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Introduction

We are pleased to present the summer edition of the *International Disputes Digest,* our bi-annual publication bringing essential news and analysis on the latest trends in dispute-resolution around the world.

There are many crises and problems that continue to complicate global business. These include inflation, particularly in the energy sector, as the EU and other regions struggle to wean themselves from Russian natural gas and oil. There is also the US debt crisis, which has weakened international confidence in the economy and distracted Washington from pressing issues, such as its relationship with China and the on-going war in the Ukraine. We hope that the articles in this digest provide readers with the know-how and tools to help them resolve any disputes or setbacks they may face.

In this edition, we feature a range of articles from around the world on topics such as ESG litigation, the financial impact of cyber-attacks on businesses, post-merger disputes, the use of arbitration in resolving M&A-related issues, and how disputes can be managed in digital trade transactions. We also explore the reasons behind a wave of class action lawsuits in Portugal, the influence of personal relationships among arbitrators on disclosure, recusal, or appeals, and the 'without prejudice' principle, amongst other matters.

We hope that you enjoy reading these articles and please do not hesitate to contact us should you wish to discuss any issues in relation to them.

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People-Planet-Profit Balance: An overview of ESG Litigation from a global perspective

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Climate change and the necessity for companies to become more sustainable are fully in the picture. Regulations are being drawn up both at the national and international levels, concerning reducing the emissions of companies, market/product communications and financial reporting of companies. Partly as a result of these regulations, companies are increasingly being held legally accountable from different angles for their responsibility and role in climate change (ESG Litigation).

Currently, ESG Litigation mainly focuses on larger companies with a larger footprint. Companies are often publicly held accountable, through various media channels and campaigns. It is not just environmental organisations that are taking action. Consumers, investors, shareholders and local communities are increasingly becoming vocal. The primary goal of ESG Litigation is to bring about a behavioural change in companies. Companies should make the transition to an adjusted qualitative and transparent climate policy, to protect the rights of individuals and communities.

In 2022, the Intergovernmental Panel on Climate Change **(IPCC)** recognised the importance of ESG Litigation in affecting the outcome and ambition of climate governance.

If holding companies accountable in the public domain do not achieve the desired result, legal action may be taken, including litigation. International studies show that the number of climate cases is rapidly increasing. Worldwide, climate litigation has doubled since 2015, bringing the total number of climate lawsuits to about 2,000, 25% of which were initiated between 2020 and 2022.

In this article, we will discuss the various trends of ESG Litigation.

Infringement of national and international climate law

One of the primary ways to take civil action against companies is on grounds of unlawful acts, whether or not through a class action. Although unwritten, the relevant standards of care are based on soft law from international conventions (1992 UN Framework Convention on Climate Change, also known as the Climate Convention, and the ECHR), standards (UN Guiding Principles and OECD Guidelines for Multinational Enterprises) and the facts derived from investigative reports (IPCC).

At this point, there is no international binding convention on business and human rights. In Europe, however, a great deal of ESG legislation is under preparation, including the Proposal of the European Commission on 23 February 2022 for a Directive on Corporate Sustainability Due Diligence. The legislative process is expected to take longer and a final directive will not enter into force until 2025 or 2026. However, the obligations to be embedded in this directive are already largely part of existing soft-law standards ensuing from previous international conventions.

The 1992 UN Climate Convention, which has been ratified by most of the global community, forms the basis for climate law. Under this convention, Member States periodically examine emission reduction targets at an annual conference. The 2015 conference in Paris resulted in the Paris Agreement and the Glasgow Pact. There is a system of Nationally Determined Contributions **(NDCs)**, under which participating Member States must inform the Secretariat of the Climate Convention what their targets are. Those plans must be tightened every year. This process is called the ratchet mechanism, which promotes compliance with NDCs through reporting duties and periodic assessments.

Conversely, the regulations formulated by intergovernmental organisations are predominantly integrated into domestic laws, thereby heightening the potential for sanctions and legal disputes. The integration of such international regulations into national legislation holds significant importance, particularly for jurisdictions outside of the EU, as the national laws directly shape the trends observed in ESG Litigation.

Turkey is a notable example since it stands outside the EU and remains unaffected by the EU's oversight mechanisms, despite its close cultural, economic, and geographical ties to the European Union. Notably, Turkey has its own environmental legislation and oversight mechanisms in place. Firstly, it should be noted that class action practices are generally not permitted in Turkey. However, a trend in ESG Litigation within the country involves the pursuit of legal actions through administrative courts. In such cases, individuals residing in environmentally affected areas have the opportunity to collectively engage in lawsuits. These legal actions aim to address situations that can potentially cause significant harm to the environment, such as the establishment of hydropower plants on rivers with low water flow, forest zoning, the construction of waste disposal facilities near residential areas, and the issuance of mining licences without obtaining environmental impact assessment reports.

Recently, individual cases have been brought to court in Turkey. One notable instance involves a citizen filing a lawsuit against the Ministry of Environment, citing a violation of the individual's right to a clean environment. Additionally, three young people filed a lawsuit against the government, contesting "unclear environmental policies." Conversely, it is not currently a widespread practice in Turkey to file lawsuits against companies. Nonetheless, it is anticipated that such cases will arise in the foreseeable future.

In this particular context, Africa serves as another important illustration. Historically, investors and corporations in Africa have not prioritised ESG Litigation. However, due to the ever-growing need and expectation to conform to ESG standards, corporations both big and small are now focusing on complying with ESG standards since sustainability in a business is key to ensuring growth. This is particularly the case with Africa since it is dominated by extractive industries and exposed to climate change conditions.

Africa has and continues to make an effort in the development and improvement of climate change. An example is South Africa's decision to draft the National Climate Change Response White Paper in 2011 in contemplation for the need to develop legislation relating to climate change. Subsequently, various laws were published concerning climate change in South Africa, namely the Carbon Tax Act 15 of 2019 and various regulations relating to greenhouse gas emissions and pollution prevention plans. The Carbon Tax Act demonstrates South Africa's commitment to contribute to climate change since it has a number of regulations, administrative requirements and submission requirements, which encourage businesses to comply and contribute to calls for climate change. In addition, South Africa has proposed a Climate Change Bill, which is currently before Parliament awaiting debate and passage. This Climate Bill is expected to support co-operative governance in the diverse and complex terrain of climate change policy and the regulatory landscape while supporting the country's efforts to meet international emissions-reduction targets.

Greenwashing: misleading market communication and financial information

Companies must be aware of the risk of providing misleading market communications and financial information, also known as 'greenwashing'. This is particularly the case when companies advertise financial instruments and products as greener and more sustainable than they really are.

Greenwashing can be divided into several categories:

1. market and product information for consumers;
2. information for the investing public on ESG risk control; and
3. financial annual reporting.

Misleading product information may constitute a wrongful act. This may be based either in the qualified form of unfair and misleading trading practices or on account of infringement of a written or unwritten standard of care.

The CSRD Directive requires large companies to report on issues such as carbon emissions and social capital, but also on the impact that a company has on biodiversity and human rights violations in the chain. The directive is an extension of the existing European Union directive on sustainability reporting, the Non-Financial Reporting Directive (NFRD). Based on legislation following from the NFRD, large listed companies, banks and, insurers have been required, since 2018 (for the reporting year 2017), to include a non-financial statement in their directors' report and a diversity statement in their corporate governance statement. On 1 January 2024, the extension of the CSRD will come into effect for companies that now fall under the NFRD, and from 2025 for large companies that do not yet fall under this scope. For listed SMEs, the CSRD will come into effect on 1 January 2026. Those companies will now be held accountable for possible incorrect and even misleading annual reporting.

Liability of the company for pollution and damage to the direct environment

In the context of ESG Litigation, companies may, of course, also be held accountable by local communities for polluting or causing damage to the direct environment, and not just through a class action. Such claims will be based upon wrongful acts in combination with environmental legislation.

