraph 1 of the VerSanG.
10. Section 49, paragraph 1 of the VerSanG.
11. Section 54 et seq. of the VerSanG.

# Are you protected?

## An overview of the law of privilege in three jurisdictions

**Alison Toepp**
Counsel
Richmond

**Victoria Spilkin**
Associate
London

**Jenine Abdeljaber**
Associate
Dubai

**Alison Eslick**
Associate
Dubai

Whether a company or individual is seeking legal advice or preparing for litigation, it is important to understand how privilege may apply across jurisdictions. The principle that certain communications should be privileged is well-established and has been upheld in many courts around the globe. However, the scope of those rules – including which parties are covered, what kind of communications are protected, and whether privilege can be waived – can vary significantly across nations and states.

This article provides an overview of how privilege is defined and applied in the United States, England and Wales, and the United Arab Emirates.

But companies and individuals – particularly those doing business internationally – should consult with counsel about the privilege that may attach to specific communications and how the associated rules may impact legal and business strategy.

## United States

In the United States, privilege rules emanate from statutes, rules, and ethical canons. As such, variations exist among the states. While the American Bar Association promulgates model rules, these model rules are not universally adopted. Federal courts sitting in diversity should consider which state's privilege rules to apply, but courts may skip over the choice of law analysis and instead follow more generalized privilege principles. Federal courts in non-diversity cases generally apply federal privilege law. In the United States, there are two widely recognized privileges: the attorney-client privilege and the work-product privilege.

**Attorney-client privilege**

The attorney-client privilege protects communications from disclosure, and again, while the precise rules vary from state to state and court to court, this privilege applies to communications between a client and legal counsel that are confidential, and made for the purpose of giving or obtaining legal advice. This means that the privilege may not attach to business advice, to communications involving third parties, or to communications that the client did not intend to remain confidential, absent certain unique circumstances such as the common interest or joint defense privilege. The privilege belongs to the client such that, absent narrow exceptions (for example, the crime-fraud exception), the lawyer cannot waive the privilege.

**Work-product privilege**

The work-product privilege generally applies to prevent the disclosure of the mental impressions of counsel. But this privilege and the rules for its application in state and federal courts can vary significantly. Even courts that apply the same work-product privilege rules come to markedly different results. For example, some courts take a narrow view and only invoke the privilege where litigation is reasonably imminent, while other courts protect from disclosure documents that were prepared for future use even if litigation is not threatened or anticipated. In other instances, courts limit this privilege to documents containing attorney opinion.

**Waiver of privilege**

The Federal Rules of Evidence address waiver and limitations on waiver of the attorney-client privilege. Fed. R. Civ. P. 502. Some states have also enacted statutes that outline precisely when and how a privilege may be waived. *See, e.g.,* Virginia Code section 8.01-420.7 (recognizing that the privilege is not waived in certain circumstances even if privileged information is disclosed, such as where the disclosure is inadvertent). And even where a privilege is not waived, ethical obligations may impose limitations on the lawyer's ability to represent clients in court. For example, the Virginia Rules of Professional Conduct prohibit attorneys from acting as advocates in matters where the attorney is likely to be a necessary witness. *See Rule* 3.7(a) (commonly referred to as "the witness-advocate rule"). Absent one of three enumerated examples, this rule cannot be waived and has been invoked successfully by litigants to preclude in-house counsel who participated in pre-litigation investigations from representing the corporate entity at trial. *See, e.g., Quality Plus Servs., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, No. 3:18cv454 (E.D. Va. Jan.15, 2020).*

## England and Wales

Several types of privilege exist in England and Wales.

**Legal advice privilege**

Legal advice privilege applies to confidential communications that pass between a client and the client's lawyer and that have come into existence for the dominant purpose of giving or receiving legal advice about what should be done in the relevant legal context. The Court of Appeal reconfirmed in *CAA v. Jet 2* [2019] that communication from an in-house lawyer is usually also protected, provided that the dominant purpose of the communication is giving or receiving legal advice.

