International Disputes Digest

July 2021

Contents

Introduction

Welcome to the 2021 summer edition of our International Disputes Digest, a bi-annual publication featuring analysis and commentary on the key trends currently shaping the global dispute resolution market.

As the world emerges from the pandemic, global businesses in almost every sector face unprecedented challenges. To help you manage risk as you move forward into the post-COVID era, we bring you information on the latest legislative developments from around the world, news on vital global issues, and our take on the most promising opportunities and most daunting challenges that lie ahead.

In this edition we discuss the most pressing issues of the day, including climate change and BREXIT. As businesses adjust to the reality of the UK's exit from the EU, our experts offer analysis on the enforcement of jurisdiction clauses and civil judgments. As for the environment, our experts explore the international rise in climate-change litigation and how rulings resulting from these cases could impact business in key industries.

Even though we all hope that COVID-19 will soon be behind us, the pandemic is leaving its mark. This edition discusses the development of hybrid dispute resolution procedures that continue to emerge from the disruption wrought by the pandemic on court systems across Europe and around the world.

In terms of global trends, our experts also explore the rise in emergency arbitration, recent developments in arbitration law in Singapore, the revision of International Bar Association rules on the taking of evidence in international arbitration, and how international arbitration is keeping in step with legal reforms and changing times.

In the EU, our experts analyse precedent-setting case-law by the CJEU exploring whether subsidiaries are liable for the infringements of their parent companies.

Finally, for those who see a more litigious future, our experts examine several effective strategies to mitigate the risk of litigation, particularly given the spate of disputes resulting from the pandemic.

We hope you enjoy reading this edition of our International Disputes Digest.

David Bridge
Partner, United Kingdom
T +44 2073 6730 21
E david.bridge@cms-cmno.com

Zsolt Okányi
Partner,
Global Head of CMS Disputes
T +36 1 48348 00
E zsolt.okanyi@cms-cmno.com

Climate Change Litigation on the rise

Stefanie Day
Associate, United Kingdom
T +44 2075 2461 23
E stefanie.day@cms-cmno.com

Bart Adriaan de Ruijter
Partner, Netherlands
T +31 20 3016 426
E bart-adriaan.deruijter@cms-dsb.com

Vučković Vedrana
Attorney-at-Law, Croatia
T +385 1 4825 600
E vedrana.vuckovic@bmslegal.hr

Climate change litigation is gaining momentum. Governments and corporations globally are increasingly being held accountable by litigants for their environmental impact, insufficient climate protection policies and non-implementation of international climate treaties. The importance of climate change litigation and regulation should not be understated as a major driver for action against climate change.

In a recent landmark judgment against Royal Dutch Shell, for the first time in history a Dutch court held a large company directly responsible for causing dangerous climate change on the basis of a duty of care, flowing from international treaties, such as the 2016 Paris Climate Agreement. This is a historic turning point and catalyst for a potential wave of climate change litigation. Multinationals with high carbon footprints will now be forced to bring their policies in line with the Paris Agreement.

In other countries, climate change litigation is increasing, and lawsuits are being prepared against multinationals. In 2019, in a ground-breaking order, the German Federal Constitutional Court ruled that the German Federal Climate Change Act was partially unconstitutional, highlighting that governments and companies that do not meet environmental standards can no longer ignore the risk of climate change litigation.

The EU's Compliance Criteria, developed by members of the Multi-Stakeholder Dialogue on Environmental Claims (MDEC), the European Commission's Sustainable Finance Package including the Taxonomy Regulation, the 26th UN Climate Change Conference of the Parties (COP26) later this year, and increasing pressure from shareholders and investors all contribute to the need for governments and companies to be ready to respond to the changing regulatory landscape. This pressure has resulted in policies for a rapid transition to 'net zero' and a focus on climate change risk mitigation to ensure a sustainable future for their business. This article discusses the status of climate change litigation in the UK, Croatia and the Netherlands.

United Kingdom

In the UK, courts are increasingly enforcing action against climate change. Climate change litigation covers a variety of different cases, including:

- **Claims against the government to increase climate change mitigation measures.** Three young claimants are currently suing the UK government for breaching their rights to life (as the future generation) through an inadequate plan to match the scale of the climate crisis. The claimants are asking for a judicial review of government actions to cut national carbon emissions. While the 2021 Budget contained a number of references to 'net zero' targets, which have been made part of the government's 'overall economic policy objective', it is clear that the UK still has a long way to go, particularly in comparison to other jurisdictions such as the Netherlands.
- **Cases brought against private corporations to limit carbon-emitting behaviour (tort or nuisance claims).** For example, in March 2021, Drax Group decided to suspend the expansion of Europe's largest gas plant in spite of the favourable judgment in *ClientEarth v Secretary of State*.
- **Cases relating to fossil fuel projects.** *In West Cumbria Mining v Cumbria County Council*, the Cumbria County Council recently withdrew its approval for controversial plans to build a coal mine in West Cumbria ahead of a public enquiry in September 2021.
- **Claims against businesses or institutions who do not disclose climate change risk in respect of investments.**
- **Claims against companies for deceptive 'greenwashing' marketing campaigns or misleading environmental impact claims.** As the focus on sustainability and ESG (environmental, social and governance) issues intensifies, businesses will be scrutinised on their policies, making environmental claims fertile ground for future litigation. In the UK, several consumer organisations and financial bodies have recently published guidance in relation to environmental impact claims, for example:
  - On 21 May 2021, the Competition and Markets Authority **(CMA)** issued a consultation on its draft consumer protection law guidance for all businesses making environmental claims.
  - The Financial Conduct Authority **(FCA)** has recently announced that it is consulting on a new Consumer Duty, which will set a higher level of consumer protection in retail financial markets.
- There is also potential for new claims linking the current COVID-19 health emergency to the climate emergency.

Another case highlighting the prominence of climate change action in the UK is the April 2021 case *Attorney General v Crosland; R v Bramwell et al ("The Shell Six case")*. A jury at Southwark Crown Court acquitted six protestors who were charged with criminal damage caused to Shell's headquarters during Extinction Rebellion protests in April 2019.

The courts are increasingly receptive to claimants raising human rights arguments, such as the right to life (article 2), the right to family life (article 8) and the right not to be discriminated against (article 14) under the Human Rights Act 1998. Duty-of-care arguments are also being deployed.

Croatia

Environmental lawsuits are not a new remedy in Croatia, but they are yet to be widely known or used. In 2018, eight applicants who lived near the waste disposal site, Jakuševac in Zagreb, filed a complaint to the European Court of Human Rights ('ECHR'): 43391/16. The complaint concerned the illegal spread of odour emanating from the disposal site, which posed a threat to the lives and well-being of individuals living nearby and presented an environmental hazard. Prior to filing the complaint, the applicants lodged a criminal complaint in Croatia. This was ultimately rejected as inadmissible because the ECHR concluded that the applicants failed to exhaust the available and effective domestic remedies. The applicants did not use civil remedies aimed at preventing and eliminating excessive environmental nuisance and providing compensation for damage. The ECHR stated that the relevant civil remedies were an environmental lawsuit under the Civil Obligations Act and the emissions lawsuit under the Property Act.

Domestic case law shows that individuals used environmental lawsuits to protect their health or property from factors such as noise or air pollution. For example, one court awarded damages for crop damage from air pollution caused by a chimney with no purification filters. In another case, a city's population suffered serious health issues due to air pollution from a refinery. The lawsuit aimed to stop the pollution by modernising the facilities and gaining compensation for the damage caused.

Practical issues such as costs and complexity can serve as a barrier to environmental lawsuits. Drafting suits, especially the measures needed to prevent damage or nuisance, is not always simple since this requires expert knowledge. Expert opinions and the costs of proceedings generally require an individual plaintiff to have substantial funding. Since these cases usually take years before a final decision is rendered, the plaintiff will have to wait for the final decision in order to receive any reimbursement for costs, provided that they succeed in the case. This uncertainty can be avoided with a proper pre-litigation strategy.

Ultimately, environmental lawsuits in Croatia are an effective way of preventing damage to the natural world and compensating for any damage that may have occurred. However, they are yet to be used to their full potential. We expect that this will soon change as environmental awareness among the population is on the rise.

The Netherlands

The Netherlands is one of the frontrunners in climate change litigation.

On 20 December 2019, the Dutch Supreme Court ruled in the first landmark case *Urgenda Foundation v The Netherlands* that the Dutch government must reduce emissions immediately in line with its human rights obligations. This was the first successful climate justice case against a national government.

The pressure group Urgenda (Urgent Agenda) used article 2 (right to life) and article 8 (right to family life) of the ECHR to bring a claim against the Dutch government on the basis that there was a real and imminent threat that required the state to take precautionary measures. In December 2019, the Supreme Court confirmed decisions of the two lower courts that the Dutch government was acting unlawfully by failing to pursue a more ambitious reduction of greenhouse gas emissions and that it must reduce emissions emitted in the Netherlands by at least 25% by the end of 2020. This case opened the floodgates for further international climate change litigation.

Following the Urgenda judgment, in November 2020 Greenpeace took the government to court with a request to require more climate safeguards in the state funding of Dutch Airline KLM.

In another landmark judgment, *Vereniging Milieudefensie & ors v Royal Dutch Shell plc* C/09/57193/HA ZA 19-379, dated 26 May 2021, a court in the Hague ordered Royal Dutch Shell to cut its global carbon emissions by 45% by the end of 2030 compared with 2019 levels. This was the result of collective legal action brought by Friends of the Earth Netherlands (Milieudefensie) together with 17,000 co-plaintiffs and six other organisations (ActionAid Netherlands, Both ENDS, Fossil Free Netherlands, Greenpeace Netherlands, Young Friends of The Earth Netherlands and the Wadden Sea Association). According to Milieudefensie, Shell needed to contribute to the prevention of dangerous climate change via its group's corporate policy, particularly in relation to emissions and climate change policies, and Shell was found to owe an unwritten duty of care. This duty of care was substantiated by articles 2 and 8 of the ECHR and soft law instruments such as the UN Guiding Principles on Business and Human Rights (UNGP).

The Court ruled that Milieudefensie could not directly invoke human rights under the ECHR. In interpreting the specific duty of care applicable, however, the Court followed the UNGP.

This case was a historic turning point: the first time a judge had ordered a large corporation to comply with the Paris Climate Agreement. Furthermore, the decision will have major consequences for other companies by forcing them to play their part in tackling the climate emergency. The oil giant's sustainability policy was found to be insufficiently "concrete" by the Dutch court, which instructed Shell that it owed a duty of care. This unprecedented ruling will have wide implications in the energy industry and for other multinational corporations.

These increasingly varied actions and successful cases highlight that climate change litigation is becoming an ever-apparent risk to the government and businesses that do not meet expected environmental standards.

Effective strategies will mitigate the risk of litigation

Siphokazi Kayana
Head of Dispute Resolution, South Africa
T +27 87 210 0711
E siphokazi.kayana@cms-rm.com

Zaakir Mohamed
Head of Corporate Investigations & Forensics, South Africa
T +27 87 210 0711
E zaakir.mohamed@cms-rm.com

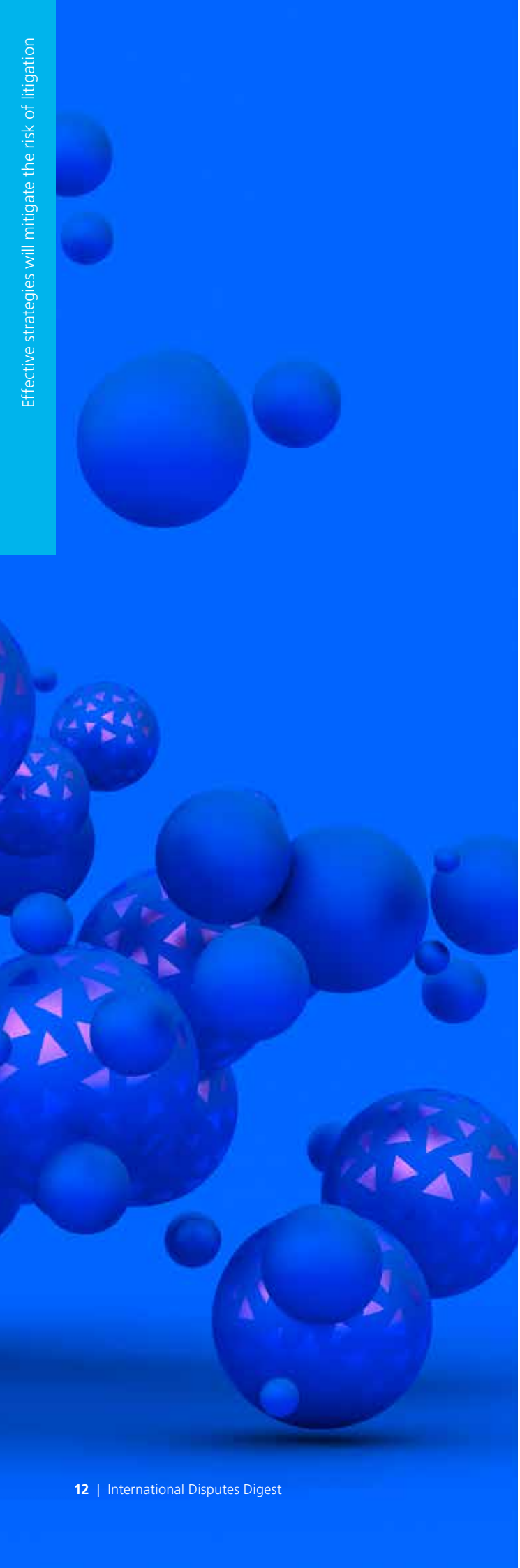
Lucinda Hinxman
Consultant, South Africa
T +27 82 557 1129
E lucinda.hinxman@cms-rm.com

Rob Wilson
Partner, United Kingdom
T +44 2073 6736 82
E rob.wilson@cms-cmno.com

As companies recover from the pandemic, many face some form of litigation or arbitration whether it be a labour dispute, an insurance claim that has been declined, or a supplier that has reneged on an agreement. Whether the dispute is contested in open court or resolved through an alternative dispute resolution process, few companies can sustain the type of long-term litigation recently seen in South Africa, such as the *Vodacom Please Call-Me* dispute.

The situation is not limited to commercial enterprises. Some of South Africa's largest municipalities are facing the long-term consequences of agreements that did not make sufficient allowance for a change in circumstances. More than ten years after the 2010 Soccer World Cup, decisions around the rapid transit systems, which were designed for the games, still affect municipal agreements. We are aware that several metropolitan areas are still undergirded by agreements that were originally designed to get these systems in place quickly.

Lengthy, onerous litigation proceedings need not be the fate of every person and enterprise. Rather, there are effective and practical ways in which to manage, avoid and mitigate the inherent risk of litigation. A key to this is to ensure you have a legal professional who understands your business and provides ongoing assistance as opposed to having an external counsel who is only engaged once a dispute arises. Some of the many benefits your legal professional can provide include: conducting legal due diligence in relation



to your business and your existing contracts, setting up project management systems, appropriate and timely document management, early case assessment, protecting legal privilege, the project management of a dispute and being able to upskill and/or support your internal teams. These measures and engagement with your legal professional may save you and your business millions in litigation costs.

In the following article, we will look at three case studies which illustrate how the lack of such processes and techniques resulted in lengthy and expensive litigation and how certain mitigation measures can curtail a dispute once it has already begun.

The ball is in your court

In the first example, a large company entered into an agreement with a municipality for the provision of services and maintenance of solutions provided to the municipality. Pursuant to entering into the agreement, a dispute arose relating to a contract with the relevant municipality. The issues in dispute included, among others, whether the contract complied with the prescripts of the *Municipal Finance Management Act* as well as the correct interpretation of certain contractual provisions.

Both the company and municipality were lax in keeping detailed records of contractual negotiations and correspondence. In addition, the municipality failed to pay credence to the meaning and effect of key contractual provisions or its key obligations in terms of the contract. Furthermore, when the company first identified an issue, it failed to implement appropriate document collation and preservation. Furthermore, the company did not bring in a team of legal professionals to advise on risks and manage the implementation of contractual provisions going forward.

The risk of this litigation could have been curtailed had the original team included basic document collation and preservation methods, as well as regular oversight over the implementation of contractual provisions. For example, had a legal professional been tasked with conducting an initial review of the contractual provisions and undertaken a regular audit over the implementation of those provisions, the legal professional could have identified potential non-compliance risks and legal issues earlier. Had either of the parties involved employed a legal professional to do a regular legal audit of responsibilities and regulatory requirements, the situation would have been red-flagged and avoided at an early stage.

