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International Disputes Digest

Contents

Introduction

Welcome to our International Disputes Digest, a new bi-annual publication featuring analysis and commentary on the key trends currently shaping the global dispute resolution market.

We begin this issue by examining the hot topic of climate change, a global new litigation risk. Viewed by the World Economic Forum as the gravest threat to human kind at present, governments, companies and board directors are facing up to liability lawsuits for their contribution to this global phenomenon.

We then explore whether the UK is entering a new era in litigation with its enactment of opt-out class actions. The recent introduction of such proceedings, initially in the UK Competition Appeal Tribunal and imminently in the Scottish Court of Session, will likely bring significant changes to the UK disputes landscape as the ground rules for bringing collective claims are established.

With many of the biggest commercial disputes globally now being decided by arbitration, we also consider the twin duties of fairness and efficiency and inquire whether due process paranoia is having a negative effect on the arbitral process.

Since the financial crisis a decade ago, cross-border anti-corruption cases have taken on a new significance as global regulators work more closely together to stamp out such activity. Our lawyers from Peru analyse the groundbreaking Latin American case *Lava Jato* which involves alleged corporate bribes of USD 788m. Linked to issues of financial risk, we also give a heads-up on the new Swiss Financial Services Act and its aim to protect the interest of consumers against financial services providers.

From a procedural perspective, our experts then examine a new two-year practice direction which aims to reduce the cost, scale and complexity of UK disclosure and also give guidance on how best to avoid last minute pitfalls in pre-trial dispute settlement.

CMS maintains a strong presence at the leading industry conferences globally and we summarise the highlights of both the London International Disputes Week and the Mobile World Congress in Barcelona where many of the key topics covered here were explored.

We hope you enjoy this inaugural edition of our International Disputes Digest and welcome your feedback on any of the issues raised.

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Climate change liability – New litigation risks

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Climate change has become one of the most prominent issues of our time. The Global Risks Report 2019 of the World Economic Forum considers Climate Change and extreme weather events as the gravest threat to humankind at present.

Even though climate fluctuation is a phenomenon that has been around the earth's history since its existence, it is scientifically undisputed today that human activity is contributing to it. The emissions of anthropogenic greenhouse gases have so far caused approximately 1°C of global warming above pre-industrial levels. Another 1°C will most likely lead to irreversible damages to the world as we know it today.

However, climate change does not only affect nature. It also changes politics and law. And it leads to new types of lawsuits. Governments, companies and board directors all over the world are faced with lawsuits trying to hold them accountable for their contribution to climate change.

How is this possible?

The Paris Agreement and zero-emission by 2050

In 1992 the international community agreed upon the United Nations Framework Convention on Climate Change (UNFCCC), providing a forum to discuss and elaborate a global strategy to counteract global warming. Over decades, the work of the UN was perceived as something to concern state actors, but without any real impact on the economy. This has changed.

In the Paris Agreement of 2015 all UN member-states agreed to limit *"the global average temperature to well below 2°C above pre-industrial levels"* and to bring greenhouse gas emissions to zero by mid-century.

Bringing CO_2 emissions to zero by 2050 is a major task. States will have to adopt unprecedented national climate protection policies and will have to convert complete industries into environmentally-friendly businesses. The Paris Agreement therefore will not only lead to new climate policies but will also trigger lawsuits.

Climate lawsuits targeting states

Today, states across the globe are already faced by lawsuits challenging insufficient climate protection policies and the non-implementation of international climate treaties. These claims are mainly based on human rights and public international law. The claimants argue that their governments' climate policies are insufficient and so violate their human rights, including the rights to life, health and property.

The first claims have been successful. In the case of *Urgenda Foundation v The Netherlands*, Dutch courts ordered the government of The Netherlands to reduce greenhouse gas emissions by 25%. Urgenda Foundation, an environmental NGO, had sued the

government on the basis that its climate reduction target of 17% was insufficient. The claim was based on the European Convention on Human Rights, the Dutch constitution and an unwritten duty of care deriving from the Dutch Civil Code, obliging the Dutch government to protect its citizens from the dangers of climate change.

In a similar case in the United States (*Juliana v the United States*), 21 minors are suing the US government alleging that the lack of regulation of greenhouse gas emissions violates their fundamental rights and the public trust doctrine. That doctrine establishes a state trusteeship of common property and a duty of maintaining the integrity of the natural resources of the country for future generations.

The objective of these and many other similar claims against governments worldwide is to drive change by pressuring state actors to develop and implement effective climate protection and adaptative measures.

Climate lawsuits targeting companies

Another wave of climate lawsuits is targeting oil, gas and energy companies over their emissions of carbon dioxide. These lawsuits are brought by individuals as well as by state entities. The claimants demand compensation for climate related harms and reimbursement of expenses from climate adaptation. The legal basis of these cases is tort and product liability law.

In the **US**, these tort claims are mainly based on the laws of private and public nuisance. The claimants argue that the companies' CO_2 emissions contribute to global warming, leading to extreme weather events and resulting in damage to public infrastructure and state-owned real estate (private nuisance). That in turn has a detrimental effect on public health, public security and public peace (public nuisance).

Most of these cases also include an action in negligence. By placing fossil fuels on the market, the energy companies take on a duty of care. This duty of care consists of preventing harmful effects caused by the product. According to the claimants, the energy companies did not take enough measures to reduce emissions, and are therefore liable for their contribution to climate change.

A similar argument is pursued to seek to establish strict product liability. The claimants argue that the sold product (fossil fuels) is defective due to CO_2 emissions when used as intended and was, despite this knowledge, introduced into the market. That defect, it is argued, led to increased global warming and to alleged damages, not only for the ultimate users, but also for innocent bystanders. The plaintiffs allege defective design of the product and failure to warn despite their knowledge of it.

In **Germany**, a climate lawsuit was filed by a Peruvian farmer against the largest German energy company (*LLuyia v RWE*). The farmer claims that RWE's emissions have contributed so far to 0.47% of the worldwide anthropogenic greenhouse gases, leading to increased global warming and the melting of the glaciers in the Peruvian Andes. The farmer is seeking a percentage-based reimbursement of the expenses for the necessary measures he must take to protect his home against the overflow of the glacial lake.

In another more recent court case filed in **the Netherlands** in April 2019, an environmental NGO demands the reduction of greenhouse gases from Royal Dutch Shell and an alignment of the companies' policies with the Paris Agreement (*Friends of the Earth Netherlands and Milieudefensie v Royal Dutch Shell*). As with the *Urgenda* case, the claim is based on the European Convention of Human Rights and the Dutch constitution and raises the highly disputed question of whether human rights have a binding effect on private parties.

So far, most of these lawsuits are still pending and their success remains to be seen. Claimants are facing many legal challenges when trying to establish climate liability, above all proving causation between the alleged climate change-related damage and the emissions produced by the companies. Establishing causation is very difficult to achieve, since it is not the individual emission contribution itself that leads to harmful climatic changes, but the accumulation of many inseparably mixed greenhouse gas emissions over a long period of time by a large number of actors.

Even if the causation cannot be established by the plaintiffs and the cases are not won, however, these lawsuits present a reputational risk for companies that needs to be considered by corporates in their risk assessment.

Other litigation strategies

Meanwhile, new litigation strategies by individuals and NGOs against companies are on the rise. In **Poland**, an environmental association bought shares in an energy company and sued the company as a shareholder from within (*Client Earth v Enea*). They claim that the Management Board and Supervisory Board's decision to build a new coal power plant was a violation of fiduciary duties of care and a breach of the duty to act in the best interests of the companies and their shareholders, due to the climate-related financial risks of that power plant.

Internal lawsuits like these seem to be a new tool aimed at driving intra-corporate change. Brought by activist shareholders and employees, such claims are directed either against companies themselves or their senior management because of climate-damaging management decisions and non-disclosure of climate-related business risks.

This intra-corporate litigation pattern is also observable in climate lawsuits targeting other actors. Besides companies, investors in these companies and their projects – such as banks, insurers and pension funds – are also being sued because of their alleged climate-damaging investment decisions, and from within by members due to non-disclosure of climate related risks.