The closest U.S. equivalent concept to legal advice privilege is the attorney-client privilege.

The court in *Raiffeisen Bank International AG v. Ashurst* [2020] recently held that documents may fall within legal advice privilege as part of the "continuum" of communications, even where they are factual and concern instructions on purely financial or administrative matters. The current approach of the English court on this point seems to be to ensure that communications are made with the overall dominant purpose of the client instructing the lawyer or the lawyer giving legal advice. However once the court determines that this purpose has been established, then it is reluctant to entertain fine arguments as to why further exchanges fall outside the continuum of communications.

### Distinction

An important contrast between the English and U.S. laws of privilege concerns the definition of "client" in legal advice privilege, which is generally broader in the United States than it is in England and Wales. In the United States, attorney-client privilege can encompass communications with third parties if the purpose of those communications is to help the attorney to provide legal advice to the client. One example is where a financial adviser is hired by an attorney to assist the attorney in understanding the client's financial information. By contrast, these communications may not be protected under English law unless litigation was reasonably in prospect at the time (in which case litigation privilege would apply).

### Litigation privilege

Litigation privilege tends to be broader than legal advice privilege. It applies to confidential communications between a lawyer and their client (or between either of them and a third party) made for the dominant purpose of litigation and relating to litigation that is pending, reasonably contemplated, or existing. Actions by non-legal professionals (such as trainee solicitors and paralegals) can also come within litigation privilege, provided that their actions satisfy the rest of the conditions.

The U.S. equivalent of litigation privilege is the work-product privilege.

### Common interest privilege

Common interest privilege operates to preserve privilege in documents that are disclosed to third parties. Typically, it arises where a person voluntarily discloses a privileged document to a third party who has a common interest in the subject matter of the privileged document, or in litigation in connection with which the document was brought into existence. Where common interest privilege applies, the document remains privileged in the hands of the recipient.

The U.S. equivalent is joint defense privilege, which operates in a similar way to common interest privilege.

### Without prejudice privilege

Without prejudice privilege protects communications between parties made in a genuine attempt to settle an existing dispute. However, it is important to bear in mind that communications marked "without prejudice save as to costs" can be used in evidence in disputes about liability for costs and their amount.

The without prejudice privilege remains the subject of litigation. The High Court in *Berkeley Square Holdings and others v. Lancer Property Asset Management Ltd* [2020] allowed a party to rely on the content of mediation statements used in a prior dispute between the parties as evidence. There exists an exception to without prejudice privilege where a party alleges that they entered into a settlement under a false representation. In *Berkeley Square Holdings* and others, the court applied a "principled extension" to the misrepresentation exemption to allow evidence from without prejudice negotiations to be adduced in a bid to **disprove** whether a fraudulent misrepresentation had been made.

"The U.S. equivalent of litigation privilege is the work-product privilege."

## United Arab Emirates

### Onshore

The United Arab Emirates (UAE) is a civil law jurisdiction. UAE law does not recognize the common law concepts of legal privilege (LP) or the protection of "without prejudice" communications. Therefore:

- Even documents clearly marked "subject to legal privilege" that have been prepared for the purpose of seeking legal advice can be ordered to be disclosed to a UAE Court.
- Even documents clearly marked "without prejudice" and specifically used for the purpose of settlement negotiations can be submitted by a party to the court and relied upon if a settlement is not achieved.

