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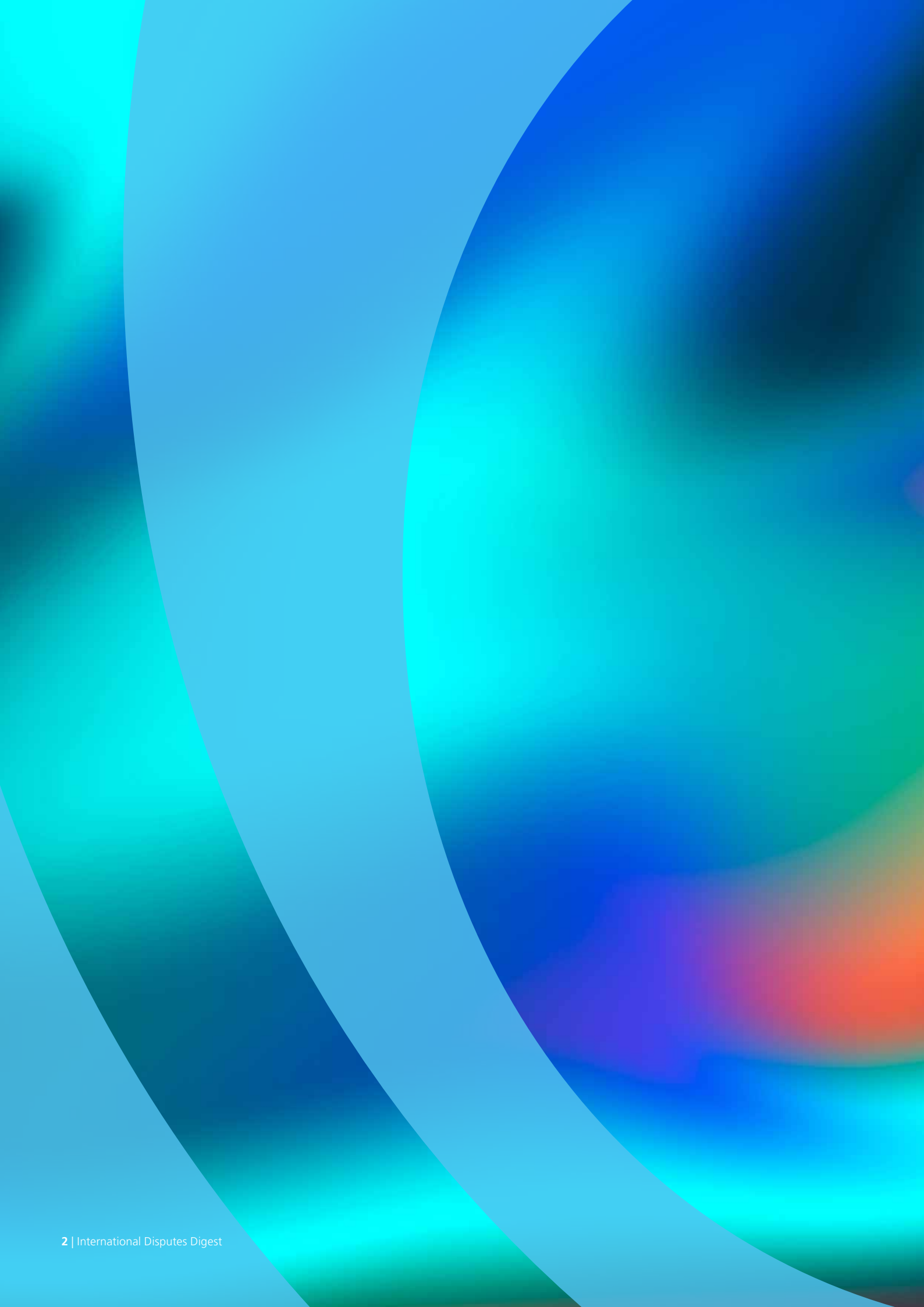
International Disputes Digest

December 2023



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Introduction

Welcome to our winter 2023 edition of the *International Disputes Digest,* analysing current trends in dispute resolution around the world with insights into and potential solutions for the challenges facing global business.

With unrest and uncertainty reigning in both Europe and the Middle East, never has the guidance in this digest been more applicable. In Europe, the war in Ukraine is now in its second year. Apart from the incalculable human cost, this conflict continues to impact energy prices, supply chains, political stability, and isolates the Russian Federation from the international business community. The war in Israel is equally tragic in terms of human suffering with an impact that is reverberating internationally. As for the pandemic, COVID-19 restrictions are largely over with no indication that they will return in the near future. The COVID-19 virus, however, remains a threat – although arguably a less lethal one – and a public-health concern that is likely to remain indefinitely.

The articles in this digest consider strategies to mitigate the impact of those challenges and others that may be affecting your business.

We hope you enjoy reading it and wish you a peaceful festive break, with best wishes for 2024.

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Litigation in the Netherlands: interesting options in challenging times

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Amid today's complex global economy, heightened by the aftermath of the COVID-19 crisis, ongoing armed conflicts and economic uncertainties, such as rising inflation, ESG transition costs, and fluctuating interest rates, businesses are faced with a rise in disputes which, if not managed, may proceed to litigation. This challenging environment calls for effective dispute resolution mechanisms to navigate the conflicts that arise between companies. Amid these challenges, the Netherlands is an interesting jurisdiction for businesses seeking efficient and balanced dispute resolution. In this article, we delve into the specific advantages of the legal landscape in the Netherlands and touch upon the emerging trend whereby litigation is increasingly considered a form of dispute risk management.

Going Dutch: a highly reliable legal system

The legal environment in the Netherlands proves favourable for companies involved in complex litigation and can often be accessed through Dutch holding companies and related assets that many multinationals hold in the country. Dutch courts are known for their impartiality, reliability and cost-effectiveness. Internationally recognised for these attributes, the Dutch legal system consistently ranks highly on the World Justice Project's Rule of Law Index. In the Overall Index, the Netherlands ranks seventh out of 142 countries and third in the project's Index for Civil Justice.[1]

A comparative study between the quality of the Dutch legal system and those of other Western and Central European countries confirms the quality of the Dutch judiciary.[2] In the various indices used by the study, which score different aspects of various legal systems, the Netherlands usually ranks in the upper half of the lists, often holding one of the top positions, which highlights the Netherlands' commitment to fair and competent legal proceedings. This study notes that public, businesses, and legal experts alike highly score the independence of the Dutch judiciary in comparison to those of other European countries.

It is not only the conduct of legal proceedings that is effective and efficient in the Netherlands. European judgments receive direct recognition and execution in the Netherlands, simplifying the enforcement process and, as a signatory to the New York Convention, the Netherlands also facilitates efficient recognition and enforcement of foreign arbitral awards. The abovementioned presence of numerous international companies' assets in the Netherlands adds to the expediency of the enforcement of foreign awards and judgments.

In addition to its reliable legal system and the enforcement options available in respect of international matters, the Netherlands enjoys unique legal functions, such as prejudgment attachments, English-language dispute resolution for commercial disputes and a balanced class-action system, which will be further explored below.

[1] WJP Rule of Law Index (worldjusticeproject.org), Overall Index Score 2023.
[2] F. van Tulder, K. Strijbos and S. Koolen, *'Quality of the Judiciary: A Look Across the Borders'*, 2021.

Prejudgment attachments in the Netherlands: an effective safety net

The approach to prejudgment attachments in the Netherlands is an effective means of preserving rights. Under Dutch law, it is relatively easy to vest prejudgment attachments *(conservatoir beslag)* with respect to third-party assets located in the Netherlands before and pending Dutch or foreign proceedings for the purpose of safeguarding recovery of a claim. The court makes a decision on the creditor's petition for prejudgment attachments within a couple of days and without hearing the debtor *(ex parte)*. Upon the court's authorisation of the prejudgment attachment, the creditor is required to initiate proceedings against the debtor within a specific period to be determined by the court.

Once a prejudgment attachment has been placed, it is difficult to remove. The debtor cannot appeal the court's attachment order and would have to petition the court in separate proceedings to remove it. A successful petition must identify one of the grounds for removing an attachment, as set out in the Dutch Civil Code, such as its unnecessary nature, the fact that sufficient security has already been provided for the claim or the invalidity of the legal grounds invoked by the attaching party.

In practice, lifting a prejudgment attachment is challenging since the burden of proof lies with the party subject to it. Judges tend to afford a higher degree of protection to the interests of the attaching party in balancing these competing interests. The ease of obtaining permission coupled with the difficulty of lifting pre-judgment attachments, makes this a powerful tool for securing claims during litigation pending future enforcement.

Netherlands Commercial Court: tailored for international commercial disputes

Another perk of the Dutch legal system is the possibility for companies to submit a dispute to the Netherlands Commercial Court (NCC) for efficient and innovative resolution of their dispute. Established in 2019, the NCC is a special chamber of the Amsterdam District Court and the Amsterdam Court of Appeals, specialising in complex international commercial disputes, conducting proceedings and delivering judgments in English, while applying the substantive law chosen by parties.

The NCC provides international parties with expert judges capable of resolving international trade disputes within a reasonable timeframe and for a reasonable cost. The court fees are lower than those in arbitration and litigating a major complex dispute in, for example, the courts of England and Wales. Another advantage post-Brexit is the ease of enforcement of NCC judgments in other European countries compared to judgments from the courts of England and Wales.

By conducting legal proceedings in English while making use of the Dutch legal system, parties can better align the judicial process for their international disputes with their customary business practices, saving considerable time and translation costs. In addition, this approach facilitates easy communication with foreign headquarters and the engagement of non-Dutch-speaking legal professionals in both international and locally based enterprises. All in all, the NCC is a cost-efficient alternative to other international venues with optimal enforcement possibilities due to the Netherlands' EU membership and international treaties the country is a signatory to.