Further, in April 2019 the Bank of England issued a policy statement requesting all **UK** banks and insurers to address their financial risks from climate change and to evidence how they will mitigate these financial risks. This new policy will lead to new liability risks for banks and insurers who do not comply with these new rules. It can also be expected that banks and insurers will be less inclined to finance or insure businesses who actively contribute to or are affected by climate change.

Outlook

The current wave of climate litigation seems only to be the beginning.

Well-funded NGOs are hiring lawyers and finance specialists to find legal arguments to fight climate change in court.

Many upcoming lawsuits have already been announced in the media. Paris, London, the City of Victoria and the Pacific Island state of Vanuatu are currently reviewing their legal options to sue fossil fuel companies to shift the costs of climate protection. The government of the Philippines is investigating the impact of climate change on the human rights of the Philippine population and the role fossil fuel companies play in this.

All things considered, the spectrum of lawsuits brought as part of climate litigation will see more actors and industries fall within its scope. Wide-ranging developments are anticipated in climate change litigation.

In this changing climate, every company ought to consider where it stands and should look for strategies either to change or to adopt appropriate risk strategies.

Opt-out class actions in the UK: are we entering a new era in litigation?

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Class actions have been a feature of the US courts for many years, but to date have not taken root in the same way in the UK. To a great extent, this is arguably due to the lack of an "opt-out" style of litigation procedure in the UK system. However, the recent introduction of these procedures, firstly in the UK Competition Appeal Tribunal and very soon in the Scottish Court of Session, is bringing about gradual but significant changes that may well alter the litigation culture in the UK permanently.

Opt-out and opt-in procedures

Class actions are often raised to pursue claims which are, for the individual claimant, of fairly modest value. A key challenge for the organiser of a UK class action to date has been securing the participation of as many potential claimants as possible, so as to maximise the value of the action as a whole – particularly where external investment from litigation funders is sought. An "opt-out" procedure avoids this hurdle.

Before 2015, the only way to raise a UK class action was by using some form of "opt-in" procedure. This is where an action is brought on behalf of an identified group of claimants who have each proactively chosen to be involved in the action. Opt-in procedures are available in the UK through, for example, group litigation orders (GLOs). By contrast, an opt-out procedure is one in which a claim is brought on behalf of the entire class of potential claimants without the need for them to proactively choose to participate. If the representative claimant successfully persuades the court or tribunal in which the claim is brought to allow the claim to proceed as a class action, and that action is ultimately successful, the remedy awarded will be available to all potential claimants (other than any who proactively chose to opt-out).

A useful illustration of the power of the opt-out procedure is a recent claim that was raised against Wm Morrisons Supermarket plc by some of its employees. The claim related to a deliberate data breach by a disgruntled employee of the personal data of 100,000 other employees. The High Court found Wm Morrisons vicariously liable to pay compensation to the employees who had chosen to participate in the claim, and this decision was upheld by the Court of Appeal (although a UK Supreme Court appeal is currently pending against that decision).

Only around 5% of the 100,000 employees affected by the data breach chose to participate in this claim. If the claim had proceeded as an opt-out procedure, all of the employees would have been included (except any who proactively opted-out). The opt-out procedure is therefore a potentially powerful tool that can exponentially increase the value of such claims – and the litigation risk for the respondent.

The introduction of opt-out procedures in the UK

Until recently, opt-out procedures have not been available in the UK at all. However, that has begun to change:

- The Consumer Rights Act 2015 amended the Competition Act 1998 to introduce an opt-out procedure into the Competition Appeal Tribunal. This is only available for actions relating to breaches of competition law.
- More recently, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 introduced provisions to allow the Scottish Courts to make opt-in and opt-out procedures available for all types of claims.

Competition Appeal Tribunal

The Competition Appeal Tribunal (CAT) is a specialist tribunal with UK-wide jurisdiction over cases involving competition or economic regulatory issues. In 2015, an opt-out procedure was introduced into the CAT with the objective of facilitating, and encouraging, consumers and SMEs to enforce their civil law claims in respect of competition law breaches.

Under the CAT rules, the first stage with such a claim is to make an application for a Collective Proceedings Order (CPO), certifying the claim as suitable to proceed as a class action. In 2017, the CAT refused the first application for a CPO to come before it (in *Walter Merricks v MasterCard*). However, in April 2019, the Court of Appeal set the CAT's decision aside. Subject to any further appeal to the Supreme Court, the CAT will now have to consider the CPO application again.

The claim could scarcely be wider. It was launched by Walter Merricks CBE, the former chief ombudsman of the Financial Ombudsman Service, on behalf of 46 million UK consumers with a potential value of GBP 14bn. The action is based on a 2014 decision that Mastercard had, over a 16-year period, breached competition law by imposing unlawful fees on retailers. The claim states that retailers passed these costs on to consumers, resulting in those consumers being overcharged for purchases during the relevant period, regardless of whether those purchases were made by card or cash.

When Mr Merricks sought a CPO from the CAT for the claim, the CAT refused this on two grounds: that the application was supported by inadequate data and that it would not be possible to determine the individual losses sustained by each claimant. The Court of Appeal ruled that the CAT's approach was wrong. Firstly, the CAT had demanded Mr Merricks meet too high a test at the certification stage. Secondly, there was no need for each individual claimant's losses to be determined as the CAT had suggested.

The Court of Appeal commented in its decision that:

> *…the power to bring collective proceedings introduced into the* [Competition Act] *by the Consumer Rights Act 2015 was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding and had Parliament considered it necessary to limit this new type of procedure to what would be required for the assessment of damages in an individual claim then it would have said so…*

After the CAT's decision in 2017, there was a sense that class actions in the CAT were already dead in the water, but the Court of Appeal's decision sounds a note of support for the new procedure. Several interested groups – lawyers, consumer rights groups and investors – will be closely watching the next steps in this case.

The CAT is, however, only a small part of the civil justice system as a whole. There are presently no active proposals to introduce opt-out procedures in any other courts or tribunals in England & Wales. However, this is something that is being actively progressed in Scotland.

Developments in Scotland – the 2018 Act

Following many years of debate about class actions in Scotland, last year the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 was passed, setting out the basic structure of a new "group procedure" which will incorporate both opt-in and opt-out processes.

The opt-out process will cover both (a) all claimants domiciled in Scotland (who do not proactively opt-out) and (b) any claimants outside Scotland who proactively choose to opt-in.

The Act came into force on 30 January 2019 but the Group Procedure will not become operational until the detailed rules are in place – these are currently awaited.

The Act provides that:

- Group proceedings may be brought in the Court of Session, with the permission of the court, by a representative party on behalf a class of persons;
- For permission to be granted, claims will need to raise common issues and reasonable efforts must have been made to identify and notify potential class members; and
- That the detailed rules are to cover a variety of matters, including:
  - The circumstances in which group proceedings may be brought as opt-in proceedings, opt-out proceedings or both;

- Any particular types of claim that are to be excluded from the procedure; and
- Various points of detail such as who may be authorised as a representative party and what steps that party requires to take to launch a claim.

Other drivers for change

The proposed EU Collective Redress directive
The UK is not alone in looking at the need for mechanisms to facilitate mass claims. In 2018, the European Commission issued a proposal for a new directive on collective redress as part of its "New Deal for Consumers". The intention is that this directive will permit certain qualified entities (which must be non-profitmaking) to bring forward class actions concerning infringements of EU laws, for example in relation to rights relating to consumer law, financial services and data protection.

The aim of the directive is to address a justice gap across the EU, as only certain member states currently have collective redress mechanisms. The directive will not impose a particular model on member states but will rather set down minimum standards that must be met. While an opt-out procedure will not be required (and this directive may not ultimately be directly relevant to the UK) at the very least this adds to the general mood music that there is a need for effective collective redress tools for these types of claim.

GDPR
Another EU creation has amplified this mood music: GDPR.

Since GDPR (and the Data Protection Act 2018) came into force last year, awareness of mass data breaches has greatly increased. Much of the initial focus was on the potential regulatory consequences of breaches, particularly the huge fines that could be imposed following a breach. However, the potential for mass civil claims is an equally significant risk.