Despite the limitations of UAE law with respect to LP and "without prejudice" communications, we note that:

- Local UAE advocates registered to appear in UAE court proceedings are bound by duties of confidentiality towards their clients. This obligation applies to any information an attorney obtains in the course of carrying out their professional duties, regardless of whether such duties are advisory or contentious in nature. These duties incorporate concepts somewhat similar to LP protections against disclosure of confidential client communications.
- This concept of privilege does not extend to legal consultants (i.e., foreign lawyers), who can be called on to disclose information by an order of the court.
- Legal consultants and others in similar legal roles (such as in-house counsel) are bound by general duties of confidentiality under the UAE Penal Code, which are applicable to all professionals. These lawyers must not disclose information provided by a client without the client's permission, unless the disclosure of such information prevents the perpetration of a crime.
- Parties in a UAE arbitration may expressly agree to be bound by LP in the terms of reference/arbitration deed. Similarly, parties may agree that a tribunal adopt or be guided by international practice rules, which incorporate concepts of LP and/or "without prejudice."
- Parties to a dispute who enter settlement negotiations should consider entering into a confidentiality agreement that expressly requires both parties to keep settlement negotiations and all documents created for the purpose of settlement negotiations confidential. In such circumstances, use of "without prejudice" communications would constitute a breach of contract and would provide both parties with an incentive to keep negotiations confidential.

"While attorneys should be mindful of the general privilege rules, attorneys advising corporate entities across jurisdictions should exercise diligence and consult with knowledgeable counsel to ensure compliance with local rules and practices."

## Free zones

Although the UAE is governed by a civil law system, it has established two financial free zone jurisdictions (the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM)) which each operate according to a common-law system with their own laws, regulations, independent judicial authority, and courts. Each of these financial free zones has its own rules regarding privilege and the protection of confidential information.

Part C-8(6) of the Code of Conduct of Legal Practitioners (DIFC Code of Conduct) and article 7(6) of the ADGM Rules of Conduct 2016 (ADGM Rules of Conduct) impose a duty of confidentiality on attorneys, their partners and their employees. These groups must ensure that all information communicated to them by their client is kept confidential, unless disclosure is authorised by the client, ordered by the DIFC Court or ADGM Court, or otherwise required by law.

In the DIFC Court, the concept of "without prejudice" communication is upheld and relied on by parties. Under part E(7) of the DIFC Code of Conduct, attorneys are not to disclose the details of settlement offers or settlement negotiations to the DIFC Court prior to judgment being given.

Regarding in-house counsel, there is no specific legislation in the DIFC or ADGM that prescribes rules or obligations on privilege. Instead, it is likely that DIFC Court and ADGM Court would apply English law when determining the extent to which the provisions on privilege extend to in-house counsel.

While attorneys should be mindful of the general privilege rules, attorneys advising corporate entities across jurisdictions should exercise diligence and consult with knowledgeable counsel to ensure compliance with local rules and practices – particularly when providing business advice or when participating in internal investigations.

# Beyond the elements

## Strategies on effective injunctive proceedings

**Elizabeth Brandon**
Partner
Dallas

**Brad Purcell**
Counsel
Dallas

> "The first key element of an injunction is demonstrating a likelihood of success on the merits of the underlying substantive claim."

Although there are various iterations of the injunctive elements in different jurisdictions, they share a common nucleus of requirements. Many lawyers and consumers of legal services are familiar with the basic tenets of injunctive proceedings. They are typically extremely time-pressured and create a significant burden on the moving party seeking injunctive relief.

In general terms, the moving party must prove: (1) a likelihood of success on the underlying merits of its substantive claims; (2) imminent harm; and (3) irreparable harm or no adequate remedy at law (or both).

In light of these requirements, any successful injunction strategy must include evidence supporting each of these elements, although a court is not obliged to treat each of these elements equally.

### (1) Likelihood of success on the merits

The first key element of an injunction is demonstrating a likelihood of success on the merits of the underlying substantive claim.

What does that mean in practical terms?

The question is not whether the claim will succeed at trial; rather it is whether the moving party adequately described and put forth a credible claim. At the temporary restraining order (TRO) stage, there is typically little, to no evidence presented to the court. The question is whether the facts, as pleaded, present a plausible claim.

Even at the temporary injunction (TI) stage, evidence will not be well-developed enough for the court to make much of substantive determination of the relative likelihood of success on the merits of the claim at issue.