The nature of ESG Litigation cases is evolving and varied, particularly given the increasing private litigation. In addition to climate litigation, which is typically administrative in nature (such as governments' insufficient assessments of climate risks when considering and/or approving coal fired power plants), there is a global emergence of greenwashing claims and cases by shareholders against board individuals who inadequately disclose their climate obligations.

Shareholders' actions at (listed) companies in order to influence strategy

Studies show that shareholders are increasingly exercising their rights as shareholders (together with other shareholders and institutional investors) for ESG purposes to force boards to take action. By way of example, shareholders are exercising their right to place items on the agenda and speak or vote on the appointment or dismissal of directors or on their remuneration policies. Institutional investors such as APG and PGGM have long had their own policies on responsible investment (partially as a result of pressure from their own investors, such as participants in pension funds). These investors make investment decisions based upon their policy and then monitor the compliance of their portfolio companies with that policy.

An example is the UK's Aviva Investors, which in January 2022 notified the boards of 1,500 companies spread over 30 countries in which it invests that it will let the remuneration and the retention of directors depend in part on their efforts to fight the climate crisis and protect human rights and biodiversity.

Another example is the non-commercial organisation Follow This, which strategically purchases small packages of shares in large oil companies in order to place adjusted climate policy on the agenda during their shareholders meetings. Large institutional investors (particularly pension funds) are increasingly endorsing the resolutions of Follow This.

Personal liability of directors

A trend that we see at an international level is that, in addition to holding a company liable as a means to exert pressure, board members are also personally liable for compliance with the company's ESG obligations. This relates to (i) personal involvement/negligence in violated standards; and (ii) improper climate change policy. In the spring of 2022 in the UK, the board of a multinational company was held personally liable in civil proceedings for failing to pursue a proper climate policy surrounding energy transition, which was in contravention of their statutory duties as directors to act in the best interests of the company.

There is also potential for criminal liability to be imposed on company directors. A notable example is demonstrated in a decision by the Turkish Supreme Court, wherein it clarified that the director of a limited liability company, a hotel, cannot be exempted from the responsibility to prevent environmental pollution resulting from the hotel's operations. This ruling highlights the personal obligation of company directors to take proactive measures in mitigating the environmental harm caused by their business activities.

Use of efficient informal dispute resolution mechanisms

ESG Litigation is often conducted through inexpensive low-threshold modalities of dispute resolution, such as the Advertising Code Committee. Another example of a complaints mechanism is a procedure before the National Contact Point **(NCP)**, which is set up in participating countries on the basis of OECD Guidelines.

Conclusion

Climate change is alarming and the urgent need for action on our planet has prompted intergovernmental organisations and lawmakers to establish clearer standards determining the extent to which businesses can impact the environment while pursuing their operations. We are now aware that we stand at a crucial point in history, necessitating the implementation of rules that uphold the values of people, the planet, and profit in equal measure. It is imperative that these rules take effect without delay, accompanied by an efficient enforcement mechanism to ensure compliance. Currently, ESG Litigation appears to be the chosen means through which humanity intends to achieve this enforcement.

The impacts of ESG Litigation extend beyond the courts as these have a global effect. ESG Litigation is increasingly becoming a strategic risk for companies and their individual board members. The legal action that can be taken in the context of ESG Litigation raises media attention, which means that a company runs the risk of reputational damage and impact on its stock market value. In this respect, it is likely that we shall see increasingly novel climate litigation and it is important to recognise in the context of risk management that, in the long run, the insurability of climate-related claims and the associated legal fees (particularly for companies with a large footprint) will be placed under pressure.

Managing disputes in a digital trade transaction environment

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A barrier to early adoption of any new technology is uncertainty. Yet businesses will take measured risks where change is driven by customer expectations. That can be seen by the widespread adoption of digital trade for B2C services. For B2B transactions, however, the transactions are typically larger, more complicated and the drivers to change are arguably weaker. Therefore, concerns around risk and uncertainty prevail. The legal standing of digital trade transactions and how disputes will be managed is one potential area of concern.

The digital sector, according to the UK Board of Trade's November 2021 report, contributed GBP 151bn to the British economy. The same report talks of digital trade representing an opportunity for the UK to play a leading role in the digital revolution, just as it did in the first industrial revolution. This ambition is admirable, but is it realistic and what are the obstacles to achieving this goal?

English law plays an important role here, which is probably the most popular choice of governing law for international contracts globally.[1] The reasons for that popularity are varied. The English language is an important factor, as well as the independence and quality of our judges and arbitrators. This article isn't here to examine those reasons, but it is linked to the British government's ambitions concerning digital trade. Given the preferences for English law to facilitate international trade, parties may well look to English law to govern future digital trade transactions.Is it up to the task? Broadly, yes. Little change of law will be needed to facilitate digital trade, but let's start with one exception.

[1] See for example the ICC Dispute Resolution 2020 Statistics. English law is commonly the most chosen law of parties' contracts in ICC arbitrations.

Electronic Trade Documents

The Electronic Trade Documents Bill (the **Bill**), currently working its way through the UK Parliament, is set to modernise certain legal practices that go back hundreds of years. They relate to how international trade has been facilitated for years. Put simply, in international trade, parties have been tied to pieces of paper[2] – and in some cases a great deal of them. While they are still very much in use, the UK, as with many other jurisdictions, is moving to give electronic trade documents the same status as paper trade documents. This is not entirely straightforward when a global system has developed based on a concept of physical possession of unique documents. Therefore, changes to the law are needed to establish standards by which electronic documents are capable of operating in a similar manner. The key to facilitating this change will be to create technology that allows an electronic document to be unique. The Bill, therefore, establishes requirements for electronic documents to meet in order to be capable of qualifying as an 'electronic trade document'.

Once the Bill becomes law, probably in the second half of 2023, it will clear a path to greater adoption of digital trade documents across thousands of supply chains around the world.

Smart Legal Contracts

There is, however, a separate digital development that has the potential to be just as transformational and may develop in parallel with the adoption of digital trade documents. That is smart legal contracts. Smart contracts were the subject of a session at the ICC Centre for Digital Trade & Innovation Conference in early April 2023, which expressed interest and scepticism in almost equal measure.

The American computer scientist Nick Szabo apparently coined the term smart contract in the early 1990s. In December 2021, the Law Commission of England and Wales published the paper "Smart Legal Contracts, Advice to Government". The focus of the paper was on smart legal contracts that are "legally binding contracts in which some or all of the legal obligations are defined in and/or performed automatically by a computer programme". This distinction matters because it emphasises the need for a smart contract to be legally binding.

There may be examples of computer programmes operating between two parties (like a contract), but may not be legally binding (because they lack elements essential to the formation of a contract). Understanding this distinction is important in establishing confidence in the adoption of smart legal contracts. While it may never be needed, parties should be confident that they can enter into smart legal contracts, knowing that they will be recognised and enforceable by law. The good news is that the Law Commission reached the following conclusion:

> Our findings conclude that the current legal framework is clearly able to facilitate and support the use of smart legal contracts. Current legal principles can apply to smart legal contracts in much the same way as they do to traditional contracts, albeit with an incremental and principled development of common law in specific contexts. In general, difficulties associated with applying existing law to smart contracts are not unique to them, and could equally arise in the context of traditional contracts. In addition, even though some types of smart legal contract may give rise to novel legal issues and factual scenarios, existing legal principles can accommodate them.

Thus, English law is equipped to give effect to smart legal contracts and even to deal with novel issues that may arise. There may indeed be some novel issues, such as how a Court might deal with conflicts between natural language and code or how a Court might deal with question of interpretation of the code itself.