Do not fire at will

This example concerns a 2009 unprotected strike at a mine. The union's members were purported to be unhappy with its terms or claimed to not know about the agreement and continued to embark on strike action. This resulted in approximately 4,000 employees being dismissed. The unfair dismissal dispute made its way to the Labour Court where it remained for over eight years. During that time, the dispute magnified with breakaway groups of applicants seeking to pursue different actions. Ultimately, the dispute involved no less than eight different representatives (a mixture between trade unions and attorneys), and each of whom tried to reinvent the matter and its direction, resulting in no less than five court procedures. This was the situation before any trial on the underlying dispute took place.

Eventually in 2016, having managed to reduce the number of applicants to 60 through various points *in limine*, the parties agreed to a private arbitration, finalising the matter within months.

The litigation avoidance takeaway: had the mine used different strike management principles, there may have been fewer dismissals, which would have reduced or done away with the selective re-employment that occurred later. However, early intervention in the litigation proceedings allowed for proper formulation of strategies to defend the dispute and enabled document and record retention relating to the strike and all information relating to the dismissed employees. This provided a significant advantage in identifying each applicant and created the opportunity to reduce the number of applicants through various preliminary points.

Reaching a settlement with the majority union within the first year of the litigation also had a significant impact on the matter, especially in relation to reducing the number of applicants and consequently the financial liability. Moving the main proceedings to private arbitration not only brought an end to the issue, but also allowed for expeditious arguments of some preliminary points. Had the matter continued in the Labour Court, it is possible that it could have remained unresolved for several more years.

Terrible medicine

The third example relates to a retailer and one of its suppliers. The supplier provided the retailer with software to run some of its processes. The software was built by the supplier and licensed for use by the retailer with concomitant support and maintenance agreements. Over a short period, the supplier lost multiple junior staff members, followed by the wholesale resignation of its key management team. These individuals opened their own competing company and started approaching their old clients, the first of which was the retailer. The retailer terminated its contract with the supplier.

The supplier rushed into the litigation without realising that no signed documentation was to be found, including employment contracts or even commercial contracts with the retailer. The supplier paid considerable attention to the litigation, but omitted to pay sufficient attention to the investigations and preliminary information gathering that would (a) provide the scaffolding for building the case; and (b) allow it to assess the merits of its position. The supplier lost because it was unable to find the information and documentation needed to give credence to its case.

In this case, litigation might have been avoided had there been better management of the contracts and how they were handled (e.g. having a central and secure repository for saving critical information such as the relevant contracts), and a systematic approach with a specialist project team to ensure that the supplier's case proceeded in a co-ordinated and structured manner. For example, had the supplier taken the time to gather all necessary information prior to commencing litigation, it would have been better placed to assess the merits of its case and would likely have saved the unnecessary costs incurred by rushing into litigation.

The case studies show that even with in-house legal teams, companies often do not take the time or lack the ability to focus early on potential legal pitfalls. In our opinion all companies would benefit from approaching outside legal professional teams to conduct an early evaluation of risk areas for the business and areas of potential dispute. Thereafter, we recommend a strategy of ongoing risk management and avoidance with appropriate due diligence or investigations undertaken. This will not only identify loopholes and pitfalls in the processes (e.g. document management), but will allow for the early identification of potential legal problems. Once identified, these problems can be actively managed with the aim of avoiding the loss of unnecessary time and costs due to litigation or arbitration. After all, in the law, to be forewarned is to be forearmed.

The revision of the IBA rules on the taking of evidence: A welcome update on arbitral practice

Jean-Fabrice Brun
Partner, France
T +33 1 4738 5500
E jean-fabrice.brun@cms-fl.com

Cécile Gimonet
Associate, France
T +33 1 4738 4294
E cecile.gimonet@cms-fl.com

Louise Decarsin
Associate, France
T +33 1 7328 3048
E louise.decarsin@cms-fl.com

On 15 February 2021, ten years after they were last revised, the International Bar Association released its updated version of the IBA Rules on the taking of evidence in international arbitration, along with an updated commentary on the rules. This revision follows the update by the ICC, LCIA, ICDR and AAA of their arbitration rules, exemplifying the idea that international arbitration actors should constantly keep up with a quickly changing practice.

The rules were introduced in 1983 to provide an efficient, economical, and fair process for the taking of evidence through the codification of prevailing arbitration practices. The IBA Working Committee has given itself the mission of drafting a comprehensive set of rules that would accommodate the adversarial Common Law system and the Civil Law inquisitory system, while reflecting the inherently flexible nature of arbitration proceedings.

The rules have achieved such success that arbitral tribunals frequently refer to them, even when not adopted by the parties to govern their proceedings. In short, the rules have almost achieved a "soft law" status.

The 2020 revision incorporates within the rules the latest prevailing practices and also sheds light on certain grey areas.

The incorporation of latest prevailing practices

Cybersecurity and data protection

Article 2 of the Rules addresses the consultation on evidentiary issues. The arbitral tribunal must, early on in the proceedings, consult with the parties to agree on a process for the taking of evidence. The revision adds a new sub-paragraph (e) to the Article, stating that the consultation may address *"the treatment of any issues of cybersecurity and data protection"*.

This integration of cybersecurity and data protection considerations is a landmark step, reflecting the growing concern of cyberattacks and breaches of personal data in our constantly digitalising world. Agreeing on the treatment of cybersecurity issues at the early stages of the arbitration proceedings is all the more relevant with the recent massive shift towards virtual hearings. The reference to data protection was required to comply with the European Union General Data Protection Regulation (GDPR) and other applicable data protection rules.

Virtual hearings

The revision adds to Article 8 of the Rules on evidentiary hearings a new paragraph in Article 8.2 pursuant to which, at the request of a party or on its own motion – but in any case, *"in consultation with the parties"* – the arbitral tribunal may order that the evidentiary hearings be conducted virtually. This new provision reflects the recent trend for virtual hearings, further accelerated by the COVID-19 pandemic and the consequent travel restrictions.

Should the hearing be conducted virtually, the tribunal will have to consult with the parties for the purpose of establishing a *"Remote Hearing protocol"*. The provision further lists practical considerations that the protocol may address with a view to having a hearing that is efficient, fair, and *"to the extent possible, without unintended interruptions"*.

The arbitral tribunal's discretion to order remote hearings could, however, be restricted by applicable arbitration rules or the *lex arbitri*, were they to limit the tribunal's discretion to decide on the format of the hearing.

Illegally obtained evidence

Article 9 of the Rules addresses the admissibility and assessment of evidence and provides the means of defence for parties to resist requests for document production. The revision adds a paragraph 9.3 under which an arbitral tribunal may, *"at the request of a Party or on its own motion, exclude evidence obtained illegally"*.

This addition is welcome in the wake of a growing concern in relation to illegally obtained information, and the consequent promulgation of legislation that aims at tackling the issue, notably the 2016 EU Directive on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure.

The concept of illegally obtained evidence is, however, not defined in the Article or the commentary, due to the absence of an international consensus on such a definition. Hence, the arbitral tribunal has the discretion to determine, on a case-by-case basis, whether any presented evidence was obtained illegally. Arbitral tribunals should use this discretionary power with caution, since an over-zealous restriction of evidence could encourage a party to challenge the final award on the grounds of its non-compliance with the party's right to be heard.

The clarification of grey areas

The right to respond for the party requesting the production of documents

Article 3 of the Rules addresses the production of documents within the arbitral proceedings, pursuant to which any party can request the other to produce certain documents. The former version of Article 3 provided for a right of the opposing party to object to the request, typically in the format of a Redfern schedule. It did not address the right for the requesting party to reply to the objection, despite it being the norm in most proceedings.

The revised Article 3.5, now provides that *"if so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection"*.

Moreover, the wording of Article 3.7, which previously provided that the arbitral tribunal will decide on the production request *"in consultation with the parties"*, has been amended. This ambiguous sentence erroneously suggested that the tribunal could be required to consider another round of comments.

The right of any party to object to a request to produce a document or to provide for the appearance of a witness

Under the previous version of Article 3.10, only a party to whom the production of a document was requested could object to the request. Article 4.9 contained similar provisions on the objection to the request to provide for the appearance of a witness during the arbitral hearing. Both articles are now revised and provide that *"any party may object to the request for any of the reasons set forth in Articles 9.2 or 9.3"*.

This amendment is convenient, especially in multiparty proceedings, since any party can have legitimate concerns on requests addressed to the other parties.

The required form to produce documents

The revised rules add new sub-paragraphs (c) and (d) to Article 3.12. Under paragraph (c), *"a party is not obligated to produce multiple copies of documents which are essentially identical".* Under paragraph (d), *"documents to be produced in response to a Request to Produce need not be translated".*

The utility of these additions will essentially come to play in arbitration proceedings that involve a high volume of document production, since the producing party will not have to make multiple copies of identical documents, nor translate them when the documents are requested by the opposing party and thus not necessarily presented to the arbitral tribunal.

The role of factual witnesses and party-appointed experts

Under the previous versions, the rules provided that when a party submits a witness statement or an expert report, it could only submit additional or revised statements or reports when addressing matters contained in another party's witness statements, expert reports, or other submissions that had not been previously presented in the arbitration. Subsequently, parties could not otherwise submit additional witness statements or expert reports.

The arbitral tribunal, however, frequently disregarded this provision since its strict implementation could raise concerns regarding due process and a party's right to be heard. New sub-paragraphs (b) in Article 4.6 on witnesses of fact and Article 5.3 on party appointed experts henceforth provide that the additional statements can also respond to new developments that could not have been addressed in a previous statement or report.

Moreover, a provision was added to Article 8.5 under which even when it is decided that witness statements and expert reports will serve as direct testimony, *"the Arbitral Tribunal may nevertheless permit further oral direct testimony".* This addition codifies the frequent tendency of tribunals to order, per their discretionary powers, oral testimonies regardless of whether the statements or reports were to initially serve as a direct testimony.

The role of tribunal-appointed experts

On tribunal-appointed experts, Article 6.3, which addresses requests to the parties for information by the tribunal-appointed expert, previously provided that the authority of the expert to request such information *"shall be the same as the authority of the Arbitral Tribunal".* This sentence, that mistakenly suggested that a tribunal-appointed expert could have an equivalent authority to the tribunal, has been removed in the 2020 revision.

In conclusion, the 2010 IBA rules on the taking of evidence in international arbitration had to be revised, firstly to align with the constantly and quickly evolving practice, and secondly to adapt to the constraints of the new decade. The 2020 revision is, in that sense, timely and fulfils both objectives.

It is unfortunate, however, that other provisions of the Rules remain ambiguous, such as those on adverse inference (Articles 9.6 and 9.7) or that of legal impediment and privilege (Articles 9.2 and 9.4). These provisions remain subject to legal controversies or divergences between different legal systems, and cannot consequently be defined by rules whose principal aim is to codify prevailing practices.

Legal actions against the cancellation of premarket approvals by the Mexican Food and Drug Agency

Manuel Ferrara
Associate, Mexico
T +52 55 2623 0552
E manuel.ferrara@cms-wll.com

Daniel Bucio Cruz
Associate, Mexico
T +52 55 2623 0552
E daniel.bucio@cms-wll.com

Complying with the health regulations in Mexico involves navigating obstacles for laboratories and companies that manufacture, import, distribute, and commercialise drugs in Mexico.

Mexican drug regulation

The Mexican Food and Drug Agency *(Comisión Federal para la Protección contra Riesgos Sanitarios or COFEPRIS),* is the federal agency in charge of the national health policy and other health services, including regulating drugs and medical devices.

According to the General Health Law, companies that manufacture, import, distribute, and commercialise drugs in Mexico need premarket approval from COFEPRIS. Companies must prove compliance with good manufacturing practices, safety and efficacy standards, pharmacovigilance, labelling standards, and other applicable provisions to obtain premarket approval. These approvals are valid for five years, but the applicable law establishes a renewal process to renew such permissions for the same period every five years.

Under the Health Supplies Regulation, the renewal request must be presented at least 150 days before the effective date of the authorisation. Once the request is filed, COFERPIS has 150 days to issue the resolution that renews premarket approval. Under the applicable law, if COFEPRIS does not issue a resolution, the authorisation should be assumed as granted for the same period (i.e. five years).

The aim of this mechanism is to comply with the international treaties that Mexico has ratified, and safeguard public health.

COFEPRIS Arbitrary Conducts

In practice, however, COFEPRIS regularly does not adhere to the prescribed period in dealing with the requests of renewal authorisations. Often COFEPRIS responds to such requests years later and cancels the authorisations. Furthermore, it forces companies to withdraw from the Mexican market within 60 days all drugs registered under that authorisation.

From a legal perspective, these resolutions are unlawful because COFEPRIS does not comply with the legal requirements relating to dealing with the renewal authorisation requests. From a practical perspective, COFEPRIS generates a problem in the Mexican drug market since those drugs that already have authorisation are regularly used for treatment of illnesses. This latter problem has been exacerbated during the COVID-19 pandemic.

Litigation against COFEPRIS

In dealing with the arbitrary nature of COFEPRIS's acts related to renewal authorisation requests, companies have the option to file a nullity claim at the Environmental and Regulatory Court of the Federal Administrative Court. The principal argument in these claims is that COFEPRIS' conduct is contrary to the principle of legal certainty, stemming from the fact that the applicable law establishes that when COFEPRIS does not resolve the request within 150 days of presentation, the authorisation is assumed to be granted.

Mexican Administrative Law establishes a general rule that in all administrative processes, the "silence" of a governmental authority for a certain period, generally three months, can be interpreted as a negative response by the authority. In that case, an affected party can either await the decision of the authority or seek judicial recourse. However, as explained above, the law relating to renewal requests of premarket approvals establishes an exception to the general rule, with the silence of COFEPRIS for a period of 150 days or longer to be interpreted as a favourable response to a renewal authorisation request.

Based on the principles above, the Environmental and Regulatory Court has determined that despite COFEPRIS purporting to cancel authorisations, companies have conferred on them a right recognised by the simple passage of time that COFEPRIS cannot ignore.

That is why in the first instance, the Court granted the suspension of all acts (and consequential effects) generated by the unlawful conduct of COFEPRIS, including the requirement to withdraw drugs from the Mexican market until judgment is handed down.

Furthermore, the Court also issued rulings recognising the unlawful conduct of COFEPRIS. Applying the applicable law, the Court also ruled that the silence of COFEPRIS effectively means that the renewal authorisation request is deemed to be granted.

Constitutional Court contributes to the strengthening of arbitration in Spain

Elisa Martín
Senior Associate, Spain
T +34 91 4519 338
E elisa.martin@cms-asl.com

Three judgments issued by the Spanish Constitutional Court between June 2020 and March 2021 represent a huge step forward towards protecting and strengthening arbitration in Spain.[1]

Previously, the Civil and Criminal Chambers of several High Courts of Justice in Spain broadly interpreted the concept of public policy when dealing with actions for annulment of arbitral awards. This led to several cases in which arbitral awards were overturned based on being in conflict with public policy, thus weakening the reliability of arbitration in the market. This issue has been particularly significant in Madrid.

However, things seem set to change. In less than a year, the Spanish Constitutional Court has rendered three decisive judgments that aim to put an end to this practice by setting out key principles for dealing with actions for the annulment of arbitral awards and establishing clear boundaries for courts when it comes to arbitration.

Key principles

When analysing actions on the infringement of fundamental rights and freedoms brought against judgments and decisions by the Civil and Criminal Chamber of the High Court of Justice of Madrid, the Spanish Constitutional Court defines the key criteria that ordinary courts must follow when dealing with actions for the annulment of arbitral awards.

Firstly, when the parties agree to settle a dispute arising from their contractual relationship through arbitration, this entails that they willingly and definitively remove any potential controversy therein from ordinary courts. Therefore, the revision of arbitral awards by ordinary

[1] We refer to judgments No. 46/2020 of 15 June; No. 17/2021 of 15 February and No. 65/2021 of 15 March.

courts may only refer to the aspects specifically allowed by the Spanish Arbitration Act, and courts may not replace the arbitrator under any circumstances when ruling on these cases. This means that ordinary courts are unable to analyse the merits of the case subject to arbitration even if an action for annulment has been lodged.