Balanced collective claim system: a unique advantage for investors and corporations

Finally, mention must be given to the balanced class-action system of the Netherlands based on the Act of the Settlement of Mass Claims in Collective Action (WAMCA). The introduction of the WAMCA streamlines the Dutch class-action system and provides distinct advantages, even in comparison to other well-known class-action jurisdictions such as the UK and Portugal.

In terms of procedural efficiency, the Dutch legal system provides representative organisations with the authority to pursue monetary damages for an entire class of claimants, eliminating the need for parties to seek redress individually after the action. This option increases the economic viability of class actions in the Netherlands, especially considering the possibility of third-party funding.

Furthermore, efficiency and conclusiveness are increased due to (i) all potential class members being automatically included in the class, unless they actively opt-out, which is a more extensive opt-out system than is available in the UK and Portugal; and (ii) all persons "affected" by the class being bound to judgments in the class-action proceedings, again only limited by explicit opt-outs. In addition to the above, all class actions related to the same matter are consolidated, preventing multiple parallel proceedings.

With regards to group settlements (including settlements in class-actions), case-law confirms that the Dutch judiciary considers itself competent to rule on international group settlements, even if they have a seemingly limited connection to the Dutch legal system, and that a decision regarding settlement agreements can be declared binding on an international group of claimants. In conclusion, the Dutch class-action system is one of the most efficient class-action systems internationally, benefitting both claimants and defendants.

Proactive strategies: optimising dispute risk management

In the realm of complex international disputes, the strategic use of advantages provided by international jurisdictions (as set out for the Netherlands in this article) can be decisive. Proactively approaching choice of jurisdiction is part of effective risk management during a dispute. Therefore, early engagement with litigation attorneys becomes imperative in effectively avoiding and mitigating risks.

We have noticed a trend in international litigation, indicating a more comprehensive approach towards disputes. Aside from the effective application of jurisdictional strategies, clients reap the benefits of the early involvement of litigation lawyers due to their keen understanding of the general risks a client might face in a matter. Proactive engagement aids clients in recognising, evaluating, and mitigating risks in complex commercial relations, therefore diminishing the likelihood of a dispute escalating. In conclusion, we would recommend that businesses engage litigation attorneys at the outset of their risk management process to potentially nip a rising dispute in the bud and develop a pre-litigation strategy, at a much lower cost than potentially lengthy legal proceedings. Litigation attorneys have in-depth experience navigating disputes that proceed to the litigation stage and therefore a unique understanding of the associated risks. This expertise qualifies them as optimal advisors for managing these risks not only during litigation but also in the pre-litigation and contracting phases.

Conclusion

As businesses navigate the complexities of international disputes, the Netherlands stands out as a jurisdiction that not only offers a robust legal framework but also empowers companies to proactively manage risks. Leveraging the unique advantages discussed in this article, businesses can chart a course for strategic dispute resolution, ensuring success in an ever-evolving international legal landscape. The Netherlands, with its reliable and efficient legal system, effective enforcement, specialised commercial court, efficient pre-judgment attachments, and proactive approach to disputes, emerges as a strategic hub for international dispute resolution, opening the road to efficient, effective, and strategic litigation.

A Great Miasma of Dishonesty? Recent Cases on Detecting and Addressing Corruption in International Arbitration: an Anglo-French comparison

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The arbitration community – parties, their counsel, arbitrators, and courts that review and enforce awards – is increasingly focusing on issues of corruption in arbitration. As evidenced by three recent cases, corruption arises in myriad circumstances and is dealt with in differing ways. The first case, in the English courts, was a set aside proceeding with allegations that the claimant had concealed from the arbitral tribunal that the arbitration agreement had been obtained by corruption. The second, in the French courts, dealt with the standard of proof required to prove allegations of corruption related to the merits of the case. The third, a French-seated arbitration, addressed the evidentiary burden required to prove corruption that allegedly occurred during the course of the arbitration.

Issues of corruption in arbitration – why does it matter ?

Corruption intersects with arbitration in several ways, as it can arise in both the underlying factual matrix to the dispute or during the course of the arbitration. Further, the same states where a foreign investor opts for arbitration due to concerns about discrimination in local courts are often states with endemic corruption. This has raised several concerns about arbitration's ability to detect and address corruption adequately. First, the confidentiality surrounding commercial arbitration may make it an attractive option for a party who wishes to conceal potentially corrupt actions. Indeed as eminent arbitrator Lord Hoffman recently noted, sometimes *"there is this great miasma of dishonesty in the background of which you are completely unaware"*. Second, the arbitration process, with its limited disclosure methods and limited jurisdiction over third parties, may make it difficult for a party who believes there may have been corruption to obtain and adduce sufficient evidence. And finally, to the extent the parties have not alleged corruption, arbitrators may be going beyond their jurisdictional remit if they of their own accord decide to investigate an issue neither party has raised.

In international arbitration, one of the parties may allege corruption (i) during the arbitration proceedings to seek to excuse its contractual misconduct or (ii) in court proceedings after the arbitration has concluded (such as set aside or enforcement proceedings). In this latter scenario, the corruption alleged may relate to the merits of the case or to the conduct of the arbitrators who rendered the award.

The treatment of corruption in French and English Law

Under the English Arbitration act 1996, a party to an arbitration can ask the Court to set aside the award for *"a serious irregularity affecting the tribunal, the proceedings, or the award."* (English Arbitration Act 1996, s. 68). A serious irregularity includes *"the award or the way in which it was procedure being contrary to public policy."* (Ibid. s. 69(2)(g)). An award that is tainted by corruption, either during the creation of the arbitration agreement or during the course of the arbitration, would fall under this public policy exception.

Regarding corruption and recognition of awards in France (i.e., exequatur), historically exequatur was only refused on the ground of a violation of international public policy if that was flagrant, effective and concrete (Paris Court of Appeal, 18 November 2004; Cass, 1st civ, 4 June 2008, n°06-15.320).

However, in the 2022 *Belokon* decision, the *Cour de cassation* – the French Supreme court – implemented new criteria: awards can be set aside or refused enforcement where there are serious, precise and consistent indicia (i.e., red flags) of corruption. With this case law, the requirement of flagrance was abandoned leading French courts to exercise a more detailed and precise control over corruption allegations compared to the finding of a situation of flagrance.

Recent decisions

P&ID (English High Court)

On 23 October, in *The Federal Republic of Nigeria v Process & Industrial Developments Ltd.* [2023] EWHC 2638 (Comm), the English High Court found that an arbitration award for USD 11bn had been *"obtained by fraud"* and thus was *"contrary to public policy."*

Factual Background

In 2010, Process & Industrial Developments Ltd. ("P&ID") had entered into a 20-year contract with the Nigerian Government under which Nigeria was to supply a certain amount of *"wet"* gas that P&ID would then strip into *"lean"* gas and deliver back to Nigeria for power generation. P&ID would retain the remaining materials for onward sale.

Neither party performed all of its obligations under the contract. A few years after the contract was signed, P&ID launched an arbitration where an eminent tribunal ultimately found Nigeria liable for repudiatory breach of contract, and then in a separate decision awarded P&ID USD 6.6bn, with 7% interest per annum.

The Judgment

After the arbitration was concluded, and partly with the aid of court-ordered disclosure in both the US and the UK, Nigeria amassed sufficient evidence for the English High Court to find that a series of payments from people and companies affiliated with P&ID to a then-Nigerian government employee were bribes *"in connection with the entry into"* the original contract. These payments apparently continued throughout the arbitration and after the final award.

The English Court also found misconduct within the arbitration itself, as during the arbitration P&ID and its lawyers had misused material that was protected by Nigeria's legal professional privilege. After noting that the contingency arrangements with P&ID's legal team would result in *"life-changing sums of money",* the Court found that P&ID's legal team had been provided with documents that they knew were privileged and were not entitled to see, but made the "indefensible" choice *"not to put a stop to it"* and instead opted to retain the documents, read them, and *"take the benefit of the information they conveyed."* This *"improper retention"* of privileged material allowed P&ID to track Nigeria's strategy throughout the arbitration and adjust its strategy accordingly, including during settlement discussions that occurred in the midst of the arbitration.

Finally, the Court found that P&ID provided false witness evidence related to the corruption. The Court was troubled by the fact that P&ID's witnesses had omitted any mention of the payments it made to the Nigerian official at the contract's inception. While P&ID claimed that it had no duty to disclose the pre-contractual portion of the payments, the Court found that omission *"dishonest by the standards of ordinary decent people."*

Despite these findings of corruption and misconduct, the Court was careful to note that given the status of the action, as a set aside proceeding, the Court's inquiry was limited to corruption in the creation of the (separable) arbitration agreement. However, the Court concluded that if the arbitral tribunal had known about the bribes, the misuse of privileged information, or the witness's failure to disclose the payments made, "the entire picture would have had a different complexion."

While the English High Court has yet to decide whether the award should be entirely set aside or remitted to the arbitral tribunal, the judge invited the larger arbitral community to engage in discussion upon several key issues relating to corruption in arbitration. First, the judge highlighted the importance of the disclosure process and a court's ability to enforce disclosure, including third-party disclosure orders, as it was only through court-ordered disclosure from banks and other third parties in England and other jurisdictions that much of P&ID's misconduct came to light. In that vein, the court noted that "in all the recent debates about where disclosure or discovery matters, this case stands a strong example for the answer that it does." Second, the judge invited discussion on the ability of arbitration to address issues of fraud as, in the Court's view, the fact that even with an eminent tribunal "of the greatest experience and expertise", these issues went undetected meant that the arbitral process was "vulnerable to fraud."

Alstom (French Courts)

On 14 March 2023, in *Alstom v. ABL* (Versailles Court of Appeal, n° 21/06191) the Versailles Court of Appeal confirmed a lower court decision granting exequatur to an ICC award against Alstom. In doing so, the appellate court considered that Alstom had not provided sufficient evidence to support a bribery defence to the exequatur.