Focussing on whether English law is equipped to deal with smart legal contracts overlooks a crucial point. Will there be the same need for oversight of smart legal contracts from courts or tribunals as there is for traditional contracts? The answer may well be no, due to a particularly beneficial feature: self-execution. Where a smart legal contract covers all the necessary steps to facilitate trade (whether digital or otherwise), the legal process can be very simple. The smart contract can be programmed, for example, to identify the relevant goods, how and when they might be transported, the conditions of transport, the arrival at the destination port, its arrival at the delivery destination and, if necessary, acceptance by the buyer. If all of that is capable of operating digitally, the smart contract can also then self-execute payment of the consideration, or even adjustments in price based on pre-agreed criteria. That should mean that there will be fewer disputes about performance, and where there are disputes, it is likely that there will be a comprehensive evidential (i.e. digital) record of that performance.

[2] Bills of exchange, promissory notes, bills of lading to name a few. See Section 1(2) of the Bill.

There is not yet the wholesale adoption of smart legal contracts in most B2B environments, but this will change, and it is high on the agenda for many businesses that expect to see greater adoption in the next few years. Smart legal contracts are, however, ubiquitous in many types of consumer transactions (e.g. tap-in, tap-out public transportation, ordering and delivery of take away food, e-shopping and an array of streaming services) facilitated through the countless apps now available. Billions of transactions occur each year, the vast majority operating smoothly with consumers barely noticing they have just entered into a smart legal contract. Once that behaviour crosses into B2B contracts, parties are unlikely to look back.

The future of dispute resolution – a great leap forward?

Many lawyers are looking at these and other digital developments with great interest (and perhaps a little concern). While legal systems are presently able to handle smart legal contracts, will parties using digital trade accept moving back into an analogue world for the resolution of disputes? Probably not. Yet, even digitised disputes processes require a high degree of human input. However, more recent developments create further opportunities or challenges, depending on your perspective. The digitisation of contracting moves a traditional analogue process into the digital world, while the onset of generative AI brings the potential for legal analysis to be digitised too. This is a matter recognised by the Master of the Rolls, Sir Geoffrey Vos. At the McNair Lecture in Lincolns in on 19 April 2023, Sir Geoffrey said[3]:

> The central element of any dispute resolution process is to identify the issue or issues that divide the parties. That issue, even in a complex case, can often, once identified, be simple. The difficulty is getting to it quickly and early enough to avoid massive cost. It is here that generative AI may be able to help. It may be that the power of AI could identify, from a mass of complex facts and transactions, the real issues that divide the parties and that require resolution. If that could be done, the actual resolution process itself could become shorter and less costly, particularly if on-chain recording meant that the scope for factual disputes was much reduced.

The mainstream legal systems are not there yet and there will be a necessary catching up as transacting behaviour and client expectations evolve. However, there are initiatives underway where existing legal frameworks are being used to develop almost fully digital online processes, other than the final decision itself. These initiatives are in the early stages, but they are coming. In the meantime, parties embracing digital trade transactions can do so in the knowledge that legal systems are already capable of dealing with disputes arising with the potential for great efficiencies to be achieved as the legal landscape evolves to meet client demands.

[3] "The future of London as a pre-eminent dispute resolution centre: opportunities and challenges"

Claims against suppliers following a cyber attack

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As well as business disruption and reputational damage, a cyber attack can result in significant costs and losses for a business. For example, if the incident involves encryption of data, a forensic IT expert will be required to contain the incident, restore systems and recover data. Legal support may also be needed to make a report to data protection authorities and other regulators, especially if an investigation has been launched. If data subjects are affected, they may seek redress in the form of credit monitoring or financial compensation. There may also be significant indirect losses, such as lost revenues while IT systems are inoperative or customers taking their business elsewhere.

In some cases, the business (and its insurer) will have to accept these costs and losses and move on. But what if the business followed its IT security measures with care and diligence but the supplier did not follow good practice? In this article, we consider circumstances in which a business or its insurer may seek to recover some of its costs and losses from another entity.

Claims against IT service providers

A business that outsources its IT services to a managed service provider (MSP) may suffer the consequences of a cyber attack perpetrated on the managed environment. In these circumstances, the threat actor may access and encrypt the business's servers in the managed environment and demand payment of a ransom for provision of the decryption key. The threat actor may also copy personal data of the business's customers and threaten to make that data available to other criminals if the ransom is not paid. The business will have expected the MSP to implement a suitable IT security system and to follow good practice so that its applications and data were kept secure, and it may therefore seek to recover its losses from the MSP. What steps should be taken to establish whether the business can hold the MSP responsible and what factors will determine whether a claim is possible?

The circumstances surrounding the cyber attack will inevitably be a key factor. The cause of the incident should be investigated thoroughly with the assistance of an independent forensic IT expert to establish how the threat actor gained access to the IT systems. It will be necessary to establish whether the incident resulted from actions taken by the MSP (e.g. malware contained in a phishing email opened by an employee of the MSP), or actions the MSP failed to take (e.g. inadequate IT security or failure to encrypt data). The MSP's cooperation may be required for this investigation, and care will be needed in communications with the MSP, especially in relation to the sharing of information.

Alongside the investigation, the contract between the business and the MSP should be considered to determine whether there may be liability on the part of the MSP and whether there may be restrictions or limitations on any liability. The starting point will be to consider whether the MSP is in breach of its contractual obligations, and then to establish that the cyber attack would not have happened but for that breach. Establishing a breach may be straightforward if the contract provides for the MSP to implement a particular IT security product and it has failed to do so. However, most contracts do not specify particular products but will contain more general obligations such as the MSP implementing appropriate security or complying with good industry practice.

If the MSP is in breach of its obligations, the business will need to consider whether it can credibly assert that the cyber attack would not have happened but for that breach. This will be largely fact driven and will depend on the nature and cause of the incident.

If liability can be established, the next step will be to determine the extent to which losses can be recovered. The contract may specify a liability cap, limiting the total sum that the business can claim from the MSP. If the losses resulting from the cyber attack exceed that cap, the remaining balance is not likely to be recoverable.

In addition, there may be exclusions of liability for certain categories of loss, such as loss of profit. In those circumstances, the business may recover its direct losses such as the costs of restoring systems, but it may not recover losses resulting from business interruption. In some jurisdictions, it may be difficult to recover internal costs for the involvement of employees to detect, deal with and resolve the incident since it is argued that the salaries for the employees involved would have to be paid in any event. However, there are exceptions to that rule and a clear legal strategy is needed if the business wants to retain the possibility of recovering such costs, which can often be a significant proportion of the damage suffered.

A claim against an MSP following a cyber attack is rarely straightforward. The question of whether the MSP complied with its contractual obligations may have both objective and subjective elements, which may include allegations that the MSP did not comply with good industry practice. In such circumstances, the business and the MSP (and their respective advisors) may reach different views on whether the MSP was compliant. There may also be other relevant factors such as identifying the party responsible for encrypting the data or implementing multi-factor authentication. The conduct of the business, as well as the MSP, may be relevant. Commercial factors may also be important, such as the strength of the relationship between the parties and whether the business is dependent on the MSP for the provision of specialist services. In a long-term outsourcing arrangement the parties may be contractually bound to deal with each other for several years and they will want to avoid a strained relationship for the remainder of the term. If the business is satisfied that the MSP is capable of operating a secure environment in the future, it may be beneficial for the parties to put the incident behind them and reach a compromise, perhaps in the form of reduced fees or service credits.

Insured losses

If the business affected by the cyber attack has cyber insurance, it may seek recovery of its costs and losses under the policy rather than from its supplier. In those circumstances it may still seek to recover its uninsured losses from the MSP, subject to the limitations and exclusions outlined above.

In addition, the insurer may seek to recover from the MSP the costs it has met under the policy, by way of a subrogated claim. That claim will, in effect, be a claim by the insured business on behalf of the insurer, and will also be subject to the limitations and exclusions under the contract with the MSP. There may therefore be a shortfall between the sums, which the insurer pays to the business under the policy and the sums it can recover from the MSP. For example, the insurance policy may include payments for loss of business while IT systems are inoperative, but those payments may be excluded from a subsequent claim against the MSP.