The hype associated with the introduction of GDPR and the headlines reporting mass data breaches that have followed – often affecting individuals across multiple jurisdictions – have dominated recent conversations around class actions reform. Indeed, it is difficult to think of a better case study for the debate on opt-out procedures than the data breach landscape post-GDPR.

Provision was made in the Data Protection Act 2018 for compensation due in respect of GDPR breaches to be dealt with under the UK courts' class actions rules. In practice, this means that in England & Wales, for the foreseeable future, collective redress will be available only through the existing opt-in procedures – although the UK Government has indicated it will review the position in 2020. In Scotland, however, such claims will be able to be made under the new Group Procedure, so there may be an opt-out procedure available for mass data breach claims in the UK very soon.

Investors are showing considerable interest in this new potential market. From a litigation funder's perspective, the large claimant pool associated with a mass data breach offers an attractive investment opportunity when redress is available by way of an opt-out procedure. From the perspective of businesses (and their insurers), however, the potential to exponentially multiply litigation risk will be a cause for concern.

Comment

The 2017 CAT decision on the Mastercard claim led some commentators to conclude that opt-out class actions were unlikely to get off the ground in the CAT. However, the recent comments of the Court of Appeal sound a different note, explicitly recognising that the UK Parliament introduced the procedure with the intention of facilitating the provision of redress to individual claimants through funded class actions. If that logic can be applied to claims arising out of competition law breaches, it is not difficult to see it being extended to other areas of the law and further reform coming down the line in the courts in England & Wales.

It will be interesting to see what the approach of the Court of Session will be to the new procedures in Scotland. Subject to the terms of the detailed rules which are awaited, an early permission application for a mass data breach claim to proceed under the opt-out procedure appears fairly likely. As well as automatically covering all Scottish-based claimants, such a claim could also cover opt-in claimants from the rest of the UK.

The policy objective behind opt-out procedures – improving access to justice for individual claimants – is an understandable one. However, it is important to bear in mind that there are competing policy considerations such as ensuring that the primary beneficiaries of such actions do not end up being the advisers and investors rather than the claimants on whose behalf the action is brought. Going forward, the CAT, the Court of Session and the EU will be looking to balance these competing considerations as they establish the ground rules for operating these new procedures for a wide range of claims.

The road ahead is likely to be a bumpy one, with more litigation to come.

Undue paranoia over due process

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Twin duties of fairness and efficiency

Most arbitrators are keenly aware that their award may be set aside or refused recognition under the New York Convention if the losing party was not accorded due process. It can be tempting to allow parties to file last minute submissions on peripheral issues, or to admit irrelevant documents into evidence, if it means that parties are less likely to claim they have been unfairly treated or deprived of the right to be heard.

This lingering fear that a more proactive or robust approach may endanger the final award – known colloquially as "due process paranoia" – often causes arbitrators to neglect their concurrent and equally mandatory duty to run the arbitration efficiently. These twin duties are set out in all the major institutional arbitration rules, including Rule 17 of the UNCITRAL Arbitration Rules, which states that an arbitrator shall *"provide a fair and efficient process for resolving the parties' dispute."*

In fact, an arbitrator who fails to efficiently resolve a dispute may also have failed to conduct the arbitral procedure in accordance with the parties' agreement (i.e. as expressed under the institutional rules likely adopted in their arbitration agreement), which is itself a ground to set aside an arbitral award under most national laws and to refuse recognition under the New York Convention.

A balancing exercise

Due process requires that parties be treated equally and be given the right to present their case. Equal treatment is readily understood, but the scope of the right to be heard appears initially to vary across different national laws and institutional rules, from a *"full"* (UNCITRAL Model Law) to a *"reasonable"* (ICC Rules 2017) or *"fair"* (ICDR Rules 2014) opportunity to be heard. However, most commentators and national courts agree that there is no fundamental difference in the standard required: a *"full"* opportunity simply means a *"reasonable"* or *"fair"* opportunity to be heard.

What constitutes a *"reasonable"* opportunity to be heard cannot be determined in a vacuum, but must be balanced against other aspects of the arbitral procedure, including the arbitrator's duty to run an efficient arbitration. It does not mean every opportunity one desires or even a reasonable opportunity to optimally present everything to the tribunal. What matters is that each party is effectively offered the chance to be heard in light of all relevant considerations.

While an arbitrator should take steps to preserve both parties' right to be heard, this does not mean that all efficiency must be sacrificed to accommodate a party's unreasonable demands. Arbitrators should also remember that parties who agree to arbitrate trade the procedures and appellate processes of the court for the speed, simplicity and informality of arbitration, and therefore should not expect the same procedures as the court room.

Judicial support for a proactive approach

Support for a more proactive approach to arbitral procedure can be found in studies of international cases. Professor Klaus Berger and J. Jensen recently found that most national courts – whether in setting aside or enforcement proceedings – rarely interfere with the tribunal's procedural decisions, even when more robust procedures are adopted. Instead, most courts afford the tribunal a very wide discretion to determine the most suitable procedures to resolve a dispute.

This is consistent with another review of recent English cases conducted by Constantine Partasides and Ben Prewett, which failed to find a single decision where an award was set aside due to complaints about case management decisions. Gary Born has also observed that the court will strike down an award only in exceptional cases, which tend to be those that immediately strike the court as unreasonable, such as where the parties' explicit procedural agreement is ignored, or where one of the parties is not heard at all.

Conclusion

The only way for an arbitrator to effectively balance fairness against efficiency is to act boldly, without excessively worrying about due process. A robust and proactive approach is generally supported by the courts, expected by the parties, and increasingly encouraged under many institutional arbitral rules. Any other approach risks the feared outcome at the heart of due process paranoia – an invalid and unenforceable award.

Crisis management in the midst of Operation Car Wash

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Operation Car Wash (known as *Lava Jato* in Latin America), the largest cross-border anti-corruption investigation in Latin America, started five years ago as a routine money laundering case in the Brazilian city of Curitiba. The Brazilian Federal Police first raided a car wash station for illegal transactions and, as the investigation has expanded, the name *Lava Jato* has generated headlines across the world ever since.

Lava Jato has become a huge corruption scandal: the investigation has uncovered bribery schemes by construction companies. Those bribes have funded hundreds of millions of dollars in payments to government officials, political parties, political party officers and political candidates in order to secure, obtain or retain business or projects in several countries.

One of the main players in the scandal is Odebrecht, a Brazilian holding company which conducted its business across the engineering, construction, infrastructure, utilities and real estate sectors in 27 countries.

The United States Department of Justice investigated Odebrecht and found that it had created a unit called Division of Structured Operations to disguise improper payments. To conceal its activities, the unit used an off-grid communications system, called "Drousys", which allowed members to communicate through secure e-mails and instant messages with codenames and passwords.

The United States Department of Justice found that Odebrecht, together with its co-conspirators, paid approximately USD 788m in bribes to secure more than 100 projects in Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru and Venezuela.

Peru: criminal investigations

When *Lava Jato* investigations began, Brazil agreed to share information regarding the case with foreign authorities. Peruvian criminal prosecutors have taken advantage of this agreement to obtain substantial information regarding corrupt payments to government officials in Peru. Between 2005 and 2014, Odebrecht paid approximately USD 29m in bribes to secure various public work contracts worth more than USD 143m.

As part of the witness protection policy implemented in Brazil, one of Odebrecht´s top executives has become a key witness for prosecutors in Peru. Information provided by this witness has led to criminal investigations and pre-trial detention orders against former presidents, political candidates, government officials and senior representatives of companies, among others. We still await the final decisions on those criminal investigations.

Peru: Recently enacted anti-corruption legislation

Besides the surge in criminal judicial activity, *Lava Jato* has led to the enactment of Peruvian Law No. 30737 and its regulation. The regulation is designed to secure immediate payment or compensation to the Peruvian State in corruption cases and related crimes. This regulation has created three groups of entities or individuals which are subject to the law:

— **Group 1:** Individuals or entities that have been found guilty or have admitted to direct or indirect corruption, and related persons (shareholders, directors or entities from the same economic group).
— **Group 2:** Individuals or entities that have been partners or have entered into a joint venture or consortium contracts with entities from Group 1.
— **Group 3:** Entities that are subject to a criminal investigation for corruption and have agreed to be subject to a voluntary intervention regime.

