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Contents

4 Introduction

7 Post-pandemic corporate disputes and the rise of litigation funding

11 EU law and investment arbitration: new rulings in line with the Achmea case

14 Increasing transparency in TPF in arbitration and its consequences in select jurisdictions

19 Mediation and the Road to Becoming Mainstream

23 The Green Funding Obtained at COP 26 Shows a Positive Prospect in Colombia Regarding the Implementation of the Environmental Crimes Act

27 Interim measures and international arbitration

31 The importance of paper trails in corporate litigation: the Luxembourg example

35 Conditional Fee Agreements Regime in Singapore – Liberalisation of Singapore's Legal Landscape and Lessons Learned from Other Jurisdictions

39 Comparisons between impecuniosity approaches in arbitration agreements in common law jurisdictions and Portugal

43 Impact Climate Change: rise of shareholder activism and board responsibility in the Netherlands

49 Bifurcation in international arbitration and the scope of the *functus officio* principle

52 CMS around the globe

53 Knowledge and Know How

Introduction

Welcome to the winter edition of the *International Disputes Digest*, a biannual publication that explores, analyses and provides commentary on the latest trends in the worldwide dispute-resolution market.

Despite the great progress made to combat the pandemic, the world is still struggling with COVID-19 and the international business community continues to face uncertainty and enhanced scrutiny.

Even though many hope that 2022 will bring more good news than bad, international business still faces a host of challenges. We hope that the news, articles and analysis in this digest provide you with the navigational tools to help circumvent obstacles, survive, and ultimately to prosper.

In this edition, our colleagues in the Netherlands report on the rise of shareholder activism in the face of climate change, and offer advice on how businesses can create opportunities by embracing climate-friendly reform.

Our experts in Australia explore bifurcation and the current approach by the Australian courts to employ *functus officio* as the basis for setting aside interim arbitral awards.

In Portugal, we consider the impact on arbitration proceedings when one of the parties claims to have limited means, and how the impecuniosity of a party can impact an arbitration agreement in certain common law jurisdictions.

Our experts also explore investment arbitration from the perspective of EU law, and how the ECJ's famous *Achmea* ruling is influencing case-law across the union.

The impact of COVID-19 on corporate disputes and the rise of litigation funding is the subject matter of an article written by our Belgian colleagues, who describe how the pandemic has redefined corporate risks and the types of litigation bring brought to the courts.

Third-party funding is the focus of another article, which charts how this is becoming an increasingly popular way for financing the sometimes onerous costs of arbitration. Colleagues in Spain discuss the trend of parties attempting to prevent or avoid the execution of an arbitral award and how interim measures are being used to enforce arbitration decisions.

The impact of the Singapore Convention is also considered, particularly in terms of how it has launched mediation onto the international stage. Singapore is also the focus of an article that explores how a new proposed framework for conditional fee agreements may attract international disputes and transform the country into a dispute resolution hub.

In Columbia we analyse how support from the recent COP26 conference could help Colombia implement its Environmental Crimes Act, and our colleagues in Luxembourg examine how paper trails can have a crucial impact in corporate litigation.

We hope you find this digest enlightening and wish you all the very best for the festive period and in 2022.

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Post-pandemic corporate disputes and the rise of litigation funding

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COVID-19 has not only defined what is to be considered "the new normal", the pandemic has also redefined corporate risks and the litigation landscape. Companies and their directors are facing unprecedented financial distress. Lockdowns have prompted staff to work remotely more often, thus increasing vulnerability to cyberattacks and causing business interruptions on many different levels. Changes to the types of risks companies face will potentially affect the litigation landscape, and may create a further need for litigation funding.

Directors' liability

The COVID-19 pandemic has caused financial distress to a wide range of companies, which has resulted in bankruptcy for some struggling companies. Even financially healthy companies have encountered sudden and severe cash-flow issues. Directors have repeatedly left their comfort zones when compelled to take decisions, which in normal circumstances might not always be considered normal and prudent.

The wide-ranging financial distress created by the pandemic has also made shareholders, creditors, employees and other stakeholders more aware of their companies' financial health, thereby heightening director scrutiny.

This increased scrutiny by directors has underlined the need for adequate director liability coverage through a D&O liability insurance policy that is sufficiently tailored to the specific challenges that directors must deal with.

Early in the pandemic, the Belgian government took steps to temporarily and partially ease the financial and managerial burden on companies and their directors. These steps included protecting companies in distress from forced bankruptcy claims by third parties and allowing delayed payment of tax and social security claims.

The government's protective measures have, however, come to an end. It seems that any leniency and understanding that companies and their directors received from their stakeholders over their financial difficulties have also diminished. This situation could give rise to an increase in bankruptcies or other insolvency proceedings, which might trigger director liability claims. Directors will likely try to rely on their liability insurance policies, which might result in an increase in coverage disputes.

Cyber risks

The pandemic has also forced companies to reconsider traditional office working practices. Companies have had to make a sudden shift to an online office environment, with the majority of their employees and staff working remotely from home. Many companies were not prepared or equipped to make such drastic changes. In many cases, employees had to use their own office equipment and devices. As a result, existing company security and privacy policies were not suited to deal with this intense digital office life.

The increase in online activity, combined with protective measures that were often suboptimal, made many companies the perfect target for cyberattacks, resulting in numerous data breaches, which disrupted the daily operations of the targeted companies and compromised third-party data (e.g. data from clients, suppliers, etc.). Since they resulted from a failure to provide adequate protection, these data breaches may lead to an increase in third-party liability claims, and possibly even director liability claims.

The shift to an online office environment and increased vulnerability to cyberattacks have made adequate cyber insurance policies more important than ever. Companies with such insurance policies will likely turn to their insurer to cover their own losses and third party losses and claims, which again could give rise to an increase in coverage disputes.

Business interruption

The move to an online office life (as challenging as this transition may be) has allowed companies to continue doing business during the COVID-19 pandemic. This was not, however, an option for all companies, such as manufacturers, which were often faced with complete or partial shutdown, resulting in business interruption losses.

Although many of these companies have business interruption insurance policies (as part of a property insurance policy), the number of coverage disputes remains relatively limited. Such insurance policies often link business interruption coverage to physical damage to the premises, such as damage from fire or storm. Business interruption following a virus or pandemic will most likely fail to meet the requirement of physical damage.

Even if the insurance policy in question offers extended coverage for business interruption following a virus or pandemic, insured companies will often have difficulty substantiating these losses, which could discourage insured companies from initiating coverage disputes. If such losses are, in principle, covered under the insurance policy, and the insured is willing to initiate proceedings, insurance companies will often appoint an expert to make a reasonable assessment of the relevant losses, thus minimising any further risk of coverage disputes.

Litigation funding

The COVID-19 pandemic might, nevertheless, cause an increase in certain types of corporate litigation, such as director liability claims and third-party liability claims for data breaches. Companies rarely anticipate incurring and spending such litigation costs, especially in times of financial distress as a result of the COVID-19 pandemic. Litigation funding might therefore become all the more relevant.

Litigation funding is available in various forms. Companies may, for instance, rely on a legal assistance insurance policy, which will often be included as additional coverage in another insurance policy, such as a liability insurance policy. The insurance company will pay the litigation costs (e.g. legal fees, bailiff fees, procedural indemnities, etc.) without having any interest in the outcome of the litigation.

Companies can also consider third-party litigation funding. A third party (i.e. the funder) will provide financial resources to pursue particular litigation in return for a share of the proceeds if the litigation is successful. In this situation, the funder will have an interest in the outcome of the litigation, unlike the abovementioned legal assistance insurer.

Companies in need of funding can also choose to assign their claim to a third party. The third party assignee will immediately pay the company a certain amount below the original estimated worth of the claim. In turn, the assignee will then hold the assigned claim, pursue the litigation, and stand to receive all proceeds. Companies considering such a claim transfer should, however, seek legal advice since the transfer of such a claim for a certain price might, in certain jurisdictions, trigger the possibility of the debtor settling the claim for the transfer price paid by the third party assignee.

The need for litigation funding and the most appropriate type of funding will, of course, have to be determined in each individual case. The COVID-19 pandemic has, in any event, changed the financial needs and priorities of many companies, and this might include the need for litigation funding, regardless of the way these funds are obtained.

EU law and investment arbitration: new rulings in line with the Achmea case

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On 6 March 2018, the European Court of Justice **(ECJ or the Court)** delivered its famous judgment in the Achmea case **(Case C-284/16, 6 March 2018)**. As a reminder, the Dutch insurance company Achmea took advantage of reform in the Slovak health care system in 2004 to establish a health insurance subsidiary in Slovakia. However, the Slovak Republic later partially reversed the liberalisation of its health insurance market and added some restrictive measures, such as banning the involvement of insurance brokers.

Believing that it was the target of prejudicial treatment, Achmea initiated arbitration proceedings under Article 8 of the Bilateral Investment Treaty (BIT) between the Slovak Republic and the Netherlands. The Award rendered by the *ad hoc* tribunal (seated in Frankfurt) ordered the Slovak state to pay damages to Achmea. Slovakia filed an action to set aside the Award before the German Federal Court, which found it necessary to refer a prejudicial question to the ECJ on the compatibility of an internal EU BIT within the provisions of the TFEU.

In an unexpected decision, the ECJ decided that a provision contained in an intra-EU BIT establishing that investor-state disputes should be settled by arbitration is incompatible with EU law. Given that investment arbitration was the favoured means of dispute settlement in BITs, the court's strict position has created the possibility for a dramatic change in the interplay between EU and international investment law. In this context, we examine two recent rulings issued by the ECJ in line with the Achmea ruling providing new elements and complexities, which will undoubtedly prove to be crucial in the future.

The KOMSTROY LLC case (Case C-741/19, 2 September 2021)

Under a series of contracts, and through different intermediaries, a contract for the provision of electricity was concluded between a Ukrainian power producer and a Moldovan state-owned enterprise.

Following the Moldovan company's refusal to pay the balance of the debt to the Ukrainian producer, the latter considered that the Republic of Moldova's conduct constituted clear violations of the obligations arising out of the Energy Charter Treaty **(ECT)** to which it was a party. The Ukrainian company initiated the *ad hoc* arbitration procedure provided for in Article 26 of this treaty.

In its Award, the *ad hoc* tribunal (seated in Paris) recognised its jurisdiction and found that the Republic of Moldova had breached its international undertakings and ordered it to pay damages to the Ukrainian company.

The Republic of Moldova filed an action to set aside the award before the Paris Court of Appeal, challenging the jurisdiction of the arbitral tribunal and questioning whether a claim arising from an electricity supply contract constitutes an investment within the meaning of the ECT. The Paris court stayed the proceedings and referred a prejudicial question to the ECJ on the ECT's interpretation of the notion of "investment".

Before the ECJ, the Council of the European Union, the Hungarian, Finnish and Swedish governments, along with Komstroy all considered that the court did not have jurisdiction to answer the questions asked since the EU law is not applicable to the dispute due to the fact the parties are non-EU members. The ECJ, however, granted itself the right to interpret a multilateral treaty providing for arbitration in a dispute between non-EU parties. Before discussing the court's decision on jurisdiction, the court made an interesting statement regarding the definition of investment within the meaning of the ECT. The ECJ indicated that the definition is limited to investment operations that "involve the immobilisation of resources abroad which generally cannot be easily repatriated in the event of a dispute" (Recital 82), and judged that a contract for the supply of electricity is a mere commercial operation that does not meet the criteria of an investment within the meaning of the ECT.

In its ruling, the court extended the Achmea decision to Article 26 of the ECT and considered that the investor-state arbitration clause, when applied in the European area, is incompatible with the autonomy of the EU legal order.

The court notes that since the EU is a party to the ECT, this agreement is "an integral part [...] of the legal order of the Union and that, within the framework of that legal order, the Court has jurisdiction to give preliminary rulings on the interpretation of that agreement" (Recital 23). This statement alone seems objectionable as the ECT remains well within its own international legal order, and by positioning itself as the official interpreter of the ECT, the court thereby empties the substance of Article 26 of the ECT, which gives competence to an arbitral tribunal to interpret the treaty. Because the court thus preempts the interpretation of the treaty entrusted to the arbitrators, we fear that no more arbitrations will be initiated on this basis, thus infringing the autonomy of the parties' will and, to a larger extent, depriving investors of their right to have access to arbitration.

The court further justifies its jurisdiction by stating: "the establishment of the seat of the arbitration on the territory of a Member State, in the present case France, entails the application [...] of the law of the Union" (Recital 34). Yet, in principle, the arbitration agreement is materially independent of its instrumentum and legally independent of any state law. The consent to arbitration contained in an investment treaty should be analysed independently of any reference to state law. By making this connection, the court considers that the arbitration agreement is no longer subject to the sole will of the parties independent of any state law.

Finally, compared to Achmea the specificity of this judgment where the court is in fact a party to the ECT raises the question of its respect for its international commitments and the hierarchy of norms.

In conclusion, the court has once again extended the scope of EU law to the detriment of arbitration law. As a result, it is feared that parties may be reluctant to fix the seat of arbitration within the territory of EU member states, thus affecting the attractiveness of Paris in favour of London or Geneva.