The burden will always be on the moving party to provide enough evidence that would support its claim at this early stage. Though this burden is relatively low, this element must not be overlooked and evidence must be provided. In many cases, if sufficient evidence can be adduced at this early stage supporting the contention of a strong likelihood of success on the merits, then there will likely be an inverse lowering of the need to demonstrate imminent and irreparable harm.

Essentially, showing a strong evidential foundation for the claim early on (if that is possible) reduces the chance that an injunction may or would harm the defendant if granted by the court. The goal will always be to put forward the best available evidence at this early stage. This will often mean using what evidence is readily to hand and putting it together in the best form possible on short notice.

Further detailed evidence gathering is unlikely to be helpful at this early stage, but as described below, the concepts of imminent and irreparable harm are at this stage central in securing injunctive relief.

“For most judges, a request seeking a TRO is a form of ‘emergency relief’ and should only be employed in a genuine emergency situation.”

### (2) Imminent harm

In the United States, imminent harm is the most critical element in securing an injunction.

For most judges, a request seeking a TRO is a form of ‘emergency relief’ and should only be employed in a genuine emergency situation.

This reality therefore begs the question: what is an ‘emergency’ that constitutes ‘imminent’ harm?

In the case of a TRO, it is something that will cause harm within the next few days; for a TI, it is something that will cause harm within a few weeks. In order to be successful, the party seeking relief must be able to demonstrate to the satisfaction of the court that an identifiable harm will occur before the parties are able to properly develop evidence in respect of the substantive issue which is the subject of the underlying claim. Examples of such identifiable imminent harm include (among an array of other possibilities) a looming foreclosure, the disclosure of confidential or trade secret information, reputational and consequent economic harm to the business due to publication of a defamatory statement, a shareholder or board vote on a proposal which impacts the moving party’s underlying claim, or the loss of the right to bid on a project.

In contrast, although an increase to damages, a loss of value, the inability to pay a judgment, or a notice of default on a loan are all examples of harm, they will be unlikely to reach the required standard of being **imminent** harm.

The significance of adequately demonstrating imminent harm cannot be overstated when considering interim injunctive relief. The moving party’s ability to discharge this obligation or otherwise can be outcome-determinative. Many TRO and TI applications are denied by the courts, solely and simply because they are not ripe for hearing. The absence of being able to satisfy the court of the existence of an identifiable emergency, will mean that it is too early for an injunction to be properly granted.[1]

### (3) Irreparable harm or no adequate remedy at law (or both)

Going hand in hand with the need to demonstrate imminent harm is the need to demonstrate **irreparable** harm.

This begs the question: what is irreparable harm?

The precise definition varies somewhat by specific jurisdiction, but conceptually, it is a kind of harm that cannot be adequately cured by monetary damages or a harm that is too difficult to calculate with any precision.[2]

There are some events that are considered prototypical irreparable harm – that is, events that warrant injunctive relief without much inquiry, for example, the loss of real estate through foreclosure or sale,[3] the disclosure of confidential or trade secret information, and harm to business reputation due to publication of a defamatory statement (see why these go hand in hand with **imminent** harm).[4]

Conversely, the defendant’s inability to pay a judgment, or high or continuing monetary damages are typically not considered as examples of irreparable harm. In instances where these issues are real concerns, there are other non-injunctive remedies, such as pre-suit attachment or garnishment processes, which may be able to be successfully deployed.

In order to successfully obtain injunctive relief, a plaintiff must be prepared to present sufficient, cogent evidence demonstrating why an injunction is needed to prevent harm in the next few days to few weeks and to satisfy the court why monetary damages which might be available following determination of the underlying substantive dispute, would not be a suitable remedy and would not make the movant whole.

In reality, experience tells us that the focus of many injunction hearings is not on the strength of the moving party’s claims, but on whether that party has identified, and provided sufficient proper evidence supporting its claim of, imminent and irreparable harm occurring or being about to occur.

## Mandatory injunctions versus prohibitive injunctions

Injunctions are frequently characterized as the need to preserve the status quo pending resolution on the merits. The purpose or outcome of an injunction will not be to improve the plaintiff's position or to ensure that the plaintiff has a solvent defendant in due course.