Factual Background

The case arose out of three consultancy contracts under which Alexandre Brothers ("ABL") undertook to assist Alstom in bidding to supply railway equipment in China. After Alstom only partially paid ABL for the first two contracts and refused to pay for the third, ABL initiated ICC arbitration to obtain payment for its services.

During the arbitration, Alstom justified its refusal to pay on the grounds that there were indications of corruption between ABL and Chinese officials. The arbitral tribunal found that Alstom had failed to prove its allegations of corruption and ordered it to pay the sum of EUR 1.7m.

The French Exequatur Decisions

ABL then turned to the courts in several jurisdictions to enforce its award. While Swiss and English courts recognised the award and refused to question the arbitral tribunal's decision on the merits, the French Courts carried out a more thorough review and by a decision of 28 May 2019, the Paris Court of Appeal overturned a lower court order granting exequatur to the award, considering that there were *serious, precise and concordant* indications of corruption on ABL's part, including the lower rating of Alstom's bid compared with its competitors, suspect accounting, and the fact ABL had obtained a confidential document from Chinese authorities.

On 29 September 2021, the *Cour de Cassation* overturned this ruling on the grounds that the Court of Appeal had misconstrued some of the written evidence.

On remand, the Versailles Court of Appeal carried out a fresh examination of the law and facts and rejected one by one all eight of Alstom's alleged indicia of corruption. This court, considered that none of them, even taken together, qualified as serious, precise and concordant issues, meaning the Award did not contravene international public policy and exequatur was proper.

In employing a strict assessment of the indicia of corruption, the Versailles Court of Appeal reminded us that review does not mean annulment, and that while French case law requires an in-depth review of the award's compliance with international public policy, the allegations must be both sufficiently particularised and supported by sufficient evidence, and must satisfy a minimum threshold requiring a violation to be demonstrated.

Commisimpex (French-seated arbitration)

On 5 October 2023, a replacement ICC tribunal issued a decision in the long-running Commisimpex case dismissing allegations of corruption against an eminent arbitrator.

Factual Background
An arbitration award issued in 2013 ordered Congo to pay EUR 225m to Commisimpex for unpaid debts relating to a public works contract. The arbitration was seated in France, where the arbitration law allows a party to ask a tribunal to revise its own award in exceptional circumstances, including where the party has discovered fraud.

After Commisimpex attempted to enforce the award in France, Congo asked the tribunal to revise the initial award. Congo's reasoning for the revision was based upon alleged ties between Commisimpex and one of the arbitrators, Mr. Yves Derains. In particular, Congo alleged that Mr Derains had accepted bribes.

Mr. Derains denied the allegations and filed a complaint for defamation against Congo, its minister of justice, its then-French counsel Kevin Grossman, and a US lawyer whom Congo had put forward as a witness.

All of the arbitrators on the initial panel recused themselves and a new tribunal was appointed to address these new allegations.

On 5 October 2023, the new arbitral tribunal issued its award. In that award, it rejected Congo's bribery allegations, finding that the evidence submitted by the State was all hearsay, which is not sufficient to establish the existence of corruption between Mr Derains and Commisimpex (the corruption has to be demonstrated with serious, precise and consistent indicia).

The tribunal also criticized Congo's conduct, finding that Congo knowingly made its revision request based solely on the hearsay of an informant. In the tribunal's view this demonstrated the request was brought solely to impede enforcement proceedings.

Lessons Learned

These cases demonstrate the myriad ways in which corruption intersects with arbitration. Further, they highlight how different legal systems have grappled, and will continue to grapple, with the issues, with some universal aspects.

Further, all of these cases demonstrate that, while corruption involving a State remains a sensitive issue, neither a Court nor an Arbitral tribunal will take corruption allegations at face value and will require a high evidential threshold to be met. The P&ID court relied upon evidence that included banking records obtained through court actions in the United States before it made its finding that the underlying contract had been procured by corruption. The Versailles Court of Appeals in the Alstom case similarly scrutinised the evidence before it in painstaking detail, finding circumstantial evidence was not enough. The reconstituted Commisimpex tribunal also was unwilling to find corruption based upon hearsay and circumstantial evidence.

Russian torpedo anti-arbitration injunctions and court penalties in recent Russian court practice

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In the wake of Russia's invasion of Ukraine and the waves of new and expanded sanctions adopted by western states against Russian citizens and legal entities in a multitude of sectors, a large number of western entities have attempted to shut down their business activities in Russia. Due to the sanctions, many of these businesses have been unable to fulfill contracts entered into with Russian counterparties before the invasion.

Even where these contracts include clauses providing for the settlement of disputes outside of Russia, often by means of arbitration, western entities are facing court proceedings initiated against them before Russian courts. Indeed, Russian courts have even issued anti-arbitration injunctions to prohibit proceedings in the contractually agreed forum. This phenomenon has given rise to several parallel proceedings where western courts and arbitral tribunals have been asked to issue conflicting anti-suit injunctions and further decisions of their own.

Russian statutory law on sanctions-related disputes

The basis for Russian courts assuming jurisdiction over these disputes can be found in Article 248 of the Russian *Arbitrazh* Procedural Code (APC). The Russian legislator introduced this provision in 2020, at a time when some sanctions were already in place but they were of a more limited nature. Article 248.1(1) APC gives the Russian *arbitrazh* (commercial) courts exclusive jurisdiction over disputes involving Russian citizens or legal entities in which foreign restrictive measures have been adopted. Part (4) of the same article extends its application to disputes falling within the competence of a foreign court or an international arbitral tribunal located outside of Russia,

"if the arbitration agreement is incapable of being performed due to the application of restrictive measures in relation to one of the parties to the dispute […] which create obstacles for such person's access to justice."

To enforce their exclusive jurisdiction, Russian courts have the power under Article 248.2 APC to issue injunctions prohibiting foreign proceedings if the Russian party presents evidence that such proceedings have been or will be initiated. A failure of the foreign party to comply with an injunction may lead to an order of penalties, which can reach the amount claimed in the foreign forum plus the legal costs incurred in that proceeding (Article 248.2(10) APC).

The purpose of these provisions was explained by the Russian Supreme Court as follows:

"Articles 248.1 and 248.2 have been added to the procedural law by the Federal Law of 08.06.2020 No. 171-ФЗ […]. It follows from the explanatory note to the draft of this federal law that the purpose of adopting

these norms was to establish guarantees to ensure the rights and legitimate interests of certain categories of citizens of the Russian Federation and Russian legal entities in respect of whom restrictive measures have been imposed by unfriendly foreign states, since such measures effectively deprive them of the opportunity to defend their rights in courts of foreign states, international organisations, or arbitration courts located outside the territory of the Russian Federation."

In theory, Articles 248.1 and 248.2 APC provide for a three-fold legal test. For Russian courts to assume jurisdiction, restrictive measures must: (i) be in force "in relation" to a Russian party; and (ii) create an obstacle for the Russian party's access to justice. For an anti-suit or anti-arbitration injunction to be issued, (iii) there must additionally be evidence that foreign court or arbitration proceedings have been or will be commenced. The Russian court practice that has evolved since the introduction of these provisions shows that Russian courts do not assess these requirements separately. They rather apply a more general and outcome-oriented approach.

Russian Supreme Court: access to justice hindered by sanctions against Russian party

In December 2021, two months before the Russian invasion of Ukraine, the Russian Supreme Court adopted its often-cited decision in Uraltransmash JSC v. PESA (Poland). In this decision, the Supreme Court held that the imposition of restrictive measures in and of itself constitutes an obstacle to the sanctioned party's access to justice in terms of Article 248.1(4) APC – and that submission of evidence to prove the impact of restrictive measures on the enforceability of the arbitration clause is optional. The Supreme Court overturned the decisions of the first and second instances, which had required proof of actual obstacles to the sanctioned party's access to justice. According to the Supreme Court:

"[F]rom a systemic interpretation of the above legal norms and taking into account the objectives of legislative regulation, it follows that the mere fact that restrictive measures have been imposed against a Russian person involved in a dispute in an international commercial arbitration outside the territory of the Russian Federation is presumed to be sufficient to conclude that such person's access to justice is restricted.

Restrictive measures are, firstly, of a personal nature, i.e. addressed to a specific person personally, and secondly, of a public nature, i.e. generally binding and based on the power and authority of public state power. The imposition by foreign states of restrictive measures (bans and personal sanctions) against Russian persons infringes them in their rights at least reputationally and thus knowingly puts them on an unequal footing with other persons. In such circumstances, doubts are justified as to whether a dispute involving a person located in a state that has applied restrictive measures will be heard in the territory of a foreign state that has also applied restrictive measures, in compliance with fair trial guarantees, including those relating to the impartiality of the court, which is one of the elements of access to justice."

Albeit not binding upon lower courts, this reasoning of the Supreme Court has been cited by most lower courts applying Article 248 APC since the beginning of the invasion. Following the logic of the Supreme Court, a Russian party does not need to prove that its procedural rights are actually affected in the foreign proceedings or that the arbitration clause in question is unenforceable. It suffices to show that restrictive measures have been imposed against it.

While there is (very limited) court practice attempting an assessment of whether the Russian party's procedural rights are actually affected in the foreign proceedings, these decisions have been reversed at the cassation level (albeit in some cases on different grounds).

Russian court practice on personal sanctions v. sectoral sanctions

The question that remained to be answered was whether the Russian party needs to be subject to personal sanctions imposed against it or whether sectoral sanctions affecting only the contractual supply or service relationship with a foreign party would suffice.

On its face, the language of Article 248.1(4) APC, stating that the restrictive measures must be introduced "in relation" to the Russian party to the dispute, suggests that this provision is aimed at the Russian entities subject to personal sanctions against them. This would be in line with the explanatory note to the draft law cited by the Supreme Court above. Following that logic, some courts ruled that they lacked jurisdiction to hear the case if a Russian party had not demonstrated that it was, in fact, subject to restrictive measures (i.e. bans or personal sanctions).