Depending on which of the Groups 1–3 the individual or entity belongs to, Peruvian prosecutors can legally:

— freeze any transfer of money out of the jurisdiction.
— force the individual or entity to create a trust or fund to guarantee the government´s compensation.
— oblige the entity to implement a compliance program.
— impose a duty to reveal information to criminal investigators, among others.

The Peruvian government has published the list of companies or individuals included in each group. The companies listed in Group 2 go beyond the description in the law and includes entities that were partners to Odebrecht but were not involved in any contracts that are now subject to criminal investigation. This is causing unwarranted reputational damage to these companies. Those companies have filed petitions to be excluded from the list and are attempting to obtain a decision as quickly as possible.

The GSP project and its termination by the Peruvian Government

In July 2014, the Peruvian government awarded the country's biggest ever infrastructure project to a consortium formed by Odebrecht and a Spanish investor which bid USD 7.3bn to build a 1,000km long gas pipeline. Both partners incorporated a limited liability company (known as GSP) and executed a concession agreement with the Peruvian government. Subsequently, a new partner, a Peruvian construction company, joined the group. Odebrecht has always been the controlling shareholder.

In order to start the project, GSP´s shareholders obtained a short-term loan from banks and issued corporate guarantees to secure the financing.

However, one of the most critical post-closing obligations in the concession agreement was to obtain a USD 4m financing from a group of syndicated banks.

The *Lava Jato* crisis limited the partners´ ability to close the deal due to the banks' concerns regarding Odebrecht being a majority owner of the project. Despite efforts to sell Odebrecht´s stake in the project, the financing could not be executed, and in January 2017 the Peruvian government terminated the concession contract and collected bonds issued as guarantees for the project from all partners.

The Spanish investor: managing a corporate crisis

After the Peruvian government terminated the concession agreement, the Spanish investor who had intended to manage and operate the biggest energy project in Peru found that it had the following claims:

— a claim against the Peruvian government for the significant investment already made in the country.
— an unsecured claim against GSP due to the execution of the concession bond by the Peruvian government.
— an unsecured claim against GSP for the execution of the corporate guarantee by a group of banks, due to GSP´s default on payment on the short-term loan.

The Spanish investor also had a right, together with other partners, to concession assets. The Spanish investor needed to negotiate terms with the Peruvian government for transferring those assets.

Decisions needed to be taken quickly to manage this corporate crisis and prevent further consequences for GSP, its stakeholders and the Spanish investor.

Managing the corporate crisis as legal advisers to the Spanish investor

As legal advisers to the Spanish investor, we made various recommendations taking into consideration *Lava Jato* and Peru's political context at the time. This analysis led to a three-fold strategy adopted by our client:

— Filing of an involuntary insolvency proceeding against GSP in order to deal with the company´s financial crisis in a regulated forum.
— Commencing negotiations with the Peruvian government regarding concession assets.
— Filing of an international arbitration petition in order to recover its investments.

The case is still ongoing; each of the three parts of the strategy has its own issues and complexities.

The strategies listed above are limited to those in the public domain. Our confidential work also involves political and corporate strategies, local arbitrations and judicial processes.

Two years have passed since the GSP concession agreement was terminated by the Peruvian government. We expect to have further developments in the case in the near future.

Beware the "anti-Midas" touch

Every project in which Odebrecht has been an investor or shareholder is now subject to strict and intense scrutiny, even if there are no corruption charges or criminal investigations in place. The GSP project has been no exception. Odebrecht´s pre- *Lava Jato* "Midas touch" has been completely reversed.

Disclosure pilot rewrites the rules on disclosure in the UK

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A two-year pilot of a new disclosure practice direction began in the Business and Property Courts of England and Wales on 1 January 2019. The pilot applies to both new and existing actions, including those where an order for disclosure had already been made under the previous rules before that date.

Aim and scope

The aim of the pilot is to reduce the costs, scale and complexity of disclosure. This is considered to be important in order to maintain the popularity of the English courts for cross-border litigation, in the light of increasing competition from international arbitration and from commercial courts in other countries. The pilot also aims to bring the disclosure process up to date in line with modern technologies by encouraging the use of analytical tools (including technology-assisted review) and coding strategies. It will apply to all claims in the business and property courts except:

- competition (anti-trust) claims.
- public procurement claims.
- claims falling within two existing pilots known as the Shorter and Flexible Trials Schemes.
- claims in the Intellectual Property and Enterprise Court.
- admiralty claims.
- claims falling within the fixed costs or capped costs regimes.

Appendix 1: The changes

The key changes that are being trialled in the pilot include:

- An express duty to send "litigation hold" letters to all relevant employees and former employees.
- An obligation to take reasonable steps to stop agents or third parties destroying documents that might be relevant to an issue in the proceedings.
- A new duty to refrain from producing irrelevant documents.
- A new step of "Initial Disclosure", in which parties must disclose the key documents on which they rely and which are necessary for the other party to understand the case against it at the same time as serving their statement of case, unless one of the following exceptions applies:
  - The parties agree to dispense with it.
  - The court orders that it is not required.
  - It would involve one of the parties disclosing more than the larger of 200 documents or 1,000 pages.

— A requirement for parties to specify within 28 days of service of the last statement of case whether or not they will seek additional "Extended Disclosure".
— A new List of Issues for Disclosure to be prepared by claimants as a basis for determining the scope of any Extended Disclosure on an issue-by-issue basis, which is recorded in a Disclosure Review Document along with the parties' proposals for using e-disclosure technology.
— A revised disclosure menu with five models:
  - Model A: Disclosure confined to known documents that are adverse to the disclosing party, with no obligation to make a special search.
  - Model B: "Limited Disclosure", consisting of known adverse documents, plus Initial Disclosure to the extent this has not already taken place.
  - Model C: "Request-led search-based disclosure", consisting of known adverse documents plus documents specifically requested by another party.
  - Model D: "Narrow search-based disclosure", broadly equivalent to the previous "standard disclosure" model in English litigation, in which a party must search for and disclose all documents that either support or are adverse to its own case or another party's case.
  - Model E: "Wide search-based disclosure", in which a party must search for and disclose all standard disclosure documents, plus "train of enquiry" documents that may lead to the identification of further documents for disclosure.
— A new type of hearing – the Disclosure Guidance Hearing – in which parties can seek guidance from the court on disputed disclosure issues before or after a case management conference.

Adjustments in response to concerns raised in consultation

The pilot scheme, as implemented from 1 January 2019, has benefited considerably from a lengthy consultation period last year in which professional bodies and court users (including CMS) were able to make representations on the proposals. The exemptions from Initial Disclosure were narrowed, and definitions of "known" and "adverse" were added. Provision was also added for the outcome of Disclosure Guidance Hearings to be recorded by the parties in an agreed note or, if the judge considers it appropriate, in a binding order. Finally, a procedure for monitoring the outcome of the pilot was added. This will be overseen by Professor Rachael Mulheron of Queen Mary University of London, a well-respected figure in the civil litigation field.

However, the most crucial factor in the success of the pilot will be whether or not it succeeds in producing a cultural change amongst litigants and the judiciary. With this in mind, there were arguably missed opportunities in not fully addressing the following issues raised during the consultation:
— The provisions on sanctions for non-compliance with the new duties were not strengthened to encourage a greater use of costs sanctions.
— The working group which produced the practice direction did not expressly specify that Model C should become the default model for disclosure in commercial cases, which would have brought civil litigation more closely into alignment with the approach taken in international arbitration and in civil law countries. We understand, however, that Commercial Court judges have been informally advised that Model C should be the default, which would be a welcome approach.
— It is not clear whether the judiciary have received sufficient training to understand the extent of the work required to conduct a standard disclosure exercise in the digital age and the ways in which advances in disclosure technology can assist this process. Without this, judges may not be sufficiently familiar with the practical implications of each disclosure model in a given case to ensure that disclosure orders are truly proportionate and cost-effective.

Experience so far

Our early experience of the pilot has been mixed. Inevitably, there have been transitional issues, and where the parties have been unable to agree the disclosure model, there has been a tendency – especially in the Technology and Construction court – for judges to default to Model D (equivalent to the old standard disclosure) out of familiarity.