Secondly, in relation to the principle that conflict with public policy can justify the annulment of an arbitral award, the Spanish Constitutional Court has clarified that this concept should be interpreted strictly, from both a material and a procedural perspective. The critique by the Spanish Constitutional Court is also enlightening. The judgments state that breach of public policy cannot be used as an excuse for ordinary courts to replace the conclusions reached by arbitrators in awards subject to actions for annulment. In such cases, the courts would be overreaching their capacity to review arbitral awards and would be infringing the autonomous will of the parties. The consequence of courts misinterpreting the concept of public policy in these cases is the infringement of the right of the parties to effective judicial protection.

Thirdly, the Spanish Constitutional Court sets out limits for ordinary courts to overturn arbitral awards based on a failure to state reasons for their conclusions on the case (again, grounded in conflict with public policy). Based on the principle that arbitration is a form of dispute resolution willingly chosen by the parties, arbitral awards are not subject to the same requirements on grounding as court judgments. Whereas court judgments must comply with stricter conditions regarding the statement of reasons, arbitral awards are merely required to show the criteria that have led to the decision reached by the arbitrator (except cases in which the parties have established additional conditions to be met by the arbitral award). Therefore, only those arbitral awards that can be deemed unreasonable, arbitrary or in patent error may be considered to have failed to state reasons for their conclusion. It follows that ordinary courts may not overturn arbitral awards where the court does not agree with the rationale or conclusions provided by the arbitrator. These new judgments give more certainty to the submission of disputes to arbitration by the parties and any subsequent awards granted.

Finally, a court reviewing arbitration proceedings as part of an application for an annulment of arbitral awards is not permitted to review the merits of the case or the evidence submitted to the arbitration proceeding. Therefore, it is stressed that the arbitrator should exclusively carry out the analysis of the merits and evidence.

Conclusion

Based on the foregoing criteria, actions for the annulment of arbitral awards can only refer to procedural errors that actually cause the infringement of fundamental rights or guarantees of the parties, such as the right to defence, equality, bilateralism, the adversarial nature of the proceedings, or evidence. Other examples include when the arbitral award lacks statement of reasons, or is inconsistent or in conflict with imperative regulations or a previous final decision. Thus, it is clear that the action for the annulment of arbitral awards is exceptional and protective not only in the analysis of the merits of the case developed by the arbitrator, but most importantly, in the right of the parties to settle the relevant dispute through arbitration proceedings.

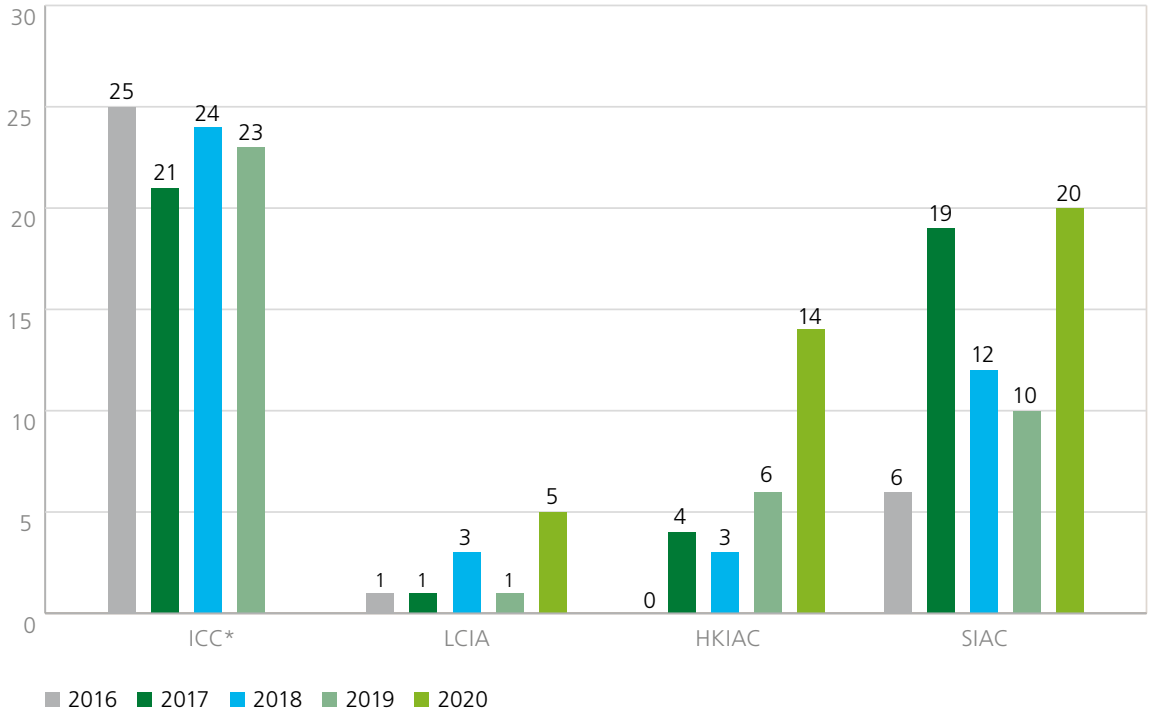
These judgments remove uncertainty on how actions for the annulment of arbitral awards based on conflict with public policy should be dealt with. It is clear that the firm and illustrative views provided by the Spanish Constitutional Court on this matter will be extremely helpful in positioning Spain as a forum for both national and international arbitration, as well as in promoting the submission of disputes to arbitration in an environment of legal certainty.

The rise of emergency arbitration

Guy Pendell
Partner, United Kingdom
T +44 2073 6724 04
E guy.pendell@cms-cmno.com

Louise Boswell
Partner, United Kingdom
T +44 2073 6737 25
E louise.boswell@cms-cmno.com

In matters of urgency, the courts in many jurisdictions have long provided parties with ways to protect their position by obtaining temporary orders pending the resolution of their dispute at trial (i.e. "interim relief"). Historically, similar measures have not been available in arbitration. However, growing competition among the leading arbitral institutions and perhaps user demand has seen many arbitral institutions amending their rules to provide for a range of measures aimed at providing urgent interim relief or an expedited process. Parties to institutional arbitrations around the world may now apply to appoint an "emergency" arbitrator who will determine applications for interim relief on an expedited timeframe. The following article is an overview of the practicalities of this relatively new and developing area, which compares the approaches taken by four of the most popular arbitral institutions: the London Court of International Arbitration **("LCIA"),** the International Chamber of Commerce **("ICC"),** the Hong Kong International Arbitration Centre **("HKIAC")** and the Singapore International Arbitration Centre **("SIAC")**.



***** 2020 figures for the ICC have not yet been published.

When can emergency arbitrations be useful?

Many arbitral rules provide for some flexibility in the arbitration timetable, including shortening timeframes if appropriate. Expedited timetabling (including expedited formation of a tribunal) is one way to speed up proceedings to resolve disputes quickly. However, while this has the potential to shorten the arbitral process significantly, a tribunal for an expedited arbitration is unlikely to be able to order relief (even interim relief) until months into the arbitration. An emergency arbitrator, on the other hand, will usually be able to grant relief (either in the form of an order or award) within two weeks of its commencement.

Emergency arbitrations are therefore an option where there is not enough time for a party to wait until the tribunal has been appointed, applications have been made and hearings have taken place for interim relief or a final award. Emergency arbitrators have the power to grant interim (or provisional) orders or awards pending the appointment of the tribunal. Some institutions even permit the appointment of an emergency arbitrator where a notice of arbitration has not yet been filed with the institution, such as the ICC. Other institutional tribunals, including the LCIA, HKIAC and SIAC, permit an application for an emergency arbitrator where it is filed alongside or following the filing of a notice of arbitration.

The sole mandate of an emergency arbitrator is to address an urgent application for relief, meaning that an emergency arbitrator will not make any final determination on the merits of the underlying dispute. Following the emergency arbitration, the case will revert to the usual arbitration procedure and timetable and the tribunal may then review and vary, confirm, or set aside the order or award of the emergency arbitrator.

How often are emergency arbitrators used?

The rules providing for emergency arbitration are relatively new and use of the facility is growing but is still infrequent. The table above highlights the number of emergency arbitrator applications accepted by the institutions featured in this article.

The relatively low number of emergency arbitrator applications is unsurprising, given that urgent relief is generally justified only in exceptional circumstances. Nonetheless, as the available 2020 figures suggest, applications for emergency arbitrations are increasing.

Procedural considerations

While procedures differ between tribunals, the formal requirements for an application for an emergency arbitrator are broadly similar. It is typically a two-stage process where the institution will first consider the application (in its discretion) and determine whether to appoint an arbitrator. Then, if the institution has so

	LCIA	ICC	HKIAC	SIAC
Time in which an emergency arbitrator will be appointed if granted	Within three days of receipt of the application (or as soon as possible thereafter)	Within as short a time as possible, normally within two days of receipt of the application	Within 24 hours after receipt of both the Application and the Application Deposit.	Within one day of receipt by the Registrar of the application and payment of the administration fee and deposits
Time in which the emergency arbitrator is obliged to determine the emergency proceedings	As soon as possible and no later than 14 days from the appointment	No later than 15 days from the date on which the file was transmitted to the emergency arbitrator	Within 14 days from the date on which HKIAC transmitted the case file to the emergency arbitrator	Within 14 days from the date of his appointment unless, in exceptional circumstances, the Registrar extends the time
Form of relief: order or award	Discretion of emergency arbitrator	Order	Order or award or other form	Discretion of emergency arbitrator

determined, the emergency arbitrator will be given a very short time in which to determine the proceedings. The table above identifies the timescales for these steps and the available form of relief.

Many of these time limits may be modified by agreement of the parties or, in appropriate circumstances, the arbitral tribunal itself.

What forms of relief are available?

There are mixed views on the scope of relief available from an emergency arbitrator. Relief intended to preserve contractual performance, evidence or substantive assets that are the subject of the underlying contract is likely to be available in most procedures. Whether relief is available that is more substantive, and may have the effect of fully or partly determining the dispute (even on a provisional basis), is less clear.

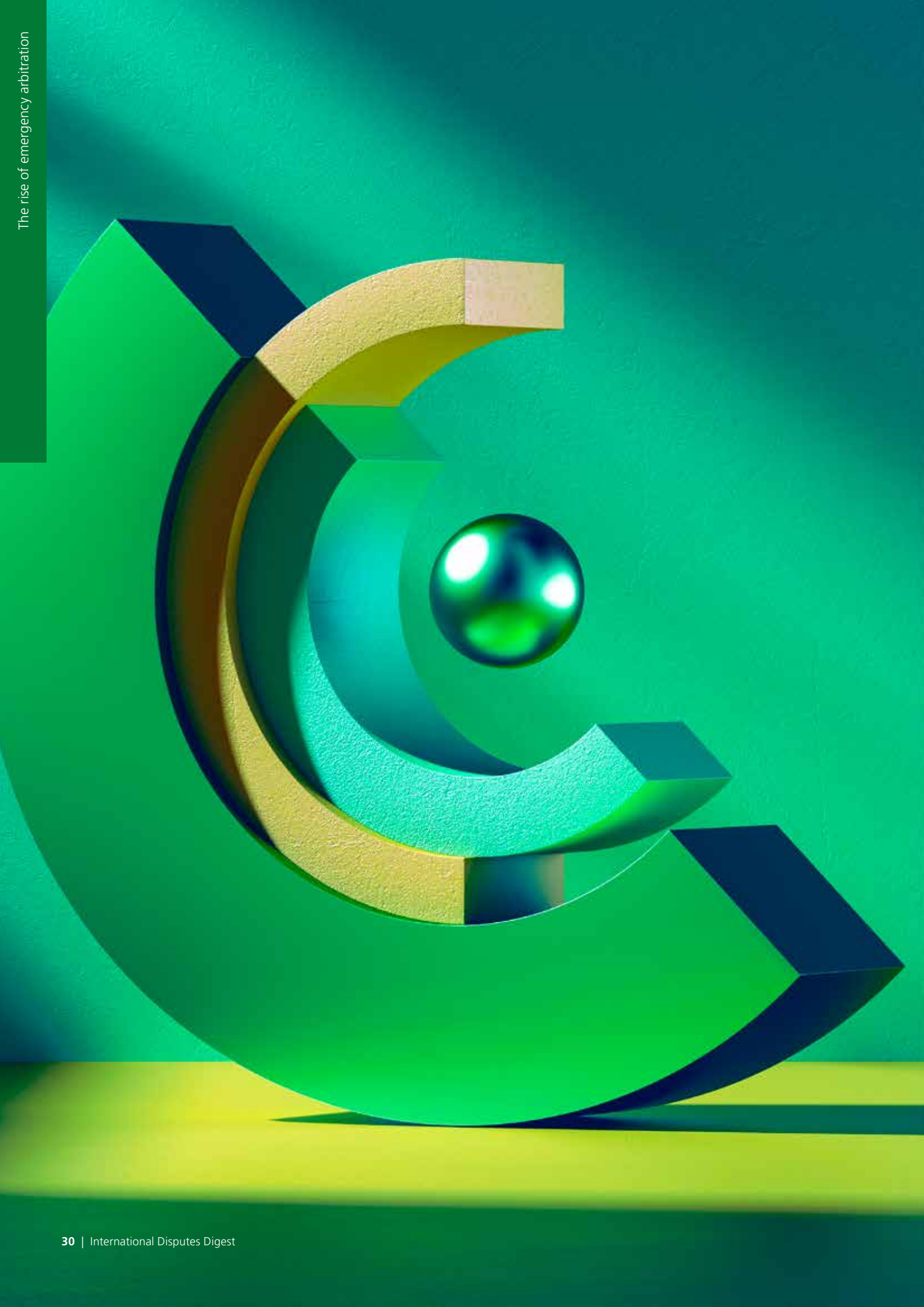
There are generally no formal limitations on the type of relief available. However, some forms of relief are more common than others. For example, of the first 80 emergency arbitration applications referred to in the 2019 ICC Commission Report, 51 cases concerned preserving the status quo, 23 concerned specific performance of contractual obligations, seven concerned the transfer of funds into an escrow account, and ten concerned declaratory relief.

Generally, an emergency arbitrator has a wide discretion to order whatever relief is considered necessary, although the specific rules of each institution may vary. For example, while most institutions would permit an emergency arbitrator to grant relief in the form of an order or award, that is not always the case (as highlighted in the table in the section above). This may be important when it comes to matters of enforcement.

Will emergency relief be granted?

Whether relief is awarded and the tests applied by the emergency arbitrator are also typically matters of discretion.

The rules generally require that the interim relief sought must be "urgent". There is no universal approach taken by the various arbitral institutions as to what "urgent" means. In the English court case of *Gerald Metals SA v Timis* [2016] EWHC 2327, "urgency" under LCIA Rules was considered the same as "urgency" under section 44 of the Arbitration Act 1996. Accordingly, under LCIA Rules, a matter will be considered urgent if "effective relief cannot otherwise be granted within the relevant timescale". An assessment of urgency will likely also involve consideration of the practical benefit of the relief sought. Since the first stage is the determination by the institution in its discretion, there is little or no available information about the thresholds that would be applied.



When the emergency arbitrator is deciding whether to grant interim relief, they will likely consider the risk of the applicant suffering "irreparable harm" if no relief were to be given; or whether greater harm would be suffered by the respondent if the relief were to be granted. In measuring the risk of irreparable harm, arbitrators will typically consider whether the harm may be remedied in any other way, such as by awarding damages. If so, emergency relief is likely to be denied. Tribunals may also look at other factors, such as whether a *prima facie* case is made out on the merits of the claim, proportionality, and jurisdictional matters.

Interaction with national courts

For the majority of arbitral rules, the appointment of an emergency arbitrator does not prevent a party from seeking immediate or interim relief from a national court, unless the parties have expressly excluded this as an option in their agreement. One advantage of interim relief ordered by state courts is that a court can swiftly grant an order, which can be immediately enforced, if necessary. In exceptional cases, this can also be done by the applicant without notice to the respondent (*ex parte*) – an option not available in arbitration. However, since urgent relief may now be obtained in arbitration, courts may be less willing or able to grant urgent relief where an emergency arbitrator could equally grant it. That will be an important consideration for any party in deciding what option to pursue.

The benefits of emergency arbitrations include confidentiality of the process, less formal evidential and procedural requirements. In many courts, a pre-requisite to obtaining interim relief is for the application to provide a cross-undertaking for damages. While respondents in an emergency arbitration may seek similar protective measures, there is no established requirement to do so.