In *Uraltransmash v. PESA,* Uraltransmash as a defence industry entity was subject to personal sanctions imposed in 2014 by the EU, US, Lichtenstein, Switzerland, and Ukraine. These restrictions included asset freezes and transactional bans. The Supreme Court therefore identified specific personal sanctions in its 2021 decision, albeit using broad language to do so. Nonetheless, its ruling has been cited repeatedly by lower Russian courts since February 2022 to support a wider interpretation of Articles 248.1 and 248.2 APC – also covering Russian parties that are affected only by sectoral sanctions.

Given the large number of sectoral sanctions introduced since the beginning of the invasion in February 2022, broadening the scope of Article 248 APC to include disputes involving a Russian party affected only by sectoral sanctions essentially means that almost any sanctions-related dispute can be brought before Russian courts these days.

Anti-arbitration injunctions: evidence of foreign proceedings

Finally, the only additional requirement for Russian courts to issue an anti-arbitration injunction – evidence of initiated or soon-to-be initiated foreign proceedings – also appears to be applied liberally. In cases where the foreign proceedings have not yet been initiated, the evidence that they will be initiated soon is rarely analysed by Russian courts. Injunctions are often granted merely based on the fact that there is an arbitration clause allowing the foreign party to turn to arbitration.

Enforcement risks on the rise?

As a result, the number of anti-suit or anti-arbitration injunctions issued by Russian courts is continually rising. Foreign parties are faced with the need to decide whether to comply with the injunction – knowing that Russian parties will almost certainly also prevail in the main proceedings before Russian courts – or pursue their rights in the contractually agreed forum and obtain anti-suit injunctions and/or enforceable titles of their own. This dilemma is reinforced by the penalties awarded by Russian courts. Such penalties are awarded not only based on Article 248.2(10) APC for non-compliance with anti-arbitration injunctions. Western entities may face additional penalties (i.e. *astreintes*) as part of the main proceedings where Russian courts award penalties to the Russian party for each day of non-compliance by the foreign party with the judgment against it. Thereby, Russian courts create an enforceable title over monetary claims that continue to build up after the judgment is rendered. These penalty claims then become the subject of enforcement proceedings in Russia.

The most relevant question that remains to be answered is whether these penalty claims can also be enforced outside of Russia. The question arises, in particular regarding countries that do not support western sanctions and are not classified as "unfriendly" by Russia, such as China or India. While it remains to be seen whether such an enforcement risk is real or remains a theoretical threat, potential damages are high. The only way for foreign parties to mitigate this risk may be to seek injunctions and enforceable titles in the contractually agreed forum. In the current political and legal landscape, this may give rise to additional parallel proceedings, aimed at obtaining titles that contradict the Russian judgments. The question of who will prevail in this kind of dispute may ultimately turn on the question of enforceability.

The impact of arbitral agreements on third parties connected to the dispute

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As with any agreement, an arbitration agreement typically applies to and binds only the parties. However, there are unusual situations, which may justify extending the effects of the agreement to a non-party. There has been a slow but steady increase in the practice of extending arbitration agreements to non-parties, which is worthy of attention, particularly within the Serbian legal context.

The general rule reflected in arbitration legislation globally is that an arbitration agreement binds only the parties. This is a general rule, which provides reliability and protects third parties from being burdened with the consequences of others' actions.

However, as an exception to the rule above, the issue of third parties (i.e. non-signatories) being bound by the arbitration agreement has in recent years become an interesting topic for both authors and legal practitioners.

When it comes to whether an arbitration agreement should be extended beyond the parties, the main question both in doctrine and practice is the way in which this decision is determined.

International arbitration conventions and national arbitration legislations usually do not provide the mechanisms for determining when third parties are bound by an arbitration agreement. Courts and arbitral tribunals must rely on other national laws, doctrine, and case-law to determine the binding nature of arbitration agreements on non-signatories. The following potential mechanisms for extending the binding force of the arbitration agreements have been formulated:

1. Agency relationship

An agent will execute an arbitration agreement on behalf of its principal and the tribunals will find the principal to be bound by the agreement. This mechanism is often triggered by an applicable national law that differentiates between explicit or apparent agency. If the agency is explicit, the agreement would bind the principal only. If the agency is apparent, it might be possible for the arbitration agreement to apply to both the principal and the agent, but only if the agent also acted in its name.

2. Apparent authority

A party may be bound by another entity's acts seemingly performed on its behalf, even where those acts were unauthorised, if the principal created the appearance of authorisation, leading a counter party reasonably to believe that authorisation actually existed.

3. Implied consent

An entity may impliedly become a party to an arbitration agreement either by conduct or declarations.

In addition to determining the third party's intent, the main question in these instances is whether the parties' objective intent was for the third party in question to be bound by the arbitration agreement.

4. Piercing the corporate veil

This instance of including a non-signatory is not an issue of consent, but rather a sanction for its behaviour. If the company invokes legal separation as a liability shield, the corporate veil is pierced in order to prevent unjust results. Piercing is an extreme sanction since once the veil is pierced, the owners of the pierced entity will be liable.

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Whether these mechanisms will successfully bind a non-signatory to an arbitration agreement will depend on the circumstances of the case and the applicable law. The mechanisms rely heavily on legal standards in order to bind a non-signatory to the arbitration agreement.

Tribunals around the world have been increasing the number of instances in which they extend their jurisdictional scope to include third parties. This, however, is still a controversial practice and must always be justified and elaborated.

In the Serbian context, both arbitral institutions and courts adopt an even more conservative stance than the global norm, refraining from extending the effect of arbitration agreements to third parties. This divergence highlights the importance of a nuanced and jurisdiction-specific approach to the complex issue of binding non-signatories to arbitration agreements.

Three years of intellectual property courts in Poland

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Until 2020, only one court in Poland specialised in intellectual property matters. More precisely, only a single division of the District Court in Warsaw was designated to hear cases involving EU Trade Marks and Community Industrial Designs (22nd Division).

All other cases concerning intellectual property issues were dealt with by the general commercial or civil divisions of the common courts. Outside their jurisdiction, however, cases arose related, for example, to invalidation of a registered trade mark that had been the basis of the plaintiff's claims. As a result, some cases went through all the instances of administrative proceedings conducted by the Patent Office of the Republic of Poland and the administrative courts before a judgment was issued by the civil court. (The only exceptions have been cases involving EUTMs and RCDs in which a counterclaim was allowed).

A linked consequence of the fragmentation of the IP judiciary in Poland has been the lack of a specialised cadre of judges with a canon of expertise focussing on cases involving more complex technical issues such as inventions, utility models or computer programmes. This was a missed opportunity since such judicial specialisation would have ensured that jurisprudence in daily IP cases involving trade marks, industrial designs or copyrights had become more unified (and thus, predictable to business).

The current system of a specialised jurisdiction in intellectual property cases was introduced by a statute of 13 February 2020. As emphasised in the explanatory memorandum accompanying the bill, the proposed changes were primarily a response to increasing demands from business and IP scholars.

It was initially planned that four intellectual property courts of first instance (justified, among other things, by Article 80 of Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs) and two courts of appeal would be established. In the end, five courts have been designated: district courts in Warsaw, Poznan, Lublin, Gdansk, and later in Katowice. These courts have been designated as first instance courts while Appeal Courts in Warsaw and Poznan have been designated the upper-tier courts. There is, however, no court in Cracow. Overlooking this city is seen as controversial considering that the Jagellonian University is a highly esteemed academic authority in Poland in the field of intellectual property law.

According to Article 47889of the Civil Procedure Code, intellectual property cases concern industrial property rights, copyright and related rights, as well as intellectual property rights. This includes cases filed to prevent and combat unfair competition, protect goods and services and protect certain personal rights (insofar as it is used for personalising advertisements or promoting a business, or is related to scientific or inventive activities).

However, the District Court of Warsaw has retained exclusive jurisdiction over intellectual property cases concerning computer programmes, inventions, utility models, topographies of integrated circuits, plant varieties and business secrets of a technical nature (Article 47990 para 2 of the Civil Procedure Code).

This provision embodies and exemplifies both the positive and negative consequences of the implemented regulation. On the one hand, a single body remains competent in the most complex cases, allowing an expert cadre handling such cases to emerge, thus making uniform jurisprudence possible. On the other hand, it concentrates much of the intellectual property-related work in only one of the five courts and consequently has led to complaints that the standing and repute of the other courts have been lowered as a result. This, in turn, has given rise to calls to reverse the reform.

The risk of the reform actually being reversed, however, is remote. The number of cases submitted to the intellectual property courts demonstrates that the new system has been adopted by court users. Another key indicator is the number of cases heard and, above all, the average time taken to hear a case in the first instance.

In Warsaw, the number of cases remains at a steady level (about 1,500 in the second year of operation and 1,600 in the third year of operation of the IP Division), whereas in the other jurisdictions the number of cases appears to have doubled. According to some experts, the District Court in Katowice (as mentioned above, the last court to enter the race) may soon become the leader in terms of the number of intellectual property cases handled, positioning this court to assume the top rank as early as next year (with fewer than 900 cases in the second year and over 1,600 cases in the third year). In other courts, the number of intellectual property cases in the third year of the reform was over 1,100 in Poznan and about 450 cases each in Gdansk and Lublin.[1]

This begs the question: why – despite the fact that the IP Division of the Warsaw District Court remains exclusively competent for a fairly wide range of IP cases – is this court not significantly ahead of the other courts in the number of cases heard? The answer is relatively simple: the reason lies in the figures. Cases concerning inventions, computer programmes or business secrets of a technical nature represent a minute percentage of the overall cases handled by the intellectual property courts.

Although the systematic classification of cases by the courts is quite imprecise (the results are influenced, among other things, by the fact that a case involving both copyright infringement and trade mark protection is only included in one of these categories by the court), the majority of cases received by the IP Divisions involve copyright, both regarding infringement and demand for payment (above 50%).