Other forms of claim following a cyber attack

Claims against IT suppliers are only one type of claim that may be brought following a cyber attack, although it is one of the most prevalent. We are also seeing an increasing number of claims following invoice fraud. This occurs when a threat actor gains unauthorised access to an IT system of a business and changes banking details for payment of an invoice by one of the business' customers. Disputes can arise if, as a result of these fraudulent changes, no payment is received by the business or the customer has paid twice.

Whenever an organisation incurs losses due to criminal cyber activity, it is worth considering whether the losses may be recoverable from any entity, which aided the criminal activity by not implementing appropriate security or good practice.

Protection against the impact of a cyber attack

While there may be opportunities to recover costs and losses arising from a cyber attack, minimising the risk of being affected by a cyber attack should be the priority. Even if some costs may be recoverable, there will always be negative consequences of a cyber attack, such as damage to reputation.

The risk of a cyber attack can never be reduced to zero, but businesses can take steps to minimise the risk. For example, businesses that outsource services or data management to a supplier should request details of the supplier's approach to IT security and request regular updates.

In a recent survey of over 500 corporate counsel and risk managers from businesses around the world, 64% said they had procedures for assessing data security standards of suppliers.[1] While it is encouraging to see that a large proportion of businesses have adopted these procedures, the remaining 34% should consider putting such processes in place as soon as possible.

In addition, organisations should have well-rehearsed processes in place for reacting to a cyber attack. A quick and considered response may result in the attack being contained and damage minimised. In our survey, 54% of respondents said they have an incident response plan to manage a cyber attack. We strongly recommend the remaining 46% put such a plan in place as soon as possible.

[1] Technology Transformation: Managing Risks in a Changing Landscape (cms.law)
https://cms.law/en/gbr/publication/technology-transformation-managing-risks-in-a-changing-landscape

Post-merger disputes: a resolution revolution?

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No one wants to think about the possibility of a dispute arising out of a transaction. Especially pre-closing when all you want to do is get the deal done. Yet the process for how any dispute – should one arise – will be resolved should not be forgotten and deserves close attention for your next deal. Effort spent on getting that right will result in a significant saving of time (and costs) further down the line.

As reported in the CMS European M&A Study 2023[1], post-M&A disputes are not just the domain of national courts. Indeed, the report finds a general increase in the popularity of arbitration as a method of dispute resolution in an M&A context, although there are also clear regional preferences for courts or arbitration. In this article we explore this geographic variation and changes to the disputes landscape through the lens of two jurisdictions: Germany and the UK

Germany

Arbitration has become a popular method in Germany for resolving disputes that arise in the wake of M&A transactions. Resolving these disputes through litigation in state courts can be expensive, time-consuming, and uncertain. As such, parties often opt for arbitration as a more efficient and cost-effective way to resolve these disputes. In Germany, the German Arbitration Institute **(DIS)** is the predominant arbitral institution, particularly for domestic disputes, and is also widely used for post-M&A arbitrations. Other popular arbitration rules include the ICC Rules, Swiss Rules and Rules of the Vienna International Arbitral Centre.

The CMS European M&A Study 2023 evidences the popularity of the use of arbitration clauses in M&A transactions in German-speaking countries. With the use of such clauses in 49% of the evaluated transactions in 2022, German-speaking countries have the second-highest usage in Europe behind only the CEE region. Between 2010 and 2021 arbitration clauses were used in 38% of all evaluated transactions in German-speaking countries. Furthermore, German-speaking countries are the only European region in which the use of arbitration clauses increased in 2022 (from 38% in 2021 to 49% in 2022), while other regions with a strong preference for arbitration clauses saw a decrease in the same year (CEE from 75% in 2021 to 72% in 2022; Southern Europe from 45% in 2021 to 38% in 2022).

These findings show that the use of arbitration clauses in transactions remains popular in German-speaking countries. However, there is an initiative seeking to compete with the heavy use of arbitration in transactions: the German government produced a draft bill in April 2023, which provides for the establishment of Commercial Courts (i.e. specialised state courts for corporate and commercial disputes, including post M&A disputes). The draft foresees the possibility of conducting the entire proceedings in English and giving judgment in the English language. The Commercial Courts are to be staffed with judges experienced in corporate disputes and fluent in the English language. A similar commercial court was already established in Stuttgart and Mannheim two years ago. Currently, however, the judgments of this court are delivered in the German language.

Further initiatives include the concentration of jurisdiction for post M&A disputes before state courts in the German state of North Rhine Westphalia, at the Dusseldorf Regional Court, if the amount in dispute is above EUR 500,000. The purpose of this concentration is to build up specialisation and corresponding efficiency among the experienced judges acting in these matters.

Generally, it remains to be seen whether the initiatives by the German legislators and government will lead to a change in the use of arbitration for post M&A disputes in Germany. For disputes over cross-border transactions, it seems doubtful that arbitration will lose its significance.

United Kingdom

Arbitration in M&A disputes does not quite enjoy the same popularity in the UK compared to Germany: only 8% of agreements included an arbitration clause in 2022, which was a slight increase over 2021 (7% of agreements).

The overall preference for court-based dispute resolution in the UK is likely driven by the English courts' pre-eminent role in resolving international disputes. In this regard, as noted above it is significant that the German government is proposing to create its own local equivalent of the English Commercial Court. This has already happened in Paris and the Netherlands. Successive reforms over a long period of time have aimed to ensure that the English courts – and, in particular, the Commercial Court – retain their international competitiveness as an attractive forum for resolving disputes. For example, the "Business and Property Courts" initiative in 2017 saw a number of the specialist jurisdictions of the High Court of England & Wales brought within a single umbrella of business specialist courts across England and Wales.

[1] https://cms.law/en/gbr/publication/cms-european-m-a-study-2023

However, the courts' historical popularity should not be seen as overshadowing arbitration. Indeed, there is a clear trend of cases in which English courts have made clear that support the parties' agreements to resolve their disputes by arbitration by upholding arbitral awards and respecting the decisions made by arbitral tribunals. Intervention by the courts is even less common. As an example, challenges to awards on the basis of serious irregularity have a high bar of demonstrating that one of a specified number of irregularities in the Arbitration Act 1996 has caused (or will cause) substantial injustice to the applicant. The case-law on this point is clear: the court will not intervene simply because it might have done things differently. This helps to ensure certainty of outcome, which is crucial to an efficient arbitration process.

In an M&A context, well-informed counterparties and their advisors should consider all the permutations for dispute resolution and adapt those options as appropriate for any particular transaction. The confidentiality and party-driven processes of arbitration as well as the potential to enforce an award internationally more easily can be highly desirable in some contexts while other processes (such as an expert determination) can be an effective method for resolving technical disputes where the law or facts are otherwise not in dispute.

Conclusion

The findings of this year's CMS European M&A Study do not suggest a seismic shift in party preferences when it comes to resolving their disputes. However, given that nearly half of all deals in German-speaking countries include an arbitration clause, representing nearly three-quarters of all deals in Central and Eastern Europe, this prevalence means arbitration will play an increasingly important role in deals having a European nexus. While English courts continue to play a dominant role in resolving domestic disputes in the UK, we anticipate that the popularity of arbitration for international disputes will continue to grow as parties appreciate the potential advantages of having their disputes resolved in this way.

Tech and social media: a new wave of class actions in Portugal?

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Class action lawsuits are an interesting legal tool for consumers to use to pursue legal claims against a large company defendant. In Portugal, the use of class actions is becoming increasingly popular. As one of the few legal systems in the EU that provides an opt-out mechanism (along with the UK and the Netherlands), Portugal is becoming a major gateway for class actions against multinational companies operating in Europe.