The PL HOLDINGS case (Case C-109/20, 26 October 2021)

The second case arises from a dispute, which originated in 2013 when PL Holdings, a company incorporated under Luxembourg law with a majority interest in a Polish Bank, had its voting rights attached to securities held in that bank suspended and was ordered to proceed with a forced sale. PL Holdings initiated arbitration proceedings against Poland before the Arbitration Institute of the Stockholm Chamber of Commerce, based on the arbitration clause provided for in Article 9 of the Luxembourg-Poland BIT.

This clause should be considered void pursuant to the judgment of the Achmea case, as it was concluded between two EU member states. However, an *ad hoc* arbitration agreement was established between the parties in that the offer of arbitration made by PL Holdings in its Request for Arbitration was tacitly accepted by Poland by failing to make timely objections to the jurisdiction.

In two awards, the Arbitration Institute of the Stockholm Chamber of Commerce found that it had jurisdiction and in finding that Poland had breached its obligations under the BIT ordered it to pay damages to PL Holdings. Poland appealed to set aside the awards and the Swedish Supreme Court referred the matter to the ECJ to clarify whether EU law precludes the conclusion of an *ad hoc* arbitration agreement, where such an agreement is identical in content to an arbitration clause provided for in the BIT and therefore incompatible to EU law.

Unsurprisingly, the court once again applied case law from the Achmea ruling and held that EU law prohibits the conclusion by a member state of such an *ad hoc* arbitration agreement. The court based its reasoning on the fact that such an *ad hoc* arbitration agreement concluded in an attempt to remedy the nullity of an arbitration clause contained in a treaty, would be "tantamount to circumventing the obligations of the Member State concerned, which would then remove from the jurisdictional system of the Union the disputes likely to concern the application and interpretation of Union law" (Recital 47).

Again, it is worth highlighting the impact of the court's reasoning. Indeed, the arbitration agreement was not concluded between member states in a treaty, but is an *ad hoc* agreement concluded between a member state and a private entity. This should have made it impossible to apply the Achmea judgment, since the situation would be like that of a commercial arbitration normally preserved insofar as it derives from the autonomy of the parties' will. Nevertheless, here again the court circumvented these obstacles and further extended the scope of EU law, insisting that "the form in which the arbitration agreement is concluded has no bearing on its compatibility with Union law" (Recital 78).

In conclusion, the hostility of the ECJ to intra-European investment arbitration is increasingly obvious and these decisions are of particular concern to Paris as an arbitration centre since one solution to the ECJ stranglehold on investment arbitration would be simply to relocate the seat of arbitral tribunals to deprive European law of its enforcement capability. It will be important to note whether there will now be a shift by investors in the appointment of the seat of arbitration for arbitration investment disputes.

Increasing transparency in TPF in arbitration and its consequences in select jurisdictions

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Third-party funding **(TPF)** is an increasingly popular method to finance a party's costs and expenses in an arbitration. In light of the recent inclusion of an explicit provision in art. 11(7) of the 2021 ICC Rules requiring parties to promptly communicate the identity of any third-party funder (TPF or Funder) to the arbitral tribunal, other parties and the ICC Secretariat, in the following article the authors analyse the most pertinent issues raised by disclosure and the position in three jurisdictions.

To disclose or not to disclose – the issue in a nutshell

Conflicts of Interest

The primary consideration in favour of the existence of TPF agreements is transparency and avoiding potential conflicts of interest. As a Funder would naturally be interested in the outcome of the arbitration, a relationship between an arbitrator and the Funder could potentially create a conflict of interest. To avoid potential problems at an advanced stage of the proceedings or during enforcement of an award, early disclosure is – from this perspective – the best practice irrespective of whether a “hard” disclosure obligation exists. This is reflected in General Standard 7(a) of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 (IBA Guidelines) that requires parties to disclose any relationship between an arbitrator and any person or entity with a direct economic interest at the earliest opportunity.

Possible Inferences from fact of funding

In addition to avoiding potential conflicts, there may be a strategic benefit to a party disclosing the existence of a TPF. In particular, the existence of a TPF will likely demonstrate that an inde-pendent third party has assessed the merits of the case and decided to invest in it.

Conversely, disclosure carries with it an increased risk (whether real or perceived) that an arbitral tribunal may issue an order for security of costs (based on the inference that a funded party is not financially liquid and thus the other party’s costs need to be secured). In this case, it may be preferable not to disclose if an explicit obligation to disclose does not exist.

Waiver of privilege

Further, disclosure may raise the prospect of a general waiver of privilege regarding documents exchanged with the TPF funder and resultant attempts to force disclosure of such documents.

No specific rules on disclosure of TPF in Switzerland necessitate a case by case analysis

In Switzerland, there is no statutory or case law guidance on whether the existence of a TPF agreement has to be disclosed at the beginning of an arbitration. Additionally, the recently updated Swiss Rules of International Arbitration 2021 do not address the issue. Thus, no direct obligation to disclose TPF currently exists.

Nevertheless, the Swiss Federal Tribunal **(SFT)** has consistently acknowledged the importance of the IBA Guidelines while stating that they are not binding. Therefore, it is likely that the SFT may conclude in a future dispute that an arbitrator is conflicted due to a relationship with a TPF funder. Moreover, non-disclosure may lead to problems at the enforcement stage depending on the place of enforcement.

The downside of disclosure of TPF agreements for Swiss based arbitrations appears limited. For example, Swiss seated arbitrations usually apply stringent requirements for requests for security of costs. While no legal guidance from the SFT exists on the impact of the TPF, a TPF may arguably be considered a factual circumstance, but it is not a decisive factor on its own.

Additionally, the applicable attorney-client privilege needs to be carefully analysed in each individual case. Under Swiss law, the transmission of privileged information to a third party is not considered a general waiver and assessments from counsel are subject to privilege even if they are in the hand of the Funder. A much-discussed question in international arbitration, however, is which law applies to questions of privilege. The risk of disclosure of information shared with a TPF funder appears low with arbitral tribunals usually lacking jurisdiction over the funder and no reported cases of disclosure ordered by a Swiss court.

From a Swiss perspective, disclosure of a TPF agreement is thus a matter of judgement. If conflicts of interest cannot be excluded, it is advisable to err on the side of transparency, thereby avoiding any risk of triggering a conflict of interest at a later stage of the proceedings or upon enforcement.

England & Wales

There is no general requirement for a party to disclose a TPF arrangement in an arbitration seated in England and Wales. However, while there is no obligation to disclose, given the potential risks that may arise from lack of disclosure, a funded party will often choose to disclose a TPF ar-rangement.[1]

As set out above, one risk that may arise from non-disclosure is the potential for an arbitrator to be conflicted, such as when an arbitrator is from a law firm that has Funders as clients or there is some other sort of ongoing relationship. Where a conflict does arise, the arbitrator may be re-moved (under section 24(1)(a) of Arbitration Act 1996 (the "Act")) or any award rendered may be susceptible to challenge (e.g. in the UK on the grounds of serious irregularity under section 68(2)(a) of the Act). In these circumstances, early disclosure of the existence of TPF and the identity of the Funder can help potential conflicts be identified and avoid the risk of a challenge to the Award.

Disclosure of TPF arrangements is also necessary if a successful party wishes to recover the costs of funding. Case law has established that costs, in addition to legal costs, incurred in bring-ing or defending a claim fall within the arbitrator's general costs discretion and that such other legal costs may include the costs of obtaining TPF (including any uplift payable). In these circumstances, the TPF will need to be disclosed by a party if those costs are to be recovered.[2]

An understandable concern for parties disclosing TPF arrangements is the retention of privilege and confidentiality. Under English law, the sharing of privileged material with third parties when a third party has a common interest in its subject matter may be covered by common interest privilege. However, as an added precaution, the Funder should enter into confidentiality and non-disclosure agreements with its client, so that the sharing of privileged documents will be con-strued as a strictly limited waiver should a claim to privilege fail.

Ultimately, as in Switzerland, the disclosure of a TPF in England and Wales is a matter of discre-tion. While not required, a party may wish to disclose any TPF arrangements as soon as practica-ble in order to preserve transparency, safeguards against the risk of potential conflict or future challenges to any award and to ensure that the costs of a TPF are recoverable.

Singapore

In Singapore, with a view to ensure there is no conflict of interest, lawyers are obligated under the Professional Conduct Rules to disclose the existence of any third-party funding related to those proceedings as well as the identity and address of the Funder to both the tribunal and other parties in the proceedings. There is also an express prohibition in the Professional Conduct Rules against lawyers holding any share or other ownership interest in a Funder, which the lawyer or his practice has referred or introduced to a client or a Funder that has a third-party funding contract with a client.

Notably, while TPFs were previously only permitted for international arbitration matters (and related court and mediation proceedings), since June 2021 third-party funding of proceedings before the Singapore International Commercial Court (SICC), domestic arbitration proceedings and related court and mediation proceedings have also been allowed.

As a result, rules governing SICC proceedings have also been amended to clarify that costs of any TPF contract will not be recoverable as part of the costs of SICC proceedings. The SICC, however, has the power to order a Funder to give security for the defendant's costs, take into account the terms of any TPF contract in ordering costs, and order the Funder to pay costs.

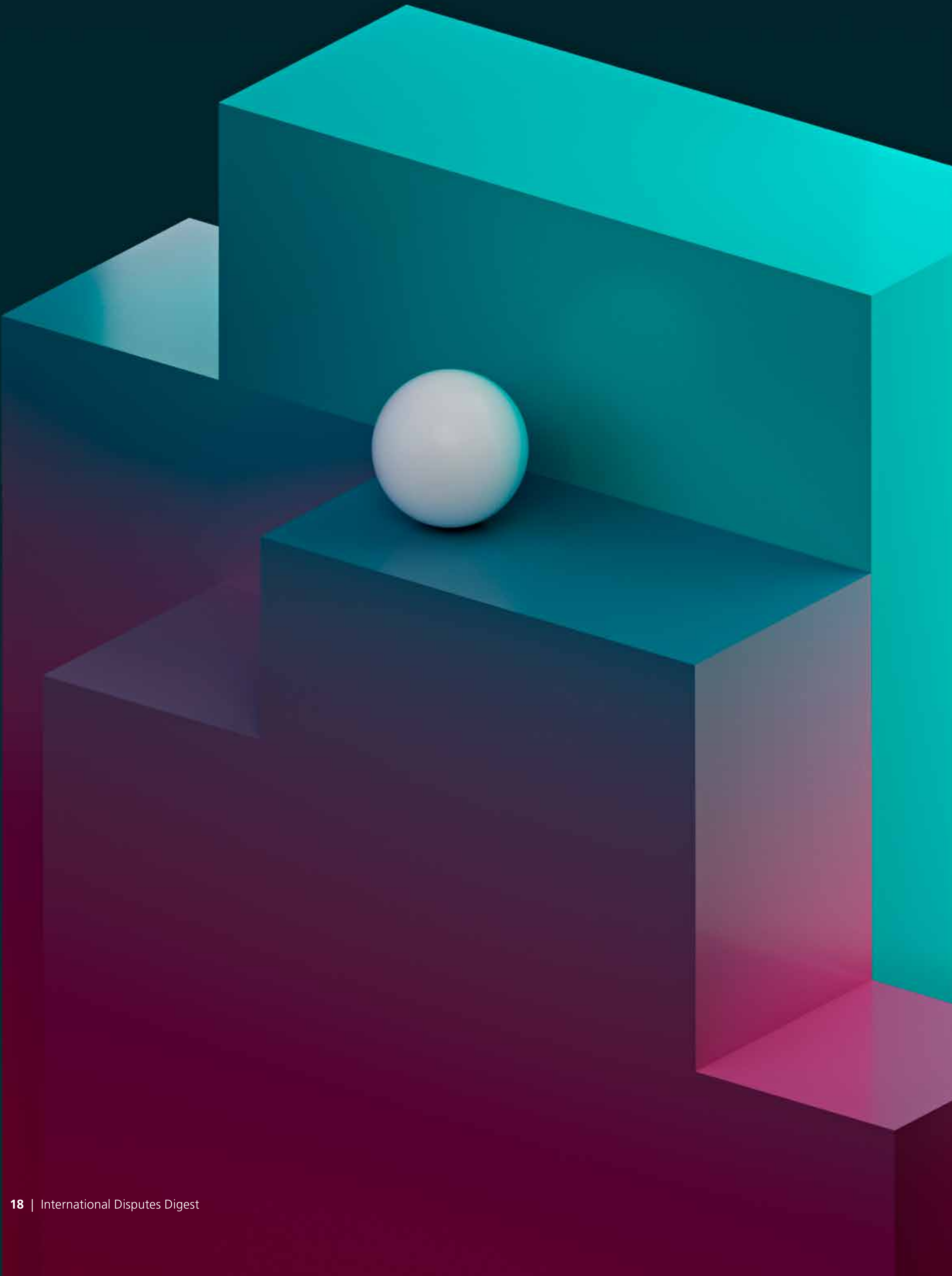
One difficulty is that given the obligation to disclose is contained in the Professional Conduct Rules, the parties themselves are not strictly bound by this obligation. Furthermore, while Singapore counsels are bound by Legal Professional Rules, unregistered foreign counsels representing parties in arbitrations seated in Singapore are also not strictly bound by these rules. In view of the recent amendments allowing third-party funding for SICC proceedings, rules governing registered foreign lawyers involved in SICC proceedings now include an obligation to disclose the use of TPFs.