It is therefore important to that, in tailoring the request for an injunction, the plaintiff ensures that the requested relief simply **maintains** the current status of the parties or their rights.

Most of the time, preserving the status quo means prohibiting conduct. Thus, the resulting relief is called a "prohibitive injunction," as it prohibits whatever conduct will cause imminent and irreparable harm.

However, on other occasions (and considerably more rarely), preserving the status quo requires the court to mandate and require action. The resulting relief in such cases is a "mandatory injunction," and if granted compels the non-movant party to take specific affirmative action in compliance with the injunction granted. For example, if a company is providing software services and hosting data for a customer, the status quo would be providing software and hosting services. The court may issue a mandatory injunction requiring the company to continue providing software and hosting services until the case is over or until another provider can be retained to prevent the irreparable harm of complete data loss by the customer.

As noted such injunctions are rarer and because a mandatory injunction requires a party to take some action against its will that disrupts rather than **preserves** the status quo, there is a heightened standard to obtain them. The moving party must show a clear or substantial likelihood of success on the merits instead of the relatively lower burden that applies to a prohibitive injunction. This heightened standard is often difficult to meet at the outset of a case and without the benefit of robust discovery.

Courts will only grant injunctive relief where the burden has been discharged by the moving party. Being clear on the specific relief sought and that it preserves a position in the face of imminent and irreparable harm are mandatory requirements. Despite the fact that injunctive proceedings are always time-pressured, preparation and clarity are key, and the standard of available evidence is critical, as is ensuring that the legal team making the case has experience with and an understanding of these requirements.

1. For example, in Texas, a TRO only lasts for 14 days by rule, after which time the court must hold a TI hearing. See TEX. R. CIV. P. 680. Thus, if you are looking for a TRO in Texas, you need to be prepared to tell the judge what is going to happen in the next 14 days before the court can hold a TI hearing.
2. For these reasons, courts may change the requirement from demonstrating "irreparable harm" to requiring the movant to demonstrate that it has "no adequate remedy at law" – meaning that money damages would not be adequate compensation. While sometimes listed separately, proof of these elements is the same.
3. Real estate is considered unique, and therefore its loss is considered irreparable harm.
4. The monetary value of business reputation and confidential information is very difficult to calculate.

# Force majeure

## One year later


**Janet Kwuon**
Partner
Los Angeles

**Matt Peters**
Counsel
San Francisco

> “It is therefore more important than ever that businesses pay close attention to their force majeure provisions and how they can be used to manage the risk of future disruption.”

Now more than one year in, the COVID-19 pandemic continues to challenge global health, commerce, government, private organizations, and our societal norms in nearly every respect. For the legal sector, this has brought into sharp focus the drafting and application of contractual force majeure provisions. Pre-pandemic, such clauses were almost a contractual afterthought, left to the boilerplate. During the pandemic, force majeure provisions are playing a vital role for businesses as dramatic and unprecedented measures employed to slow the spread of COVID-19 (e.g., travel restrictions, business closures, remote schooling, stay-at-home orders, and quarantines) continue to force businesses and organizations into positions in which they are often unable to meet their contractual obligations.

As the initial phase of the pandemic subsides, some may think that it is time to put force majeure back in the locker. Yet, as the world adjusts to post-vaccination COVID-19, the threat of abrupt business disruption resulting from health care interventions remains, particularly given the threat of variants of the virus. It is therefore more important than ever that businesses pay close attention to their force majeure provisions and how they can be used to manage the risk of future disruption. To assist, we have prepared **a white paper supported by a U.S. multi-state jurisdictional survey** which looks at what we can learn from the differing approaches to force majeure across U.S. jurisdictions in the context of COVID-19. We examine the alternative defenses and provide recommendations on practical action as businesses look to protect themselves in the future. We also compare the themes identified from our U.S. state survey with force majeure issues arising in some major international jurisdictions. We outline our key findings in this article.