On a positive note, in one case we were able to avoid the expense of a case management conference because the process of working through the Disclosure Review Document enabled the parties to agree all outstanding case management issues.

It remains to be seen whether the pilot will achieve its aim of reducing the costs, scale and complexity of disclosure. Time will tell but, for now, it is a step in the right direction.

ADR under the new Swiss Financial Services Act

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On 1 January 2020, the new Swiss Financial Services Act (FinSA), introducing new regulations for financial services, will enter into force in Switzerland.

In the wake of the 2008 financial crisis, it was widely felt that under the current system it was overly burdensome for retail customers to enforce their claims against financial institutions. One of the objectives of FinSA is therefore to better protect the interests of customers against financial services providers.

FinSA imposes various obligations on financial services providers with respect to information, organisation and documentation. In addition, the preliminary draft of FinSA included various procedural proposals to facilitate the enforcement of investors' claims.

Initial proposals to facilitate taking legal action against financial institutions

The preliminary draft of FinSA provided for the establishment of a permanent arbitral tribunal that would have the final say on financial services disputes. The preliminary draft further envisaged that bank customers could have their claims arbitrated at low cost or even free of charge. Alternatively, it was proposed that the legal fees of bank customers would be paid from a fund financed by the industry, provided the customers' claims had some prospect of success. However, following heavy criticism in the legislative consultation process, none of these proposals made it into law. It is worth noting, however, that certain cost alleviations for claimant bank customers are currently being considered in the context of a review of the Swiss Civil Procedure Code.

The idea of reversing the burden of proof in the financial services providers' duty of care was also rejected during the legislative consultation process for FinSA. Under this concept, the investor suing the financial institution would no longer have been required to prove a breach of the latter's duties of care. Rather, the onus would have been on the financial institution to prove that it acted in compliance with its duties.

The preliminary draft of FinSA also proposed a class action and a group settlement procedure. These instruments of collective redress were primarily aimed at ensuring access to justice for bank customers with relatively small claims. This idea was also left out of the final version of FinSA. Similar concepts are, however, being discussed again in the context of the ongoing review of the Swiss Civil Procedure Code.

The only leftover from previous initiatives: strengthening the Banking Ombudsman

The only proposal included in the preliminary draft of FinSA that was finally enacted relates to the strengthening of the Banking Ombudsman. The office of the Swiss Banking Association's Ombudsman was established in 1993. Under FinSA, several new Ombudsman's offices will come into operation following approval from the Swiss Federal Department of Finance (art. 77 FinSA). FinSA aims to enhance the role of the Banking Ombudsman's system in the financial industry by introducing various new features.

Under FinSA, all financial services providers will be obliged to join one of the approved Ombudsman's offices (art. 77 FinSA). Financial institutions will also be required to fund the Banking Ombudsman's office to which they are affiliated (art. 80 FinSA). For this reason, some commentators believe that the Banking Ombudsmen may not be sufficiently independent from the industry. However, Banking Ombudsmen are required to freely assess the cases submitted to them and to process them without receiving any instructions from third parties (art. 75(6) FinSA). In addition, their activities are supervised by the Swiss Federal Department of Finance. Hence, there seem to be adequate measures in place to ensure that Banking Ombudsmen act independently under FinSA.

Financial services providers, as opposed to bank customers, are further obliged under FinSA to participate in proceedings initiated against them before the Banking Ombudsman (art. 78 FinSA). This obligation includes the duty to appear before the Banking Ombudsman and to file comments on the matter within the applicable time frames. Under FinSA, the proceedings before the Banking Ombudsman continue to be of conciliatory nature only. The Banking Ombudsman is not equipped with any decision-making power but is expected to submit non-binding draft proposals for an amicable settlement of the parties' disputes.

This objective is in line with the purpose behind the largely mandatory conciliation proceedings before the Justice of Peace (cf. art. 197 et seqq. of the Swiss Civil Procedure Code). Under FinSA, the claimant party may, therefore, choose not to initiate conciliation proceedings if it has gone through the process before the Banking Ombudsman (art. 76(2) FinSA). In this context, it should be noted that, unlike the filing of a conciliation request (cf. art. 135(2) of the Swiss Code of Obligations), the initiation of proceedings before the Banking Ombudsman does not interrupt the statute of limitation.

The strengthening of the Banking Ombudsman may help to further promote it as an effective and cost-efficient dispute resolution body in the financial industry. This would reduce the case load of the Swiss state courts.

New momentum for arbitration in the financial industry?

The same effect would be achieved if financial disputes were more frequently referred to arbitration instead of state court litigation. For certain types of financial disputes, arbitral proceedings may, indeed, offer significant benefits.

Banks and their clients tend to prefer not to disclose their business relationship, or to see their disputes being followed by the public. The confidentiality of arbitral proceedings may address these concerns. The flexibility of the arbitration process is a further advantage. It includes the possibility for the parties to appoint arbitrators with sector-specific expertise or to select the language of the arbitration. Finally, the facilitated enforceability of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is often regarded as another key advantage of arbitration in cross-border banking disputes.

Whilst the establishment of a permanent arbitral tribunal was rejected by the Swiss legislator, FinSA nevertheless repeatedly refers to the competence of state courts or arbitral tribunals for the resolution of financial disputes (arts. 75(4)(d), 76(3), 87(3) FinSA). A bank's duty under FinSA to categorise its customers into private, professional and institutional clients (art. 4 FinSA) seems to further facilitate the systematic inclusion of arbitration clauses into contracts concluded with certain types of bank customers. It remains to be seen whether these features of FinSA will lead to banks considering arbitration more frequently as an alternative to state court litigation.

In March 2019, views on this topic were exchanged at a conference in Zurich entitled "Arbitrating financial disputes – are there tangible benefits?", which was co-organised by CMS and the Swiss Chambers' Arbitration Institution (SCAI). In-house counsel attending the conference considered it rather unlikely that FinSA alone would add significant momentum to the use of arbitration in the financial industry. However, various participants pointed out that raising awareness of the tangible benefits of arbitration in the field of (cross-border) financial disputes would probably have such an effect.

Indeed, according to the 2018 International Arbitration Survey, recently published by the Queen Mary University of London, the interest in arbitration amongst financial institutions now appears to be higher than ever – 56% of respondents expressed the view that the use of international arbitration for cross-border financial disputes would increase in the years to come.

Outlook

Given its few and modest modifications, FinSA will not revolutionise the dispute resolution regime currently in place in Switzerland. Rather, it is to be expected that Swiss banks and their customers will continue to appreciate the efficient and high-quality services provided by the (commercial) state courts.

This preference may be further reinforced with the proposed introduction of a Zurich International Commercial Court. The project has been launched by members of the Zurich bar, and it aims to establish an adjudicative body composed of experts familiar with the technicalities of international trade in different industries. In addition, the intention is that proceedings before the Zurich International Commercial Court would be conducted in English.

Against this background, it is unlikely that alternative dispute resolution will seriously compete with Swiss state court litigation in the financial industry in the near future. However, in certain cases, alternative approaches may better accommodate the needs of the parties. If awareness of such benefits is raised, alternatives to state court litigation will most likely gain further ground as viable niche offerings for the resolution of financial disputes in Switzerland.

London International Disputes Week

Reflections on the future of international dispute resolution in a fast-changing world.

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The inaugural London International Disputes Week took place from 7 – 10 May 2019 in London. CMS is a founder Member of the initiative and participated actively in a number of the events which took place, including hosting a seminar on "Technology and dispute resolution-innovation, disruption, evolution" featuring partner Luke Pardey. It was a busy week for the CMS London office, with CMS partners Guy Pendell and Adrian Bell presenting papers at the Commercial Litigation and Construction sessions respectively, and Richard Bamforth delivering welcome remarks at the opening cocktail reception and the week's flagship conference.

The concept of London International Disputes Week originated not from the UK government or from any institutional body with an interest in dispute resolution, but from a group of leading law firms, barristers' chambers, experts, academics, legal commentators and dispute resolution organisations. The aim was two-fold. First, to celebrate the heritage of London as a venue where international businesses and their counsel gather to resolve their disputes – whether through the courts or by arbitration, mediation, expert determination or negotiation. Second, to reflect on and discuss the future of dispute resolution internationally – where and how disputes will arise, and how businesses and their counsel should adapt to the changing landscape and the future of dispute resolution globally.