Conclusion

Despite differences between jurisdictions, the trend is clearly moving towards increased disclosure of TPFs. While not mandatory in all jurisdictions, transparency decreases the risk of future conflict issues both in the proceedings and during enforcement. In the authors' view, more transparency is a positive development, and it will further increase TPF's acceptance as a source of funding for international arbitration.

1 The 2015 Queen Mary School of International Arbitration Survey identified that 76% of respondents thought that the disclosure of the existence of TPF should be mandatory and 63% believed that the dis-closure of the identity of the Funder should be mandatory. For further information on TPF in international arbitration see the Report of the International Council for Commercial Arbitration and Queen Mary Task Force Report on Third Party Funding in International Arbitration here: Microsoft Word – ICCA Re-ports 4_TPF_FINAL for print_26 March_amended 29 March (arbitration-icca.org)

2 *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm)



Mediation and the Road to Becoming Mainstream

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Three years ago, mediation emerged on the international stage with the UN adoption of the Convention on International Settlement Agreements Resulting from Mediation (the **Singapore Convention**) in December 2018[1] and the Convention's entry into force on 12 September 2020.

Over that time, the principle of mediation has gained momentum. There have even been efforts, cited by the likes of the UK judiciary, to make mediation more than an "alternative" dispute resolution tool, but instead a mainstream process on par with litigation and arbitration. In the following article, we look at key international developments since the Singapore Convention came into force that is helping mediation become mainstream.

Harmonisation of Mediation Laws

Alongside the Singapore Convention, the UN General Assembly also adopted the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, which amended the UNCITRAL Model Law on International Commercial Conciliation (2002). This Mediation Model Law was designed to assist states in reforming and modernising their laws on mediation procedures, provide uniform rules on the mediation process, encourage the use of mediation and ensure greater predictability and certainty in its use.[2]

1 https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements
2 https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation

Separately, in further efforts to harmonise laws and rules related to mediation, UNCITRAL is also updating the UNCITRAL Conciliation Rules (1980) and is expected to publish the UNCITRAL Mediation Rules and the UNCITRAL Notes on Mediation at the end of 2021.

Mediation Developments in Singapore

Before looking at developments since 2020, it is worth noting that in Singapore there had been an incremental increase in the efforts taken to promote the use of mediation to resolve disputes prior to its signing of the Singapore Convention in 2019.

Going back to November 2014, the Singapore International Arbitration Centre **(SIAC)** and the Singapore International Mediation Centre **(SIMC)** introduced the SIAC-SIMC Arb-Med-Arb Protocol, which gave parties the option to attempt mediation during arbitral proceedings. A mediated settlement agreement settling the dispute may be recorded as a consent award and would be enforceable in over 160 countries under the New York Convention. Subsequently, in 2017, Singapore enacted the Mediation Act 2017, which has a key provision allowing parties to apply to court to record their mediated settlement agreement as an order for court, thus making the agreement directly and immediately enforceable as a court order. In October 2018, the Singapore Infrastructure Dispute-Management Protocol **(SIDP)** was launched, which provided for the appointment of a Dispute Board **(DB)** to assist with the management of differences and disputes in mega construction or infrastructure projects. The SIDP provided for the resolution of differences or disputes referred to the DB to be resolved in a number of ways, including by way of mediation with the DB members acting as mediators. If mediation was adopted and a mediation settlement agreement was achieved, this agreement could then be recorded as an order of court under the Singapore Mediation Act 2017.

The mediation ecosystem in Singapore was primed to receive an international framework for the enforcement and invocation of mediated settlement agreements such as the Singapore Convention. Even though the COVID-19 pandemic struck soon after the signing of the Singapore Convention, the momentum for mediation did not falter and efforts to promote the use of mediation to resolve international commercial disputes continued.

In May 2020, the SIMC launched the SIMC COVID-19 Protocol with the aim of providing "a swift and inexpensive route to resolve commercial disputes during the COVID-19 period". This protocol was well received, resulting in further international collaboration in the creation of joint COVID-19 protocols. SIMC collaborated with partner institutions in Japan and India in launching the JIMC – SIMC Joint COVID-19 Protocol and the SIMC – CAMP Joint COVID-19 Protocol in September 2020 and July 2021 respectively. These protocols provide seamless case management to international parties able to appoint two mediators to co-mediate the case, in order to navigate and overcome any physical, cultural and jurisdictional barriers to settlement.

In March 2021, the SIMC and International Centre for Settlement of Investment Disputes **(ICSID)** entered into an agreement to provide for the use of SIMC's facilities and services for mediation proceedings conducted under the auspices of ICSID, as well as to enhance technical collaboration between the two centres. This is the first cooperation agreement for ICSID with a centre that is exclusively focused on mediation. Mediation is one of the dispute settlement mechanisms available to parties at ICSID and the SIMC-ICSID agreement encourages mediation as a viable option for investor-state disputes.

Meanwhile, the popularity of mediation as a method of resolving disputes has continued to grow. With each year, the SIMC has witnessed an increase in its case filings. In the first seven months of 2021, case filings at the SIMC have exceeded its entire caseload for 2020. In turn, the caseload for 2020 was nearly twice of that filed in 2019.

The signing and entry into force of the Singapore Convention has fuelled this momentum by bringing increased focus and attention to mediation as a means of resolving disputes while preserving commercial relationships, especially during the COVID-19 pandemic.

Mediation Developments in the UK

The past year has been a busy one for mediation and ADR in the UK. In March 2021, Sir Geoffrey Vos, the new Master of the Rolls and Head of Civil Justice in England and Wales, gave a speech on the relationship between formal and informal justice, arguing for the ultimate integration of ADR into the dispute resolution process and setting the tone for more to come from the judiciary.

Shortly after in May 2021, the Lord Chancellor announced that a public consultation would be held on the Singapore Convention in order to understand the Convention's impact on the dispute resolution sector.

Also in May 2021, leading mediation body the Centre for Effective Dispute Resolution (CEDR) published its Ninth Mediation Audit, giving important insight into the state of civil and commercial mediation in the UK. This reported a 38% increase in the annual number of cases mediated since its 2018 Audit; evidence of mediation's resilience during the pandemic; a rapid upsurge in online mediation; and GBP 4.6 billion of savings being made from the "quicker and more effective resolution of commercial disputes". Altogether, this provided a clear picture of a thriving mediation market.

June 2021 saw the further development of ADR within the civil justice system. The Civil Justice Council (CJC), chaired by Sir Geoffrey Vos, published a report entitled "Compulsory ADR", which concluded that compulsory ADR is compatible with Article 6 of the European Human Rights Convention and is therefore lawful; that it has the potential to bring about a beneficial change in the culture of dispute resolution; and again that ADR should no longer be viewed as an "alternative", but as an integral part of the dispute resolution process which focuses on "resolution" rather than "dispute". Vos later gave a speech (in October 2021) endorsing the CJC's findings; setting out a vision for change and the introduction of a layered online system that would provide signposting to all accredited dispute resolution platforms; and indicating that an upcoming CJC report will be recommending that small claims worth less than GBP 500 should be subject to mandatory mediation.

Two important consultations followed. In August 2021, the Ministry of Justice launched a Call for Evidence on dispute resolution, with wide ranging topics around the practice of dispute resolution outside of the courts. The Call for Evidence also highlighted the need for what had been regarded as "alternative" methods of dispute resolution to be mainstreamed within the culture of the legal system and a call "to mainstream non-adversarial dispute resolution mechanisms, so that resolving disagreements, proactively and constructively, becomes the norm". In November 2021, the CJC published an interim report on the Pre-Action Protocols within the Civil Procedure Rules, following a review started in late 2020 and preliminary surveys. This mooted various reforms and launched a consultation. This includes the potential introduction of a mandatory good faith obligation to try to resolve or narrow a dispute. Compliance with this obligation could involve ADR without prejudice discussions or formal settlement offers.

Conclusion

The continuing efforts by UNCITRAL to harmonise the laws, rules and enforcement mechanisms for international commercial mediation, together with the efforts by nations such as Singapore and the UK indicate that significant international momentum is building towards mediation. While there are undoubtedly more developments to come, in looking to shake off the "alternative" label, mediation is well on the road to becoming mainstream.

The Green Funding Obtained at COP 26 Shows a Positive Prospect in Colombia Regarding the Implementation of the Environmental Crimes Act

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At the 31 October to 12 November 2021 UN Climate Change Conference (COP 26) in Glasgow, Colombian President Ivan Duque stated that Colombia was one of the countries most threatened by climate change, even though it only represented 0.6% of global greenhouse emissions.

In light of this, the President made a series of commitments, including: (i) declaring 30% of the country's territory as a protected area by 2022; (ii) extending the marine protected area; and (iii) issuing a plan to progressively cut down greenhouse emissions up to 51% by 2030. To fulfill those commitments, a long-term public policy instrument was drawn up, led by the Ministry of Environment and Sustainable Development, which complies with the global objectives of the Paris Agreement (E2050).

As a result of the COP26, Colombia gathered USD 1.2bn from the Inter-American Development Bank, and from bilateral cooperation with UK, France, and Germany, among others to finance its commitments. This funding will enable Colombia to implement the Act of Credit Protocolisation for Sustainable and Resilient Growth, and fulfill its new environmental public policy goals. In addition, some of the resources will be allocated to the implementation of the Environmental Crimes Act, as well as the Climate Action Act, which is currently a draft bill in the Colombian Congress. This bill seeks to promote the creation, funding, and execution of policies to mitigate the environmental impact of greenhouse gas emissions.

On 29 July 2021, the Environmental Crimes Act was enacted (formally known as Law 2111 of 2021). This law aims to broaden the application of criminal law on environmental issues by enforcing existing criminal sanctions, and creating new environmental criminal offences. This Law replaces Title XI of the Colombian Criminal Code regarding "Crimes against Natural Resources and the Environment", and modified the Colombian Code of Criminal Procedure.

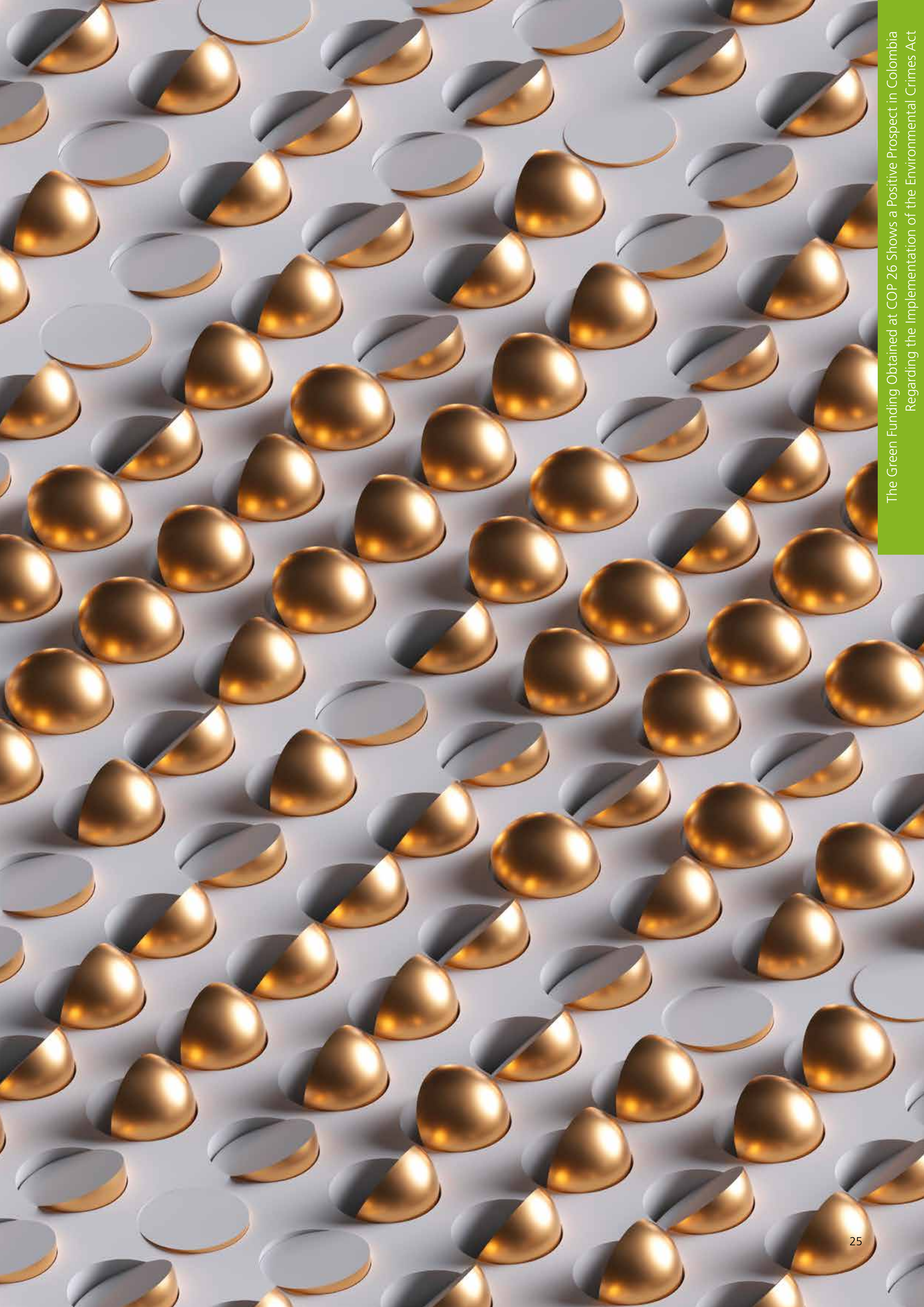
The new criminal offences are wildlife trafficking (Section 328A), deforestation (Section 330), promotion and financing of deforestation (Section 330A), ecocide (Section 333), financing of invasion of important ecological areas (Section 336A), illegal appropriation of wastelands (Section 337), and financing of illegal appropriation of wastelands (Section 337A). In relation to increasing sanctions for existing crimes, imprisonment and fines were raised approximately 25%. This law also introduced ten new aggravating circumstances to the environmental crimes title of the Criminal Code in Section 338.