## The trigger event

Force majeure is a contractual relief provision, so whether it will assist a business in any given situation depends on what the contract actually says. A key issue is how the language of the clause defines the force majeure event that then triggers the right to contractual relief.

In our white paper, we discuss the various approaches to trigger events in contract drafting, ranging from specific enumeration of the event (for example reference to “pandemic”) to broader catch-all language, or a combination of both. Our survey reveals that U.S. state courts are far from uniform in their approach to construction of contractual triggers, with some jurisdictions requiring express mention of the trigger event and others finding that catch-all wording may apply in the context of a health care crisis. As a general theme, we have identified that U.S. courts may be increasingly reluctant to recognize broad wording such as “Act of God” and that the language of the contract is of paramount importance. Accordingly, in future, parties may need to be as specific as possible in their drafting, to differentiate between pandemic-related events which may trigger a right to relief and the general contractual risks assumed by parties under the contract.

“Our survey identifies that in applying these principles, U.S. jurisdictions have shifted focus from unforseeability to a “basic assumption standard.””

## Narrowing the scope of relief

Our white paper surveys some of the jurisprudence derived from cases heard in the context of the recent health care crisis and observes that U.S. courts will be reluctant to view the COVID-19 pandemic as a blanket excuse from commercial performance. In legal terms, this means that courts may find ways to construe broad force majeure provisions more narrowly.

One example of this is foreseeability. Our survey reveals that many U.S. jurisdictions will look closely at this issue and whether or not the specific risk (i.e., the pandemic) is one that the parties could not have anticipated or one that was a foreseeable risk of doing business. This demonstrates that parties may need to pay even closer attention to their language around foreseeability as health care interventions become part of the business landscape.

Another example of courts narrowing the application of force majeure comes from certain U.S. jurisdictions requiring that the triggering event be outside the parties' control. Other courts identified in the survey apply causation restrictively and insist that the force majeure be the cause of the non-performance. Here, a key takeaway is that courts will distinguish between the consequences of the pandemic and the general economic downturn and bad business decisions.

## Other defenses

In the absence of a contractual relief provision, parties have to rely on common law or statute-based defenses – most likely contractual impossibility or impracticability (or a civil law equivalent). Our survey identifies that in applying these principles, U.S. jurisdictions have shifted focus from unforseeability to a “basic assumption standard.” This may lead to important differences in application where a government intervention might well be foreseeable but could still undermine the basic assumptions of the parties.

Another important difference arises from whether U.S. jurisdictions recognize both impossibility and impracticability as common law defenses. Many use the concepts interchangeably. Yet, impracticability is much more flexible, especially for businesses such as restaurants that can adapt to the circumstances of the pandemic by trading in reduced form. Many U.S. jurisdictions also recognize “frustration of purpose,” which can provide a basis for relief for the cancellation of events.

Jurisdictional planning can be important here. Contractual force majeure takes on more importance in jurisdictions that restrict defenses to situations of true “impossibility.” Parties may find further support from the jurisdictions identified in our survey that adopt statutory relief provisions such as UCC 2-615 or Restatement (Second) of Contracts.

## Remedies

The remedies available in the event of force majeure will depend on the contract wording. Across U.S. jurisdictions, termination or suspension provisions will generally be upheld by courts. An area where jurisprudence may develop further is the availability of contractual damages if a relief event has occurred. Our survey reveals that courts in some U.S. jurisdictions have permitted the recovery subject to damages principles, while courts in other jurisdictions have refused recovery of damages.[1]

Our white paper also considers the question of whether affected parties may recover affirmative relief from state or local governments. The “regulatory taking” doctrine from the Fifth Amendment of the U.S. Constitution offers a potential route for recovery. However, courts have previously found this doctrine to be applicable only in circumstances in which interference is characterized as a physical invasion by the government. Moreover, a temporary closure of certain businesses may substantially advance a legitimate state interest and would therefore not be covered by the doctrine.