Second place pertains to cases involving combating unfair competition, followed only by proceedings related to trade marks, industrial designs, and, at the very end, utility models and patents.

However, from the point of view of businesses and professionals with an interest in dealing with intellectual property cases, another statistic is key: namely the average time taken to process cases. In this regard, despite the fact the judiciary operated under the conditions of the COVID-19 pandemic for an extended period, the data is at least satisfactory and offer both plaintiffs and defendants some hope for a swift resolution of disputes. In the third year of the reform's operation, the average case processing time ranged from less than three months in Lublin to just over seven months in Warsaw. It should not be forgotten that the IP Division of the District Court in Warsaw entered the reform with the largest number of cases on its docket in the first year of specialised IP jurisdiction – over 1,000 cases in Warsaw and less than 200 in Lublin. However, it is the District Court in Warsaw that handles cases requiring expert opinions and complex evidence.

The ratio of the number of completed cases to the number of cases opened in a given year is is almost balanced. This is a highly optimistic since one can conclude from this that intellectual property cases are now being handled almost "in real time", especially when compared to the average time for proceedings in intellectual property cases in Germany where the waiting time for a first-instance decision can be as high as eight to 20 months, depending on the complexity of the case and the current workload of the respective regional court.[2]

The appellate courts in Warsaw and Poznan remain almost equally efficient. Because of Poland's considerably lower costs for court proceedings in comparison to Western Europe (both for court fees and attorney fees), Poland is becoming a forum where parties are more likely to seek effective legal protection for their exclusive intellectual property rights.

The changes introduced three years ago, which affected not only the organisation but also the competence and tools available to the courts in IP cases (e.g. measures to secure or extract evidence), represent a meaningful step in the right direction – a response to the needs of business based on innovation, branding and creativity.

[1] All data related to the number of cases and average time for processing a court case cited after: https://www.linkedin.com/pulse/iii-rok-wydzia%2525C5%252582%2525C3%2525B3w-ip-w-polsce-zestawienie-pawe%2525C5%252582-pozna%2525C5%252584ski%3FtrackingId=16a2MqW1SheS5zj00jOcLw%253D%253D/?trackingId=16a2MqW1SheS5zj00jOcLw%3D%3D

[2] https://www.wipo.int/edocs/pubdocs/en/wipo-pub-1079-chapter5-en-germany-an-international-guide-to-patent-case-management-for-judges.pdf; page 192

Stark reminder from Court of Session to follow accurately section 1 procedures

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Employees and/or consultants leaving a job or engagement and taking company confidential information with them, perhaps either as a head-start in a new business venture, or to make them more employable when job hunting, is a fairly regular occurrence.

In these instances, legal remedies to ensure the safe return of the information can range from a strongly worded letter to more significant court action. Generally, the more sensitive or confidential the information is, then the more likely it is that court action may be required.

If the information misappropriated is highly confidential, and perhaps contains financial information, customer lists or company trade secrets, this could require a fairly significant legal effort to recover it. In Scotland, the most effective remedy in these circumstances, is often to seek an order under section 1 of the Administration of Justice (Scotland) Act 1972. Such orders (the Scottish equivalent of English "search and seizure" orders) allow a party to enter into a home, office or other space to recover and preserve evidence. Such evidence might include documents and information saved on electronic devices such as phones, laptops, tablets and those stored electronically in the "cloud". The rationale behind seeking such an order is that the information is so highly sensitive that there is a chance it may be destroyed or otherwise hidden in advance of a full court action being raised. Therefore, there is a requirement for the evidence to be preserved in advance of those full proceedings being commenced.

Generally, owing to the lack of widescale disclosure obligations in Scotland which are present in other jurisdictions (for example England and the US), such orders are more regularly granted in Scotland than they might be in other countries.

A recent case heard in the Court of Session has raised some interesting points as to when such orders might be granted, the form of any kind of "dawn raid" search and what ought to happen to the information once it has been recovered.

Facts of the case

Briefly, former employees (**"Matheson"** and **"McIntosh"**) of a financial planning and investment company (**"TIHL"**) were alleged to have misappropriated TIHL's confidential information. As a result, TIHL successfully obtained section 1 orders for the retrieval of the materials taken by both former employees. It was alleged that Matheson and McIntosh had, or were in the process of, establishing their own business which was intended to compete with TIHL.

On 24 June 2022, section 1 searches took place at the homes of the respondents Matheson and McIntosh, to seize materials relevant to the section 1 order. As is standard practice, the Commissioner for each search (normally a KC or at least relatively senior advocate) provided a report on the findings of the search to the court.

On 30 June 2022, the Commissioner for the McIntosh search provided a revised version of the report to both the court and TIHL's solicitors, noting the results of an initial professional examination of McIntosh's

personal device which suggested the presence of information relevant to the court order.

Thereafter on 11 September 2022, the IT expert reported on findings from investigations on electronic devices seized in both searches to the Commissioners. On 12 September 2022, the Commissioner for the McIntosh search provided a revised report containing the IT experts' findings to both the court and TIHL's solicitors.

Having consulted with counsel, TIHL's solicitors proceeded to disclose the information contained in the reports to TIHL, without having obtained the court's authorisation allowing them to do so, and proceeded to raise an action as contemplated in the section 1 petition.

The improperly disclosed findings were subsequently used: to carry out internal investigation by TIHL into Matheson's and McIntosh's conduct as employees, whereby both were dismissed; (ii) in Matheson's appeal for dismissal to the Employment Tribunal; and (iii) in the disciplinary action by the Financial Conduction Authority for both Matheson and McIntosh.

Main findings of the case

Attendance of solicitors during "Dawn Raid"

In this case, the Court clarified that the sole purpose of permitting the attendance of the petitioner's representative (solicitor) at a section 1 search is to provide the Commissioner with more specialised knowledge of whether a particular item being examined by the Commissioner falls within the scope of the court order and should be seized. The court further explained that the petitioner's solicitor should not routinely be shown items that the Commissioner is considering seizing and that they should not under any circumstances be shown items that the Commissioner has already decided to seize. Notably, the Court discussed that in the past, it may have "been too ready to authorise the attendance of petitioner's representatives [at section 1 searches] and should in the future require a clear demonstration that specialised knowledge may be required, and can be provided by such a representative, before such authorisation is given."

Having been involved in a number of these types of procedures, I found these comments very interesting. It goes without saying that these cases can be challenging, not least because one may be entering people's homes where children and other family members may be present. Often, emotions are running high and, in my experience, the most effective section 1 order searches are those carried out as quickly and calmly as possible.

Whilst I do think it is important that solicitors acting for the petitioner are present and on hand to assist in case urgent instructions are required, I have generally taken the view that very little good comes from being physically present in the premises whilst searches are carried out. Being a short distance away and being contactable by phone is often more than sufficient. In my view, it would still be necessary and important to include the relevant solicitor(s) on the order, so that they can enter the premises if absolutely necessary.

Role of IT forensic experts

Similarly, the Court discussed the rationale for authorising the attendance of IT specialists at section 1 searches. In this case, the Court clarified that the IT specialist may be present for the purpose of assisting the Commissioner in examining or carrying out "on the spot" forensic imaging of, electronic devices or data storage facilities for materials relevant to the court order. Notably, the Court considered that if no on the spot examination is required, and devices are simply seized and taken away for later analysis, then it would be difficult to see how the attendance of IT specialists during the section 1 search was justified. The Court's consideration of the topic extended to how the cost of a section 1 search "particularly if swollen by the attendance of unnecessary personnel, can easily become an instrument of oppression in the underlying dispute." In considering the attendance of IT specialists moving forward, the Court stated that this "is something in relation to which the court may need to develop a more robust attitude than has to date been apparent."

These days, almost all cases of these type will involve the taking possession of, and/or carrying out a forensic mirror image of, electronic devices. Often the search will also require accessing individual's cloud-based storage accounts to change passwords.

In these circumstances, it is very important, in my opinion, that the court continues to allow forensic experts, or at least someone proficient with IT issues, to be present and assist when carrying out the search. In my view, it is neither fair nor reasonable to expect a Commissioner (who although may well be a very experienced KC) to have all the necessary IT skills and competencies to ensure the search and recovery of confidential information is carried out across complex IT systems.

Again, an important objective of these kinds of operations should be to get out of the premises as quickly as possible (whilst of course making sure the search is completed properly and thoroughly). Having IT experts on hand can only assist with that. In the cases I have been involved in, the IT experts were often of paramount importance in ensuring the smooth running of the search. It is also very important to note that often you cannot be sure what IT assistance will be required until the search is actually carried out. If the IT forensic

personnel are not listed in the order, they will not be authorised to be present during the search. So again, best practice would be to have those personnel listed so that they can be on hand to assist, if necessary.

Use of Information post "Dawn Raid"

In summarising the stream of errors in this case, the Court acknowledged that as "so many of those involved in the process apparently did not understand its basic principles suggests the existence of a systemic misunderstanding of the court's procedures which is deeply concerning." In this case, the IT report should not have been provided by the Commissioner to TIHL's solicitor; it should have been provided only to the Court. Once provided to the Court, the solicitor should have then enrolled a motion for disclosure of the expert's IT report, whereby Matheson and McIntosh would have had the opportunity to object. The Court stressed that this was a serious procedural error on the part of the Commissioners, and one which TIHL's legal representatives should have recognised.

This can often be an area where solicitors come undone. An absolutely fundamental tenet of these types of cases is that once the search has been carried out and devices and have been mirrored and returned to Court, nothing can be done without the Court's authority.