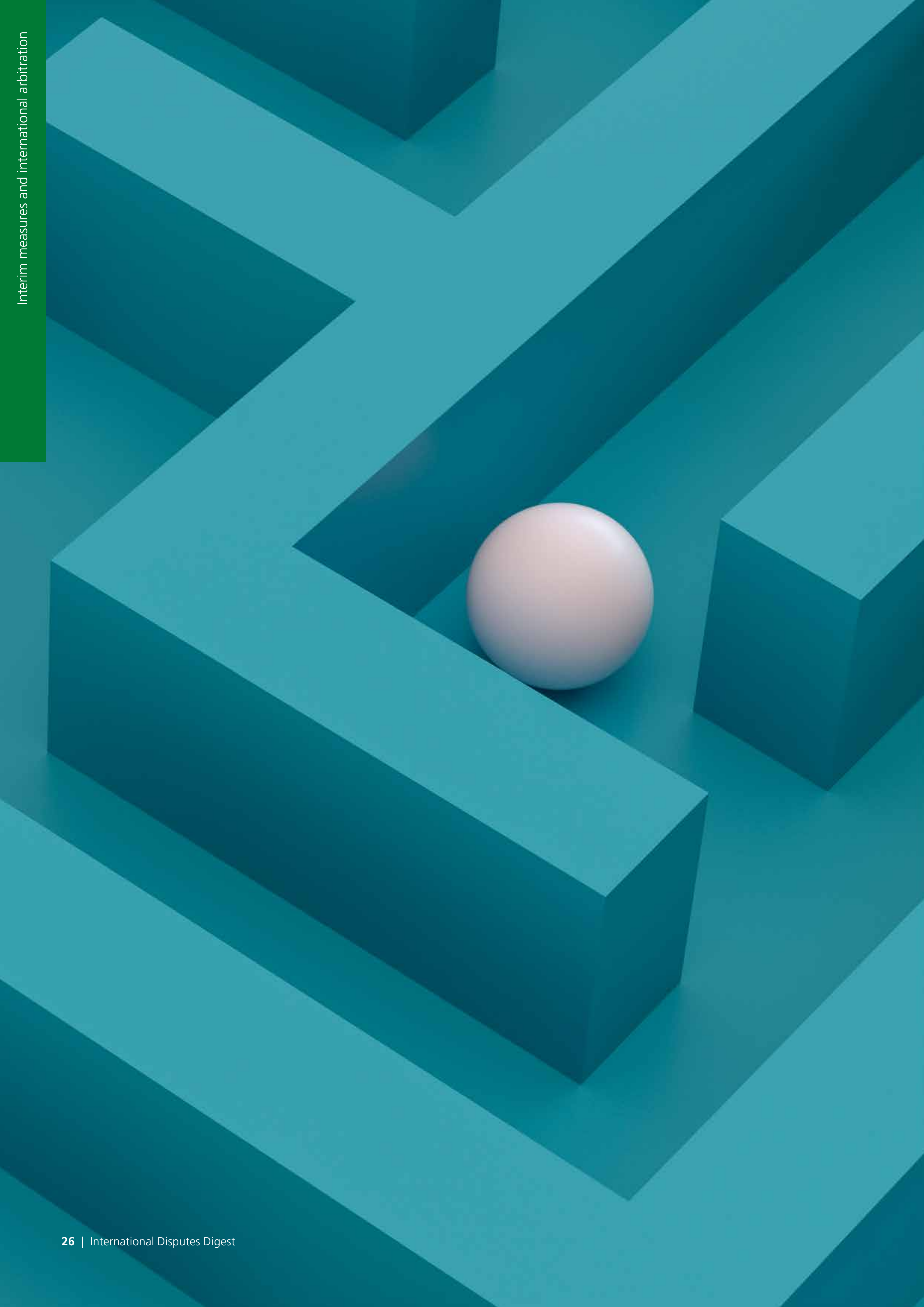
Structural changes have been made to the Office of the Attorney General. The new legislation has mandated the creation of a Specialised Division for Crimes Against Natural Resources and Environment, aimed at boosting the prosecution of environmental crimes. Historically, convictions for environmental crimes in Colombia have been virtually nonexistent due mainly to the lack of expert prosecutors and criminal judges in the matter. This is a promising step forward. This new initiative should provide the Prosecutor's Office with the necessary tools to investigate and prosecute environmental crimes. However, up to date this Division has not been effectively created.

Furthermore, Law 2111, 2021, has modified the Colombian Code of Criminal Procedure. Some of the new environmental crimes, such as illegal exploitation of renewable natural resources, wildlife trafficking, deforestation, promotion and financing of deforestation, damage to natural resources and ecocide, and invasion of areas of special ecological importance, will be tried before Specialised Criminal Judges. The Specialised Judges will have specific training in environmental crimes and should, in theory, have a good understanding of environmental issues. However, the Specialised Criminal Judges' jurisdiction is limited to the crimes set out above and the remaining environmental crimes will continue to be heard before Ordinary Criminal Judges. This may limit the impact of the new legislation because non-specialist judges may not have the expertise required to fully understand this type of criminal behaviour.

Despite the above limitations, the fact that the Climate Action Act is in the process of being approved by the Colombian Congress and the recent coming into force of the Environmental Crimes Act are both significant steps forward in terms of environmental protection. Both of these Acts owe their implementation to the green financing obtained in COP 26. As long as the financing is invested in a strategic way, Colombia can achieve its goal of reducing crimes against the environment. For example, these resources can be used to create the new Specialised Division for Crimes Against Natural Resources and the Environment and to train Criminal Judges and prosecutors in environmental matters to ensure fair judgments and criminal investigations.

In conclusion, the Colombian President's attendance at COP 26 and the resulting support for Colombia obtained from the international community has been important in developing and implementing public policies, such as the E2050. These resources are vital for the strengthening of environmental protection measures, such as the Climate Action Act and the implementation of the Environmental Crimes Act. We believe that even with the shortcomings of the Environmental Crimes Act, Colombia has made a positive step towards achieving protection of the environment, via criminal sanctions.





Interim measures and international arbitration

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Every potential award creditor (typically, the claimant in the arbitration) is undoubtedly concerned about the enforceability of a favourable arbitral award. Even though arbitration proceedings aim to be shorter than court proceedings, they may take longer than expected, and the potential award debtor (typically, the respondent in the arbitration) often tries to prevent the execution of an eventual arbitral award against its assets. Interim relief, which can provide an effective answer to this concern, consists of adopting certain provisional measures that are aimed at securing the effectiveness of an eventual judgment or arbitral award. Interim measures may not be easily obtained and enforced when it comes to international arbitration, especially when the potential award creditor seeks an interim measure that would be enforced in a country different from the country of the seat of the arbitration.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), often referred to as the "New York Convention", is an essential instrument for foreign-seated arbitrations, but it does not contain rules on interim measures. Its material scope is set out in article I, establishing that the New York Convention "(…) shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought (…)". Even though there have been some broad interpretations of the New York Convention to allow the recognition and enforcement of orders for interim measures issued by tribunals in foreign-seated arbitrations, the prevailing interpretation is that interim measures are excluded from the scope of the New York Convention.

This raises a problem: how does a potential award creditor seek interim relief that needs to be enforced abroad? First, the existence of applicable conventions or international treaties between the relevant countries and their material scope need to be checked. In the absence of an applicable treaty, the potential award creditor may decide to request an order granting the interim measure from the arbitral tribunal or may seek interim relief from the competent courts in the country where the relevant measure is to be enforced.

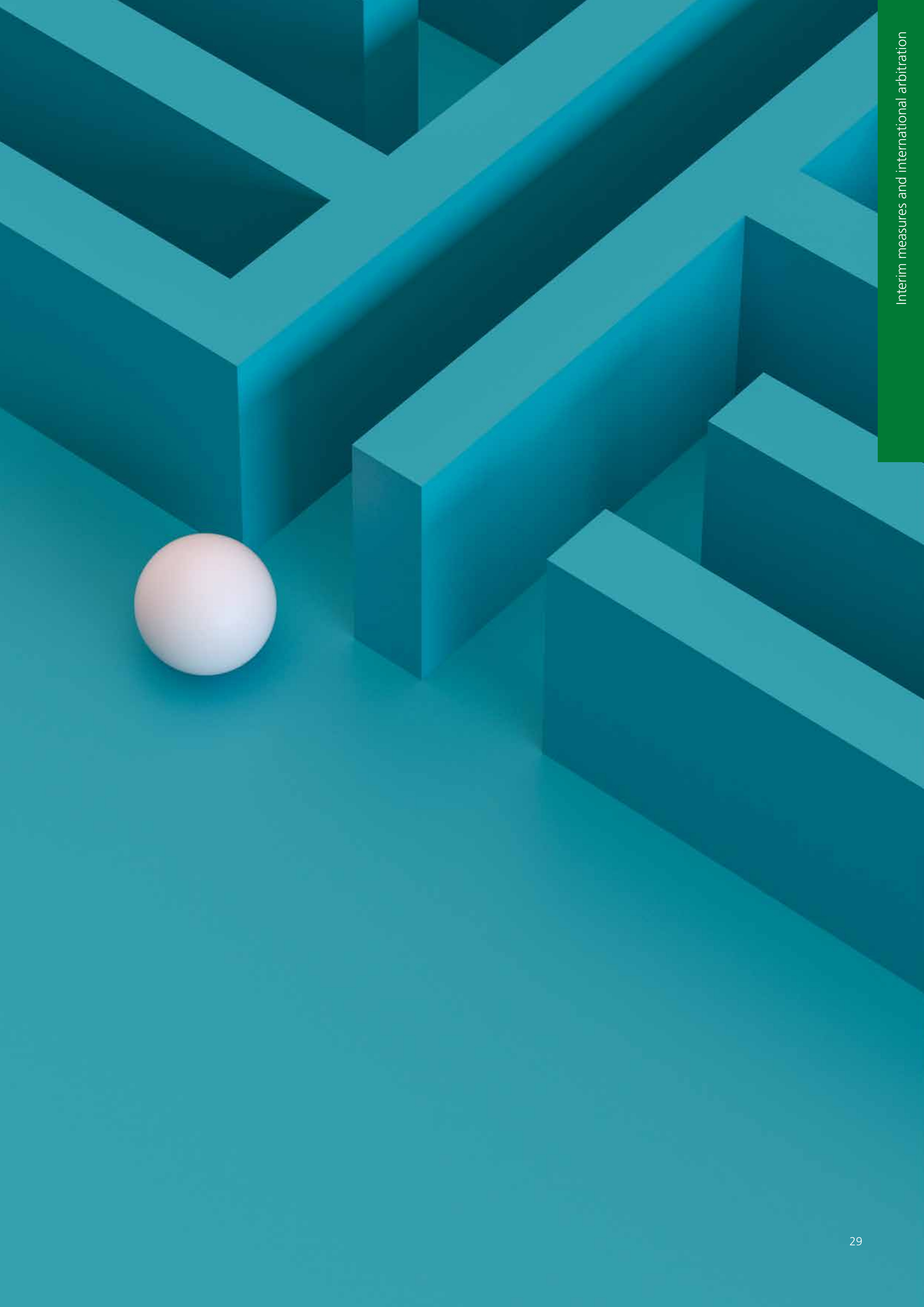
In Spain, each course of action would lead to different scenarios. Should the potential award creditor decide to request the relevant interim measure directly from the arbitral tribunal, it is uncertain whether the potential award debtor will comply with it voluntarily. The key issue is that arbitrators lack coercive powers, which leads to the need to request judicial assistance from the court with territorial jurisdiction over the matter. In any event, such an order by a foreign-seated arbitral tribunal would not be automatically enforceable in Spain. The applicant would have to request an exequatur procedure to have the relevant order recognised and then initiate an enforcement proceeding. The drawbacks of this course of action are that it is more time-consuming and also likely to be more costly. It may still be an attractive option on the basis that the arbitral tribunal is more familiar with the merits of the underlying case, which could work in favour of the applicant in the more complex cases.