1. See VICI Racing, LLC v. T-Mobile ISA Inc., 763 F.3d 273 (3d Cir. 2014).

## The international context

Our white paper includes a comparative review of force majeure themes arising in nine global jurisdictions, including England, France, Germany, and Singapore. Despite wide differences in the underlying legal systems, the force majeure issues identified in our U.S. survey in fact remain consistent in an international context. Force Majeure is a contractual mechanism and it stands to reason that regardless of jurisdiction, the objective interpretation of the wording of the specific clause will be the paramount concern for the court. As with U.S. courts, specific enumeration of the pandemic as a trigger event will not generally be required internationally, but catch-all wording may not be sufficient in the future. Likewise, the surveyed international courts will look closely at what the contract says in terms of foreseeability and causation.

However, a wider difference emerges with alternative defenses. Here, there is a key distinction between civil law jurisdictions, which may imply an alternative statutory form of force majeure protection in the contract as a matter of law, and common law jurisdictions based on English law where a party would need to rely on a defense based on contractual frustration. The latter is a significant point because, as our survey notes, frustration under English law is highly restricted in the extent to which it will provide relief to non-performing parties. For example, historically, very few litigants have succeeded in the English courts with arguments based on common purpose. It is important that businesses understand these nuances so that they can assess how hard to push counterparties for force majeure or COVID-19 protection.

## Next steps for businesses

The following next steps are key for businesses as the law evolves:

- Review your contract terms. Consider the existing force majeure wording in your contracts and whether it requires amendment to cover future COVID-19-related interventions that fall within the foreseeable risk landscape, particularly if you are relying on broad language. Also consider the availability of contractual remedies such as liquidated or general damages if a trigger event occurs.
- Determine the specific cause of non-performance. Be aware that courts across U.S. or international jurisdictions may become more restrictive in their interpretation of causation and reluctant to view the pandemic as a blanket excuse for non-performance. Think carefully about why your business will be unable to perform in any given context.
- Tailor your contract suite to the applicable jurisdictions. For example, running an event under the law of a jurisdiction with a restrictive approach to impracticability/purpose might mean you need better contractual protection through force majeure provisions.
- Comply with notice requirements. In various jurisdictions, non-compliance with notice provisions can invalidate force majeure provisions.
- Mitigate your loss. Courts will not look favorably on parties who invoke force majeure then remain inactive.
- Think twice before invoking force majeure. Some businesses may find renegotiation or amendment of contractual terms to be a practical and commercial solution.
- Develop COVID-19-specific language. As time passes, courts in U.S. and international jurisdictions will likely expect parties to anticipate future COVID-19-related issues. Businesses seeking full protection might be best served by developing specific language related to COVID-19 rather than relying upon generalized force majeure provisions.