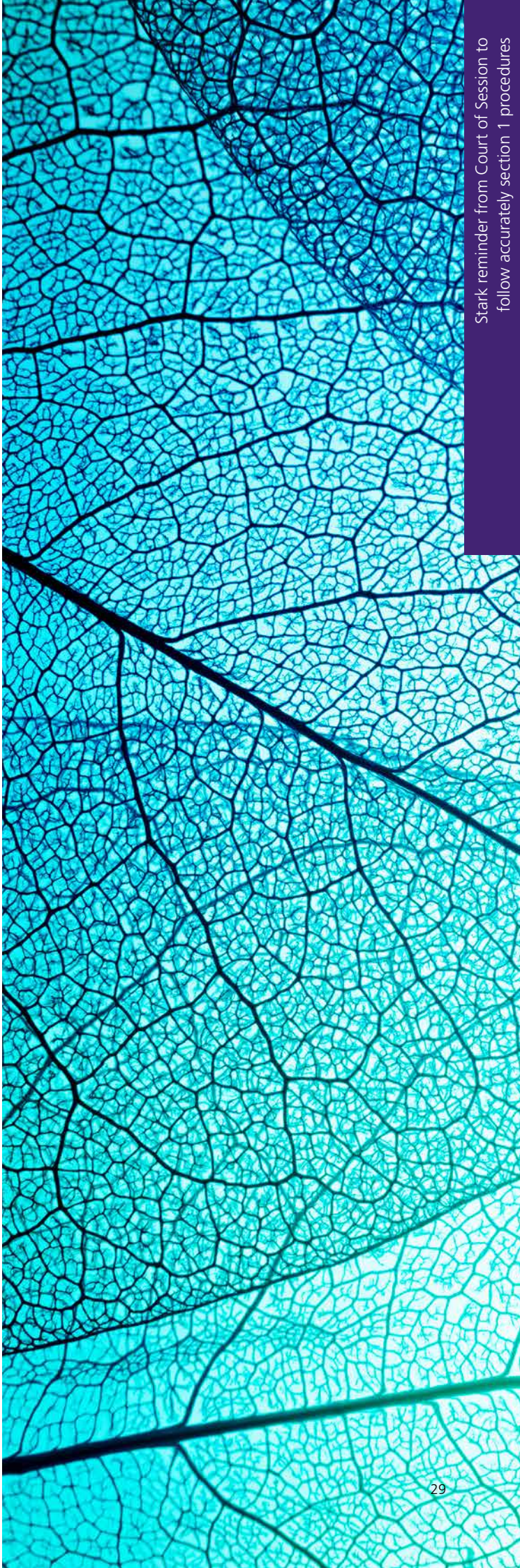
Ultimately, it is the role of the Commissioner to ensure that the authority of the court order is not exceeded and therefore one would normally expect the Commissioner to take control of ensuring the reports and devices/recoveries are lodged in court and any confidentiality concerns are respected. Again, in any of these actions where I have been involved, the Commissioner has taken a fairly robust approach and in any dispute between the parties on information being shared or returned to either party, made clear that a further court order would be required before he or she could assist.

Summary

This case is a useful reminder on how searches under Section 1 of the Administration of Justice (Scotland) Act should be carried out. They can be logistically very challenging as well as being high-pressured environments to work and provide advice in.

Understanding what can and cannot be done and what requires the Court's authority is absolutely crucial. Whilst it is right that the Court seeks to keep those attending such section 1 searches under review, in my view it is also important that the Court does not take too restrictive an approach so as to make the successful commission of a section 1 search more difficult that it needs to be.

The Scottish IP Disputes team at CMS are very experienced in dealing with these kinds of cases. Please get in touch if you would like to know more.



Directors´ liabilities and restructuring plans

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When a company is in financial difficulty, the responsibilities and duties of its directors can change depending on the financial position of the company. There are scenarios in which directors must consider the interests of creditors and potentially even prioritise those over the interests of shareholders. If the applicable duties are not properly discharged, directors can face personal liability and/or disqualification.

Considerations of directors' duties may influence:

a. whether the company should continue to trade;
b. whether to obtain specialist advice;
c. the time available for key stakeholders to agree to the terms for financial restructuring; and
d. what the company may and may not be able to do pending completion of restructuring.

If the company ultimately undergoes an insolvency process, the insolvency practitioner will investigate the prior decisions of the company´s directors. Depending on the findings, different claims may arise.

Directors' duties vary according to the financial position of the company. When a company is solvent, its directors owe a duty to the company to act in a way that – in their estimation – will promote the success of the company for the benefit of the shareholders.

When a company is insolvent, the directors' duties may vary depending on the anticipation of the insolvency. Anticipation of insolvency may occur in one of the two following scenarios:

a. likelihood of insolvency, when it is expected that the debtor will not be able to meet its obligations within the next two years if a restructuring plan is not implemented; and
b. imminent insolvency, when it is likely that the debtor will not be able to meet their obligations within the next three months.

In these scenarios, directors owe a duty to the company to consider the interests of the company's creditors as well as the interests of its shareholders.

But when a company enters into current insolvency (i.e. when enforceable obligations can no longer be met, and there is no reasonable prospect of the company avoiding an insolvent administration), its directors must take every available step to minimise potential losses to the company's creditors by submitting a request for the judicial declaration of the insolvency within a maximum period of two months from the time the directors knew, or ought to have known, that the insolvency has occurred.

It is important for the directors to fulfil such duties as the consequences could include, among others:

a. the directors' liability to pay damages for any loss caused by their breach of duty; and/or
b. the directors' disqualification from being concerned with or taking part in the promotion, formation or management of a company for a minimum period of two years up to 15 years.

Taking into account the above, the most advisable rule for directors would be the prompt reaction by anticipating and submitting a restructuring plan for approval by the affected creditors.

The most remarkable characteristic is that a restructuring plan aims to change the breakdown, terms and conditions or structure of the debtor's assets and liabilities or equity, including transfers of assets,

production units or the entire company, as well as any necessary operational changes.

Taking into account such a wide range of possibilities, the terms and conditions of underlying debts can be amended under the restructuring plan, in particular:

a. change in the date they become due;
b. amended principal or interest;
c. conversion into equity and/or a subordinate claim, shares or stocks, or any other instrument that differs from the original loan;
d. amendment or termination of the guarantee, whether personal or in rem, which secures the loan;
e. a change of debtor; or
f. changes to the loan's applicable law.

For the purposes of converting debt into shares, with or without a premium, the debts to be set off are considered liquidated, payable and due.

If the plan provides for a structural change, the affected creditors have no right to object.

Regarding debts governed by public law, only the date by which they are due can be affected and must be paid in full within a limited period of time provided by law.

Restructuring plans may provide for an extension of their effects vis-à-vis creditors or classes of creditors holding affected claims who have not voted in favour of the plan, as well as shareholders who have not approved the plan.

Restructuring plans may also aim to protect interim financing and the new financing provided for therein, as well as recognising payment preferences, and the actions, operations or transactions carried out within a restructuring plan from the general rules of clawback actions. It may also aim to rescind certain contracts in the interest of restructuring.

The general criteria for forming classes of creditors are the common interests among the members. Creditors of equal rank are determined by the order of payment in the insolvency proceedings. If the creditors are small or medium-sized companies and the restructuring plan involves giving up over 50% of their claim, they must form a separate class. Loans secured by an *in rem* guarantee right over the debtor's assets will constitute a single class unless the mix of assets or rights justifies separating them into two or more classes. Debts that are governed by public law will constitute a separate class (among classes with the same insolvency rank).

The majorities for approval for each class or group require votes in favour of over two thirds of the amount of liabilities in that class. Classes of secured credits require votes in favour of three quarters of the amount of the liabilities in that class. For debts linked by a syndication agreement, the restructuring agreement may apply specific rules for their approval.

Should the restructuring plan not be approved by all of the creditors, the debtor may request judicial approval in order to extend its effects over the creditors and/or the shareholders that voted against the plan and belonged to a class that had not approved it. The court's approval is directly enforceable, even if a challenge to the approval order is submitted.

In order to assure the negotiation of the restructuring plan, it is possible to agree that opening negotiations with creditors will not give rise to early debt maturity of any claims, and will not affect contracts with pending reciprocal obligations, and any contractual clauses that provide for this are ineffective.

But until three months have elapsed from the date the notice is submitted, creditors cannot initiate judicial or out-of-court enforcements on assets or rights that are considered necessary to ensure the continued running of the debtor's business or professional activity. Any measures currently being processed will be suspended.

At the debtor's request, the judge may extend this ban on pursuing judicial or out-of-court enforcements or suspending those already initiated regarding all or part of the debtor's assets, against one or several individual creditors or classes of creditors, when this is necessary to ensure the success of the negotiations during the extension.

The holders of *in rem* guarantee rights, even for third-party debt when the debtor is a company within the same group as the one who issued the notice, may initiate judicial or out-of-court enforcements on the encumbered assets or rights.

If the guarantee relates to assets or rights that are necessary to ensure the continued running of the debtor's business or professional activity, once the enforcement proceedings have started, the judge will suspend the proceedings for three months from the date the notice was issued.

If a restructuring plan is not agreed, an application for insolvency proceedings must be submitted within one month if directors are to avoid any liability for breach of duty, unless the debtor is not currently insolvent.

Arbitration reforms in Italy

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In 2022, the Italian government implemented Legislative Decree 149/2022, which extensively reformed Italian civil proceedings (i.e. the Reforms).

The objectives of these Reforms include creating faster and more efficient proceedings; incentivising alternative dispute resolution; and reducing the workload of ordinary Italian courts.

As part of these changes, arbitration rules were significantly amended with the intention of making arbitration more suitable and attractive to both Italian and foreign users, thereby reducing the heavy burden on the Italian courts.

Specifically, this scope was pursued through:

— a greater alignment of the arbitration procedure with ordinary court procedure, in order to reduce user distrust in the arbitration procedure by ensuring, as much as possible, that arbitration will provide the same protections as the ordinary Italian courts; and
— a greater alignment of the Italian rules on arbitration with international models (e.g. giving arbitrators the power to issue interim measures and introducing disclosure requirements for arbitrators).