The alternative in Spain is that the party wishing to obtain the interim measure applies directly to the court with territorial jurisdiction (or based on the interim measures granted by the arbitral tribunal without requesting an exequatur procedure). The Spanish Civil Procedure Act allows a party involved in an on-going foreign arbitration proceeding to request interim measures from the Spanish court of the location where such measures are to be enforced. The court will grant the measure if the legal requirements set out under Spanish law for the adoption of interim measures are met, provided that the matter at issue in the main proceeding is not of the exclusive jurisdiction of Spanish courts. The legal requirements for the adoption of interim measures are the appearance of legal standing (also known as *fumus boni iuris*), the risk of delay (also known as *periculum in mora*) and the posting of a bond or security. In a nutshell, the appearance of legal standing relates to the provision of evidence by the applicant of the likelihood that the final decision in the main proceeding will result in their favour. Risk of delay refers to showing that a failure to grant the relevant interim measure may lead to circumstances preventing or hindering the effectiveness of the relief sought, and/or the enforcement of an eventual award in favour of the applicant. Lastly, Spanish law requires that the applicant post security sufficient to promptly and effectively compensate any damage that may arise from the granting of the interim measure. The application for the interim measure must set out in detail the compliance with these legal requirements.

The Spanish Civil Procedure Act also allows a party to apply for interim measures before the initiation of the main arbitration proceeding by proving reasons for their urgency, without such application entailing an implicit waiver of the agreement to arbitrate. Should the interim relief be granted, in order to have it maintained the applicant must prove to the court that it is taking every step necessary towards initiating the arbitration proceeding.

One of the advantages of requesting interim relief from courts directly is that it entails a more straightforward and less costly procedure. Another advantage is that the court decision granting the relevant interim measure will be immediately enforceable since the appeal against the decision does not have suspensive effects. One disadvantage is that the relevant application will be made to a court that is not as familiar with the merits of the case as the arbitral tribunal, which may make the court reluctant to grant the interim measure if the appearance of legal standing is not sufficiently evidenced.

While Spanish law offers options to potential award creditors to obtain interim relief during the pendency of a foreign-seated arbitration, it would be desirable to have a widely applicable international treaty or convention. Such an international legal instrument would provide more certainty on the adoption and enforcement of interim measures by arbitral tribunals and would ultimately protect the effectiveness of final arbitral awards rendered outside the country where enforcement is sought.



The importance of paper trails in corporate litigation: the Luxembourg example

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Not only has the concept of the "interest of the company" gained autonomy (departing from the purely financial interest of the shareholders), but this concept has also evolved, pressuring company directors into taking into consideration the interests of a wider group of stakeholders (employees, customers, suppliers), albeit not the interests of the community as a whole (social and environmental issues).

It is thus becoming increasingly crucial for company directors to be able to prove that these interests have been taken into consideration in the decision-making process and the best way to achieve this is to make sure to leave an adequate paper trail.

Fighting the outcome bias

The "interest of the company" is a key concept in Luxembourg corporate law: voting agreements are void if contrary to the company's interest, while failing to act in the best interests of the company is an act of mismanagement (*faute de gestion*) and the use of a company's assets or credit contrary to the interests of the company is a constituent element of the misuse of corporate assets offence.

When determining whether an action was contrary to a company's interest or not, Luxembourg courts will usually put themselves in the shoes of the director. For example, when assessing whether a business decision constitutes an act of mismanagement, they will assess – based on the director's knowledge and level of skills – if the director manifestly departed from prudent and diligent behaviour.

Nevertheless, judges are human beings and like anyone can be influenced by outcome bias, which is the natural tendency to assess the quality of a decision based on its outcome rather than its merits. The more negative the outcome (e.g. the company becoming bankrupt), the stronger the bias is likely to be.

However, businesses and their directors must be able to take risks (as long as they are adequate and proportionate) without facing a liability risk each time the risk is realised.

The only way to avoid the influence of this bias is to focus solely on the information that was available before taking the decision (i.e. to provide context for the directors' decision). In a director liability claim, this means that directors will be in a better position if they are able to shift the focus of the court from the outcome of their decision to the context of the decision. That can include consideration of factors such as:

- the investigations undertaken by the directors before taking its decision (did the board conduct its own due diligence and/or seek external financial or legal advice?);
- the information or data on which the board based its decision (was it reliable, and/or was there a significant margin of error?);
- the aspects of the company's interest taken into consideration (e.g. the company's interests versus the group's interests, or financial versus reputational interest);
- if there were contradicting interests, how the board balanced them;
- the evaluation of the risks and reward of each option; and
- the evaluation of the company's capacity to face the risks, should they materialise.

To achieve this, directors must therefore make sure that they maintain a paper trail that adequately evidences the inquiries they made before reaching their decision.

The evidentiary value of paper trails

One underlying principle of the Luxembourg rules of evidence (derived from article 1315 of the Luxembourg Civil Code) is that one may not create proof on their own behalf (*nul ne peut se constituer de preuve à soi-même*).

However, this rule is widely misunderstood in several respects, the main one being that it only applies to the proof of the existence and content of legal acts, and not to facts – such whether a specific action is in the best interests of the company or whether a director has been diligent.

Therefore, by creating a paper trail of the decision-making process, directors are in fact creating admissible evidence of the matters they considered.

It is then only a question of the evidentiary value of the paper trail. Indeed, stating that one director has conducted an investigation into relevant matters is not irrefutable proof that he has in fact done it, or that he has done it diligently. However, it is good *prima facie* proof and the more detail provided regarding the investigations conducted, the stronger the evidence will be.

Which medium for your paper trail?

The most obvious method by which a paper trail of the board's investigations can be established is through the company's board minutes. These are meant to reflect not only the resolutions passed by the board but also the debates between the board members and more generally the decision-making process. Moreover, it is a document that reflects – except where dissenting opinions are expressed – the views of the board as a whole, and not simply of one director.

However, it may sometimes be advisable to create a paper trail outside or in parallel of the board minutes, such as where the board is dealing with highly sensitive information or where the decision-making process is complex. In such cases, the board should make sure that it keeps a record of such information and of all the inquiries carried out in any appropriate form (e.g. internal memorandum, emails, etc.) and that this record is made available to the directors prior to a board meeting. In any event, board minutes should be prepared to give context to the board's decision (e.g. by referring to any record prepared) and that they address the question of why the board takes the view that the contemplated resolution is in the best interests of the company.

Who is likely to have access to such paper trails?

Under the Luxembourg rules of Civil Procedure, there is no disclosure process. Parties come to court with their own evidence and courts will refuse to supplement the deficiency of one party in the production of evidence.

There is one exception. Parties can request that a court (either before or during trial) order the disclosure of a document that is likely to have an influence on the outcome of the trial. To be successful with such an application, the requesting party will need to specify with precision the relevant documents and demonstrate their likely existence. Any broad requests amounting to a fishing expedition will be rejected.

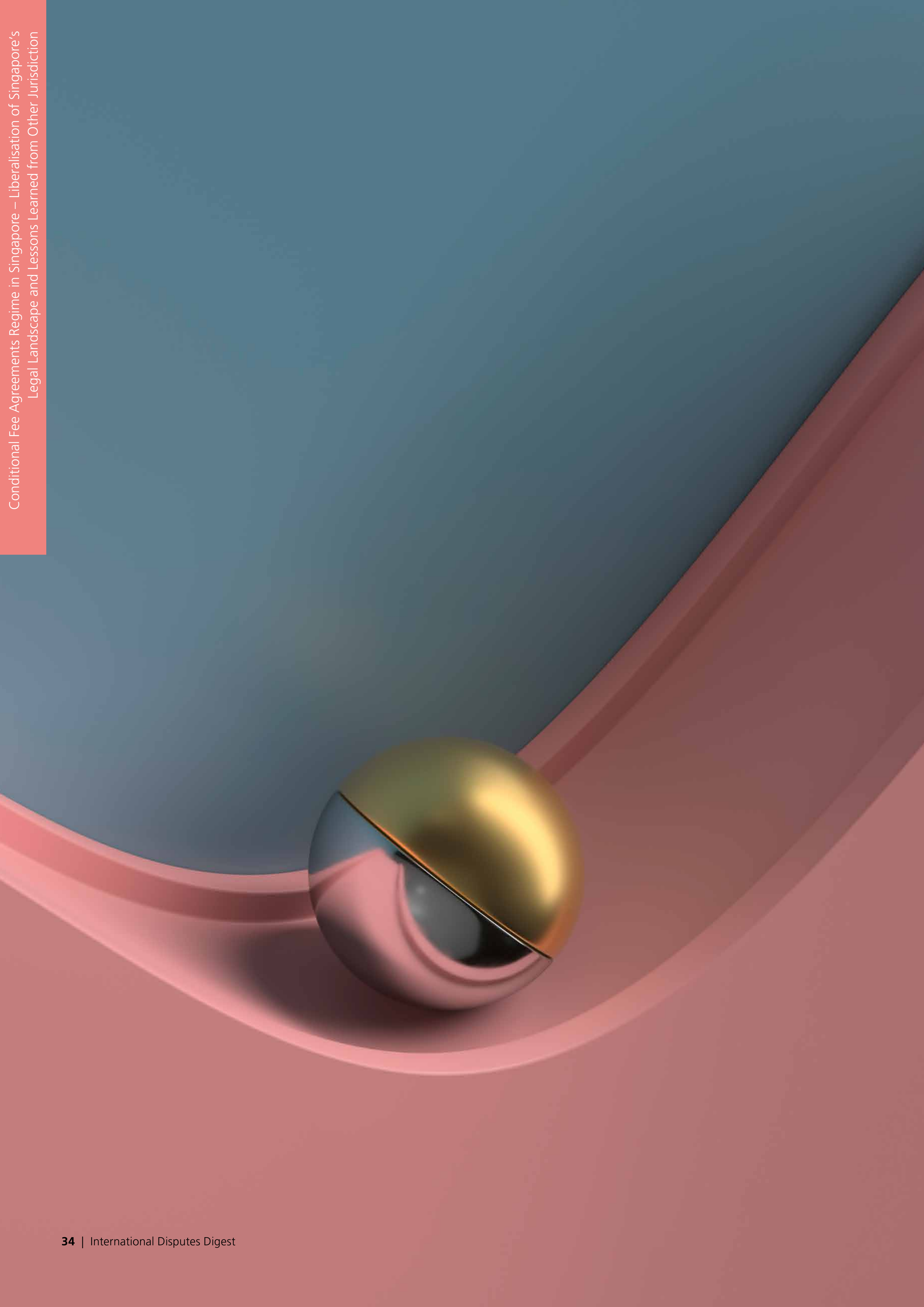
In practice, this means that – in the example of a director liability claim – shareholders or third parties will not be able to judicially request disclosure of "all exchanges and documents in the hands of the board" and relating to a particular matter. While it will be relatively easy for them to obtain the disclosure of the relevant board minutes (since they can satisfy the above criteria by simply requesting the disclosure of the board minutes that approved a specific resolution), it will be much more difficult for them to obtain disclosure of other documents relating to the decision-making process unless they are able to target specific documents, which they know exist.

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.

What about privilege?

Luxembourg law approaches privilege differently than common law systems, and with restrictions. Its approach is in essence limited to client-attorney privilege, which only covers communications between a client and external attorneys (to the exclusion of in-house attorneys). Also, this privilege is not absolute. When facing a request to order the disclosure of a document protected by client-attorney privilege, courts will balance the legitimate interest of the party protected by such privilege and the legitimate interests of the party making the request.

This means that directors should not only be mindful of the paper trail they willingly create, but also of the paper trail they leave.



Conditional Fee Agreements Regime in Singapore – Liberalisation of Singapore's Legal Landscape and Lessons Learned from Other Jurisdictions

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In a recent development, Singapore's Ministry of Law proposed a framework for conditional fee agreements **(CFAs)** that may be entered into between lawyers and their clients in prescribed proceedings. This liberalisation of the legal landscape in Singapore promises to strengthen Singapore's position as an international dispute resolution hub. It also levels the playing field for lawyers practising in Singapore in areas such as international arbitration or the Singapore International Commercial Court **(SICC)** vis-à-vis their counterparts in foreign jurisdictions who are already able to offer such arrangements.

Conditional Fee Arrangements in Singapore

On 1 November 2021, Singapore's Ministry of Law tabled for First Reading in Parliament the Legal Profession (Amendment) Bill, which sought to create a statutory exemption for CFAs in Singapore. CFAs are arrangements whereby the whole or a part of a lawyer's fees only become payable in specified circumstances (e.g. where the claim is successful). Such arrangements were hitherto prohibited in Singapore due to its laws against champerty and maintenance.[1] When champerty and maintenance were abolished as torts in 2017,[2] contracts that were affected by champerty and maintenance were still considered illegal and contrary to public policy except for permitted categories.

In addition to creating a statutory exemption for CFAs in relation to fees or costs for prescribed proceedings that comply with specified requirements, the Bill also sets out an overarching framework for CFAs that will apply to Singapore law practices and certain registered foreign lawyers and foreign law practices to which the Legal Profession Act applies.

The Bill defines a CFA as "an agreement relating to the whole or any part of the remuneration and costs in respect of contentious proceedings (whether relating to proceedings in Singapore or any state or territory outside Singapore) conducted by a solicitor, a foreign lawyer or a law practice entity, which provides for the remuneration and costs or any part of them to be payable only in specified circumstances, and may provide for an uplift fee." CFAs are to be distinguished from contingency fee arrangements. In a contingency fee arrangement, a lawyer will ordinarily receive an agreed percentage of the sum recovered by the client, with no direct correlation to the work done. Contingency fee arrangements will continue to be prohibited under the Bill.

Contentious proceedings relate to proceedings before a court or an arbitrator or any other dispute resolution proceedings, and they could be proceedings occurring in Singapore or elsewhere. In its press release on 1 November 2021, the Ministry of Law clarified that as a start, these proceedings include international and domestic arbitration proceedings, certain proceedings in the SICC, and related court and mediation proceedings.