Applicants will also want to consider the enforceability of any interim order or award and obtain legal advice in jurisdictions where the emergency relief may need to be enforced. Many jurisdictions do not automatically enforce interim awards and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which provides a standard and widely accepted regime for the recognition and enforcement of final arbitral awards, does *not* cover interim arbitral awards or orders, meaning that their enforceability is inconsistent across jurisdictions. However, a respondent deliberately failing to comply with an emergency award or order may face more serious problems in the substantive arbitration. As such, a substantial number of emergency awards or orders will be complied with voluntarily. It is the authors' first-hand experience that in some cases, securing an emergency arbitral award will also be sufficient to bring about a voluntary resolution of a matter once the parties see "the writing on the wall".

Conclusion

Emergency arbitrations are a welcome procedure in the dispute resolution toolkit that offer parties additional options for seeking speedy assistance in resolving a dispute. They will not necessarily achieve a full and final resolution of the dispute. However, they may provide important safeguards to protect rights along the way and in suitable cases may provide effective relief and resolution, in less time and at far lower cost.

Cryptocurrency and its seizure: An overview of the legal situation in Turkey

İremgül Mansur
Associate, Turkey
T +90 212 401 4269
E iremguel.mansur@cms-rrh.com

Döne Yalçın
Managing Partner, Turkey
T +90 212 401 4260
E doene.yalcin@cms-rrh.com

Since 2020, demand for cryptocurrencies has exploded in Turkey, as it has in other countries. The increase in the number of local cryptocurrency exchanges and the establishment of local branches of foreign exchanges in Turkey has also played an important role in this explosion of demand.

As cryptocurrencies become more prominent, their legal status becomes crucial, which is why discussions among companies, investors, and legal experts are focusing more on this topic. The questions that arise are not theoretical, but address issues such as (i) the usability of cryptocurrencies in transactions, whether the agreement is based on a sale or an exchange transaction; or (ii) the attachability of cryptocurrencies and what procedures are subject to such attachability and whether cryptocurrencies are to be treated as movable or immovable assets.

This article discusses the legal status of cryptocurrencies in enforcement proceedings based on a landmark decision by a Turkish civil enforcement court.

Cryptocurrency: A tool for business change or investment

In the words of Satoshi Nakamoto, the creator of the first known cryptocurrency Bitcoin, in his widely read article "Bitcoin: A Peer-to-Peer Electronic Cash System": *"What is needed is an electronic payment system based on cryptographic proof rather than trust that allows two willing parties to trade directly with each other without the need for a trusted third party".* This sentence alone is enough to explain that the original idea behind cryptocurrencies is to create a tool for electronic commerce that enables secure transactions by eliminating the need for any third party to process electronic payments.

However, among other reasons, the market is showing a tendency to use cryptocurrencies as an investment instrument due to significant price fluctuations. Therefore, new cryptocurrencies have emerged, and new exchanges have been established for this purpose since the introduction of the first cryptocurrency in 2009.

Recently, the Central Bank of Turkey published the Regulation on the Non-Use of Crypto-Assets in Payments (the **"Regulation"**), which came into force on 30 April 2021. According to the Regulation, (i) crypto-assets may[1] not be used directly or indirectly in payment transactions; and (ii) no service may be provided in relation to the direct or indirect payments through cryptoassets. The Regulation has been heavily criticised for this along with the argument that it blocks technological development and restricts the right to ownership from those who have invested in cryptocurrencies contrary to the hierarchy of norms. What the Regulation does not prohibit is investment in cryptoassets. Conversely, the Capital Markets Board of Turkey has issued numerous announcements to inform investors that cryptoassets are experimental businesses mainly outside the scope of their supervision. This means that investors who put their money into unregulated cryptoassets are taking risks.

In fact, not all cryptocurrency exchanges have been realised to date (40 local cryptocurrency exchanges are currently operating) and collapse is an ever-present risk. In 2021, four major cryptocurrency exchanges have shut down their systems, and thousands of aggrieved investors are waiting for investigations to be completed to recover their money.

Nevertheless, some investors accept the risks and place a considerable amount of their savings in cryptoassets. Since public institutions ignore this market and leave the actors unsupervised, the danger of evasion of law by investing in cryptoassets to hide money from litigation becomes a great threat to society and the economy. To eliminate this and provide safer investment alternatives with more stable currency fluctuations, Turkish lawmakers are expected to further regulate the legal status of cryptoassets.

A Turkish court ruled: "Cryptocurrencies are to be considered a type of digital currency; therefore, they can be confiscated."

Although there is no specific regulation in Turkish legislation on cryptocurrencies and their position in enforcement proceedings, a Civil Enforcement Court of First Instance in Istanbul clarified this issue on 19 April 2021 and ruled that cryptocurrencies can be attached. According to the Turkish Bankruptcy and Enforcement Code, all assets and rights of a debtor may be subject to attachment proceedings, regardless of physical possession. In other words, if a debtor's assets and rights are in the possession of a third natural or legal person, the respective enforcement office is entitled to send notices to the relevant third party who may have the debtor's assets or claims, requesting the attachment of an amount equal to the amount of the debt. Such third parties are usually banks, the land registry directorate, the traffic department, or institutions similar in terms of assets.

In this decision, an enforcement officer in Istanbul sent a notice to a cryptocurrency exchange operating in Turkey at the request of the plaintiff and seized the debtor's cryptocurrency equivalent to the total debt amount of approximately TRY 60,000.

The debtor was informed by the support team of the respective exchange that his account had been blocked due to an attachment and could only be unblocked after presentation of an official certificate of retrieval of the attachment.

The debtor objected to the attachment. The Civil Enforcement Court of First Instance ruled on the objection on 19 May 2021. Specifically, the Court decided that cryptocurrencies are to be considered as goods and securities (*emtia ve menkul kıymetler*), that they are a type of digital currency and can be attached. Thus, the court rejected the objection.

The debtor's further objections regarding the enforcement officer's decision to sell the seized assets (i.e. cryptocurrency) were also rejected by the Civil Enforcement Court of First Instance on 20 May 2021. The court ruled that regardless of the financial classification, any asset or right that represents economic value can be the subject of seizure proceedings under enforcement and bankruptcy law. This is the first known case of cryptocurrencies being subject to enforcement proceedings. Accordingly, as shown here, the legal status of cryptocurrencies has been defined as attachable property by a court for the first time in Turkey.

[1] The Regulation defines "cryptoassets" as intangible assets created virtually through the use of distributed ledger technology (tr. dağıtık defter teknolojisi) or similar technology and distributed through digital networks and not classified as fiat money, registered money, electronic money, payment instrument, security or other capital market instrument.

Although there is no established case-law on this and another court or the respective court may change this approach in another case, this is the first important decision on this controversial issue.

Difficulties with cryptocurrency seizure procedures

Even if the courts follow the above approach and decide that cryptocurrencies are attachable assets, there are still many difficulties for each further step of the corresponding enforcement procedure.

First of all, under Turkish law, there are two types of assets: movable and immovable. Both procedures do not correspond to the nature of cryptoassets.

On the other hand, due to rapid currency fluctuations, it is not clear how to determine which exchange rate should be the basis of payment and who assumes the risk of loss of value between the time of seizure and sale. Moreover, as cryptocurrency exchanges are experimental businesses, they are exposed to the risk of fraud in some degree during this period.

Furthermore, law enforcement officials in Turkey do not have e-wallets. So it is not yet clear whether enforcement officers will be able to sell the cryptoassets. On the other hand, as mentioned above, there are over 40 local cryptocurrency exchanges operating in Turkey and it is not certain whether every enforcement office in Turkey will recognise and have access to every cryptocurrency exchange. These practices may violate the principle of equality, as cryptoassets in foreign or undisclosed local exchanges may benefit from a *de facto* exemption.

Last but not least, this complex area raises the question of whether such attachment procedures violate the Central Bank of Turkey's Regulation, as enforcement agencies will use cryptoassets to pay a debt.

The legal status of cryptocurrencies and their position in enforcement law is a multidimensional issue that cannot be developed within court proceedings and requires comprehensive legislation.

Conclusion

The recent court decision (referred to here) and the Regulation reveals that the Turkish legal system tends to accept cryptocurrencies as attachable "property". However, as cryptocurrencies are complex and multifaceted assets, it is prejudicial to shape such vivid issues related to the right to ownership based on case law and individual remarks of local courts that are binding solely on the parties of the particular dispute. On the other hand, as the trading volume of cryptocurrency exchanges grows and the technology evolves, the need for legal predictability becomes more of an issue.

As a result, general legal acts with higher status than regulations are needed to cover the array of issues of companies, technology, and individuals and to ensure legal certainty.

Hybrid Dispute Resolution procedures

Robin Wood
Senior Associate, United Kingdom
T +44 2073 6721 23
E robin.wood@cms-cmno.com

Marta Lalaguna
Counsel, Spain
T +34 91 4520 004
E marta.lalaguna@cms-asl.com

What are Hybrid Methods Med-Arb, Arb-Med and Arb-Med-Arb?

As a consequence of the disruption caused to many national court systems by the COVID-19 pandemic, ADRs are being further enhanced and new forms of "Hybrid ADR" are receiving increased interest.

A Hybrid ADR combines elements of consensual methods with determinative methods of dispute resolution. The best-known hybrid method of dispute resolution is Med-Arb, which combines mediation and arbitration successively, with the same person acting as mediator and arbitrator.

The intention of Med-Arb is to address the limitations of mediation (principally by ensuring that the parties end up with a solution to the dispute) and those found in arbitration (improving the chances of maintaining commercial relations). However, concerns have been raised that a mediator who is also an arbitrator may not reach the standard of impartiality required of all arbitrators, and that this could be used as grounds to annul an award granted by Med-Arb in some jurisdictions. To try to address the limitations of Med-Arb, practitioners have developed further variants. Most include a third-party mediator.

Among these variants is the "reverse" of Med-Arb, known as Arb-Med in which the arbitration is held and the arbitrator keeps the award *in a sealed envelope* to give the parties the opportunity to try to reach an agreement in a mediation process conducted by him. If the parties reach an agreement, the arbitrator will not reveal the award; otherwise the award will be disclosed and only then will be binding.

A further extension of the Arb-Med approach is Arb-Med-Arb, which has been developed institutionally by the Singapore Mediation and Arbitration courts. In this procedure one of the parties submits a request for arbitration and, once the tribunal is constituted, the arbitration is suspended and the matter is referred to mediation. In this model, the arbitrator and the mediator are different people and – to avoid delays – a time limit is established for the mediation.

The most obvious advantage of this mechanism is that it synchronises and coordinates the transition from mediation to arbitration, which means greater agility and certainty within the process, mitigating the procedural risks noted above.

How widely used are hybrid ADR procedures in practice?

It is difficult to know exactly how widespread the use of hybrid methods is in the international market, but there does seem to be an appetite for combining arbitration with other forms of ADR. Furthermore, arbitral institutions, well placed to determine how parties are choosing to resolve their disputes, now see a demand for med-arb and other similar hybrid processes.

Studies of market participants (mainly lawyers, arbitrators and mediators) show the following:

— A study published by Queen Mary's University of London in May 2021 showed that 90% of respondents prefer international arbitration, either on its own (31%) or in conjunction with other means of ADR (59%). In other words, approximately 60% of respondents, users of arbitration, prefer to use it in conjunction with another means of dispute resolution. It should be noted that this percentage

is increasing with respect to the results of the same survey in previous years: (i) 49% in the study published in 2018; and, (ii) 34% in the study published in 2015.

— In a study published in February 2021, entitled "Mediation in Arbitration", slightly fewer than half of the mediators who had experience with mediation in arbitration reported that they resolved at least 70% of these cases in mediation. Of these mediators, most indicated that their success rate was above 80% for mediation in arbitration.

Despite the apparent preference in the market for combining arbitration with ADR, only a minority of cases were resolved by the combined use of mediation and arbitration. The reality is that many ADR practitioners remain reluctant to use these methods, because they are relatively new and, as discussed above, have some risks, which can be off-putting for the parties and their representatives.

Standard clauses of hybrid methods of the main international mediation and arbitration institutions and in Spain

Leading arbitration and mediation institutions have recently taken steps to promote hybrid methods. It is important to note the emerging role of mediation and that almost all arbitration institutions are recognising its possibilities individually or combined with arbitration.

At the international level, examples include:

— **American Arbitration Association (AAA).** In the AAA's Commercial Arbitration Rules, published on 1 October 2013, Rule 9 provides that, where the claim or counterclaim exceeds USD 75,000, the parties are required to mediate in accordance with the AAA's Commercial Mediation Procedures.

— **DIS (German Institution of Arbitration).** DIS Rules 2018, Article 27.4 (iii) refers to the fact that the arbitral tribunal should seek to encourage an amicable settlement of the dispute throughout the proceedings.

— **ICC.** In the "New ICC Rules", which entered into force on 1 January 2021, regarding mediation, arbitral tribunals are invited to "encourage" the parties – Article 22 (2) and Appendix IV, paragraph (h) (i) – to consider reaching a settlement by informing the parties about the Mediation Rules and the benefits of mediation.

— **The Rules of the International Centre for Dispute Resolution (ICDR),** in its new rules published on 1 March 2021, continue its tradition of inviting parties to resort to mediation in accordance with ICDR Mediation Rules. Unless otherwise agreed upon, Mediation will run concurrently with Arbitration and the mediator will not be a member of the tribunal.

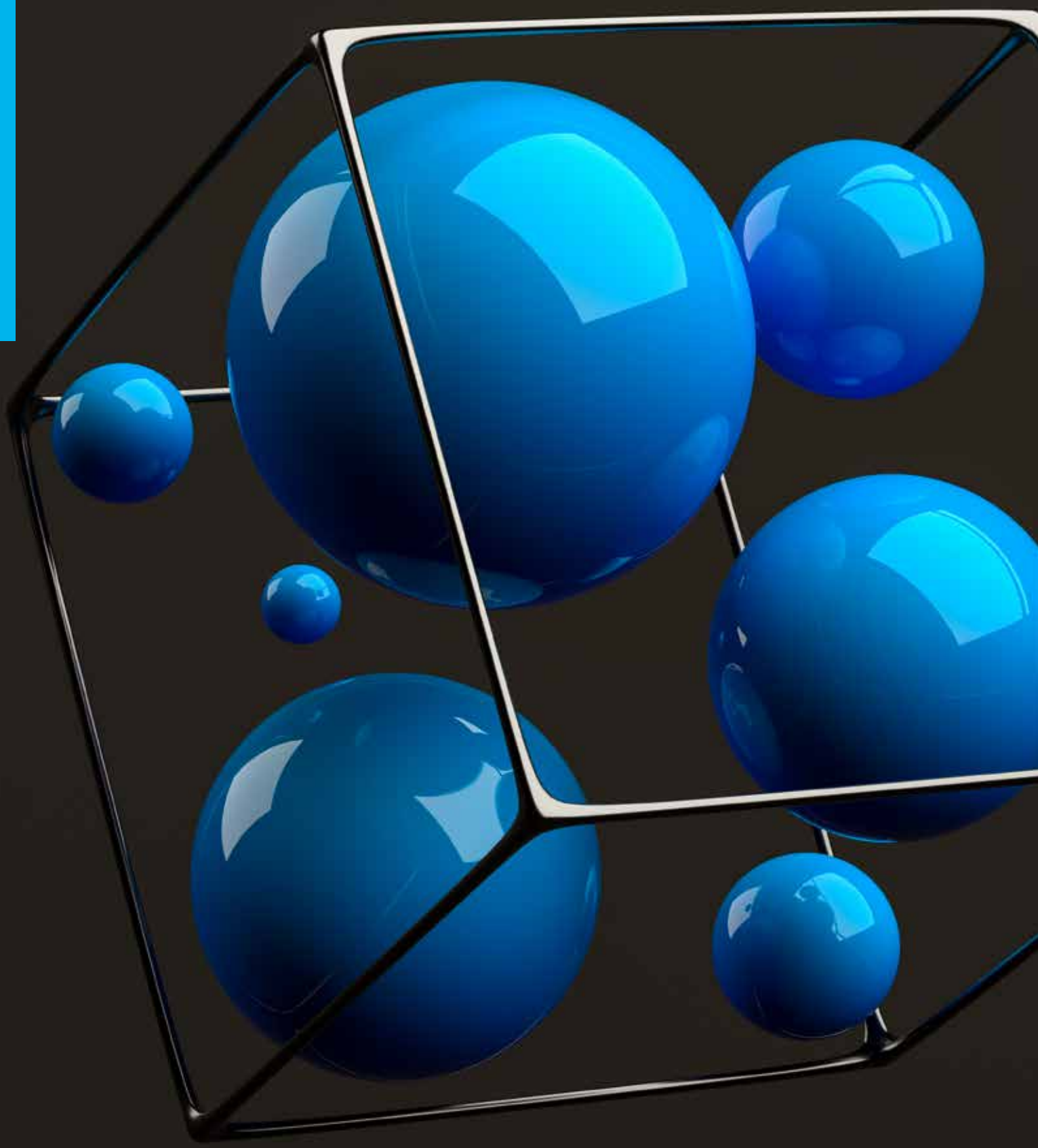
In Spain, the "Preliminary Draft Law on Procedural Efficiency Measures of the Public Service of Justice", approved by the Council of Ministers on 15 December 2020 and published on 21 January 2021, introduces the obligation to attempt ADR (not only mediation) in civil and commercial disputes before initiating litigation. Thus, when initiating litigation in Spain by way of example, the claimant must include a document showing that negotiation has been attempted prior to issuing proceedings. This attempt will also serve to interrupt the statute of limitations and suspend the expiration of any actions.