Traditionally a footnote in its legal practice, Portugal has been swept in recent years by a surge of class actions, marked by high-value claims in the millions of euros and an influx of third-party financiers. These class actions have been primarily filed as follow-on damage claims arising from various legal violations, such as breaches of competition regulations, product liability, and consumer rights. In the tech and social media sector, there are a few high-profile cases worth exploring.

The Portuguese class action regulatory framework

In Portugal, class actions are known as ***ações populares*** and are regulated by Law no. 83/95 of 31 August 1995. This legislation has consistently provided a framework for the use of class actions since its enactment in civil, commercial and administrative litigation, and only received an amendment in 2015. The law was designed to prevent, cease, or judicially prosecute offences against public health, consumer rights, quality of life, and the preservation of the environment and cultural heritage. Additionally, this law is responsible for ensuring the defence of the assets of the State, autonomous regions, and local authorities.

Law no.83/95 allows for the formation of a representative plaintiff who can act on behalf of the entire class by default, without the need for express mandate or authorisation from each singular individual of the class. The final judicial decision will bind all individuals, except for those who decide to 'self-exclude' from the proceedings (i.e. **opt-out**).

The opt-out procedure is initiated right after the initial plea is presented. The judge will fix the deadline for individuals to declare exclusion from collective representation or to singularly act in the proceedings alongside the representative plaintiff. Service of process is executed through any social media or judicial edicts.

The Public Prosecution may intervene in class actions proceedings and replace the representative plaintiff in case the latter withdraws, settles or acts against the interests of the class. In addition, judges have reinforced powers of evidence collection since they will not be bound by the initiative of the parties in this regard.

Judicial court fees and a word on litigation funding

In Portugal, legal costs tend to be relatively low compared to other jurisdictions. Court fees to present a claim are subject to a progressive table depending on the claim value. As of May 2023, the maximum initial fee amounted to EUR 1,632. At the end of the procedure and whenever the value of the dispute exceeds EUR 250,000, the final court fees are subject to remainder fees, calculated in proportion to the claim value. The remainder fees may then significantly increase the cost to litigate in a Portuguese court and discourage the submission of high-value claims.

However, within the context of a class action, the claimants are exempt from payment of the initial court fee and may also be exempt from the remainder fees if the claim is at least partially successful. If the claimants are totally unsuccessful, the court will fix the court fees between 10% and 50% of the court fees that would normally apply (bearing in mind the economic situation of the claimants and the reasons why the claim was unsuccessful).

The legal regime for fees when it comes to class actions is more favourable to claimants when compared to the legal regime in common claims and may favour the submission of high-value claims through the class-action method.

A class action may imply a multitude of other costs, such as lawyers' fees and experts' fees, and it is common to find litigation funders operating in different jurisdictions and financing class actions who will cover these costs. This is especially important since Portuguese law does not provide a specific framework for litigation funding, which increases the risk associated with financing agreements.

In addition, class-action law provides that consumer's non-reclaimed amounts are to be delivered to the Ministry of Justice to promote access to justice, increasing the remuneration challenge for financiers since the possibility to receive the non-claimed amounts appears to be excluded by the law.

Despite these challenges, class actions in Portugal seem to remain attractive to financiers of litigation (the opt-out regime is of course one of the reasons behind such interest) and there are pending claims where the existence of litigation funders and the contents of the funding agreements have been disclosed.

Recent high-profile cases within the tech and social media sector

In recent years, there have been several high-profile class actions in Portugal, including one involving the social-media platform Meta (previously Facebook).

In 2018, in the aftermath of Cambridge Analytica leak, the Portuguese consumer association DECO filed a class-action lawsuit against Meta (then Facebook), alleging that the company violated data-protection law by failing to adequately inform and obtain consent from users to share their personal data with certain entities. The lawsuit sought EUR 200/year compensation for each affected user. It was initially estimated that 63,000 Portuguese users were affected by the breach. Support from users in the lawsuit was high since more than the initial of 63,000 users joined the association. The lawsuit was withdrawn in 2021, after Meta and DECO reached an agreement to co-operate in a three-year programme to improve Portuguese users' digital life.

In March 2022, Ius Omnibus (a non-profit association created in March 2020 to defend consumers in the EU) filed a lawsuit in the Portuguese Competition, Regulation and Supervision Court to defend Portuguese consumers against Apple's alleged anti-competitive practices. The lawsuit addressed the company's practice to produce and sell devices that work exclusively with the Apple operating system (iOS), specifically iPhones, iPads, and iPods Touch. The association asked the Court firstly to declare Apple's practices in this context an infringement of consumer protection and competition laws; secondly, to order Apple to stop these alleged anticompetitive practices; and thirdly, to compensate affected Portuguese consumers.

In April 2023, the same association Ius Omnibus filed two class actions against TikTok. The platform is accused of allegedly adopting misleading commercial practices, which violates privacy and mishandles personal data of Portuguese users. The court is being asked to declare the alleged ongoing abuse and to condemn TikTok to put an end to these illegal actions. Additionally, TikTok has been asked to pay compensation to all represented consumers, which can reach EUR 1.12bn, according to Ius Omnibus.

Summing up

The Portuguese class action regulatory framework provides a stable opt-out mechanism for individuals to pursue legal claims collectively. Legal costs tend to be relatively low, allowing easy access to the judicial system with reduced initial budgeting.

The recent examples of class actions involving social media platforms like Meta and TikTok demonstrate the growing trend in Portugal to present lawsuits representing millions of euros in compensation. Associations are becoming more active, engaging with their popular support and drawing the media's attention. There are also indicators that consumer support may be high, leaving the curious impression that things are about to get hot in the Mediterranean.

The duty of revelation of arbitrators: what about the existence of a friendship relationship?

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In a decision rendered on 10 January 2023 (20/18330), the Paris Court of Appeal ruled on the issue of the arbitrators' duty to disclose in relation to a unique case. While the merits of the case and the issues raised were common, the decision was highly publicised because of the identity of the persons involved, two being famous protagonists in the arbitration world. The decision led to a "severe" decision, strengthening the arbitrators' duty to disclose to an extent that might appear questionable for some.

The duty of revelation under French law

First, it is necessary to go back to the principles established by French law in relation to the arbitrators' duty to disclose since the courts frequently restate them.

Article 1456 of the French Code of Civil Procedure imposes a disclosure obligation on arbitrators, the objective being that an arbitrator discloses any fact or circumstance, which from the perspective of a reasonable third person would give rise to justifiable doubts as to their impartiality or independence. Article 1456's obligation is continuous and does not cease upon the appointment of the arbitrator. Once appointed, it is the arbitrator's responsibility to disclose any circumstances that may affect their independence.

However, only relevant and unknown facts have to be disclosed, well-known facts do not if they are defined as "easily accessible public information that the parties could not fail to consult before the beginning of the arbitration proceeding" (Paris Court of Appeal, 26 January 2021, 19/10666, Vidatel).

On this basis, business interactions between an arbitrator and the parties to the arbitration proceeding must naturally be disclosed (Cour de cassation, 20 October 2010, 09-68.997) while academic relationships do not. Consequently, it was judged that an arbitrator's participation in his capacity as a lawyer in a conference organised by a party, at which he did not intervene as a speaker, does not have to be revealed (Cour de cassation, 4 July 2012, 11-19.624).

The infringement of the duty to disclose is not by itself a cause for setting aside the arbitral award. The irregularity in the constitution of the arbitral tribunal will only be acknowledged if the non-disclosure creates a reasonable doubt in the minds of the parties as to the impartiality of the arbitrator (Cour de cassation, 10 October 2012, 11-20.299, Tesco).

Besides, the mere fact that the disclosure was incomplete is not considered sufficient to have an award set aside even if the incomplete disclosure was made by the opposing party as long as the facts on which an objection could have been raised against the arbitrator had been disclosed *(Cour de cassation, 15 June 2017, n°16-17.108)*.