To fall within the purview of the Bill, the CFA must: (i) be in writing and signed by the client; (ii) not provide for the remuneration or costs to be payable as a percentage or proportion of the amount of damages or other amounts awarded to or recovered by the client in any contentious proceedings (i.e. not a contingency fee arrangement); and (iii) comply with the regulations made by the Minister of Law to carry out or give effect to the Bill. The proposed framework also provides for a mandatory cooling-off period of five days upon entry into a CFA and three days for a variation to a CFA. This mandatory cooling-off period has been instituted in Australia, but not in the equivalent English legislation regulating CFAs.

An "uplift fee" would be the remuneration or costs payable in specified circumstances, which are higher than the remuneration or costs that would otherwise be payable without a CFA. The proposed draft section 115C(2) of the Bill provides that uplift fees cannot be recovered as party-and-party costs by a client who had entered into a CFA. The current arbitration regime in Singapore gives the arbitral tribunal broad discretion to award party-and-party costs, but the Bill appears to prohibit an arbitral tribunal from exercising such discretion in relation to uplift fees in CFAs. The ability to recover uplift fees from counterparties continues to be a hotly debated topic among legal practitioners since its non-recoverability has apparently contributed to an increase in solicitor-client disputes in certain jurisdictions like the UK. It remains to be seen whether the eventual legislation passed by parliament would continue to adopt an absolute prohibition against such recovery, or take on a more nuanced, qualified position.

1 Maintenance is the provision of financial assistance to a party by a person who has no interest in the proceedings. Champerty is the maintenance of an action in return for a share in the proceeds of the action. As such, champerty is a sub-set of maintenance. Under contract law, agreements affected by maintenance or champerty are void as being contrary to public policy.

2 Section 5A, Civil Law Act (Cap 43)

Benefits of Introducing CFAs to Singapore's Legal Landscape

Feedback from the legal profession and other respondents to a public consultation exercise conducted by the Ministry of Law in 2019 was generally positive and supportive. The feeback recognised that CFAs stood to improve access to justice by providing litigants with additional funding options to pursue meritorious claims, which they may otherwise not pursue. Furthermore, considering that fees under a CFA are contingent on outcome, CFAs may also help to discourage lawyers from pursuing weak cases and frivolous claims. Any concerns about intermeddling in or profiting from litigation (the main objections to maintenance and champerty) are addressed by the regulations and safeguards provided in the Bill that CFAs will be subject to. Fees charged under a CFA will also continue to be subject to professional conduct rules against overcharging.

Ultimately, the ability to provide additional funding options to litigants would strengthen Singapore's position as an international dispute resolution hub. This builds on the third-party funding framework, which was introduced for international arbitrations in 2017 and extended to domestic arbitrations, certain proceedings in the SICC, and related court and mediation proceedings in June 2021.

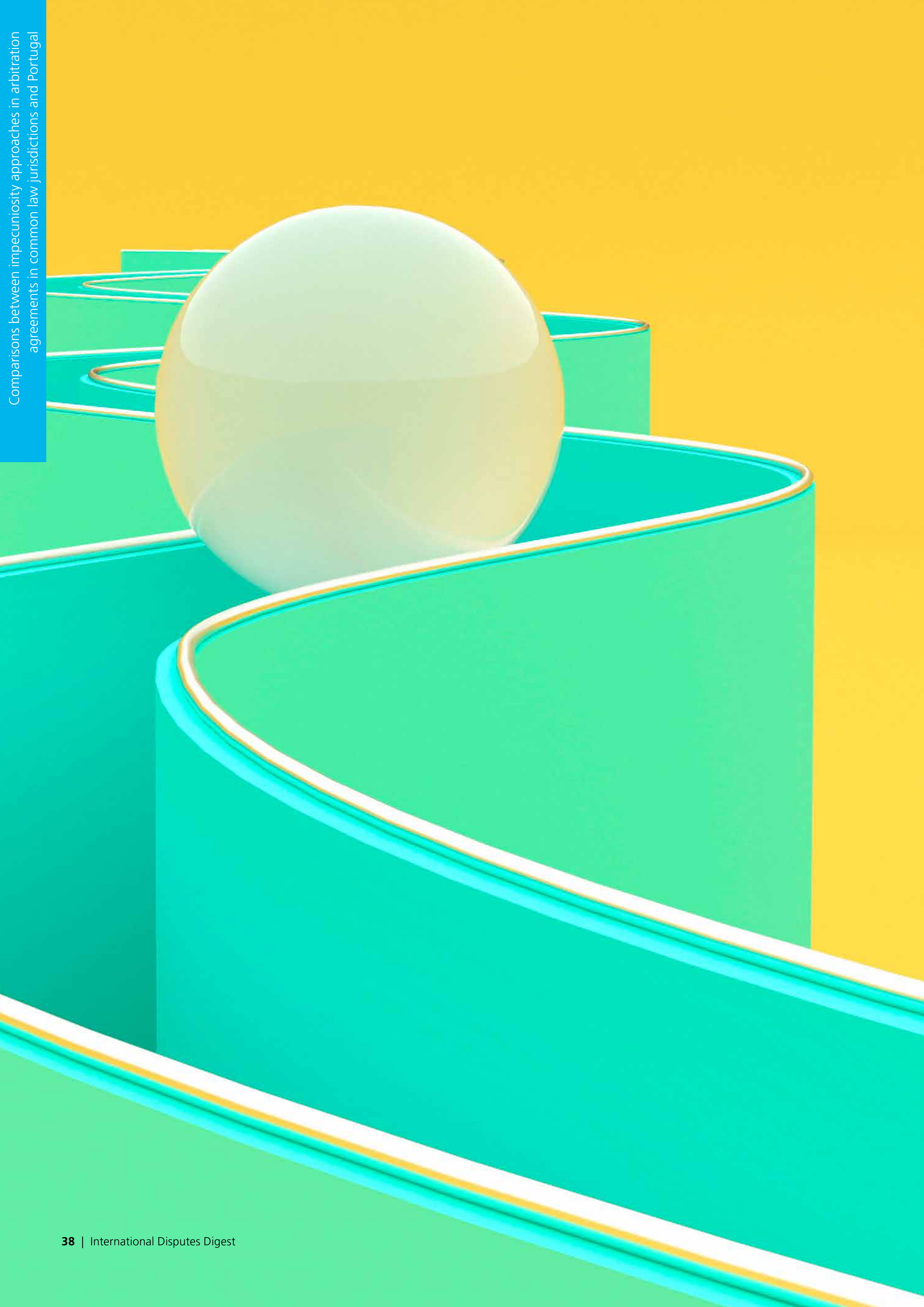
The ability to provide CFAs places Singapore lawyers in a better competitive position with lawyers in other jurisdictions who were already able to offer such arrangements. For example, although the prohibition against maintenance and champerty stemmed from English common law, this prohibition was removed in England by the Courts and Legal Services Act 1990, and since 1998, conditional fees were made available in all civil litigation proceedings, except for certain family law matters and in arbitration proceedings.

It will be interesting to see how the CFA regime develops in Singapore. As mentioned, the Ministry of Law will continue to provide safeguards for the implementation of CFAs. Nonetheless, the experience of other jurisdictions would be useful in identifying issues, which would require diligent scrutiny. For example, issues such as the recoverability of CFA success fees and the interpretation of the statutory requirements for CFAs appear to have contributed to a rise in solicitor-client disputes in the UK and Australia. Such issues should be given particular attention as it would be an ironic albeit unintentional consequence if the proposed framework – introduced to provide greater access to justice to parties with meritorious claims but who may be facing cashflow issues – were to result in more solicitor-client disputes.

Conclusion

In areas such as international arbitration, lawyers and legal practices practising in Singapore have been handicapped or placed at a relative disadvantage when compared to their counterparts in other jurisdictions that allow CFAs. Parties involved in international arbitrations are likely to be more commercially sophisticated, and would welcome the opportunity to be able to enter into arrangements with their lawyers on their fees.

To the extent that entering into a CFA is an important consideration in a party's choice of legal representation in international arbitration proceedings, this further liberalisation of the legal landscape in Singapore will provide increased opportunities for lawyers and legal practices in Singapore. The amendment may in future be extended to domestic litigation proceedings since the Ministry of Law continues to monitor the litigation funding landscape to assess whether CFAs can promote greater access to justice in other categories of proceedings.



Comparisons between impecuniosity approaches in arbitration agreements in common law jurisdictions and Portugal[1]

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In arbitration, whether domestic or international, the impecuniosity of a party creates a tension between, on one hand, the binding nature of contracts validly entered into between parties, and, on the other, the parties' access to justice to ensure equal treatment.

The impecuniosity of a party can concern the use of arbitration agreements and not any breach of the arbitration agreement that taints it. While there is some debate, impecuniosity of a party – for some – can threaten to make the arbitration agreement *inoperative* or *unenforceable*.

In Germany and Austria, for example, impecuniosity has generally been accepted as a reason to depart from arbitration agreements by the courts. In the UK, Switzerland and US, in principle, impecuniosity should not justify departure from the arbitration agreement. This approach has also been taken in France, albeit that there has been a recurrent phenomenon of the annulment of arbitral awards (i.e. one of the parties' access to justice is curtailed).

In Portugal, there is sensitivity to protecting the position of the impecunious party. The courts based their decisions on the difficulties of complying with the ancillary provisions of the arbitration agreement (i.e. the payment of administrative expenses) for no fault of the debtors (i.e. article 790 of the Civil Code). The solution, while perhaps fair, is not without criticism because of the forced nature of the legal arguments on which it is based, and because it is incompatible with the (non-binding) doctrine of scholars and other case law regarding article 790 of the Civil Code.

1 This article is an updated and abridged version of a paper originally published in Portuguese on "Revista Internacional de Arbitragem e Conciliação", Vol. XI (2018), pp. 107 to 142

In addition to the different approaches to an impecunious party in different jurisdictions, impecuniosity may also require different approaches within the same jurisdiction, depending on whether the impecunious party is claimant (including a counterclaiming claimant) or defendant.

In the UK, Section 9 of the Arbitration Act 1996 enshrines the exceptions when a court would refuse to stay proceedings where there is an arbitration agreement governing the subject matter before the court, along the same lines as article 8 of the UNCITRAL Model Law:

1. A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.[…]

4. On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

The rule is similar to the provisions of the New York Convention (Art. II (3)) and the Portuguese Voluntary Arbitration Act (LAV) at article 5, which speaks of "nullity", "ineffectiveness" and "unenforceability".

Faced with a dispute governed by an arbitration agreement where the case is decided in favour of the defendant in the case, unless that court also finds that the arbitration agreement is null and void, ineffective or unenforceable, the issue will then arise whether the impecuniosity of a party means that the arbitration agreement is "incapable of being performed".

English courts tend, as a rule, to interpret the expression "incapable of being performed" restrictively, deciding the invalidity of arbitration agreements for reasons of impecuniosity in special situations only. This position is rooted in its more "arbitration friendly" legal culture, preferring to observe respect for "certainty of law" and "freedom of contracts", which explains why it is accepted that a party entering into a valid arbitration agreement has the legitimate right not to be sued in court.

The English courts do not seem to regard the threat against access to justice as it is perceived in Portugal as a breach of a fundamental right. This can be explained by the fact that the English courts consider arbitration to be an alternative way of administering justice through the courts. Despite the UK's adoption of the European Convention on Human Rights through the Human Rights Act 1998, this remains the position in the English courts. However, this does not mean that justice cannot be done in each case. It is a matter of perspective. It is also feasible to dispense justice whether it is from the perspective of the keeping state courts as the ultimate guarantors of justice or from the perspective of contractual safeguards and the parties' right to choose.

Some key decisions

Smith v Pearl Assurance Company, Ltd. (1939) 63 Ll.L.Rep. 1

In this case, Charles Henry Smith was in a serious accident while traveling in the car of a friend named Blackmore, who had, in turn, taken out an insurance contract with Pearl Assurance. Smith sustained serious injuries and losses, which led him to sue Blackmore. The court ordered Blackmore to compensate Smith. Blackmore, however, was declared bankrupt and, under the Third Parties (Rights Against Insurers) Act 1930, Smith issued a court claim, demanding the compensation originally owed by Blackmore from Blackmore's insurer. Pearl Insurance objected to the proceedings on the basis that the policy entered into with Blackmore stated that any disputes should be settled by arbitration. Smith claimed that he was not be able engage in an arbitration due to lack of financial resources.

The matter reached the Court of Appeal, which held that the arbitration agreement applied, despite Smith's impecuniosity.

Fakes v. Taylor Woodrow, Ltd. [1973] QB 436

Thirty years after *Smith v Pearl*, this decision helps to understand the general approach of common law countries in matters of impecuniosity. Similarly, the court was concerned with serving justice on the facts of the specific case and balancing this with the importance of safeguarding the arbitration agreement. In *Smith v Pearl,* Lord Justice Clauson left the door open in terms of the impecuniosity exception and related dismissal of the tribunal. This has proven to be of great practical use.

Although the contracts entered into between the parties contained arbitration clauses, the plaintiff Fakes sued the construction company Taylor Woodrow, Ltd. in the courts, claiming that he was unable to pay the fees required to commence an arbitration, despite having obtained "legal aid".