The main features (effective as of 1 March 2023)

Transfer of judgment (translatio iudicii)
The new provisions make it possible to transfer a dispute from the ordinary courts to the arbitral courts and vice versa when a claim is brought before the "wrong authority" and the original court does not have jurisdiction to hear the dispute. This transfer procedure preserves any legal effects (e.g. a limitation period) and evidence already gathered. A case must be transferred within three months of the judge's or arbitrator's decision on lack of jurisdiction.

Independence and neutrality of arbitrators
The Reforms have introduced a specific disclosure obligation whereby, upon acceptance of their appointment, arbitrators are required to declare circumstances that could affect their independence and neutrality. This is an ongoing duty, which means that arbitrators are obliged to renew the disclosure if circumstances change.

Failure to make a disclosure may legitimise recusal: parties to the dispute will be entitled to request the disqualification of the arbitrator where they fail to make a disclosure within ten days of acceptance or discovery of the disclosable circumstance.

Interim measures
In an important new feature, arbitrators have been given power to issue interim measures. However, this power must be granted expressly by the parties in the arbitration agreement or by a subsequent act, prior to initiation of the arbitration proceedings. To avoid possible overlaps in the exercise of the precautionary power, the power to issue interim measures remains with the ordinary judicial court until the arbitrator accepts the assignment.

The new rules are the result of the Italian government's intention to align arbitration rules in Italy with other civil law jurisdictions (such as Germany, France and Switzerland), and with international models (e.g. Article 17 of the UNICITRAL Model Law expressly

provides for the possibility of recognising and enforcing interim measures).

The Italian court of appeal has jurisdiction over any appeal of interim measures granted by the arbitrators, while the ordinary court of the district where the arbitration is located has jurisdiction to implement those measures.

Choice of applicable law
The Reforms enable the parties to choose which foreign law will apply to the arbitration. The choice must be made in the arbitration agreement or in a subsequent act prior to initiation of the arbitration proceedings.

In the absence of a choice of law being made by the parties, the arbitrators will use conflict-of-law rules to determine the applicable law.

The new features introduced by the Reforms intentionally enable the parties to invoke a broad spectrum of rules. This allows parties who choose to use arbitration more freedom and flexibility over the conduct of the procedure. This is in contrast with a situation where parties are forced to adopt internationally recognised sets of rules such as the *lex mercatoria* or the UNCITRAL model law.

Reduction of time limits for appealing the award
The time limit for appealing an arbitration award has been reduced from one year to six months from the date of the signing of the last arbitrator.

This feature responds to the need for greater stability of arbitration awards, again with the intention of equalising the arbitration procedure with ordinary court procedure.

Recognition of enforceability of foreign award
Following the Reforms, an arbitral award is immediately enforceable once it has been recognised by an Italian court. There is no longer a need to wait for pending opposition proceedings before the award can be recognised. If a challenge is issued and serious reasons are found, the opposing party may request a stay of the award.

Corporate arbitration
To a lesser extent, the Reforms have touched upon corporate arbitration: arbitration arising from an arbitration clause in a company's bylaws, relating to disputes between shareholders or between shareholders and the company.

The rules on corporate arbitration were previously laid out in a separate law (Legislative Decree no. 5/2003). Following the Reforms, they are now included in the Italian Code of Civil Procedure.

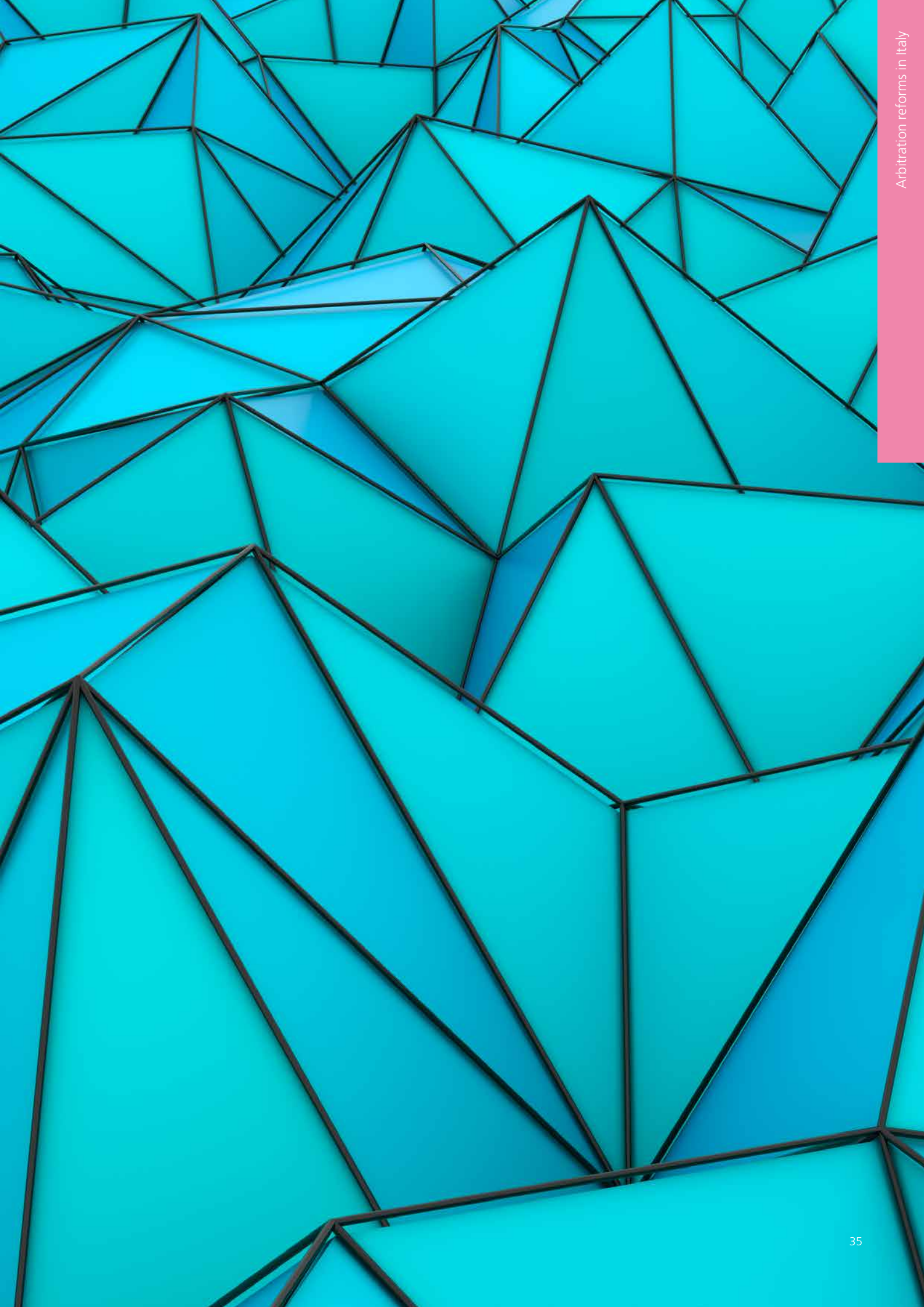
The only new feature provided on the former rules is that arbitrators are able to order the suspension of a shareholders' meeting resolution if the dispute concerns its validity or effectiveness. Therefore, in cases of corporate arbitration, the arbitrators also have power to issue interim measures. Parties are able to appeal a suspension order before the ordinary courts.

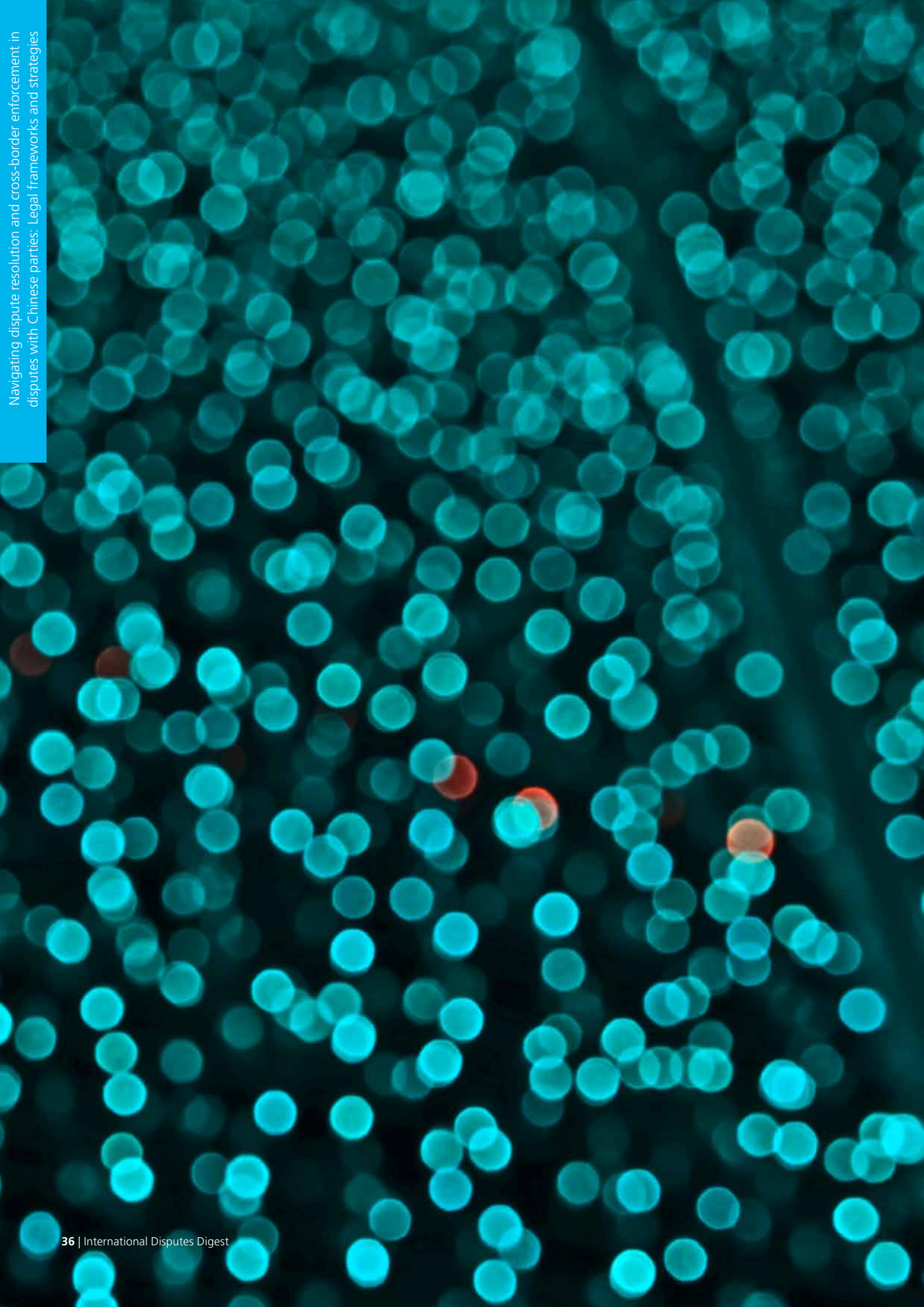
Conclusion

The Reforms enacted by the Italian government have brought arbitration into alignment with recent case-law developments. The new features are expected to ensure that arbitration is more attractive to parties, particularly since cases heard in ordinary courts in Italy typically run for a long time. Because of this, effective and efficient alternative dispute resolution systems have become a necessity.