Factual summary

The dispute in question arose from a concession contract concluded between the Autonomous Port of Douala (PAD) and the company Douala International Terminal (DIT), relating to the management and operation of a container terminal. A disagreement arose over the distribution of revenues from the parking of containers and goods on the concession area.

On 16 January 2019, DIT, represented by Emmanuel Gaillard, filed an arbitration procedure before the ICC in Paris.

DIT appointed Professor Hugo Barbier and the PAD appointed Mr. Achille Ngwanga as arbitrators. Professor Thomas Clay was appointed as chairman.

In a partial award issued on 10 November 2020, the arbitral tribunal ordered PAD to compensate DIT for the damage caused by the breach.

PAD filed an action for annulment before the Paris Court of Appeal against this partial award.

In the meantime, Gaillard, professor of law and representative of DIT, died on 1 April 2021.

On 15 April 2021, Professor Thomas Clay published a eulogy in tribute to the late Emmanuel Gaillard (Th. Clay, In Memoriam Emmanuel Gaillard (1952–2021): D. 2021, p.705).

The eulogy revealed the existence of a personal and close relationship between the chairman of the tribunal and the counsel of DIT, and on that basis the PAD submitted on 20 April 2021 a request for the recusal of Thomas Clay to the Secretariat of the ICC International Court of Arbitration. This recusal request was rejected.

Based on the request of the PAD, the Court of Appeal decided to set aside the award based on the analysis that there were close personal ties between the chairman of the tribunal and DIT's counsel, the lack of disclosure of which "was such as to lead the parties to believe that the chairman of the arbitral tribunal might not be free in his judgment, and thus to create in the mind of the PAD a reasonable doubt as to the independence and impartiality of this arbitrator".

Analysis of the motivation of the court

Although the Court of Appeal followed the established case-law, it also strengthened the obligation imposed on the arbitrators to disclose potential ties with the parties, and in the present case the counsel of one of the parties.

To determine the extent of the circumstances that have to be disclosed, the court made reference to the ICC Note to Parties that requires that arbitrators reveal any "professional or close personal relationship with counsel to one of the parties or the counsel's law firm".

The court also made reference to the well-established principle that, if the relationship does not lead to the creation of reasonable doubt on the independence and impartiality in the parties' mind, a lack of revelation of close personal ties with one of the parties or his representative will not result in a conclusion that there is a lack of independence or impartiality.

In that regard, the fact that the chairman of the tribunal and one of the arbitrators were both law professors should not have had an impact since this is a well-known fact that did not need to be revealed. This conclusion is in line with existing case-law.

However, in its analysis of the specific circumstances of the case, the court made reference to some extracts of the eulogy given by Thomas Clay in which he mentioned that he consulted the late Emmanuel Gaillard "before making any important choice". The court considered that such an admission "revealed the intensity of a relationship that went beyond mere ordinary friendship".

The court also noted that in the eulogy Thomas Clay not only made reference to the personal ties he had with the late Emmanuel Gaillard, but also mentioned the ongoing arbitral procedure: "I was about to meet with him again in three weeks under his new colours for hearings in which he would act as counsel and I would act as arbitrator, and I was looking forward to hearing again his formidable knife-edge arguments, in which precision and perspective were even more appealing than any spin. This meeting will not take place, nor will our regular meetings."

The Court of Appeal considered that these circumstances were of such a nature as to "create in the mind of the PAD a reasonable doubt as to the independence and impartiality of this arbitrator".

The review of the court's motivation to set aside the award raises some questions.

First, the statements referred to when analysing the potential lack of impartiality of the arbitrator were made in the context of an eulogy that is empathetic by nature, which the court did not fail to point out "the particular context of this publication [...] involves a degree of emphasis and exaggeration inherent in eulogies". This specific context should therefore be taken into consideration to potentially minimise their importance.

Most importantly, it appears in this case that what led to the setting aside of the award was ultimately the existence of a friendship between the chairman of the tribunal and the counsel of one of the parties.

If as a result of this decision an arbitrator must reveal the existence of a friendship relationship, the court does not define the extent of the friendship relationship. In short, it begs the following questions: at what point should the relationship be deemed worthy of revelation? To whom should the bond of friendship bind? Should family members or other members of firms also be considered in this regard?

Many questions remain unanswered. Hence, it should be considered that this decision will lead to a duty of revelation that is not clearly defined or limited. At the same time, it should also be kept in mind that the arbitration world is a small one where everyone knows each other, and "friendship" ties can easily appear. At the same time, arbitration is based on trust, and parties nominate arbitrators they know and trust, not because they will be impartial, but because it is preferable to name someone that is reliable and serious.

As a consequence, the strengthening of the obligation of disclosure of arbitrators is a good thing if it increases the confidence of the parties in arbitral justice. But the obligation must be clearly defined and it can be questioned whether the notoriety of the protagonists of this case had an impact on the decision adopted by the Court.

We are curious to know the position that the Court of Cassation will adopt now that an appeal against the decision has been made.

Engaging the UK financial regulators – why conversation beats challenge

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The UK's two financial regulators are charged principally with protecting consumers and ensuring banks and insurers operate prudently. Their three key functions – authorisation, supervision, and enforcement – encompass the regulatory lifecycle from cradle to grave. Authorisation ensures that only a fit and proper firm is licensed for business. Supervision conducts checks to ensure a firm's compliance, and enforcement punishes individuals and firms for breaches.

In exercising their formal powers, regulators have historically focused on disciplinary action for crystallised misconduct. However, they are now putting more onus on front-end regulation in authorisation and supervision. There are multiple drivers behind this change. Both the conduct regulator, the Financial Conduct Authority (FCA), and the Prudential Regulation Authority (PRA), responsible for the UK's banks and insurers, have come to recognise that preventing misconduct before it occurs, or halting it as soon it is detected, is the most effective way to carry out their regulatory remit. Too often consumers have been harmed by the 50,000-plus firms regulated by the FCA that are too small to receive any routine supervisory contact. This makes it imperative for the FCA to police market entry more effectively, and to stem the risk of authorised firms causing customer loss.

Moving quickly helps avert criticism. The FCA has come under repeated censure for failing to protect consumers against scams, whether it is mini-bonds, the collapse of London Capital and Finance, or retirees persuaded to transfer out of safe pensions. All of these irregularities involved small firms. The FCA is also seeking to reduce claims falling on the Financial Services Compensation Scheme (FSCS). Funded by industry levy, this is the safety net of last resort, meeting (within strict limits) investor claims arising from the failure of an FCA or PRA-authorised firm. By intervening more quickly with risky firms, the FCA hopes to reduce the incidence of claims falling on the FSCS.

Some anonymised examples drawn from our current caseload show how this new activist policy works in practice. These examples are from the authorisation stage where the FCA focuses on ensuring the quality of market entrants:

1. **The challenged authorisation –** an insurer applies for FCA authorisation. The FCA is concerned about some aspects of its business plan and invites the promoters to withdraw the application. If the firm fails to do this, the FCA will commence the formal refusal process.
2. **The challenged approval –** a bank applies for the FCA to approve a senior individual as its chief executive. The FCA states that it will refuse the application because it considers the proposed individual to be not fit and proper based on a reference from a past employer.
3. **The challenged takeover –** a large overseas institution has agreed to purchase a UK bank, requiring approval as a "change in control" from both the PRA and the FCA. They propose refusal because adverse press coverage about the acquirer's management in its home state suggests it is not fit and proper.

Another, increasingly common, situation occurs during the supervision process:

4. **The sudden intervention –** the FCA contacts a retail finance business and invites it to surrender its permission because of allegations that its sales force uses high-pressure sales practices. In another instance, the FCA contacts a private client wealth manager and requires it to cease business immediately because of concerns over its handling of client assets.