The High Court declared that it did not have jurisdiction to hear the case, accepting that the arbitration agreement as invoked by the construction company should be observed, largely based on *Smith v Pearl Assurance.*

Fakes appealed, claiming that his insolvency was a consequence of having accepted work from the defendant and the latter having breached the contract. In addition, the legal aid he had obtained was only capable of use in pursuing claims in the courts, not in arbitral proceedings. He therefore sought release from the arbitration clauses.

The Court of Appeal held that there were sufficient grounds to establish that the construction company had caused Fakes' impecuniousness, and therefore decided that it would be just to depart from the arbitration agreement and have the case heard and decided by the courts.

Paczy v. Haendler & Natermann GmbH [1981] 1 Lloyd's Rep. 302

This decision set out that, the court is obliged to stay proceedings unless one of the situations specifically provided for in Section 1 of the Arbitration Act 1975 applies, which was not the case here. The presiding justice stated: "In my judgment, the plaintiff cannot rely on his own inability to carry out his part of the arbitration agreement as a means of securing a release from the arbitration agreement. The arbitration agreement remains an agreement which is perfectly capable of being performed if the parties are themselves capable of performing it […]".

Some similarities between the English and Portuguese case law

Unlike in the UK, where the courts address the issue of impecuniosity from the perspective of the contract, in Portugal the issue is considered on the basis of access to justice and the effective jurisdictional protection guaranteed by Article 20 of the Constitution of the Portuguese Republic. Protection of the impecunious party is based on case law establishing when a party may not be able to comply with the ancillary provision of the arbitration agreement (payment of administrative expenses) for reasons not attributable to the debtor (Article 790 of the Civil Code).

Both scholars and case law agree, almost without discrepancy, that the impossibility of compliance mentioned in article 790(1) is an absolute and not a relative impossibility (i.e. the obligation to arbitrate only expires when the provision has become truly impossible and not when it has merely become too difficult or excessively costly).

Conclusion

If individuals are presumed to be impecunious just because they obtained certificates granting them legal aid, or when it is assumed that the costs in ordinary courts are less onerous or, worse, when a breach of the fundamental right to access to justice is presumed, this would not be adequate for the purpose of displacing an arbitration agreement. A truly exhaustive scrutiny must be carried out – involving full and frank disclosure – and not merely a formal scrutiny of the financial conditions, the intentions of the party claiming impecuniosity and, possibly, the efforts that they have made with third parties to honour their commitment, under penalty of allowing one party to unilaterally evade the effects of an arbitration agreement that they entered into freely. Therefore, a heavy burden of proof must be imposed on whoever intends to challenge an arbitration agreement by alleged reason of impecuniosity.

Moreover, an arbitration agreement should not be set aside unless all attempts to carry out arbitration, in good faith, have proven unsuccessful. Ultimately, modification of the arbitration agreement in line with what is required may be necessary to avoid its setting aside.

Impact Climate Change: rise of shareholder activism and board responsibility in the Netherlands

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ESG and climate change litigation: external pressure on companies

CMS's Climate Change Risk Report[1] confirmed the impact on corporations from external public interest groups that are focused on climate change.

As this article shows, a key driver of Climate Risk for corporations revolves around information. Companies are producing reports that are deluging investors with information on how they are measuring and managing their impact on and from climate change. Climate change is one of the environmental factors provided for in the letter "E" of the ESG principles: Environmental, Social and Governance.

Climate change litigation is a direct and growing risk to corporations that fall under the spotlight of a variety of potential claims against an increasing number of potential claimants. It is prudent to actively manage this risk through dispute avoidance strategies, having plans in place to deal quickly and effectively with the situation where a claim is brought, and understanding the key features that are typically at play in such litigation.

Climate change litigation is ascending the corporate-risk register. NGOs and individuals are increasingly using the courts to try to achieve their objectives, including enforcing corporate and governmental adherence to environmental regulations, sustainability targets and broader ESG principles. Litigation can also encourage behavioural change by raising public awareness for climate change, environmental harms and other human rights infringements. Spurred on by landmark judgments in the Netherlands, Germany, Norway, Italy, France, Ireland and the UK, climate change claims have now been filed in over 40 countries.

The COVID-19 crisis has already accelerated a focus on sustainability and social responsibility. In addition, existing social dynamics result in more public pressure on climate-change prevention.

If the transition process will not go fast enough, private enforcement through litigation in court might act as a 'big stick', motivating corporations to get on the right track.

In addition to pressure from external parties, potential investors and shareholders are also increasing their internal focus on climate change and ESG.

1 https://cms.law/en/aut/publication/climate-risk-report

Internal pressure on companies as shareholder activism increases

The COVID-19 pandemic has increased the awareness of sustainability and climate change at listed companies, many of which have found that a positive ESG-policy and relationship with stakeholders significantly impacted business during the pandemic. The pandemic made clear what kind of extreme impact and disruption can be caused by external circumstances. It also widened the gap between company performance, which experienced relatively weak share-price performance. According to a report of Alvarez & Marsal (A&M) 'Activist Investors in Europe: Who Will they Target Next?', there will be a significant rise in investor activism due to low valuations on one side and ESG concerns on the other.

A hot topic in the boardrooms of many Dutch and European companies, shareholder activism is when minority shareholders use legal, strategic and publicity means to promote their interests in listed companies. Because most shareholders do not actively exercise their shareholder rights (e.g. the right of control), much can be achieved even with an equity interest of less than 5%. Research shows that despite the lack of mandatory regulation and the use of shareholder proposals, shareholders in the Netherlands increasingly care about ESG issues and in particular environmental matters. For example, many big institutional investors (and shareholders) like ABP, Aegon Asset Management, APG, NN Investment Partners and Robeco are part of Climate Action 100+, which is a five-year initiative designed to engage important greenhouse gas emitters and other companies that are able to drive the clean energy transition and help achieve the goals of the Paris Climate Agreement. Most Dutch companies publish full transcripts of their general meetings, providing a unique opportunity to evaluate the developments that each company has made vis-à-vis corporate sustainability. For example, since 2018, there has been an increase of ESG claims against European corporates by a factor of 2.5 times.

Through strategy and remuneration policies, shareholder activism can have a positive impact on the value, performance and decision-making of a company. Shareholders increasingly call for companies to address ESG issues (e.g. climate change) and for non-financial criteria (e.g. energy transition) to be included in the remuneration policy. Shell is one company that has made big steps in this direction by including energy transition targets in its long-term remuneration policy based a constructive dialog with its shareholders.

This is an interesting development, given that shareholders usually opt for profit and high stock value in the short term, while the company benefits more from a long-term strategy. This new form of shareholder activism underscores the urgency for creating more long-term opportunities and better long-term strategies to make business more sustainable.

Shareholders have multiple tools to make a mark on the ESG performance of Dutch companies. The most prominent of these tools are discussed below.

Private engagement with the company

Shareholder activism generally starts with the shareholders engaging in a dialogue with the boards of the company in a private setting. This could take the form of informal one-on-one discussions with the company's board (or CEO) to discuss strategy and measures to maximise shareholder value, or by putting items on the agenda for shareholder meetings.

In order to influence a company from within, some organisations become shareholders solely for this purpose.

The impact of climate change on companies and vice versa were the main topics discussed at shareholder general meetings in the Netherlands this year. For example, at the request of a number of institutional investors, including Dutch asset managers Aegon asset management and Robeco, LyondellBasell included two climate-related discussion items on the agenda of their 2021 general shareholders meeting. The shareholders wanted to exchange views with the board and other shareholders about the company's climate goals and strategy, and requested that the company's climate strategy be submitted to the general meeting for an advising annual vote: they wanted to have their 'say on climate'.

The downside to this tool is that the board can be reluctant to go along with the requests of shareholders at general meetings. For example, in response to the agenda item that the shareholders proposed, the board of LyondellBasell stated they did not think the general meeting was the appropriate forum in which to discuss the company's climate goals and strategy. (They preferred one-on-one discussions with shareholders.) They also said they saw no point in an annual vote on climate strategy. The request for a 'say on climate' was raised for discussion at the general meetings of multiple Dutch companies and received a lukewarm response. ING-Group and Signify stated that they already had an ongoing dialogue with their shareholders about climate strategy. And the board of DSM stated that its integrated sustainability strategy made it inappropriate to submit one topic from that strategy (i.e. climate change) to the general meeting for an advisory vote. Only Heineken committed itself to investigate the shareholders' proposals.

Public awareness campaign

When shareholders are not satisfied with a company's response to issues raised in private discussions or the general meeting, a public campaign may be a necessary result. Typically, this includes the use of traditional media and social media, and initiating "name and shame" actions in order to force the company into action. This can also include teaming up with other shareholders and institutional investors and gaining support from the investor community at large by publishing investor presentations or setting up websites dedicated to the campaign.

Changing board structures

Activist shareholders are analysing how boards and management teams oversee environmental and social performance, how ESG oversight is allocated among board committees, and whether a board has sufficient expertise in environmental issues. Such themes include calling for enhanced director independence, separation of the CEO and board chair roles, declassification of the board and even the resignation of the CEO.

Shareholder activism litigation

When all else fails, shareholders can turn to litigation, which occasionally happens in the Netherlands. Shareholder litigation typically takes place in inquiry proceedings before the Enterprise Chamber (Ondernemingskamer), a chamber of the Amsterdam Court of Appeal specialised in corporate proceedings. A shareholder holding sufficient shares, either alone or jointly with other shareholders, can initiate inquiry proceedings at the Enterprise Chamber and request that the Chamber order an inquiry by independent, court-appointed investigators into the company's policies. The Chamber can order several measures to address the issues at hand, such as dismissing a controversial director or appointing a third 'super' director.

For activist shareholders in the Netherlands, the attraction of such an inquiry is its comparatively low expense. Since the proceedings before the Enterprise Chamber are relatively quick and informal and the company (in the first instance) pays the costs of the inquiry, launching an inquiry to change corporate policy can be relatively low-cost in relation to the effect it may have.

Increasingly, Dutch courts are also enforcing actions against climate change. The Royal Dutch Shell case was the first time in history a court held a large company directly responsible for having a dangerous impact on climate change. The ruling was based on duty of care, flowing from international treaties such as the 2016 Paris Climate Agreement and the Dutch Corporate Governance Code. The court eventually ordered Shell to lower emissions by 45% by the end of 2030. Although not initiated by shareholders, this case shows the active role Dutch courts have taken in enforcing action against companies that do not meet their international treaty obligations.

Looking forward

Over the years, activist shareholders have been forced to shift their approach from staging confrontations with companies about strategies at general meetings (e.g. by proposing agenda items), to engaging privately and publicly with boards (not least through litigation).

It is expected, however, that institutional investors will continue to insist on a clear strategy to reduce greenhouse gas emissions during operations and the production chain, and to include targets, progress reports and periodic evaluations as to whether climate strategy needs to be tightened in response to internal and external events. Additional corporate disclosures on environmental and social issues can provide these shareholders with a substantial amount of new material to use in their campaigns. Consecutive editions of sustainability reports issued by companies over the course of several years will provide investors with the ability to compare the ESG performance of companies over time and with other companies.

Board responsibility with focus on long-term success of the company

In the Netherlands, when preforming their duties directors[2] and supervisory officers[3] must direct their attention on the interests of the company and of the enterprises connected with it. This principle has been explicitly implemented in Dutch law since 2013.[4]

This responsibility means that directors and supervisory officers have to pursue the continued long-term success of the company and, in doing so, must take into account the interests of all stakeholders of the company and its business, including employees, shareholders, suppliers, customers and creditors.

2 Section 2:129(5)/2:239(5) of the Dutch Civil Code.
3 Section 2:140(2)/2:250(2) of the Dutch Civil Code.
4 Stb. 2011, 275 31763 (Staatsblad 2011, 275 | Overheid.nl > Officiële bekendmakingen (officielebekendmakingen.nl))
5 Principle 1.1.1 under vi of the Corporate Governance Code 2016.
6 https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2018)97&lang=en

Over the past decade, this focus area of directors and supervisory officers has apparently been broadened from the company and its direct stakeholders, to the company having a duty of care to implement social and environmental issues in its business conduct. Dutch Corporate Governance Code 2016, which is applicable to listed companies based in the Netherlands, states that the management board, when seeking long-term value creation strategies, should pay attention to environment and socially focused matters[5] among other issues.

In order to retain the sympathy of consumers and investors over the long run, companies must already focus on sustainability. The COVID-19 pandemic accelerated this focus on sustainability among consumers, media and investing public. The dilemma for the board is that the investment and financing involved with the transformation towards a sustainable business model will impact profitability and competitiveness in the short term. Companies are waiting for the appropriate financing and tax facilities & laws from the EU and local government.