From this perspective, the new power to recognise interim measures brings Italian arbitration into line with international standards and represents an important innovation. In other countries, particularly neighboring countries such as Germany, such powers were already in existence. The lack of such powers in Italy undermined the confidence of foreign parties to use arbitration to resolve disputes in Italy.

We must wait and see if Italy’s reforms have a positive impact and increase the attractiveness of arbitration in the region. In any case, the Reforms represent a step forward for the Italian legal system.





Navigating dispute resolution and cross-border enforcement in disputes with Chinese parties: Legal frameworks and strategies

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Summary

The use of mixed-mode dispute resolution processes offers flexibility to parties in the resolution of disputes and continues to be used in international commercial agreements. Parties to cross-border commercial disputes often consider China as an enforcement jurisdiction. Legal frameworks and institutional arrangements have developed in response to these developments. This article looks at enforcement-related considerations for contracting parties when negotiating dispute resolution agreements.

Article

Alternative dispute resolution processes such as arbitration continue to trend in international commercial agreements, alongside the complementary trend of multi-tiered and mixed-mode dispute resolution processes, which allow parties flexibility to combine processes in resolving disputes. Mediation is typically contemplated as part of the process, either as an initial dispute resolution mechanism before escalation to arbitration or litigation, or as an intermediate step after another initial dispute resolution process.

Where the dispute is successfully resolved, a real concern for parties in cross-border commercial disputes is the enforceability of a final outcome – be it by way of court judgment, arbitral award, or mediated settlement agreement. In this context, contracting parties often look to China as an enforcement jurisdiction.

In this article, we will discuss various developments and dispute resolution clauses that contracting parties should consider in facilitating the recognition and enforcement of final outcomes, particularly where China is contemplated as an enforcement jurisdiction.

SIMC-SCIA Med-Arb Protocol

The Singapore International Mediation Centre (SIMC) and Shenzhen Court of International Arbitration (SCIA) launched the SIMC-SCIA Med-Arb Protocol (MA Protocol) on 25 November 2022. The MA Protocol allows the recording of any settlement agreement resulting from mediation at SIMC as an arbitral award of the SCIA and will facilitate the direct enforcement of such arbitral award in China.

Significantly, the MA Protocol applies to all disputes submitted to SIMC for mediation, and not just to disputes submitted through SCIA. A party wishing to submit a dispute to mediation at SIMC will file a Mediation Request with SIMC either directly or through SCIA, in accordance with the SIMC Mediation Rules.

Under the MA Protocol, where a dispute is submitted to mediation at SIMC through SCIA pursuant to an existing arbitration agreement between the parties, the parties agree that any dispute settled during mediation at SIMC will fall within the scope of the arbitration agreement.

Where the dispute is submitted to mediation at SIMC through SCIA:

- Mediation at SIMC shall be deemed to have commenced pursuant to the SIMC Mediation Rules.
- Unless arbitration proceedings have already commenced at SCIA when the submission to mediation at SIMC is made, arbitration at SCIA shall be deemed to have commenced only on the date when the outcome of the mediation has been received by SCIA.
- Where arbitration proceedings have already commenced at SCIA when the submission to mediation at SIMC is made, arbitration at SCIA shall be stayed until the outcome of the mediation is received by SCIA.
- SIMC shall promptly inform SCIA of the outcome of the mediation. SCIA will then initiate the arbitration proceedings or resume the arbitration proceedings, as the case may be, in accordance with the SCIA Arbitration Rules.

Whether the dispute was filed first with SCIA for arbitration or with SIMC for mediation, parties may make a consent application to SCIA under the MA Protocol to record a successful mediated settlement of a dispute (either partially or entirely) as an arbitral award.

This allows the mediated agreement to be efficiently and effectively enforced in China as an award. This is particularly useful to parties with commercial disputes in China, or where the subject matter of the dispute or contemplated enforcement assets are located in China.

In negotiating dispute resolution clauses, parties may adopt or incorporate the SIMC Model Clause set out below:

All disputes, controversies or differences arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall before or after the commencement of any other proceedings, be first referred to mediation in Singapore at the Singapore International Mediation Centre in accordance with its Mediation Rules for the time being in force, without prejudice to any recourse to apply to any tribunal or court of law of competent jurisdiction for any form of interim relief.

Enforcing mediated settlement agreements as consent judgments or arbitral awards

Parties who have agreed to court litigation or arbitration may wish to refer their disputes to mediation either before or after they commence legal proceedings. If the dispute is settled through mediation, parties can combine the advantages of a flexible dispute resolution process with the advantage of enforceability and finality by agreeing to have the mediated settlement agreement recorded as a consent judgment or consent award. If mediation fails, they may continue with the legal proceedings.

The SIMC has established arbitration-mediation-arbitration protocols with the Singapore International Arbitration Centre and the Singapore Chamber of Maritime Arbitration. Where parties have agreed to adopt these protocols, any settlement of disputes reached through mediation at the SIMC after the commencement of arbitration shall be referred to the arbitral tribunal. A consent award may be made on the agreed terms. Such consent award would, subject to local legislation and/or requirements, be generally enforceable as an arbitral award in convention countries under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). China is a contracting party to the New York Convention.

The Singapore International Commercial Court (SICC) and the SIMC have established a litigation-mediation-litigation (LML) framework with a view to promoting the amicable resolution of international commercial disputes. The SICC is a division of the General Division of the High Court and part of the Supreme Court of Singapore. Established in 2015 to hear transnational disputes that are international and commercial in nature, the SICC bench comprises a diverse panel of eminent international and local specialist commercial judges.

Where parties have agreed to do so, the successful mediated settlement terms of a dispute (either partially or entirely) submitted to the SIMC may be recorded by the SICC as a consent order of court. Such order would, subject to local legislation and/or requirements, be generally recognised and enforceable as a foreign court order in convention countries under the Hague Convention on Choice of Court Agreements 2005 (Hague Convention). China is a signatory party to the Hague Convention.

Parties may adopt the SICC-SIMC LML protocol by incorporating the LML Model Clause into their agreements, or by separate agreement at any time such as after a dispute has arisen. The LML Model Clause is set out below:

Agreement (supplemental to a Basic Jurisdiction Clause) to resolve a matter through a LML framework

[A dispute, controversy or claim having arisen between the parties concerning [define dispute] (the "Dispute"), each party hereby irrevocably submits the Dispute to the exclusive jurisdiction of the Singapore International Commercial Court.] The parties further agree that despite the commencement of proceedings in the Singapore International Commercial Court, the parties will attempt in good faith to resolve the Dispute through mediation at the [Singapore International Mediation Centre], in accordance with the Litigation-Mediation-Litigation protocol for the time being in force between the Singapore International Commercial Court and the [Singapore International Mediation Centre]. [Any settlement reached in the course of mediation may be recorded by the Singapore International Commercial Court as a consent order on agreed terms.]

Singapore – China: MOU on the management of BRI disputes

The Supreme Court of Singapore and the Supreme People's Court of the People's Republic of China have agreed to each develop and implement a LML framework, through the SICC and the China International Commercial Court (CICC), respectively, by a Memorandum of Understanding (MOU) signed on 1 April 2023 on cooperation on the management of international commercial disputes in the context of the Belt and Road Initiative (BRI) through a LML framework.

Parties to BRI disputes may consider adopting either of the following LML Model Clauses mentioned in the MOU:

Where the parties choose to resolve the dispute in the SICC

Each party irrevocably submits to the exclusive jurisdiction of Singapore International Commercial Court any dispute arising out of or in connection with this contract (including any question relating to its existence, validity or termination).

The parties agree that after the commencement of court proceedings, they will attempt in good faith to resolve any such dispute through mediation in accordance with the Litigation-Mediation-Litigation Protocol of the Singapore International Commercial Court.

Where the parties choose to resolve the dispute in the CICC

Each party, according to the procedural law of the seat of the court, irrevocably submits to the exclusive jurisdiction of the China International Commercial Court any dispute arising out of or in connection with this contract (including any question relating to its existence, validity or termination).

The parties agree that after the commencement of court proceedings, they will attempt in good faith to resolve any such dispute through mediation in accordance with the Procedural Rules for the China International Commercial Court of the Supreme People's Court.

Conclusion

Contracting parties to international commercial agreements look to mixed-mode dispute resolution processes as affording more flexibility and efficiency in achieving dispute resolution. It is no less important to ensure the enforceability and finality of resolved outcomes. Contracting parties ought to consider carefully the particular dispute resolution and enforcement options that are available in their specific circumstances when negotiating dispute resolution agreements.

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