# Authors

**Jenine Abdeljaber**
Associate
Dubai
jabdeljaber@reedsmith.com

**Karen Braje**
Partner
San Francisco
kbraje@reedsmith.com

**Elizabeth Brandon**
Partner
Dallas
ebrandon@reedsmith.com

**Douglas E. Cherry**
Editor
Partner, London
dcherry@reedsmith.com

**Alison Eslick**
Associate
Dubai
aeslick@reedsmith.com

**Peter Glover**
Partner
London
pglover@reedsmith.com

**Rosanne Kay**
Partner
London
rkay@reedsmith.com

**Janet Kwuon**
Partner
Los Angeles
jkwuon@reedsmith.com

**Matthew Peters**
Counsel
San Francisco
mtpeters@reedsmith.com

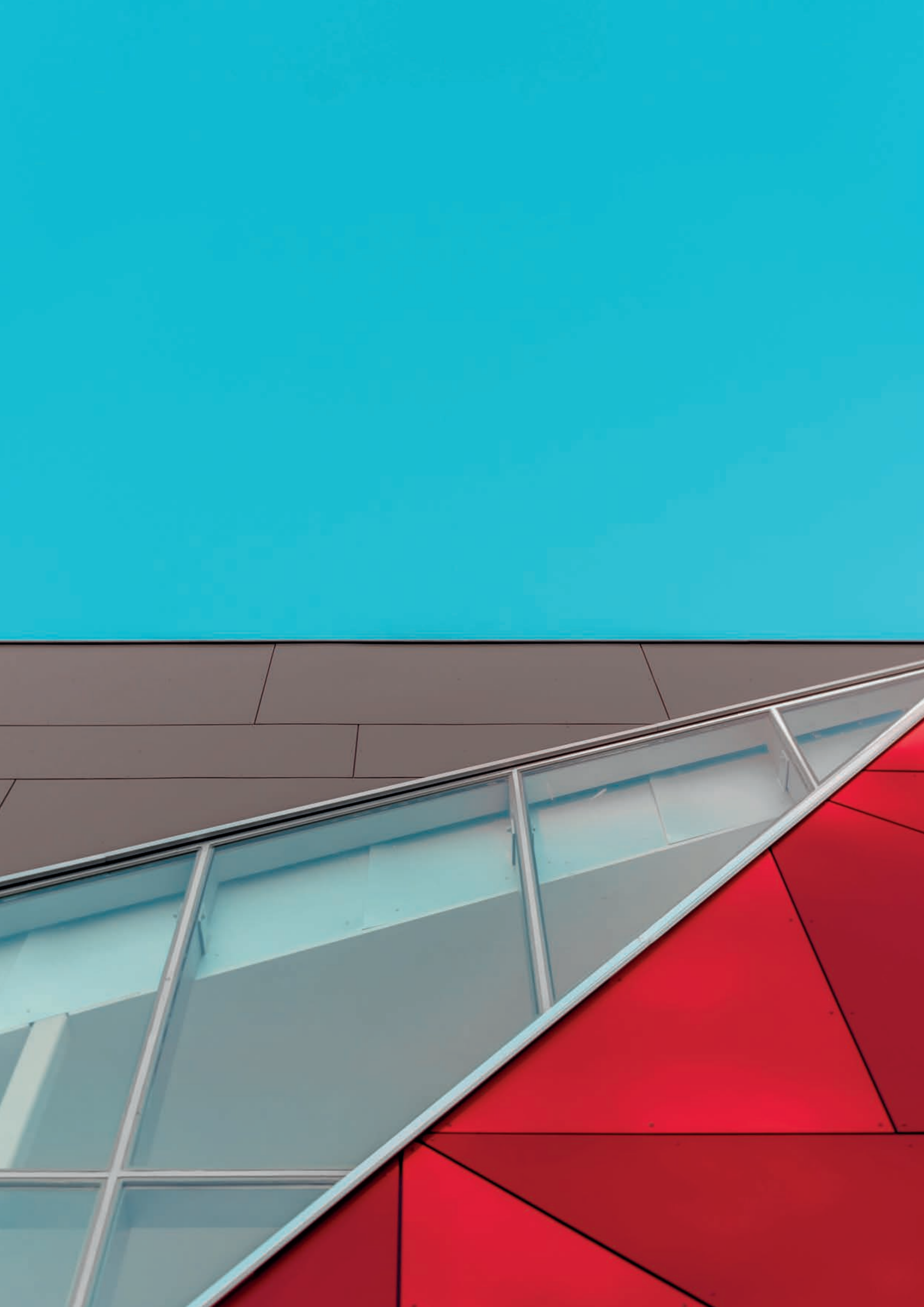
**Brad Purcell**
Counsel
Dallas
bpurcell@reedsmith.com

**Emma Shafton**
Associate
London
eshafton@reedsmith.com

**Victoria Spilkin**
Associate
London
vspilkin@reedsmith.com

**Christian Stempfle**
Partner
Munich/Frankfurt
cstempfle@reedsmith.com

**Alison Toepp**
Counsel
Richmond
atoepp@reedsmith.com



Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City/DX18 London

ABU DHABI
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
KAZAKHSTAN
LONDON
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