In authorisation cases such as (1) to (3) the regulator will first indicate its concerns, in writing or at a meeting, giving the applicant the opportunity to respond. If dissatisfied with the response, the regulator invites the applicant to withdraw by a "minded to refuse" letter detailing its objections and inviting the applicant's response. If the applicant continues, the regulator will commence the following formal Statutory Notice procedure:

1. **The Warning Notice –** this sets out the regulator's concerns, often in more detail than the preceding "minded to refuse" letter. The applicant must respond within 28 days but is usually granted an extension. This is the applicant's last opportunity to influence the regulator, but there are two snags. First, by this stage the regulator has all but made up its mind and there is unlikely to be any change without some startling new facts. Second, the FCA decides the issue on papers alone; applicants can no longer present in person to the decision-maker. This retrograde step, recently taken in the "interests of efficiency", deprives applicants a key opportunity to fully engage with the regulator.
2. **The Decision Notice –** if the regulator decides to refuse the application, it issues (and invariably publishes) a Decision Notice containing its reasons. The applicant may require that the Upper Tribunal considers the decision, otherwise the regulator issues a Final Notice representing its conclusive determination.
3. **The Upper Tribunal –** the Upper Tribunal is an expert court specialising in financial regulation, which offers independent judicial consideration of the matter from a fresh start and not as an appeal. If it upholds an authorisation or supervision case – as sometimes happens – it can remit it to the regulator with instructions to reconsider in accordance with its findings of fact. But, despite being intended to provide "a quick and informal process", this process is painfully slow. On 1 May 2023, there were 25 pending cases, submitted within the last two years, and a single listed case that had waited two years to be heard.

In a supervision case such as example (4), the FCA will usually send a written notification of its concerns, inviting the firm to apply for a "variation of permission" to restrict its business, failing which it will exercise its statutory power to this effect. In urgent cases, the FCA may intervene immediately to halt a firm's business, for instance where it suspects dissipation of assets or dishonesty. The FCA follows a similar procedure to authorisation cases. If not urgent, it issues a First Supervisory Notice to which the firm can respond, followed by a Second Supervisory Notice that the firm can challenge before the Tribunal. In an urgent case, the FCA can issue a First Supervisory Notice with immediate effect, suspending the firm's business pending any challenge to the Tribunal.

There are two features to this Statutory Notice procedure common to both authorisations and supervision. First, the process does not necessarily make it easy to persuade a regulator to change its mind. While this certainly can happen, it is difficult to achieve on paper alone. Second, the Tribunal offers a remedy simultaneously real and illusory. The Tribunal had a distinguished track record of protecting against irrational decisions by examining evidence and judicially evaluating the regulator's proposed action. However, where your authorisation is refused, or your business stopped in its tracks, there can be few clearer examples of "justice delayed is justice denied" than having to wait two years before your case is heard. Further, because the statute prescribes that challenges to Statutory Notices are to be determined by the Tribunal, there is no realistic prospect of taking the regulator to court for judicial review.[1]

This highlights the importance of not getting caught in the Statutory Notice process and the limitations of the Tribunal. Of course, this may be unavoidable. A firm confronted with an immediate shut-down order has little choice. But in other cases, there may be concrete steps that can be taken to address the regulator's concerns before they become a threat.

1. **Know the red lines –** both the PRA and the FCA have published extensive material on their websites covering most aspects of their work. These offer valuable information on pre-empting regulatory concern. Of especial relevance is the PRA's material on governance and operational resilience, and the FCA's Dear CEO letters setting out its conduct expectations for firms in different sectors.
2. **Talk if you can –** while the regulators can be reluctant to engage, a meeting or telephone conversation can help to understand the regulator's viewpoint and offer an opportunity to explore a solution in a way that emails do not.
3. **Understand the agenda –** the regulators' key objectives are to achieve stability and conduct goals. Look at the issue through their eyes and see what you can offer: strengthening governance, enhancing procedures or offering a past business review may be what is needed.
4. **Seek to cooperate –** the regulators rarely shy away from a challenge so, where practicable, it may be better to resolve concerns through cooperation rather than a fight.
5. **Be credible –** every regulatory engagement is an opportunity to enhance trustworthiness in the regulator's eyes. Recognising and addressing concerns, even if you disagree with them, can help establish your credibility.

In conclusion, UK regulators are increasingly concentrating their powers at the gateway and in halting what they view as the risk of damage. The Statutory Notice process incorporates multiple safeguards but these are sub-optimal in practice, which highlights the advantage of reaching agreement with the regulators by other means.

[1] See R (on the application of Christopher Willford) v FSA [2013] EWCA Civ 677.

New draft law on class actions in the Czech Republic

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Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers has not yet been implemented into Czech law.

Although the Ministry of Justice of the Czech Republic introduced a draft Act on Collective Proceedings (i.e. draft Class Actions Act) at the end of 2022, the aim of which is to transpose the relevant EU Directive, the draft Class Actions Act is still subject to interministerial comment and has not yet been submitted to the Chambers of Deputies (the lower chamber of the parliament) to undergo the standard legislative procedure.

The current possibilities for claims of a similar nature do not offer consumers adequate solutions in the Czech Republic. This is particularly so with small claims where individual consumers are often discouraged by the costs of proceedings and drop their claims.

What is the scope of the draft Class Actions Act?

Class actions will be limited in scope to disputes arising out of legal relations between businesses and consumers.

The draft Class Actions Act promises a faster, easier, more efficient and more budget-friendly solution for consumers in disputes. The Ministry believes that introducing and adopting the act will reduce the load on the courts and strengthen legal certainty in court decisions.

Who can be the claimant?

The claimant in class actions will exclusively be a legal entity that is registered in the list of authorised persons. The law requires legal entities to fulfil several requirements in order to be eligible for placement on the list. Among other things, the entity must be not for profit. It must share information about its structure, funding sources, and goals publicly on its websites, and the entity must be able to demonstrate that it has a legitimate interest in protecting the interests of consumers. The entity must have a history of activity in the field of consumer protection for a certain period of time, which has not yet been determined although a draft amendment to the Act on Consumer Protection contains two suggestions: one year or five years.

The list of authorised persons must be maintained by the Ministry of Industry and Trade of the Czech Republic, which has two months from the submission of an application to decide whether to register the applicant onto the list of authorised persons. After being added to the list, the entity must share information publicly on its websites about any class action that it has filed, the state of proceedings of any filed actions, and the results of any actions that have been solved.

How many consumers does the claimant need to represent and what rights do they have?

The claimant must represent a group consisting of a minimum of 20 consumers at trial.

The individual consumers will have limited procedural rights, consisting mainly of the right to be heard and the right to inspect the court file.

How does a consumer apply for the class action proceeding?

The draft Class Actions Act proposes an opt-in option, which means that the affected consumers must actively join a class action in order to assert their rights.

Consumers can join the group by filling an application to the court within a set period of time after the commencement of the proceedings or by prior given consent.

The Ministry of Justice will publish an application for consumers to join the proceedings, enabling consumers to join easily, irrespective of where they may be. In addition, the draft Class Actions Act also provides for the creation of a registry of on-going class actions.

Admissibility proceedings

After the class action is filed, the court will consider the admissibility of the class action by checking whether the statutory requirements are met:

(a) the claimant has, in accordance with its main purpose, a legitimate interest in the protection of the rights or legitimate interests that are the subject of the proceeding;
(b) the claimant is acting in the interests of the group and is not in a conflict of interest;
(c) the group has at least 20 members;
(d) the alleged rights or legitimate interests of the members of the group are based on similar facts;
(e) the class action was not filed with malicious intent, and in particular the intent to harm the consumer group or to unfairly prejudice the entrepreneur; and
(f) the class action is not funded by a third party that is a competitor of the entrepreneur.

The claimant will also be required to provide the court with an overview of its financial resources, including the origin of those resources, to satisfy the court that the claimant is not committing an abuse of a class action (i.e. a class action being brought by a competitor).

New rule on discovery

On the motion of a participant to the proceedings who has offered reasonably available evidence in support of its claims and has pointed to evidence under the control of the participant against whom the motion is directed, the court may order the participant against whom the motion is directed to provide such evidence.