Both in Spain and other jurisdictions, the main arbitration institutions have also published model clauses, which combine mediation and arbitration. While the terminology used is not consistent between institutions, these clauses are closer to Med-Arb concept.

Conclusion

The implementation of Hybrid ADR depends on the ADR culture of each country, and these methods do seem to enjoy greater acceptance in Anglo-Saxon countries with a long tradition of ADR.

According to the published data, it seems that these mechanisms are not yet being used on a regular basis. This could be due to lack of awareness, lack of previous experience or reluctance based on potential risks that they may entail. These limitations can be mitigated, in most cases, by agreement between the parties and by including adequate wording of the clauses that contemplate these mechanisms. Their application does, however, require extreme caution and knowledge by the parties and their advisers.



English courts expand the duty-of-care principle

Zainab Hodgson
Senior Associate, United Kingdom
T +44 2075 2469 48
E zainab.hodgson@cms-cmno.com

Tim Malloch
Senior Associate, United Kingdom
T +44 20 7367 2499
E tim.malloch@cms-cmno.com

Alex Danchenko
Associate, United Kingdom
T +44 20 7367 3723
E alex.danchenko@cms-cmno.com

Co-Authors

Karen Denny
Partner, United Kingdom
T +44 2075 2464 70
E karen.denny@cms-cmno.com

Carl Dray
Partner, United Kingdom
T +44 1142 7940 49
E carl.dray@cms-cmno.com

The UK Supreme Court's recent judgment in ***Okpabi and others v Royal Dutch Shell Plc and another*** [2021] UKSC 3 is of significance to UK based parent companies operating in industries that could attract a high risk of environmental, social and governance **("ESG")** related harms. The Supreme Court's judgment provides guidance to parent companies on how they might owe a duty of care to third parties and, therefore, be potentially liable in negligence for their subsidiaries' overseas operations. Alongside a number of other recent cases, the Supreme Court's decision is indicative of a broader judicial trend whereby English courts appear to be expanding the principles of duty of care.

Factual and procedural background

The case has a long and protracted procedural history. In 2015, over 40,000 Nigerian citizens initiated proceedings against Royal Dutch Shell **("RDS"),** a company domiciled in England and the parent company of the multinational Shell group of companies. The claimants alleged that RDS was liable in negligence for various oil spills in the Niger Delta. The claimants argued that RDS owed them a duty of care because it exercised significant control over material aspects of the operations and activities of its Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria Ltd. **("SPDC"),** the second defendant in the proceedings. The claimants sought to join SPDC in the proceedings before the English courts, and a *forum non conveniens* argument ensued.

To proceed to trial on the substantive issues before the English courts, the claimants needed to establish RDS as the anchor defendant in order to attract the English courts' jurisdiction over the claim with SPDC joined as a necessary and proper party. To achieve this, the claimants had to show that there was a real issue to be tried against RDS, proving that the claim has a real prospect of success. The following is the summary judgment test under English law.

At first instance, in January 2017 the English High Court concluded that it was *"not reasonably arguable that there is any duty of care upon RDS",* and the claimants' case was struck out. In February 2018, the Court of Appeal ruling in the majority upheld this decision.

In a unanimous judgment, the UK Supreme Court has overturned the decisions of the lower courts. In reaching that conclusion, the Supreme Court relied heavily on its earlier judgment in ***Vedanta Resources PLC and another v. Lungowe and others*** [2019] UKSC 20, and concluded that the claimants had shown that there was a real issue to be tried against RDS. As a result, the court allowed the claim to proceed to trial on the merits against RDS and SPDC.

Issues before the Supreme Court

The appeal before the Supreme Court raised two important issues:

1. Whether the majority of the Court of Appeal materially erred in law, particularly in its analysis of:
   (a) The principles of parent company liability in its consideration of the factors and circumstances that may give rise to a duty of care.
   (b) The procedure for determining the arguability of the claim at an interlocutory stage.
   (c) The overall analytical framework for determining whether a duty of care exists in this type of case, and the reliance on the threefold test espoused in ***Caparo Industries plc v Dickman*** [1990] 2 AC 605.
2. If the Court of Appeal had erred in law, whether the claimants have an arguable case that a UK domiciled parent company owed them a common law duty of care so as to properly establish jurisdiction against a foreign subsidiary company as a necessary and proper party to the proceedings.

The first issue

The Supreme Court emphasised that there is no limiting principle that *"a parent company could never incur a duty of care in respect of the activities of a particular subsidiary merely by laying down group-wide policies and guidelines, and expecting the management of each subsidiary to comply with them."*

Rather, liability will turn on the extent and way in which the parent is availed of the *"opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations… of the subsidiary"* (***Vedanta,*** para 49). To that extent, it is clear that each case will be fact specific.

The Court deemed control to be just a starting point. The key issue is the extent to which the parent did take over or share the management of the relevant activity with the subsidiary. As an example, the Court commented that a parent company may incur the relevant responsibility to third parties if, in published materials, it states that it exercises that degree of supervision and control of its subsidiaries, even if in fact it does not do so.

The second issue

The Supreme Court concluded that the Court of Appeal had erred in law in terms of the procedure for determining the arguability of the claim at an interlocutory stage. The Court found that both of the lower courts had incorrectly embarked on a mini-trial, which caused them to make determinations in relation to contested factual evidence that were inappropriate to make in an interlocutory application. Importantly, the Court commented that the analytical focus should be on the particulars of the claim and whether, on the basis of the alleged facts, the cause of action asserted has a real prospect of success. Except in cases where allegations of fact are demonstrably untrue or unsupportable, it will be inappropriate for a defendant to dispute the facts alleged by adducing evidence of its own.

Furthermore, the Supreme Court held that the Court of Appeal had wrongly dismissed the relevance of future disclosure and whether there were reasonable grounds for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue, particularly the disclosure of internal corporate documents.

The third issue

The Supreme Court concluded that it was "wrong" for the lower courts to analyse the case by reference to the threefold test in ***Caparo Industries plc v Dickman.*** Following ***Vedanta***, it was determined that the law relating to the liability of parent companies in relation to the activities of their subsidiaries is not a distinct category of liability in common law negligence. It gives rise to no new issues of law and must be determined on ordinary general principles of the law of tort regarding the imposition of a duty of care.

Outcome of the appeal

The Supreme Court held that there is a real issue to be tried in relation to RDS's potential duty of care to the claimants. The approach of Sales LJ in the Court of Appeal was adopted, with the Supreme Court noting that the Shell group is organised along business and functional lines, as opposed to corporate status.

Judicial trend

The decision in ***Okpabi*** is yet another example of the English appellate courts showing willingness to extend the law of negligence. For example, the Court of Appeal's judgment in ***Begum v Maran*** [2021] 3 WLUK 162 has reaffirmed that there is an arguable case for the English former owners of a ship to answer in refusing to strike out the claim of a Bangladeshi widow whose husband had been killed while dismantling a ship in the Bangladeshi shipbreaking yards in Chittagong. In its judgment in ***Begum***, the Court of Appeal emphasised that this area of tort law was a new and rapidly developing one.

The decision on the threshold question of "an arguable case" re-emphasises that the threshold is a low one for a claimant to pass. However, it should not be forgotten that ***Okpabi*** was decided on a preliminary issue and there is a long way to go before the duty of care arguments are fully tested. Moreover, the decision of the English High Court in ***Municipio de Marina & others v BHP Group Plc and another*** [2020] EWHC 2930 provides a clear warning that the English courts will not always jump to the assistance of overseas claimants. In that case, over 200,000 Brazilian claimants commenced proceedings in the English High Court and sought compensation for damage caused by the 2015 collapse of the Fundão Dam in South Eastern Brazil. Their claims, however, were struck down as an abuse of process because parallel proceedings were ongoing in Brazil.

As a consequence, it remains to be seen whether ***Okpabi*** and ***Vedanta*** signals a settled direction for the English courts in readily accepting jurisdiction.

Practical implications

3. The ***Okpabi*** judgment highlights that an English domiciled parent company may be liable before the English courts for claims brought by overseas claimants in circumstances where the parent company can be shown to owe a duty of care towards the claimants for the acts of its subsidiary. With developments in human rights law and the ever increasing profile of environmental, social and governance (ESG) and the need for companies to comply with international environmental standards, it seems likely that the law of negligence will continue to evolve.

4. Multinational companies should review their risk registers, policies and reporting procedures and consider whether their organisational structure may contribute to the risk of liability as between subsidiaries and on the parent company to third parties impacted by the group's activities.

5. Corporate governance gives rise to an uncomfortable tension for group companies and the parent who will no doubt want to promote and ensure compliance with ESG standards that they have committed to and promoted to shareholders, but who also do not want to be potentially exposed to negligence claims related to the activities and operations of their subsidiaries.

The Finality of Arbitral Awards: the Kenyan Position

Zeus Ombeva
Associate, Kenya
T +254 20 711064000
E zeus.ombeva@cms-di.com

George Muchiri
Partner, Kenya
T +254 20 4297000
E george.muchiri@cms-di.com

Background

Among the various touted advantages of arbitration is that when parties agree to arbitrate their commercial disputes, the dispute will be adjudicated in an expeditious and cost-effective manner. This necessarily gives rise to the issue of the finality of arbitral awards: which is to say, the question of when courts of law can interfere with arbitral awards.

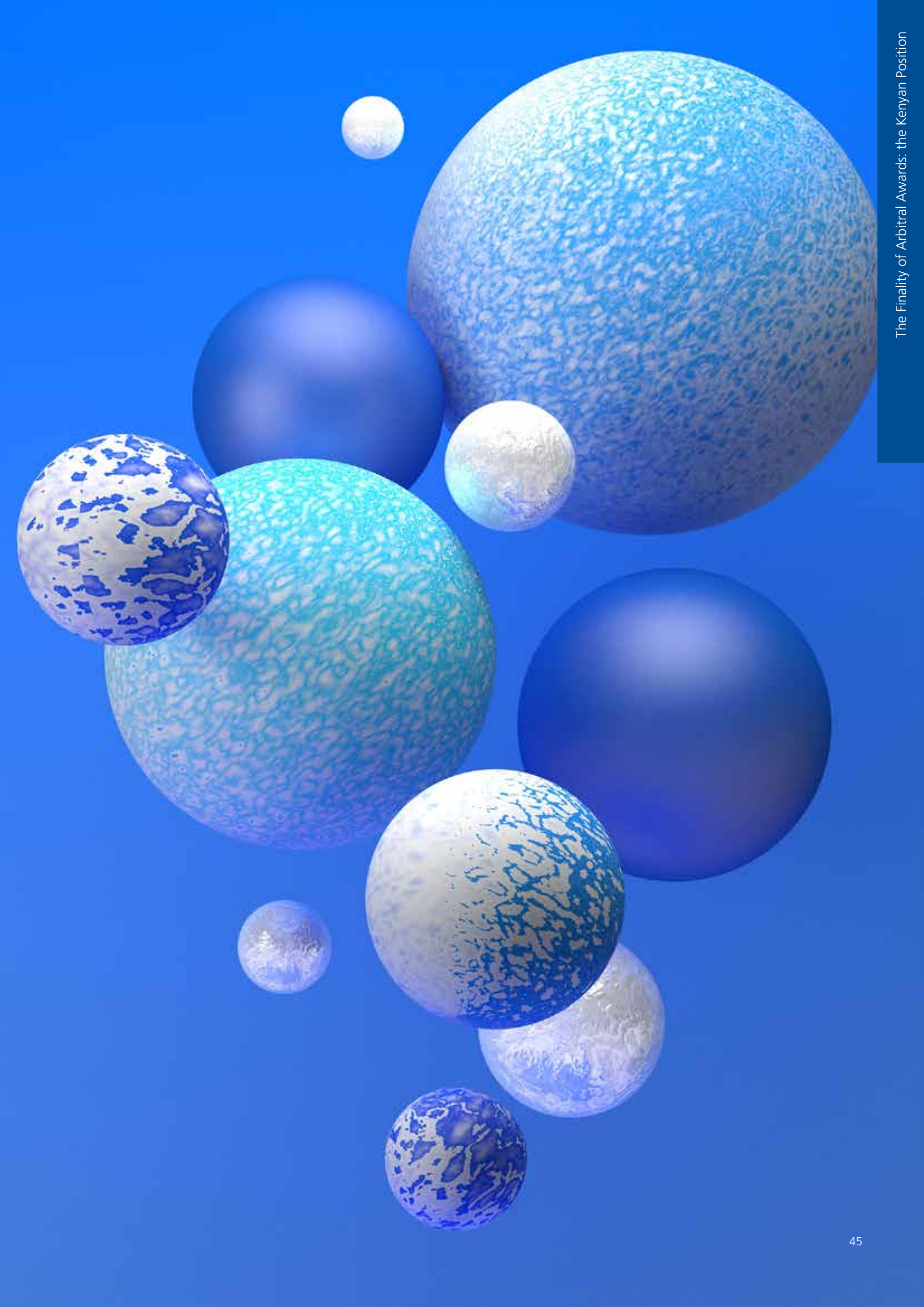
The Kenyan courts have, in the last decade of post-enactment of the 2010 Constitution, engaged in robust analysis of a party's right to appeal arbitral awards. The Kenya Arbitration Act 1995 ("**the Act**") provides, under section 35, that an application may be made to the High Court for the setting aside of an arbitral award on certain specific grounds, which include, *inter alia*, if the arbitration agreement was invalid under law, if the arbitrator was appointed irregularly, if such an award dealt with a dispute not contemplated by the parties, if it falls outside the terms of reference to arbitration, or if the award is against public policy.

While section 35 of the Act sets out succinct parameters under which an arbitral award can be challenged, it is silent on whether the High Court's decision is appealable by the Court of Appeal, and ultimately, the Supreme Court. This uncertainty forms the background under which the Kenyan Supreme Court has, in recent years, endeavoured to provide binding jurisprudence on the novel question of whether an aggrieved party may challenge a High Court's decision in courts of higher hierarchy. These cases, which are independently examined later in this article, include *Petition 12 of 2016: Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Another [2019] eKLR; Petition No. 2 of 2017: Synergy Industrial Credit Limited v Cape Holdings Limited [2019]; and Petition No. 47 of 2019: Geo Chem Middle East v Kenya Bureau of Standards [2020].*

The Law prior to the Nyutu Case

Before the Supreme Court's intervention, the Court of Appeal rendered conflicting decisions on the matter. As illustrated in the case of *Civil Application No. 302 of 2015: DHL Excel Supply Chain Kenya Limited -Vs.- Tilton Investment Limited [2017] eKLR*, the Court of Appeal – in granting the aggrieved party leave to file an appeal from the decision of the High Court – reinforced the proposition that since section 35 was silent on whether parties before the High Court have a right to appeal, this silence cannot be construed as denying a party the right to appeal. This position fortified an earlier position, before the enactment of the Constitution, where the Court of Appeal in *Civil Application No. 57 of 2006: Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR* reasoned that decisions by the High Court rendered following an appeal against an arbitral award were in fact appealable. The reason: had the Legislature meant to bar appeals nothing would have been simpler than to set out this out under section 35 of the Act.