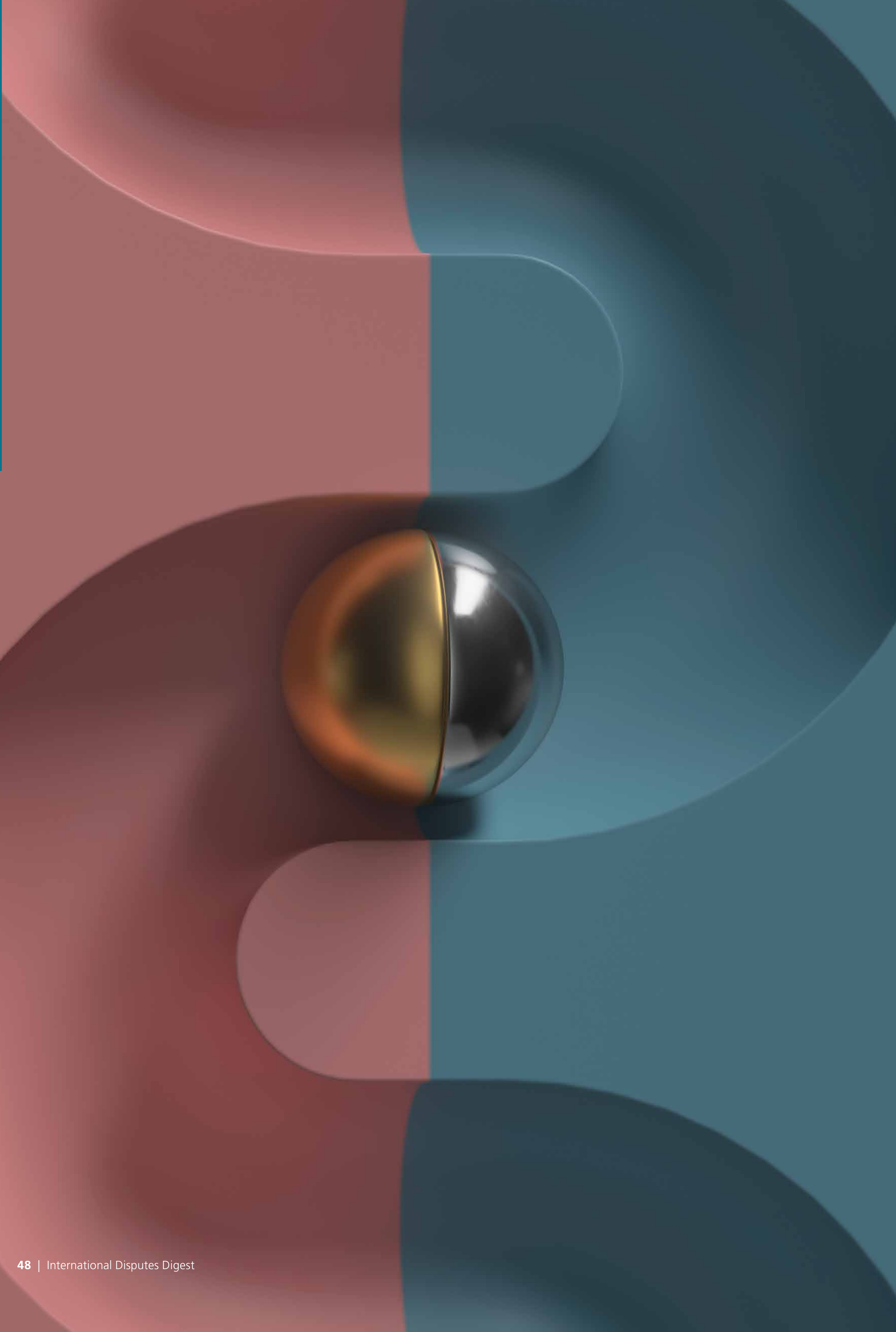
For the financial sector, the first step to answer this call was taken in March 2018, when the European Commission adopted the Action Plan on Financing Sustainable Growth.[6] The Action Plan has three objectives:
- to reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth;
- to manage financial risks stemming from climate change, environmental degradation, and social issues; and
- to foster transparency and long-termism in financial and economic activity.

Regulations following the Action Plan include the EU Taxonomy Regulation (EU Regulation 2020/852), which sets down a unified EU classification system with harmonised criteria for determining whether an economic activity is environmentally sustainable; and the Sustainable Finance Disclosure Regulation (EU Regulation 2019/2088), which sets out rules on transparency and requires financial-market participants to disclose how they consider sustainability risks in their investments. As a result of these regulations, ESG principles will be embedded in legislation. This development reveals that the era is over where companies are non-committal about whether to adopt adequate ESG or climate change policies. Stakeholders (e.g. active shareholders) and also external public interest groups should pay close attention to the steps companies are taking to address environmental and social matters. At the same time, regulators are in the process of implementing ESG principles into legislation.

The result is that companies, and possibly also managing directors, face additional litigation exposure. There is a growing number of pending cases concerning ESG principles being initiated against companies across the globe. To avoid such claims and to be prepared for risk management in relation to new legislation, management boards will have to consider taking responsibility by implementing protocols and taking relevant measures (e.g. informing investors on how ESG principles are implemented in the company's business conduct) while pursuing the long-term success of the company. Rather than being reactive, directors and officers must be ESG-conscious, if only as a strategy to avoid potential disputes.

Conclusion

The COVID-19 pandemic, with its significant impact on stock value and ESG awareness, will accelerate the rise of shareholder activism and litigation initiated by external public interest groups with regard to ESG principles such as climate change. In view of the costly transition towards new, sustainable business models and the potential disadvantages faced by first movers, there is a tension in companies between the desire for profit in the short term versus success in the long run. As this development is rapidly evolving, shareholders and investors are expected to target companies, directors and officers with more litigation. As a result, directors and officers must take action to anticipate this shareholder activism and litigation. At the same time, boards must be aware of on-going legal and social developments and accept higher responsibility in managing new risks in relation to climate change.



Bifurcation in international arbitration and the scope of the *functus officio* principle

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The *functus officio* doctrine in arbitration means that once a tribunal has performed its duty by rendering an award regarding the issues submitted, the arbitrator's mandate or jurisdiction is over. This may lead to disputes where interim or partial awards are issued (e.g. where bifurcation is ordered) if one party asserts that certain issues have not been addressed and remain within the tribunal's jurisdiction.

In the following article, we examine the concepts of bifurcation and *functus officio* in international arbitration from a historical perspective and take a look at the current approach by the courts in the recent decision of the Supreme Court of Western Australia where the court set aside an interim arbitral award on the basis that the three-member tribunal was *functus officio*.

Bifurcation and *functus officio*

Bifurcation occurs where arbitral proceedings are split into two stages, typically where liability is determined prior to quantum. Bifurcation can increase the efficiency of the arbitral process, but – depending on the case in question – bifurcation may not be appropriate where issues concerning liability and quantum are inextricably entwined (e.g. by common evidence). In this case, bifurcation may have the unintended consequence of decreasing efficiencies and increasing costs in the arbitral process. Naturally, the bifurcation process results in more than one award and a dispute may arise as to whether (or to what extent) the tribunal is *functus officio*.

The *functus officio* doctrine is a long-established principle of arbitration. In the 1965 English Court of Appeal decision of *Fidelitas Shipping Co. Ltd. v V/O Exportchleb,*[1] the court found that where an award is an interim award determining the particular issue or issues, it creates an issue estoppel and the arbitrator is *functus officio* in relation to the issue or issues that have been determined. The court also noted that whether an issue is determined may not be simple because "a particular issue, if determined in one way, may dispose of the whole of the dispute between the parties, but if determined in another way may leave other issues to be determined".[2]

More recently, the English High Court in Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited[3] applied the longstanding principle of *functus officio* finding that the principle "applies as much to a partial award as to a final award".[4]

The recent decision by the Supreme Court of Western Australia in *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd*[5] demonstrates that the doctrine of *functus officio* remains entrenched as a fundamental principle of arbitration.

Chevron Australia Pty Ltd v CBI Constructors Pty Ltd

Chevron Australia Pty Ltd engaged a joint venture between CBI Constructors Pty Ltd and Kentz Pty Ltd. (CKJV) to provide construction and other related services for Chevron's Gorgon offshore oil and gas project off the north-west coast of Western Australia.

Following commencement of arbitration proceedings between CKJV (as claimant) and Chevron (as respondent and counter-claimant), a three-person arbitral tribunal was constituted that included Philip Greenham, the Honourable Christopher Pullin QC and Sir Robert Akenhead as chair.

The underlying dispute in the arbitration concerned labour costs whereby Chevron contended that it had overpaid CKJV. Conversely, CKJV argued that that it was owed more than it had been paid. On the second application by CKJV, the tribunal issued a procedural order to 'bifurcate' the arbitration into two separate stages. Liability issues would be determined in the "First Hearing", and quantum issues would be dealt with in the subsequent "Second Hearing".

After the First Hearing, the tribunal made an interim award with the effect that CKJV was only partially successful (First Interim Award).

CKJV subsequently submitted a further pleading asserting an amended case on quantum.

Chevron objected and applied to strike out the pleading on the basis that it was, in substance, a fresh case upon liability for labour costs. Chevron relied upon res judicata (cause of action estoppel), issue estoppel or Anshun estoppel (a type of estoppel which, if applicable, prevents a party from raising claims that ought to have been pursued in earlier proceedings), and also asserted that the tribunal was *functus officio* in relation to all issues of liability.

The tribunal then made procedural orders that, in effect, referred the strike out application to the Second Hearing.

After the Second Hearing, by a further interim award (Second Interim Award), the majority of the tribunal (Akenhead and Greenman) held that CKJV was not prevented from advancing the additional liability arguments regarding labour costs (whether by res judicata, issue estoppel or Anshun estoppel, or as a result of the tribunal being *functus officio* in relation to liability).

The Supreme Court judgment

Chevron's applications relied upon section 16(9) of the Commercial Arbitration Act 2012 (WA) (CAA) and section 34(2)(a)(iii) of the CAA.

Section 16(9) of the CAA

Section 16(9) of the CAA permits a party to request, within 30 days after receiving a ruling by the tribunal (as a preliminary question) that it has jurisdiction for the court to decide whether the tribunal does in fact have jurisdiction.

Martin J dismissed Chevron's application under section 16(9) of the CAA on the basis that the tribunal did not rule against Chevron's objection that the tribunal was *functus officio* as a "preliminary question"; this issue was resolved in the Second Interim Award.

In reaching this conclusion, the court agreed with the UNCITRAL explanatory note that where a jurisdictional ruling by a tribunal has been combined with a merits award, curial recourse is only available via Article 34 or Article 36 of the Model Law (analogues CAA s 34 and s 36), which is a view that is also supported internationally by the Singapore High Court decision in AQZ v. ARA.[6]

1 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630
2 *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at [644]
3 *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm)
4 *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm) at [26]
5 *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323

Section 34(2)(a)(iii) of the CAA

Section 34(2)(a)(iii) of the CAA empowers the court to set aside an arbitral award if "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration…".

The wider legal arguments before the tribunal based on estoppel were narrowed to arguments that only concerned whether the tribunal was *functus officio* when heard by the court, although the court acknowledged that these wider legal challenges "display an overlapping foundation with the functus arguments".

The court found that a set aside application arising out of an assertion that a tribunal is *functus officio* falls within the parameters of section 34 (2)(a)(iii) of the CAA because the *functus officio* doctrine engages with the phrases "not falling within the terms of the submission to arbitration" or "decisions on matters beyond the scope of the submission to arbitration". This conclusion was reached citing the Singapore Court of Appeal decision of *CRW Joint Operations v. PT Perusahaan Gas*[7] concerning an arbitral tribunal exceeding its 'authority' when the tribunal improperly decided matters that had not been submitted to it.

As to whether it is the court or the tribunal that decides whether a tribunal is *functus officio*, the court referred to both local and international cases in holding that ultimately, it will be a matter for the court to decide. The court referred to the Supreme Court of England and Wales decision of Dallah Real Estate v. Ministry of Religious Affairs, Government of Pakistan[8] where it was observed that the tribunal's view of its jurisdiction had no legal or evidential value.

The court evaluated the merits of the assertion that the tribunal was *functus officio* and (save for matters requiring minor corrections or clarifications) largely accepted the dissenting reasons of Arbitrator Pullin in the Second Interim Award that the tribunal was *functus officio* on all issues of liability following the publication of the First Interim Award. The court's reasons included that all liability issues had been "unquestionably dealt with" in the First Interim Award, the CKJV's further claims were freshly articulated contractual liability issues and that the opportunity to raise them was at an end after the publication of the First Interim Award.

Finally, on the question of residual discretion, the court concluded that, notwithstanding its observations on minimal curial intervention, a set aside order under the present circumstances should be "virtually automatic".

Implications

While a court may only intervene in the arbitral process in specific circumstances permitted by the legislation, where the tribunal has become *functus officio*, an arbitral award purportedly issued by the tribunal on matters that have been previously dealt with should be set aside. This is a question purely for the court and the tribunal's view on the matter is of no legal or evidential value.

The concept of finality is crucial to the arbitral process. As noted by the court, an approach that seeks to take "multiple bites at the cherry" cannot be accepted.

For parties involved in arbitral proceedings, the decision demonstrates the critical importance of ensuring their written and/or oral submissions to a tribunal address issues that the tribunal is likely to deal with on a final basis before the relevant interim (or final) award is rendered. This will, of course, require careful consideration of, and adherence to, procedural orders throughout the arbitration. That is particularly so where it is clear that some issues will be dealt with prior to the final award, given that the tribunal must not revisit issues once they have been determined.

[6] *AQZ v. ARA* [2015] SGHC 49

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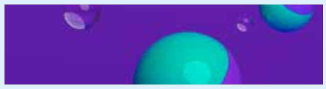

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