London International Disputes Week was attended by lawyers and businesspeople from 47 jurisdictions across

the world, as well as London based-lawyers. Discussions addressed challenges including today's rapid technological developments and how existing processes deal with the vast volume of data that businesses generate. Clients are also demanding, rightly, increased speed and efficiency. How do we harness technology to meet those demands? In the UK we are also facing the continuing uncertainty of the impact of Brexit. How does that affect dispute resolution in the UK, in Europe and globally (if at all)? We are also seeing an increasing number of jurisdictions looking at raising their profile in order to attract dispute resolution business, whether through the establishment of international commercial courts or new international arbitration institutions or centres.

These were just some of the issues and challenges that were hotly debated across the week – in technical sessions hosted at 20 different law firm venues across the City of London, in a one-day keynote conference held at the National Gallery, and in numerous fringe events. Participants were positive about the week-long initiative, and it is hoped that this or similar events will become a regular feature in the diaries of disputes lawyers from all around the world. Some 230 panellists – including 16 current and former English judges and 20 client representatives – presented papers and contributed to wide-ranging and varied debate about London's role as a dispute resolution centre both historically and into the future.

One highlight was a speech by the Lord Chancellor, the Rt Hon David Gauke MP, in which he reflected on the importance of the rule of law for business and the strengths of English law as perceived and understood in the world. He urged a collaborative approach in ensuring that cross-border partnerships continue to thrive, and that London remains a global hub of legal expertise, demonstrating UK government support for dispute resolution in London whilst recognising the global challenges that we face. The Lord Chief Justice's IT adviser, Professor Richard Susskind, also provided us with a wake-up call over the rapid pace of technological growth and made us wonder when – not if – we will all be replaced by machines who provide a reliable, consistent, cheap and incorruptible system of global dispute resolution.

A number of sessions noted that a key feature of London's historic success has not only been the export of English law and English trained lawyers to practise across the world, but London's role in educating lawyers from all over the world and attracting international lawyers to practise in London. In his closing remarks at a spectacular closing dinner, Michael McIlwrath, head of litigation at GE, noted that he had been in London for a week in relation to three arbitrations, none of which had any connection with London apart from the fact that the lawyers and supporting infrastructure were located here. There was a note of caution, however. While, perhaps surprisingly, participants seemed to be less concerned about the threat of Brexit than might have been expected, concerns over a loss of business confidence and potentially increased difficulty in accessing the UK market were raised as matters that need to be monitored.

Overall, attendees at the week's events were struck by a tremendous sense of co-operation and camaraderie among the practitioners and those involved in global dispute resolution. Participants acknowledge that the business world is changing fast and that clients need the dispute resolution mechanisms – and lawyers – to match those changes. Efficiency, certainty, fairness and cost-effectiveness were watchwords in almost all the sessions, as delegates and participants (many of whom are competitors) debated and sought to find some answers to these challenges.

London International Disputes Week was stimulating, challenging, inspiring, exhausting and rewarding – often all at the same time – certainly for those involved in its organisation and, hopefully, for participants too. All involved should now work to ensure that its legacy as a forum for thought leadership and debate in international dispute resolution continues into the future.

Intellectual property fast action protocol during MWC Barcelona 2019

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For the last 14 years, Barcelona has been hosting MWC (Mobile World Congress) Barcelona – the flagship global event for the Groupe Spéciale Mobile Association (GSMA). MWC Barcelona is the world's largest exhibition for the mobile industry and a thought-leadership conference on tech and digital transformation.

The event has traditionally been used by the industry to launch and showcase high-impact innovations and flagship products that will shape companies' commercial strategies for the season to come. These novelties include technology patents (mobile and wireless patents), IP rights (apps or state-of-the-art software) and industrial designs (design for devices and wearables).

Over the years, news of some launches has prompted the filing of claims against products that purportedly infringe IP rights. These claims normally request preliminary injunctions (i.e. suspension of both the announcement and the display of the product).

Although initially considered by the industry as opportunistic claims designed to prompt quick settlements (qualifying as "patent trolling"), with time, some of these claims have proven to be more serious and present more substantial risks.

In particular, the new flagship product launch may be paralysed, causing potentially massive economic and reputational damage to the company. Conversely, if the product does infringe a competitor's IP rights, that competitor may see the impact and novelty of its own product launch diluted.

The increasing number of claims filed over the years confronted Barcelona's Commercial Courts ("the Courts") with the need to establish an expeditious and balanced mechanism for the handling of such claims.

For the last five years, the Courts (and lately the European Union Trade Mark Court of Alicante) have agreed on a specific protocol for the reliable processing of MWC IP-related claims – the "Intellectual Property Fast Action Protocol".

Main features of the protocol

The protocol's major objective is to maintain a reasonable balance between the due protection of IP rights and the avoidance of unnecessary (or groundless) harm to exhibitors at the MWC.

The protocol's aims are thus, "to avoid, to the extent possible, deciding interim measures solely on an ex parte basis, whilst, at the same time, to ensure effective measures are taken to protect [IP] rights".

For this purpose, the protocol includes the following commitments by the Courts:

a) Priority and preferential processing of emergency preliminary injunctions.
When injunction applications relate to technological patents and industrial designs linked with products which are to be exhibited (whether sought on an ex parte basis or not) the Courts will seek to handle these in preference to any other such request filed. Priority is also granted for acts of infringement of trademarks and copyrights or unfair competition and unlawful advertising acts in relation to products and materials which are on display at the MWC.

This priority puts the claimant on a fast track for the processing of its request.

b) Deadline for decisions (upon prior protective writ filing)
The Courts are committed to deciding any ex parte preliminary injunction within 48 hours of the complaint being received. In cases where the preliminary injunction is not requested ex parte, the mandatory hearing will be held and the matter decided within a 10-day period.

c) Protective writs regime
In the context of a possible IP conflict – and recognising the reasonable fears a company may have of being subject to an application for an ex parte preliminary injunction – a company is entitled to file a protective writ in order to avoid, to the extent possible, an unexpected (and unchallenged) ex parte preliminary injunction.

A protective writ allows the potential defendant to put forward its arguments to the Court and to show its willingness and availability to appear before the Court immediately in the event that a request for an ex parte preliminary injunction is filed.

The Courts are committed to deciding upon the admission of a protective writ (and the relief sought) within 24 hours of its filing.

d) Urgency requirements for deciding upon an ex parte preliminary injunction
In order to assess the urgency of an ex parte preliminary injunction, the Courts will consider two critical factors: the previous conduct of the claimant and the promptness of their reaction.

In line with the above, the Courts underline the importance of early filing so that the defendant is not unreasonably denied an opportunity to be heard. If the claimant delays taking action after knowing that an injunction may be required, this could make it less likely that the Courts will assess the matter as urgent and, therefore, will be more prone to refusing the injunction.

The protocol began as a sole initiative of Barcelona's commercial courts, since these were normally the courts holding jurisdiction according to a place of infringement/effects criteria (article 118 of the Spanish Patents Act). However, during MWC 2019, and as a further innovation, the European Union Trade Mark Courts of Alicante also adopted the protocol.

The reason for this was the recognition of the need to grant rapid and effective enforcement by Barcelona's Commercial Courts of the decisions issued by the European Union Trade Mark Courts of Alicante in relation to preliminary injunctions and/or urgent measures in matters of EU Community Trademarks and designs.

Results of protocol enforcement in 2019

Use of the protocol has grown steadily since its introduction. An analysis of the Courts' activity illustrates that there is a short period of time each year where the protocol is deployed – normally confined to two weeks ahead of MWC and the week of the MWC itself.