The Court of Appeal, in other decisions, held in favour of the principle of the finality of arbitral awards. The reasoning behind this decision was that that parties to an arbitration agreement had, of their own volition, opted to have their dispute adjudicated outside the confines of the Courts.



This position was restated in a myriad of decisions stemming from the Court of Appeal, and resting with *Civil Appeal No. 228 of 2014: Micro-House Technologies Limited v Co-Operative College of Kenya [2017] eKLR*. To a large extent, the decisions from the Court of Appeal in which the Court held that appeals cannot be brought before it after a High Court decision under section 35, relied upon section 10 of the Act, which provides that *"except as provided in the Act, no court shall intervene in matters governed by the Act"*. This provision was modelled under Article 5 of the United Nations Commission on Trade Law Model Law ("the **UNCITRAL Model Law**"), which provides similarly that *"in matters governed by this law, no court shall intervene except where so provided in this law"*.

Nyutu v Airtel: ground-breaking decision

Following the consensus-deficient trajectory taken by the Court of Appeal, which had resulted in, for lack of a better phrase, jurisprudential turmoil, the Kenyan Supreme Court in Nyutu v Airtel was invited to determine the novel question of whether sections 10 and 35 of the Act contravened a party's right to access justice under the Constitution and whether there is in fact a right of appeal after a decision by the High Court under section 35 of the Act. The Supreme Court decision was critical since it established, other than the question of appealability from the High Court, the grounds upon which the Court of Appeal can interfere with a decision of the High Court.

The facts of the Nyutu Case, in summary, were as follows: Nyutu and Airtel entered into a distributorship agreement dated 20 December 2007 where Nyutu was contracted to distribute telephone handsets on Airtel's behalf. Airtel alleged fraud resulting in a commercial dispute that found its way before an arbitral tribunal whereafter an award was delivered in Nyutu's favour in the sum of approximately KES 541,005,922 (USD 5,056,130). Airtel sought to set aside that award, which the High Court granted on the basis that the grounds under section 35 had been met (i.e. the award contained decisions on matters beyond the distributorship agreement and terms of reference to arbitration).

Nyutu appealed the High Court decision to the Court of Appeal, but their appeal was struck down preliminarily on the basis that the High Court's decision was final and no appeal could be made to another court. Aggrieved, Nyutu filed a further appeal to the Supreme Court.

As the case raised issues of public importance, the Supreme Court assumed jurisdiction to determine the Petition in accordance with Article 163(4)(b) of the Constitution. As to the question of whether sections 10 and 35 were a hindrance of access to justice, the Court found that while it acknowledged that access to courts is a tenet of access to justice, statutory limitation to appeals do not necessarily infringe on access to justice. By so finding, these sections of the Act were rendered constitutionally sound. In a majority decision, and in answering the question on whether an appeal could emanate from a High Court decision under section 35, the Court, while answering in the affirmative, observed that both the Act and UNCITRAL Model Law do not expressly bar appeals from a determination of the High Court and furthermore, that an unfair determination by the High Court cannot be shielded from appellate review.

The Court, in its ultimate majority decision, found that a party may only appeal a High Court decision where the court, in determining whether to set aside an arbitral award, has considered grounds beyond those provided under section 35 and thereby made a decision so grave and manifestly wrong that the door of justice for either of the parties has been closed.

Nyutu's appeal to the Court of Appeal was, following the Supreme Court's determination, referred back to the Court of Appeal for a determination on its merits.

Synergy v Cape Holdings: reinforcing the Nyutu decision

Before the Supreme Court rendered its determination in the Nyutu case, a Petition with strikingly similar questions of law was filed in the Supreme Court by Synergy Industrial Credit Limited against Cape Holdings Limited. The facts in the Synergy case were that the parties entered into a purchase agreement for office and parking spaces. A dispute arose after Synergy advanced funds to Cape Holdings. The dispute was referred to arbitration after an award of KES 1,666,118,183 (USD 15,571,198) was made in Synergy's favour. While setting aside this award, the High Court found that the Arbitrator had acted *ultra vires* in his scope of reference and went on to rewrite the parties' agreement, among other grounds.

Synergy filed an appeal with the Court of Appeal, which was challenged on the basis that the Appellant had no right of appeal in view of sections 10 and 35 of the Act. By its Ruling, the Court of Appeal struck down Synergy's appeal and specifically held that no appeal could result from the High Court's decision.

In its Petition before the Supreme Court, Synergy sought reinstatement of its appeal. The Supreme Court allowed Synergy's appeal to be revived on the basis that, just as in the Nyutu case, an aggrieved party had a right to commence appeal proceedings against a High Court decision in instances where the High Court, in setting aside an award, went beyond the scope provided under section 35.

Maraga, CJ: the dissent

In both the Nyutu and Synergy cases, then Chief Justice David K. Maraga, who was also the President of the Court, dissented from the majority judgment. In his dissents, Maraga CJ. was of the view that allowing appeals beyond the High Court would be contrary to the legislative intention of sections 10 and 35 of the Act, whose purpose was, among other things, to insulate the arbitration process from courts with the ultimate goal of saving money and time in so far as the resolution of commercial disputes is concerned. According to the Court's then President, allowing court intervention in arbitration matters would have the grave implication of distorting the advantages of arbitration.

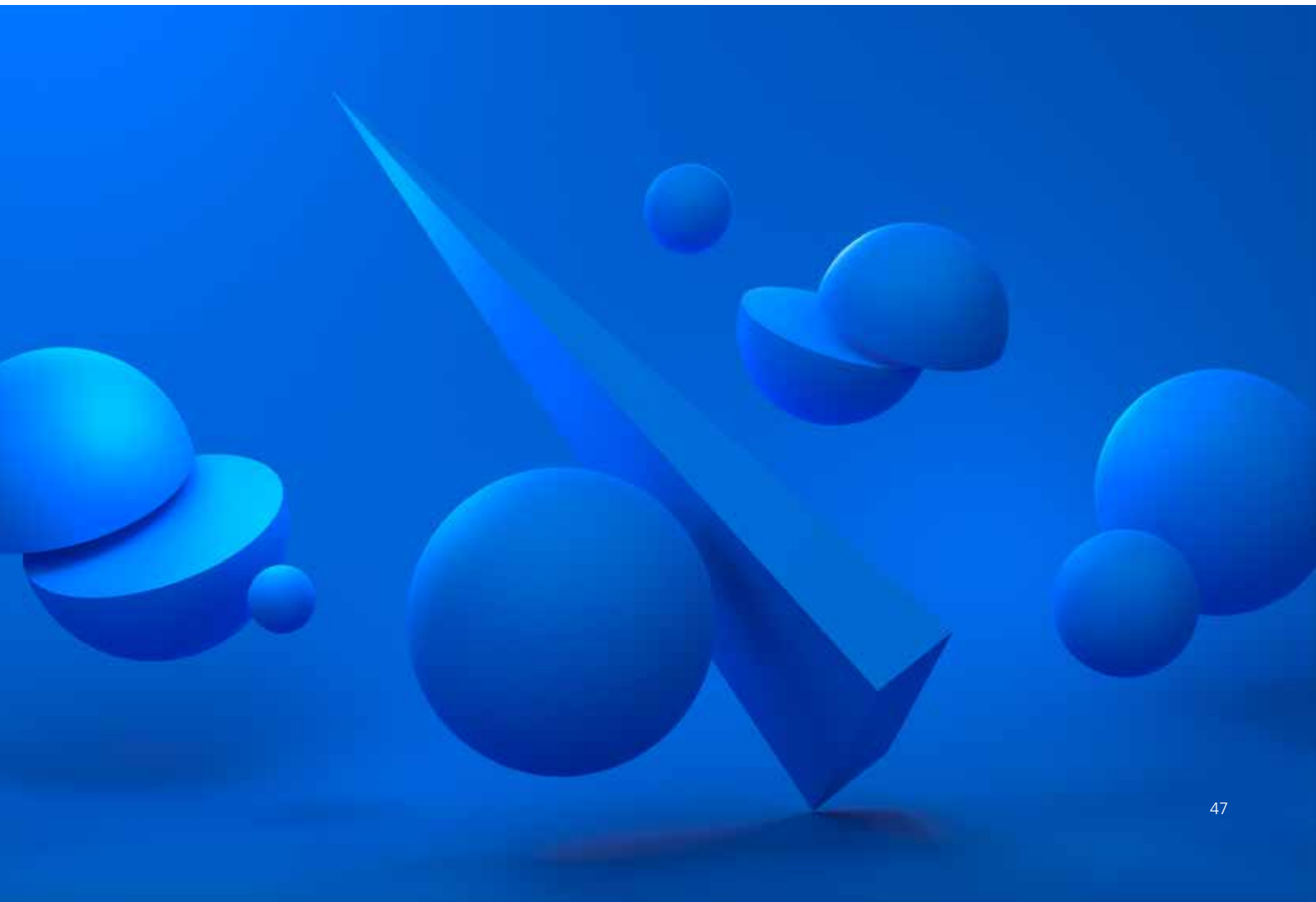
Geo Chem v Kenya Bureau of Standards: continuing jurisprudence

After Nyutu and Synergy, the Supreme Court entertained yet another Petition, which in effect held that the Court of Appeal was the last court of resort in so far as appeals on the merits of an arbitral award are concerned.

Conclusion

The present position, as confirmed by the Supreme Court decisions, is that if a party is displeased with an arbitral tribunal's decision, the aggrieved party may challenge the award in the High Court for setting it aside under section 35.

The decision by the High Court will, in turn, be appealable, but on the narrow ground that the High Court, while reaching its decision, stepped outside the grounds set out under section 35 of the Act and thereby made a decision so grave, and so manifestly wrong that it completely closed the door of justice to either of the Parties. The appeal to the Court of Appeal will be final.



Enforcing jurisdiction clauses and civil judgments after Brexit – an Anglo-German perspective

Evgenia Peiffer
Counsel, Germany
T +49 89 23807 219
E evgenia.peiffer@cms-hs.com

Luke Pardey
Partner, United Kingdom
T +44 2070 6735 51
E luke.pardey@cms-cmno.com

By including jurisdiction clauses in their international commercial contracts, parties strive to achieve certainty about the competent court and the applicable procedural framework for future disputes. Often, the choice of a jurisdiction is further driven by the need for efficient cross-border enforcement of a potential court judgment. To ensure that jurisdiction clauses continue to serve these purposes in a post-Brexit world, parties need to keep an eye on the changes, which took effect as of 1 January 2021.

On 31 December 2020, the transition period ended following the UK's formal withdrawal from the EU. The EU-UK Cooperation Agreement from 31 December 2020, however, does not address jurisdiction and cross-border enforcement of judgments in civil and commercial matters. As a result, the jurisdiction and enforcement provisions of the Regulation (EU) 1215/2012 ("Brussels I") will no longer apply in the UK in court proceedings initiated after 1 January 2021.[1]

The situation is the same for the Lugano Convention 2007 ("Lugano Convention"), applicable to the EU, Switzerland, Norway and Iceland, the provisions of which closely resemble those of Brussels I. The UK has applied to reaccede to the Lugano Convention 2007, but the EU has not consented to the UK's accession.

As the UK is unable to join the Lugano Convention, the Hague Choice of Court Convention 2005 ("Hague

[1] Court proceedings that have been initiated on or before 31 December 2020 will continue to be governed by the Brussels I provisions, both in terms of jurisdiction as well as for the recognition and enforcement of any court judgement.

Convention") will, at least for the time being, play an increasingly important role in the enforcement of exclusive jurisdiction agreements and foreign judgments between UK and EU countries (and other signatory states). In this article, we examine the mechanisms for enforcement under the Hague Convention, English and German national law, as well as the more general impact of Brexit on judicial cooperation in civil and commercial matters in the UK and Germany.

The Hague Choice of Court Convention

The Hague Convention entered into force on 1 October 2015 and provides uniform rules for the jurisdiction and enforcement of court judgments based on an exclusive choice of court agreement in favour of one of the contracting states. The courts of these states must enforce an exclusive choice of court agreement and either decide the dispute (if they are the designated forum) or dismiss the proceedings (if the chosen forum is in another contracting state). The contracting states are further obliged to recognise and enforce judgments rendered by a chosen court and can only refuse to do so in a limited number of circumstances similar to those of Brussels I and the Lugano Convention.

The contracting states of the Hague Convention include all EU states, Singapore, Mexico and Montenegro. Until 31 December 2020, the UK was a party to the Hague Convention by virtue of its EU membership. As of 1 January 2021, the UK acceded to the Hague Convention in its own right. Thus, it will apply to exclusive choice of court agreements in contracts between EU and UK parties going forward, although there is a degree of uncertainty about pre-2021 contracts that we will touch upon below.

As we explain in this article, the Hague Convention does and will continue to streamline the process for enforcing jurisdiction clauses and judgments rendered pursuant to those clauses. But parties need to bear in mind that:

— The Hague Convention applies solely to exclusive jurisdiction agreements between merchants. Unlike Brussels I and the Lugano Convention, it does not apply to B2C contracts. It also does not apply to asymmetric jurisdiction clauses, which are often found in loan agreements, including many Loan Market Associate standard forms.

— Several civil and commercial matters governed by Brussels I and the Lugano Convention are excluded from the scope of the Hague Convention. These include, *inter alia*, the transport of goods, anti-trust (competition) matters, as well as claims arising from rent and lease of immovable property.

— The Hague Convention expressly does not apply to interim measures, meaning that insofar as a party to an international contract (even one including an exclusive choice of jurisdiction) might want to apply for interim relief or enforce such relief abroad, this will need to take place outside the scope of the Hague Convention procedures.

— The Hague Convention only applies to exclusive jurisdiction agreements concluded after the state of the chosen court has joined the Convention. The UK's position is that it joined at the same time as all other then-EU member states on 1 October 2015 and has been a member continuously since. The EU Commission has taken a different view, namely that the UK only became a member for present purposes when it joined in its own right with effect from 1 January 2021. Although the Hague Convention website suggests that the UK has been a member since 1 October 2015, this is an issue with no single, universal truth – the UK courts might reach one view, but there is no guarantee that a court in an EU member state being asked to recognise a UK judgment would reach the same view. So the message is to be mindful of this potential gap if one is seeking to enforce exclusive jurisdiction agreements from before 2021 or judgments based on such agreements from the UK.

— While under the Hague Convention a court not chosen must suspend or dismiss a claim initiated before it and to which an exclusive choice of court agreement applies, it can refuse to do so if it considers that (i) the agreement is invalid, (ii) a party lacked the capacity to conclude the agreement, (iii) giving effect to the agreement would lead to a manifest injustice or manifestly contradict public policy, or (iv) the agreement cannot be reasonably performed for exceptional reasons beyond the parties' control. In contrast, under Brussels I, a court not chosen is obliged to stay its proceedings already, if – based on a cursory review – it is satisfied that a jurisdiction agreement exists. Under the Hague Convention, the risk of time and cost consuming parallel proceedings in different jurisdictions is thus generally higher than under Brussels I. As will be shown below, there are ways of minimising this risk.

The Hague Convention urges signatories to provide a quick and simplified procedure for recognition and enforcement. Both the UK and Germany have done so.

In the UK, Hague Convention judgments follow a simplified recognition procedure pursuant to the Civil Jurisdiction and Judgments Act 1982. Instead of having to bring an action on the judgment (which is the typical route to enforcement at common law), a judgment creditor merely applies to the Court for an order recognising the foreign judgment as, in essence, one of its own.

That application is made without notice to the judgment debtor and requires only a witness statement or affidavit in support. Once recognised, the foreign judgment is enforceable as if it were a UK judgment, unless the debtor applies to set recognition aside, which it can only do on very limited grounds (i.e. because it says the judgment was not in fact one to which the Hague Convention applied).