During MWC Barcelona 2019, a total of 35 cases were admitted and decided within the framework of the protocol. These included:

— 22 protective letters (compared to 12 in 2018) relating to patents and two protective letters relating to European Union Trade Marks were submitted. All of them were decided on the same day as filing.
— Three verification of facts procedures about patents matters – procedures to deploy preliminary inquiries prior to filing a lawsuit – were submitted against four different companies. Those were processed and resolved within 48 hours and the inquiries were upheld.
— Seven *ex parte* preliminary injunction requests (the same number as in 2018) were submitted, affecting eight different companies, which were decided within 48 hours (all of them upholding the claimants' demands). In two of these cases, a "substitution bail" was established allowing (where the bail was deposited) the preliminary measures to be lifted. Another case was concluded by a settlement being reached, the measures lifted and the devices withheld being returned that same day to the defendant.
— One preliminary injunction upon hearing was submitted. This was decided before the MWC kick-off day, with the court upholding the request for preliminary measures.

The data shows that injunctions are normally upheld by the Courts, based on the principle that, pending issue of a ruling on the merits, the claimant's rights may be harmed. However, the defendants are granted the opportunity to apply to lift those measures (such as seizure of devices) by depositing a substitute bail. This bail is deposited in the Courts' account and is not accessible by the claimant until a final (upholding) judgment is delivered.

CMS specific task force during MWC

For the last three consecutive years, CMS has made a specific task force available during MWC to help clients deal with IP-related issues. The task force is comprised of litigation and IP lawyers based in Barcelona, supported by our renowned multi-jurisdictional practitioners specialising in IP and IP procurement throughout the CMS network.

The CMS team provides:
— thorough and comprehensive advice in case of IP infringements detected by a client;
— assistance on the preparation of preventive writs.
— on-site presence in Barcelona to enable urgent and immediate assistance where precautionary measures are applied for by/against a client.
— 24/7 availability of our team during MWC dates.
— specific on-site advisory services from our lawyers during MWC dates and product presentations as required.

Done and dusted? Avoiding last minute pitfalls in dispute settlement

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In view of the increasing costs of litigation and other formal dispute resolution processes, coupled with the uncertainty of the outcome at trial, it is not surprising that an overwhelming majority of civil cases settle before they reach trial or the hearing stage of a lawsuit or arbitration.

While there are many advantages in settling a dispute, a poorly managed settlement process can compromise both reputation and relationships. In this article, we seek to highlight the key risks faced in resolving disputes through a negotiated settlement and the best practices for managing risks to achieve the best outcome.

Assessment of the position for settlement

Unless you have a complete understanding of the strengths and weaknesses of your case, and your alternative options, it is difficult to make an informed decision over whether to proceed with a trial or accept a negotiated settlement offer. At the outset of every negotiation or settlement process, it is critical to invest adequate time and resources into the assessment of your case. This is essential for planning and developing an effective negotiation strategy. Having a comprehensive and realistic understanding of your position will only increase your bargaining power.

Merits of your case and your position for settlement

This may seem an obvious task, but is often overlooked. At this stage, you will gather factual as well as subjective information.

— Factual information includes evidence that is contained in documents, correspondence, e-mails, drawings etc., as well as witness accounts. This information should be located and preserved as soon as possible. As the availability of witnesses, particularly if they were only employed for a specific project, may not always be guaranteed, it is important to secure their early cooperation and ensure that their accounts are recorded as soon as possible in the form of witness statements.

— Subjective information includes the objectives and motivations of the people involved in the matter – the other party as well as your own employees. A better understanding of the other side's motivations will inform your strategy, as will a good understanding of the motivations of your employees. An employee who does not wish to give evidence or handle a dispute, particularly if there is a possibility that it will expose that employee's shortcomings, may have greater motivation to make the matter "go away".

Relationship risk

Consider any ongoing or potential relationships you have or your company has with the opposing party. If there is a long-running commercial relationship, or the potential of starting a commercial relationship with the other party, be proactive and address issues at an earlier stage. Alternatively, your circumstances may demand that urgent or tough actions are taken to preserve your position and reputation.

Your relationship risk will also have an impact on the type of dispute resolution and negotiated settlement process you chose. If there are good relationships between upper management, face-to-face discussions may be an effective option. However, if relationships have soured or if attempts to resolve have been ineffective, you may consider using the services of a neutral third party such as a mediator. If you are already in the middle of an arbitration, you may consider the hybrid procedure of Arb-Med-Arb.

Quantum and costs

Have a realistic view about the cost of managing the dispute. Apart from setting aside a financial budget for the litigation or arbitration of the dispute, it is equally important that you factor in the cost of time management and the administrative and resource burden of managing a dispute, particularly a long running one.

Other factors: Precedent value, principle, reputational impact

Your dispute may have precedent value, i.e. you may have other similar suits for which you need to establish a precedent in order to benchmark future matters. For these circumstances, litigation/arbitration could be your best option. There may also be issues of principle and organisational reputation to consider. In some circumstances, it may be necessary to stick to your principles and not allow the other side to continue behaving in a manner that is detrimental to you and the business. This will obviously need to be balanced against the impact a long running dispute may have on your business and reputation.

Time – is it the best time to start the negotiation process?

Your assessment process and investigations may have unearthed information that you would rather not disclose. In such a situation, you may decide to negotiate immediately in order to decrease the likelihood of such information coming to light. Alternatively, if you have limited information, you may wish to wait and let litigation or arbitration commence to allow for more facts and documents to surface before assessing whether negotiation is prudent.

Leverage

Are you in a better position to influence the other party to agree to your terms and your negotiating position? Your situational advantage or disadvantage can influence when you should commence the negotiation process. This is highly subjective, and as your relative situation can change very quickly, it is always prudent to consider what steps you could take to increase or improve your leverage.

Persuasion and Bargaining

During this stage, you can strategically share information available to you in order to persuade the other side to settle and resolve the dispute in a way most favourable to you. A good understanding of your advantage as well as your “walk away” point will assist you in coming up with a prudent negotiation strategy. Apart from having a target goal range within which to settle, you should also understand your concession points during the different stages of the negotiation.

Appendix 1

It is also important to ensure that the person leading the negotiations has the necessary mandate and authorisation. If that person has to go back to seek approval from management, you could end up losing any advantage or leverage you may have had.

You can gain an advantage in the negotiation process by making the first offer and establishing a reference point. This is also known as 'anchoring'. Having a good understanding of the other side's objectives and motivations (based on the substantial information you had obtained during your research), will assist you in gaining an edge and anchoring the discussion in your favour. Equally, having an understanding of the other side's position will also equip you in resisting or defusing the other side's anchors.

Arb-Med-Arb

This hybrid process of combining mediation and arbitration can be a useful tool in assisting your settlement negotiations. It combines the benefits of both dispute resolution methods – the finality and enforceability of an arbitration award, as well as the collaborative approach of a mediation. The dispute is first referred to arbitration. The arbitration proceedings are then stayed while parties attempt to settle their disputes through mediation. This can happen at any stage of the proceedings. If the mediation results in a settlement, the terms of the settlement can be recorded in the form of a consent arbitration award. If the mediation fails, parties will then resume the arbitration proceedings.

Managing your legal risk

In your eagerness to achieve the best outcome, it is crucial that you do not jeopardise any advantage or leverage that you may have acquired by mismanaging your legal risks. Used properly, the legal tools available to you can enhance your settlement negotiations.

There is always the risk that negotiations may break down, and that you may find yourself heading to litigation or arbitration. As such, you should be protective during negotiations, without compromising on the quality of your negotiations and settlement discussions. This is where the concept of privilege could help – having the security that frank discussions or admissions could not be used against you at a later stage. It is therefore important that privilege is maintained and that it is not inadvertently waived.

Legal advice privilege

Confidential communications (written and oral) between a lawyer and a client which are made for the purpose of giving or receiving legal advice are protected, in that you will not be required to disclose to the opposing party any such sensitive or confidential advice given to you by your lawyer. This will allow frank disclosure and discussions between you and your adviser. However, it is important to note a few key points:

- Privilege is a question of substance rather than form: simply forwarding documents to your lawyer will not make a non-privileged document into a privileged one. The document needs to be created for the purposes of giving or receiving legal advice.
- Privilege is subject to the dominant purpose test, namely whether the communication or document was brought into existence with the dominant purpose of obtaining legal advice. If the dominant purpose of an email or communication is to seek advice from the lawyer, and others were copied in for information only, then the email is privileged regardless of who it is sent to.
- If, on the other hand, the dominant purpose of the email or communication is to seek a commercial view, and the lawyer is copied in whether for information or even for the purpose of legal advice, then the email (in so far as it is sent to the non-lawyer), is not privileged.
- Further, if sent to the non-lawyer for a commercial comment, but sent to the lawyer for legal advice, then the email is not protected by privilege, unless it or the non-lawyer's response discloses or might disclose the nature of the legal advice sought and given.