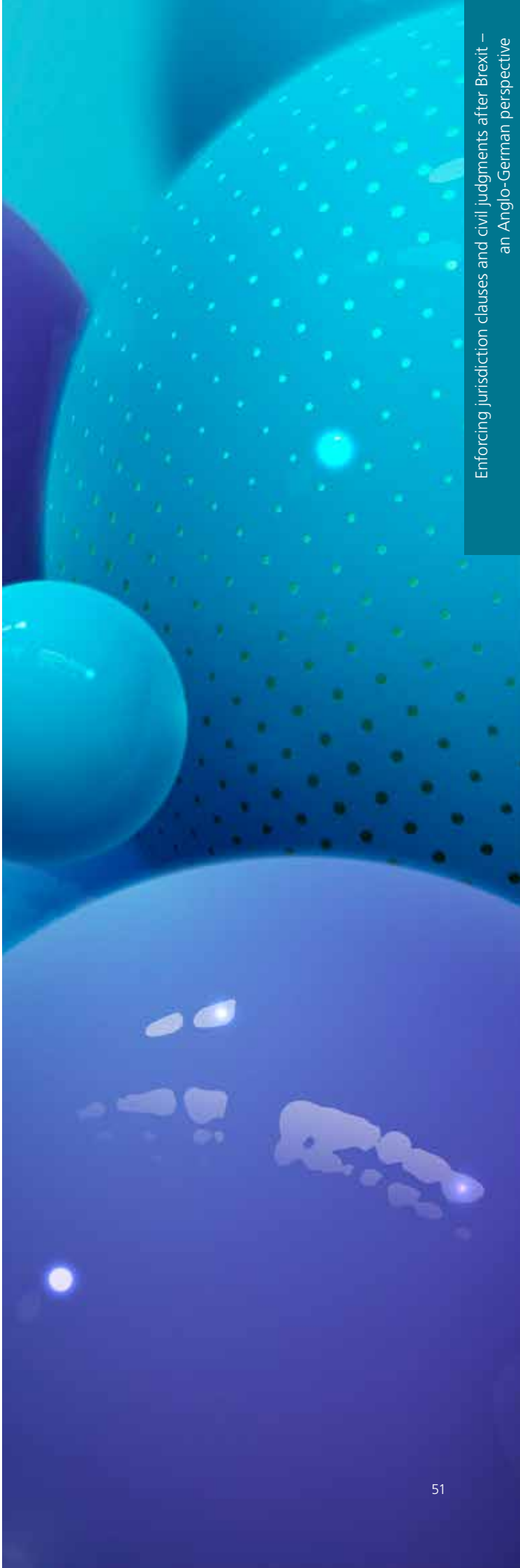
In Germany, the enforcement of Hague Convention judgments is governed by the Recognition and Enforcement Execution Act ("*AVAG*"). To initiate enforcement measures, the judgment creditor must request the competent regional court to issue an enforcement clause for the foreign judgment. The court will decide without hearing the judgment debtor.

Jurisdiction clauses and judgments outside the scope of the Hague Choice of Court Convention

When dealing with jurisdiction agreements and judgments outside the remit of the Hague Convention in court proceedings initiated after 1 January 2021, UK/EU counterparties must now revert largely to national law. That will add a layer of complexity and uncertainty to enforcement compared to the Brussels I framework.

Revival of the 1960 German-British Convention?

It is unclear whether the Convention between Germany and the UK for the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1960 ("German-British Convention") will apply to non-Hague Convention judgments. The German-British Convention provides rules for cross-border enforcement of German and UK judgments for a definite sum of money. The provisions of the Conventions are rather outdated: the enforcement requires an application of the judgment creditor for registration of the judgment. The reasons for refusal of the registration go far beyond those listed in Brussels I, the Lugano and the Hague Convention. The German-British Convention was superseded by the Brussels Convention 1968 and its successors. It is questionable if the German-British Convention will be revived as a result of Brexit. The EU Commission has spoken out against its applicability, and the UK government seems to assume that only its national law will apply.



English law

In the UK (and specifically England), the starting position is common law for the enforceability of jurisdiction agreements and judgments based on such agreements.

The English courts afford parties a high degree of autonomy in agreeing on the preferred forum to resolve their disputes. The English courts will typically uphold the choice the parties make. This means that the Court will – all things being equal – typically stay proceedings commenced in England in breach of a jurisdiction agreement, or consider granting anti-suit relief if a party brings proceedings elsewhere that should have been brought in England. Importantly, however, the Court is under no absolute obligation to uphold the parties' contractual choice of forum and has discretion to override the choice, either accepting jurisdiction where the contract suggests it should have none or refusing jurisdiction where the contract says that it is the appropriate forum. This discretion is not exercised lightly. Furthermore, a party inviting the Court to depart from a jurisdiction agreement will need to show strong reasons why England is or is not the appropriate forum.

Foreign judgments are not automatically enforceable in England. Instead, provided they are for money and are final and conclusive on the merits, they give rise to obligations that are directly actionable against judgment debtors. So, in this context, the label "enforcement" is in fact a proxy for legal proceedings to pursue the cause of action arising out of a foreign judgment. The procedure for pursuing that action is similar to any other civil action, but often can be short-circuited. Typically, a claimant looking to "enforce" its foreign judgment in England will apply for a summary judgment (i.e. a judgment without a hearing of evidence) and the Court will not allow a defendant to reopen the substantive issues determined by the foreign court.

Common law is the starting point, but in some cases statutory mechanisms allow a judgment creditor to avoid the more cumbersome "action on a judgment" and instead seek a streamlined order for recognition and enforcement. For present purposes, the most significant of these mechanisms arises from section 2 of the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides that final money judgments emanating from certain jurisdictions can be the subject of a simplified recognition procedure, in the same way as Hague Convention judgments, and thereafter be treated as judgments of the English Courts. This applies to a number of EU member states (namely Austria, Belgium, France, Germany, Italy and the Netherlands). The effect is that even non-Hague Convention judgments from those countries, unlike non-Hague Convention judgments from other EU member states, can be enforced in England much more simply by applying, without notice and on witness statement or affidavit, for recognition of the judgment and then proceeding straight to enforcement against assets.

German law

In Germany, the enforceability of jurisdiction agreements in favour of the UK courts outside the scope of the Hague Convention will be subject to national law.[2] German courts are obliged to recognise choice of court clauses, which have been validly concluded (according to the applicable law) and are permissible under German law (i.e. comply, *inter alia*, with sections 38, 40 of the German Code on Civil Procedure ("*ZPO*")). As a result, a German court must decide a dispute if a valid agreement confers jurisdiction on it or has to dismiss a claim if a valid and permissible agreement on the exclusive jurisdiction of foreign courts exists.

The recognition and enforcement of non-Hague Convention judgments from the UK in Germany are governed by sections 328, 722 and 723 of the ZPO. These provisions require a judgment debtor to initiate a separate court action for an enforcement judgment (*Vollstreckungsurteil*). While a German court will not review the reasoning of the UK court, it will examine various formalities such as the jurisdiction of the UK court, the proper service of the claim and the possibility of the defendant to arrange for his defence. In addition, a German court will assess if reciprocity is granted (i.e. if an equivalent German judgment would be recognised in the UK). These formalities will impede and could prevent the enforcement of a UK judgment in Germany.

Anti-suit injunctions and damages for breach of jurisdiction agreements post-Brexit?

While the applicability of the Hague Convention and national law entails some complexity and uncertainty for the enforceability of jurisdiction agreements and judgments, it could also bring additional flexibility compared to the Brussels I framework.

Where Brussels I applies, courts of one EU member state cannot grant an anti-suit injunction in respect of proceedings in another EU member state, even if a party is acting in breach of a jurisdiction agreement. The Hague Convention imposes no such restriction, meaning that the English courts, which are prominent exponents of anti-suit relief, will once again be free to grant such relief in the event that proceedings pursued in an EU member state are in breach of a jurisdiction agreement (and indeed in other circumstances where it considers such relief appropriate, such as where jurisdiction is already founded elsewhere).

[2] Outside the scope of the Hague Convention, German courts (as well as the courts in all remaining 26 EU countries) will continue to apply Brussels I to agreements between EU/UK counterparties, which provide for the jurisdiction of the courts of an EU member state.

It is anathema to the Brussels I framework that a party might be able to sue and seek damages from another party for breach of a jurisdiction agreement. There is less resistance to such actions where the Hague Convention applies, meaning that parties who disregard contractual promises only to sue or be sued in a specific jurisdiction may find themselves liable for the consequences of their breach. There are numerous examples of English courts granting damages for breach of an exclusive jurisdiction agreement. In Germany, the availability of damages has been controversially discussed. In a landmark ruling of 2019, the German Federal Court held that a party to an exclusive jurisdiction agreement who initiated proceedings outside the designated courts may be ordered to pay for the legal costs incurred by the defendant for the proceedings in the wrong forum. Bearing in mind that damages associated with pre-emptive litigation in breach of jurisdiction agreements can be substantial (indeed, such damages may be the reason those unlawful proceedings were commenced in the first place), this – combined with the availability of anti-suit relief – may cause parties to pause for reflection before launching proceedings in courts that lack proper jurisdiction.

Conclusion

In a post-Brexit world, there is increased uncertainty about how courts will approach jurisdiction agreements. Britain's accession to the Hague Convention goes some way to reduce that uncertainty, but it is a partial answer. The Hague Convention only applies to certain agreements and does not impose quite the same level of restrictions on national courts as does the Brussels I framework. However, national machinery, particularly in the UK and Germany, is sophisticated and will undoubtedly be adequate in the vast majority of cases. In cases where greater flexibility is more important than absolute certainty, life after Brexit will present more opportunities to deploy that machinery to one's advantage.

Recent developments in Singapore's arbitration law

Lakshanthi Fernando
Partner, Singapore
T +65 9648 9008
E lakshanthi.fernando@cms-holbornasia.com

Os Agarwal
Associate, Singapore
T +65 6422 2844
E os.agarwal@cms-holbornasia.com

While the pandemic and subsequent restrictions have changed the way disputes are handled, the most obvious effect being physical attendance at hearings, developments in Singapore's arbitration law have continued seemingly unabated. With 2020 being another record year for the Singapore Arbitration Centre (SIAC), a number of notable decisions have arisen in arbitration-related matters. We summarise some of these developments below.

Setting aside applications

Time Limit

In the recent decision of *Bloomsberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] SGCA 9, the Singapore Court of Appeal held that the three-month time limit for bringing an application to set aside an award under Article 34(3) of the *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law"), which applied to applications under section 24 of the International Arbitration Act as well, is absolute and cannot be extended, even in cases of fraud or corruption. Article 34(3) of the Model Law is clear on its face and does not suggest that any carve-out is available for fraud or corruption, or indeed any ground at all. Unlike some other Model Law jurisdictions, Singapore has not legislated separate time limits for arbitral awards influenced by procedural fraud. The Court also noted that in the context of arbitration awards, substantial injustice may be avoided despite the existence of fraud since the innocent party would be able to take action to resist and set aside the enforcement of the award.

In another notable case, *BRS v BRQ and another and another appeal* [2020] SGCA 108, the Singapore Court of Appeal clarified that a request for correction of an arbitral award under Article 33 of the Model Law would trigger an extension of the three-month time limit for bringing an application to set aside the award under Article 34(3) of the Model Law only if the substance, and not merely the form, of the request for correction came within the scope of Article 33 (i.e. to (a) correct any errors in computation, any clerical or typographical errors; (b) give an interpretation of a specific point of the award; and/or (c) make an additional award for claims presented in the arbitral proceedings but omitted from the award). On this basis, the Court concluded that the application in this case was time-barred since it sought a review of the Tribunal's decision on substantive matters, and this did not fall within the scope of Article 33.

The Court emphasised that while such an approach would result in less certainty, Article 33 is an exception to the initial time limit in Article 34(3). It would be incongruous and an abuse of the provisions if a party could obtain a time extension merely by making a request drafted to follow the terms of the applicable provision of Article 33, even if in substance it is clearly nothing of the sort. If the request did fall within the scope of Article 33 in substance, any application to set aside would have to be made within three months of disposal of such a request (whether allowed or dismissed).

Denial of opportunity to present case

In China Machine New Energy Corporation v Jaguar Energy Guatemala LLC and another [2020] 1 SLR 695, the Court of Appeal clarified that a party's right under Article 18 of the Model law to a "full opportunity to present his case" is not unlimited. Despite the use of the term "full", a party's right to be heard is impliedly limited by considerations of reasonableness and fairness and must be balanced against concerns for efficiency and expediency. The proper approach to be taken by a court in determining if a party has been denied his right to a fair hearing by the tribunal's conduct of the proceedings is to ask if what the tribunal did falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. In short, a tribunal is only required to give each party a reasonable opportunity to present its case.

Indemnity costs are exceptional

In another recent decision by Singapore's Court of Appeal in *CDM and another v CDP* [2021] SGCA 45, the Court reiterated that the imposition of costs on an indemnity basis was dependant on there being exceptional circumstances to warrant a departure from the usual course of awarding costs on a standard basis. In this case, the Court of Appeal declined to adopt the Hong Kong position of having a default position that an unsuccessful application to set aside an arbitral award will attract indemnity costs. It would not be "exceptional" if every instance of an award being unsuccessfully challenged could be said to be a presumptively exceptional circumstance warranting indemnity costs. The assessment of whether indemnity costs are warranted turns on a highly fact-specific assessment of the totality of the facts and circumstances, with the setting-aside context being merely one of the factors the court takes into consideration.

Enforceability and the seat of arbitration

In *ST Group Co Ltd and others v Sanum Investments Ltd and another* appeal [2020] 1 SLR 1, the Court of Appeal ruled that once an arbitration is wrongly seated, in the absence of a waiver by the parties, any award that ensues should not be recognised and enforced by other jurisdictions because such an award had not been obtained in accordance with the parties' arbitration agreement. Furthermore, a party resisting enforcement arising out of a wrongly seated arbitration need not demonstrate actual prejudice arising from the wrong seat, It suffices that a different supervisory court would have been available to parties for recourse had the arbitration been correctly seated.

Singapore's pro-arbitration policy is not without its limits

In the case of *BNA v BNB and others* [2020] 1 SLR, the Singapore courts considered the proper interpretation of the phrase "for arbitration in Shanghai". The issue before the Court of Appeal was whether a tribunal appointed by the SIAC lacked jurisdiction to hear the dispute on the grounds that Shanghai was the seat of the arbitration. In arriving at its decision, the Court reviewed an arbitration agreement set out in a contract governed by the laws of People's Republic of China (PRC) that provided for disputes to be submitted to SIAC for arbitration in Shanghai. As the parties had not specified the law governing the arbitration agreement, there was a presumption that this would be the same as the law of the underlying agreement (i.e. PRC law). Notably, the Court of Appeal reversed the decisions by the High Court and the arbitral tribunal, and held that *"arbitration in Shanghai"* naturally meant that Shanghai was the seat of the arbitration, and not merely the venue for hearings. The Court of Appeal noted that there was no contrary indication to point away from this reading. Notably, the Court of Appeal made this finding even though it would mean that the tribunal had no jurisdiction to determine the dispute between the parties, as PRC law does not permit a foreign arbitral institution to administer a PRC-seated arbitration. The Court of Appeal emphasised that arbitration agreements can be deemed invalid despite the parties' best intentions, and although Singapore maintains a pro-arbitration policy, it does not follow that parties' manifest intention to arbitrate must always be given effect to at all costs.

Issues of Jurisdiction vs Admissibility

In *BBA and others v BAZ and another* appeal [2020] 2 SLR 453, the Court of Appeal held that decisions of a tribunal on jurisdiction (i.e. power of the tribunal to hear a case) can be reviewed *de novo* by the courts at the seat of the arbitration, while decisions on admissibility (i.e. whether it was appropriate for the tribunal to hear a case) cannot. The distinction between issues that go to jurisdiction and admissibility can be made by applying the "tribunal versus claim" test underpinned by a consent-based analysis. The test asks whether the objection is targeted at the tribunal (in that the claim *should not be arbitrated* due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself was defective and *should not be raised at all*). On this basis, the Court declined to undertake a de novo review of the tribunal's decision on whether a claim was time-barred under the Indian Limitation Act because it found that issues of statutory limitation go towards admissibility.

In the subsequent decision of *BTN and another v BTP and another* [2020] SGCA 105, the Court of Appeal once again applied this distinction between jurisdiction and admissibility. The appellants had applied to set aside the arbitration award on the ground of public policy, arguing that they were prevented from litigating an important component of their defence since the tribunal had held it to be *res judicata*. The Court held that a tribunal's decision on the *res judicata* effect of a prior decision went towards admissibility and not jurisdiction, and therefore courts cannot review such a decision on its merits. As a result, the Court dismissed the setting aside application.

Some other notable cases

Article 22.1(vii) of the London Court of International Arbitration Rules allows consenting third parties to be joined to extant arbitrations so long as an existing party also consents to the joinder, even if another party to the arbitration objects (i.e. forced joinder). In the decision *CJD v CJE and another* [2021] SGHC 61, the Singapore High Court clarified that a forced joinder was a drastic order, and required express consent in writing from the third party to be joined. Such consent was not established simply by the third party being a signatory to a multi-party contract containing a generally worded arbitration agreement incorporating institutional arbitration rules that permit forced joinder. The wording of the arbitration agreement and the relevant institutional arbitration rule must be clear and unambiguous in empowering an arbitral tribunal to allow a forced joinder.

In the case of *Convexity Ltd v Phoenixfin Pte Ltd and others* [2021] SGHC 88, the Singapore High Court set aside an arbitral award where the claimant had objected to the late introduction of an issue into an arbitration. The tribunal, however, erroneously thought that the parties agreed on the introduction of the issue and then decided the arbitration on that issue. The Court found that there was a breach of natural justice prejudicing the claimant: the tribunal had exceeded the scope of submission to arbitration and acted contrary to the arbitral procedure agreed between the parties. The setting aside application was allowed.

International Arbitration Act

Finally, and in addition to the abovementioned developments to arbitration-related case-law, Singapore's International Arbitration Act (Cap 143A) (the "IAA"), underwent an overhaul in late 2020 following a public consultation in 2019. Of the four proposals put forward, the following two were introduced:

1. The introduction of a default mode of appointment of arbitrators in multi-party situations where the parties' agreement does not specify the applicable procedure; and
2. The explicit recognition of the powers of the arbitral tribunal and the High Court to enforce obligations of confidentiality by making orders or giving directions, where such obligations exist.

These amendments, which took effect from 1 December 2020, further strengthen Singapore's international arbitration framework.

Admissibility of "bottom-up" and "top-down" liability of a company

(Opinion of Advocate General Giovanni Pitruzzella issued in the Sumal v Commision case, C-882/19)

Anna Cudna-Wagner
Partner, Poland
T +48 22 520 5529
+48 22 520 5555
E anna.cudna-wagner@cms-cmno.com

Aleksandra Skrzypczynska
Associate
T +48 22 520 8423
E aleksandra.skrzypczynska@cms-cmno.com

The case-law of the Court of Justice of the European Union **("CJEU")**, in principle allows for the attribution of liability to a parent company for the anticompetitive conduct of its subsidiary (i.e. "bottom-up" liability). A precedent-setting position on the admissibility of the reverse theory – holding a subsidiary liable for infringements of its parent company ("top-down" liability) – was presented in the opinion of Advocate General Giovanni Pitruzzella issued in the *Sumal v Commision* case, C-882/19. Adopting such a view would have many consequences, particularly regarding follow-on damage actions (i.e. actions aimed at obtaining compensation for damage caused by infringements of competition rules previously found by a national or European competition authority) in substantive, procedural and jurisdictional terms.

Existing CJEU case-law for "bottom-up" liability

The CJEU has, in the past, imposed liability on a parent company for the anticompetitive conduct of its subsidiary on two alternative grounds:

1. The lack of autonomy of the subsidiary company, resulting from the exercise of decisive influence over it by the parent company;
2. The existence of an economic unit and joint action on the market despite the formal "veil" of two separate legal personalities.

In the first case, the parent company of the subsidiary attributed with unlawful conduct is held individually liable for an infringement of the competition rules, which it is deemed to have infringed.

In the latter approach, the decisive factor in assigning responsibility to a parent company for the anti-competitive behaviour of its subsidiary would be their uniform behaviour in the market, which combines several legally independent entities into one economic unit. From CJEU case-law, the basis of a parent company's liability for the anticompetitive conduct of its subsidiary also lies in the unity of the economic activities of those companies – that they constitute a single economic unit and a single undertaking for the purposes of applying competition rules. This determination must be made in the light of the economic, organisational and legal links that tie the subsidiary to its parent company.

Precedential view of Advocate General Giovanni Pitruzzella for "top-down" liability

The Advocate General, in his opinion in the *Sumal v Commision* case, C-882/19, stated that while, in a situation where the decisive influence of the parent company is accepted as a basis for attributing liability to the parent company for its subsidiary's infringements of competition law, there is no possibility for the subsidiary company to be held liable for the parent company's anticompetitive conduct (since the subsidiary does not, by definition, exercise any decisive influence over the parent company), it would, nevertheless, be admissible to accept such liability on the basis of the existence of an economic unit.

In the Advocate General's view, decisive influence is a necessary condition for the existence of an economic unit. In that sense, the criterion of decisive influence and that of the economic unit are not so much two alternative bases for the liability of the parent company as two logically necessary steps in the process of attributing liability for anticompetitive conduct. This liability, in the Advocate General's opinion, is first attributed to the undertaking understood as being the economic unit within which the infringement was committed. That liability is then allocated to the

individual companies within the undertaking. Those companies – as a legal person – should bear the consequences of the infringement (i.e. the fines or compensation).

The Advocate General also pointed out that the subsidiary's "top-down" liability results from (i) the decisive influence exercised by the parent company; and (ii) the fact that the subsidiary's business is objectively necessary for the effect of anticompetitive conduct (e.g. because the subsidiary sells goods that are the subject of the cartel). Therefore, in order for "top-down" liability to be incurred, the subsidiary must operate in the same area where the parent company engaged in anticompetitive conduct and must have been able, through its conduct on the market, to give effect to the infringement.

Moreover, the Advocate General emphasised, that, owing to the joint and several liability of each of the companies comprising the economic unit, pursuing and imposing a penalty only on the parent company by the Commission (*public enforcement*) does not preclude the possibility that its subsidiaries equally liable for the infringement may be held liable for the damage caused by the infringement of competition law (*private enforcement*).

Jurisdiction issues

In his opinion in the *Sumal v Commission* case C-882/19, the Advocate General also referred to jurisdictional issues.

The basis for consideration of this matter is Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the **"Regulation"**). Under Article 4 (1) of the Regulation, as a matter of principle, *persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.* However, this principle is subject to several exceptions. As to follow-on damages claims, it would also be possible to determine jurisdiction based on Article 7 (2) of the Regulation, which provides that in matters relating to tort, delict or quasi-delict, a person domiciled in a member state may be sued in another member state in the courts of the place where the harmful event had occurred or may occur.

The Advocate General points out that allowing the injured party to sue a subsidiary with which it has had direct or indirect commercial relations in order to obtain compensation for damages suffered as a result of the anti-competitive conduct of the parent company facilitates bringing an action for damages in cases where the parent company, unlike the subsidiary, is based in a country other than that of the injured party.

Pursuant to Article 7 (2) of the Regulation, the injured party has the option to sue the perpetrator of the infringement before the courts in the place where the harmful event had occurred. However, the Advocate General stressed that granting an injured party the right to bring an action against a subsidiary domiciled in its own member state avoids the practical complexities of serving the claim abroad and the enforcement of any judgment ordering damages. Moreover, enabling the injured party to choose the company against which it intends to bring an action increases its chances of fully satisfying its claims for damages.

Conclusions

The Advocate General proposes that the CJEU provide the following answer to the question that a Spanish court referred for a preliminary ruling:
Article 101 TFEU must be interpreted as meaning that, in an action for damages, the company may be held liable for damage caused by a breach of that article for which the Commission penalised only its parent company if it is shown, first, that, because of the economic, organisational and legal links between those companies, they formed one economic unit at the time of the infringement and, second, that the behaviour of the subsidiary on the market affected by the unlawful conduct of the parent company significantly contributed to the achievement of the purpose of the conduct and the consequences of the infringement.

The position of the Advocate General – although reasoned – is currently only an interesting view and a proposal for new solutions presented to the CJEU for consideration. The admissibility of "top-down" liability has not yet been confirmed in the jurisprudence of the CJEU. Ultimately, we should await the position of the CJEU on this matter. However, this is undeniably a precedent-setting issue with an impact on private enforcement and with far-reaching consequences, which should be closely monitored.

Chilean expropriation of annuity insurance contract – an international arbitration perspective

Hugo Ojeda
Associate, Chile
T +562 24852 032
E hugo.ojeda@cms-ca.com

Rodrigo Campero
Partner, Chile
T +562 24852 015
E rodrigo.campero@cms-ca.com

Stephan Luhrmann
Partner, Chile
T +562 24852 015
E stephan.luhrmann@cms-ca.com

The COVID-19 pandemic has caused a severe financial crisis that the Chilean government has tackled with a series of measures. One measure has been to reform the Constitution granting people the right to withdraw 10% of their pension savings from the individual accounts that they currently have with Pension Fund Administrators.

To date, Congress has approved three pension fund withdrawals. However, the latest reform to the Constitution through Law No. 21.330, published on 28 April 2021, included for the first time the possibility to request annuity advances from the technical reserves maintained by the respective insurance company. The Superintendency of Pensions states that insurance companies will have to disburse an estimated USD 2.6bn.[1]

In particular, the reform contains a single article that states:

As of the publication in the Official Gazette of this reform and through the following 365 days, pensioners or their beneficiaries for life annuity may, for a single time and voluntarily, advance the payment of their annuities up to the equivalent of ten percent of the value corresponding to the technical reserve that the pensioner maintains

[1] Information available on the official website of the Superintendency of Pensions, available at the link https://www.spensiones.cl/portal/institucional/594/articles-14447_recurso_1.pdf

with the respective insurance company to cover the payment of their pensions, with a maximum limit of UF 150 (approximately USD 6,194.78 today).[2]

The withdrawal made by pensioners or their beneficiaries who choose to request it, will be charged to the monthly amount of their future life annuities, pro rata, proportionally and in the same percentage as that representing the amount effectively withdrawn.

Although this reform applies to pension funds and annuities, both legal matters have different legal treatments.

In Chile, pension funds belong to affiliates of the mandatory individual capitalisation system and have no relationship whatsoever with the capital of the pension fund administrator. In other words, these are assets owned by the affiliate that are managed by third parties.

The function of these companies is to manage people's pension savings, so that all the profits that are produced by the investment of these resources belong to the affiliates and are destined to increase the balances of their respective mandatory individual capitalisation accounts.

For their part, life annuities consist of a contract, which is signed between the annuitant and the respective insurance company, by which the existing pension savings in the individual account of the affiliate are transferred and become part of the assets of the company, in exchange for the insurer paying him monthly until his death.

In other words, unlike pension funds, insurance companies own life annuity funds, and their economic utility is given by the difference that occurs between the amount received by pension savings transferred by the affiliate and the monthly income that person can receive before death.

Faced with this Constitutional reform, companies have argued that allowing annuitants to request an advance from their technical reserves is an expropriation because these assets belong to the insurance company. In addition, this process constitutes an alteration of the current contracts, which involve modifying the rights and obligations of the parties to the insurance contract.

Some of these companies, such as Principal, Consorcio, Metlife and Ohio, are owned by foreign investors, which are covered by special investment regimes regulated by International Treaties. These treaties include, among other things, special dispute resolution mechanisms and fall under the jurisdiction of International Tribunals, such as the International Centre for Settlement of Investment Disputes (ICSID).

According to recent data from the United Nations Conference on Trade and Development, Chile is obliged to respect 34 International Treaties for the promotion and protection of foreign investments and 27 Free Trade Agreements with rules on investment protection. According to Professor Matías Guiloff Titiun, these treaties and agreements have two central elements in common:

"*Firstly, the government's obligation not to discriminate, expropriate (directly or in a regulatory manner), or treat the foreign investor unfairly or unequally (including respecting their legitimate expectations) and secondly, foreign investors are protected by these treaties and can initiate an international arbitration for the violation of these treatment standards*".[3]

In general, after a mandatory amicable negotiation period, investors can initiate international arbitration without any other requirement since it is not necessary to exhaust local remedies before doing this. In this way, insurance companies, as foreign investors, are able to sue the Chilean government through these international organisations.

In our opinion, one of the main arguments to file this lawsuit is the existence of a regulatory expropriation, since these are acts or formal measures of the Chilean government, which seriously affect investments, resulting in the foreign investor losing part of its assets without receiving equitable compensation in return.

In effect, Law No. 21.330 deprives insurance companies of part of the pension savings funds transferred by the affiliate, decreasing the investor's assets. It modifies current contracts, particularly the obligation of the insurer to deliver the life annuity and the contingency of the contract, since this obligation is to be performed at a future date The contract becomes unconditional and there is an increase risk of loss for the company since the new law increases the possibility that the insured is able to receive a greater part of the transferred pension savings.

Therefore, we consider that from the perspective of international law, insurance companies are protected from the measures adopted by the Chilean government and can repair the damage suffered as a result of the modifications to the rights and obligations of current contracts and to the property rights affected through an ability to file lawsuits in International Courts, such as ICSID.

[2] "UF" is the acronym for "Unidad de Fomento", which is a unit of account created by Chilean law to adjust the variation of local currency to inflation on a monthly basis.

[3] Guiloff T., Matías. "If the government regulates, does it have to compensate?: Regarding the withdrawal of annuities. Seen at https://derecho.udp.cl/si-el-estado-regula-tiene-que-indemnizar-a-proposito-del-retiro-de-rentas-vitalicias

CMS around the globe

The Americas

Bogotá
Lima
Mexico City
Rio de Janeiro
Santiago de Chile

Europe

Aberdeen
Amsterdam
Antwerp
Barcelona
Belgrade
Bergen
Berlin
Bratislava
Bristol
Brussels
Bucharest
Budapest
Cologne
Duesseldorf
Edinburgh
Frankfurt
Funchal
Geneva
Glasgow
Hamburg
Istanbul
Kyiv
Leipzig
Lisbon
Ljubljana
London
Luxembourg
Lyon
Madrid
Manchester
Milan
Monaco
Moscow
Munich
Oslo
Paris
Podgorica
Poznan
Prague
Reading
Rome
Sarajevo
Sheffield
Skopje
Sofia
Stavanger
Strasbourg
Stuttgart
Tirana
Utrecht
Vienna
Warsaw
Zagreb
Zurich

Africa

Algiers
Casablanca
Johannesburg
Luanda
Mombasa
Nairobi

Middle East

Abu Dhabi
Beirut
Dubai
Muscat

Asia-Pacific

Beijing
Hong Kong
Shanghai
Singapore

Knowledge and Know How

You can access our guides, podcasts and publications at cms.law:

Publications

European Class Actions Report 2021
First report on the true picture of European class action risk, a key concern for major corporates. We conducted a major study of collective proceedings filed in Europe over the past five years, gathering information on each qualifying claim. We then identified key trends which we set out in this report. Our report is data- driven to give an accurate picture of what is actually happening in Europe. The key findings of the 2021 report include:

- The number of class actions filed in Europe increased by over 120% between 2018 and 2020
- Increasing availability of U.S.-style optout mechanisms in Europe is a major concern for businesses
- Claimant law firms and litigation funders both see class actions as attractive opportunities
- Class actions against the technology sector are increasing dramatically
- Data protection claims grew 11 times (i.e. by 1,000%) between 2016 and 2020
- Areas of risk are: competition class actions; data protection class actions; product liability and foreign torts/environmental claims
- Areas of future class action risk are product liability/artificial intelligence and climate change litigation

CMS Guide to Anti-Bribery and Corruption Laws
We have just published the new, sixth edition covering more jurisdictions than ever before, assessing the laws in 45 countries.

Podcasts

CMS Disputes Talk podcast
In these uncertain times, global businesses in almost every sector are facing challenges brought about by an unprecedented operational climate. In order to help you navigate, we launched an interactive online event series – covering international dispute resolution hot topics – the CMS Disputes Talk. Have a look at our first four sessions which you can re-watch or listen as a podcast. You can also access our podcasts on our CMS Disputes Talk Spotify channel.

Facing the Future of International Arbitration Podcast Series
New podcast series exploring the evolving challenges and innovations of international arbitration by the members of the CMS International Arbitration Group.

Social Media

LinkedIn
Follow the CMS Dispute Resolution Group on LinkedIn to be part of the conversation as we post articles, event information and industry commentary.

CMS Expert Guides

CMS Expert Guide to International Arbitration
The Guide provides a detailed overview of the law and practice of arbitration in a number of jurisdictions. Covering now 34 countries in MENA, CEE and Western Europe and Asia-Pacific region. Further volumes will cover South Asia, South East Asia, the Pacific and the Americas.

CMS Law-Now™

Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.
cms-lawnow.com

CMS locations:
Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Beirut, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

---

cms.law