Litigation privilege

Confidential communications (written and oral) which has come into existence when litigation (including arbitration) is in reasonable contemplation or has commenced are protected by litigation privilege.

A few points to note:

- The documents that are protected include (i) confidential communications are between a client or lawyer (on the one hand) and third parties (on the other), and (ii) other documents created by or on behalf of the client or his lawyer.
- The documents must be prepared for the dominant purpose of the conduct of the litigation, including deciding whether to litigate or settle the dispute. A recent English Court of Appeal decision held that emails between a company's Board members discussing a commercial proposal for the settlement of a dispute were not covered by litigation privilege. The court declined to extend the scope of litigation privilege and held that it could not see any justification for covering all internal corporate communications with a blanket of litigation privilege.

Without Prejudice Communication

In order to encourage frank discussion, oral or written communications made during a negotiation process, which are genuine attempts at settlement, are subject to without prejudice privilege. This means that such communication cannot be disclosed and/or used against the maker of such communication in subsequent litigation or arbitration.

— The court will be prevented from seeing the document, or informed about the communication.
— The protection belongs to both parties, and cannot be waived by one side alone.
— The protection either attaches to the whole document, or none at all. This is where without prejudice privilege differs from legal advice or litigation privilege, where documents may be redacted.
— You may have come across situations where the words "off the record" are used during oral conversations. Bear in mind that these words have no legal status. Always clarify with the other party if they intend for the conversation to be a genuine attempt at settlement of the dispute.

Subject to Contract

While negotiations are taking place, it is important to ensure that you do not inadvertently create binding relations because of those communications. The use of the words "subject to contract" points towards a strong presumption that the parties did not intend to be legally bound by the terms of the communication until a more formal contract was entered into. Until you are sure that all the terms of your settlement are made out and can be agreed to, it is prudent to use the words "subject to contract" in all offers and negotiations.

Documenting and finalising the settlement

Appendix 2

It is important that your documents reflect the agreement you intend to enter into. In your haste to bring the dispute to an end, some issues that may seem obvious could be missed. Attending a mediation or negotiation with a draft agreement that you had prepared in advance would mean that you had considered and would be able to incorporate or promote the adoption of terms that are more favourable to you. The impact could be significant, ranging from the settlement agreement being declared void, to being bound by terms that you did not think you were entering into.

Counterparty

Are you settling with the correct entity? You may have entered into the contract with the local subsidiary of an international entity, set up specifically for your contract. If the settlement involves payment of a settlement sum by the subsidiary, you may wish to ensure that the parent company is also jointly liable for payment of the settlement sum. In the event that there is a failure by the subsidiary to make payment, you will be able to look to the parent company for payment. If joining the parent company to the settlement agreement is not possible, consider obtaining a parent company guarantee of the obligations under the settlement agreement.

Authority to settle

Does the person making or accepting your offer has the authority to settle and to bind the company into the settlement agreement?

Do the terms of settlement reflect your agreement?

It is difficult to correct mistakes in settlement agreements. The courts are also reluctant to interfere in compromise agreements. As such, use plain and clear language in setting out the terms of the settlement to avoid any confusion.

Clear payment/obligation terms

Any payment or obligation terms under the settlement agreement should be set out in clear terms so that they may be enforced.

Release of all claims

Use plain and clear language to identify the dispute that is being settled, including whether it is intended to settle any potential future claims arising out of the same or similar facts as the relevant dispute. If there is a release of all future claims, do ensure that it is reciprocal. If litigation or arbitration has commenced, and the settlement is intended to conclude all proceedings, then ensure that the terms of the settlement agreement reflect this.

No outstanding warranties & indemnities

This is particularly relevant if the original contract provides for warranties and indemnities of the subject matter. Do clarify and ensure whether your settlement terms release you from future obligations and liabilities under the underlying contract.

Conclusion

Preparation is key. Investing adequate time and resources in the initial stages of the process will ensure that you are well informed and able to negotiate effectively. Ultimately, the difference between a good settlement and a bad one depends on how clear and unambiguous the document setting out the terms is. Being well prepared during all the different stages of the negotiation process, and having an understanding of your legal and contractual risks, will assist you in achieving the best possible outcome.

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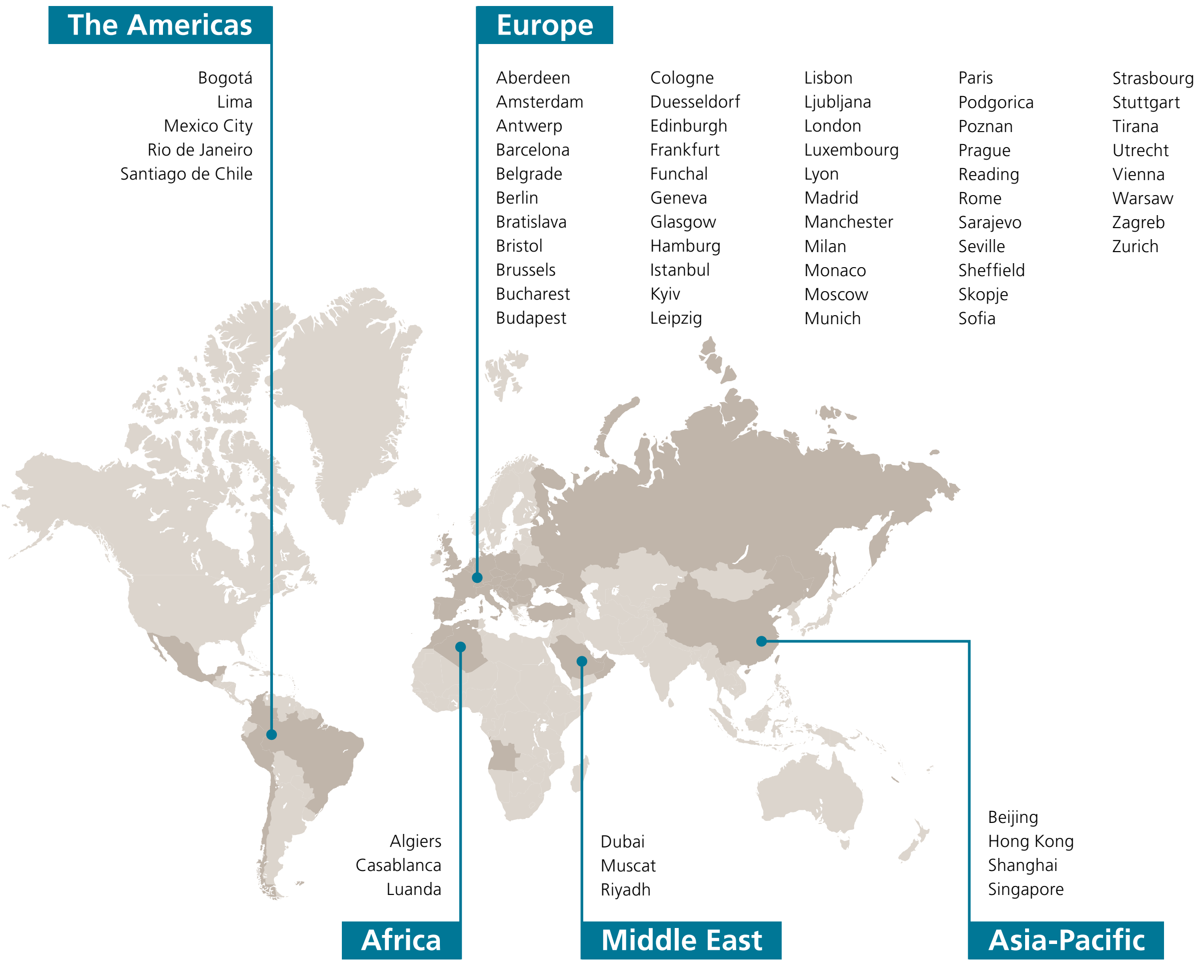
Facts and figures



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