If the participant who is obliged to do so fails to provide the evidence without giving a justifiable reason, the court may draw adverse inferences and make a determination in favour of the requesting participant.

Are judicial settlements available in class action proceedings?

Yes, the participants to class action proceedings may reach a judicial settlement.

If the participants submit a proposal for a judicial settlement to the court, the court will without undue delay publish it in the registry of on-going class actions. The court will then assess whether the proposed settlement serves the interests of the consumer group appropriately, whether the claimant represented the group's best interests, and whether the settlement is fair when taking into account factors such as costs, risks, and length of the proceedings.

The court will not accept the proposed settlement if it is unfair towards the interests of the consumer group.

The approved settlement will also have the effect of a final judgment.

Remuneration of the claimant

Only the participants to the proceedings bear risks and costs arising from the proceedings. Individual members of the consumer group represented by the claimant could be obliged to cover those costs that would not otherwise have arisen except for the fault of the member.

The draft Class Actions Act provides for a maximum of 5% or 25% of the claimant's share of the award. The exact maximum amount has not been decided yet. Thus, the group members' share of the award will be reduced accordingly.

Conclusion

In conclusion, the draft Class Actions Act introduces long-awaited legal rules, which can effectively secure rights of consumers, especially in small cases, and protect businesses from the misuse of class actions by competitors and/or consumers (or organisations representing consumers).

Nevertheless, as the legislation process is still in its infancy, many of the proposed provisions could be significantly amended. We will continue to monitor the draft's development and provide an assessment of the act as soon as it is adopted (if ever).

The Without Prejudice Principle in Common and Civil Law

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In both common and civil law jurisdictions, the principle of 'without prejudice' plays a significant role in legal proceedings. While this concept aims to protect certain information, the rules governing the use of the without prejudice principle vary, depending on the jurisdiction involved. This article discusses the similarities and differences in common law and civil law jurisdictions and their impact on international arbitration.

The without prejudice principle

The without prejudice principle is a legal concept that seeks to protect the disclosure of communications and documents prepared in connection with, and for the purposes of settlement negotiations. The protection granted by the without prejudice principle is intended to ensure a "candid, free and uninhibited flow of information between the parties during their settlement talks"[1] (i.e. if the negotiations fail, then any statements made during these negotiations cannot be admitted as evidence in subsequent legal proceedings).

Lawyers will therefore often utilise the without prejudice principle by labeling negotiations and the preceding correspondence to be made "without prejudice".

Common law jurisdictions

The without prejudice principle stems from the common law spectrum. In the US, the without prejudice principle is a recognised legal concept also referred to as 'settlement privilege', or 'mediation privilege' if settlement negotiations are conducted by a third party. Under English law, any written or oral communication prepared for the purpose of a genuine attempt to compromise a dispute between the parties is subject to without prejudice privilege. If these negotiations do not result in an agreement, the without prejudice rule prevents either party from referring to the content of those negotiations (i.e. anything written or said by the parties in the course of the negotiations in order to settle their differences) in their evidence.

[1] Berger, *The Settlement Privilege*, in Arbitration International, Vol. 24 (2008), Issue 2, pp. 265-276, p. 268.

Under English law, the label 'without prejudice' constitutes *prima facie* evidence that the respective documents and/or statements are privileged since this label indicates that the documents were created in the context of settlement negotiations and were not intended to be used as evidence in court. However, settlement negotiations do not automatically confer privilege. Any statements made by the parties are only privileged if they are made in furtherance of the settlement negotiations. Privilege applies only to statements and documents with a sufficiently close link to a settlement offer (i.e. to admissions made in a *bona fide* attempt to settle the dispute) but not to any statements of facts, which are asserted independent of the settlement negotiations. The without prejudice principle is further limited and subject to various exceptions, *inter alia*, (i) where there is a waiver of privilege, (ii) if the application of the principle would violate public policy, and/or (iii) where the parties are in dispute about the interpretation of the settlement agreement or its validity.

Finally, it must be noted that parties are not prevented from referring to documents and/or statements exchanged during or in the context of settlement negotiations, and potentially labeled "without prejudice", in subsequent legal proceedings. Instead, a court will review any documents submitted in this regard in order to determine which statements or admissions are admissible as evidence and which are protected by privilege.

Civil law jurisdictions/German law

In civil law jurisdictions, taking German law as an example, the without prejudice principle is not explicitly recognised. The principle of confidentiality of settlement negotiations is nevertheless partially protected by law and by professional rules of conduct.

The without prejudice principle corresponds to the German wording *"ausschließlich für Zwecke der Vergleichsverhandlung"* (translated: solely for the purpose of settlement negotiations). This principle does not constitute a prohibition on the disclosure of evidence (*"Beweisverwertungsverbot"*) in subsequent legal proceedings, but rather expresses a reservation regarding any legally binding effect on the part of the declaring party. Consequently, under German law, parties are permitted to introduce statements made during settlement negotiations into evidence, as these are not privileged. These statements, however, do not have binding effect or constitute a corresponding admission. Instead, even without a corresponding express reservation, German courts will generally consider the legal effects and probative value of the documents/statements depending on the individual case (i.e. by determining whether the declaring party made the respective statement with the intention to be bound by law).

International Arbitration

As demonstrated in ICC Award No. 6653 of 1993, the without prejudice principle is a wellestablished general rule in international arbitration and confirms that settlement negotiations are confidential:
"[…] the confidential character of the exchange of proposals between parties who attempt to achieve an amicable settlement stems from a general principle of international commerce. This principle is a corollary of the general principle of good faith."

This fundamental principle is enshrined in many rules, *inter alia*, in Articles 9 (2) (b) and 9 (4) of the IBA Rules on the Taking of Evidence in International Arbitration, Article 9 (2) of the ICC Mediation Rules (and in almost all institutional mediation rules), the UNCITRAL Conciliation Rules, the UNCITRAL Model Law on International Commercial Conciliation, the EU Directive on certain aspects of mediation in civil and commercial matters and the US Uniform Mediation Act.

Thus, the without prejudice principle is considered a transnational and wellestablished principle in international arbitration, and is independent of the applicable law to the arbitral proceedings. Consequently, this principle also applies even if the choice of law refers to a legal system which does not directly recognise this principle, such as German law.

The without prejudice principle, however, does not prevent the parties from adducing potentially privileged documents into evidence. In the event that such documents are presented, an arbitral tribunal must therefore, based on the circumstances of the individual case, carefully determine which statements or admissions are admissible as evidence and which are protected by privilege. Failing to correctly apply the without prejudice principle may result in the arbitral award being set aside or its enforcement being refused. If the tribunal unjustifiably ignores the privilege, this may constitute a violation of arbitral due process.

Risks of incorrect application

Generally, the effect of the without prejudice principle is that communications subject to this principle are privileged and thus inadmissible as evidence. The restrictive scope under which the without prejudice principle is applied, however, entails the risk that this principle is handled inadequately and lawyers, when not applying the principle correctly, may give the opposing party the opportunity to argue against the interests of their client. To reduce this risk, it is advisable to mark any privileged communication with a *"without prejudice"* label, even if only to draw the tribunal's attention to a potential confidentiality issue and, in addition, clearly state that the statements made and documents submitted are made only to achieve a compromise and to avoid litigation or arbitration. Nevertheless, the prerequisites of without prejudice privilege, such as a close link between the statement or document and the settlement negotiations, must be present in order for privilege to apply. Thus, if there is any doubt as to whether the prerequisites for without prejudice privilege are met or whether independent facts have been exchanged during or in the context of the settlement negotiations, the execution of a Non-Disclosure Agreement **(NDA)** may also be appropriate.

Conclusion/practical considerations

In common law jurisdictions, where statements or admissions are protected by the without prejudice principle, such evidence – if introduced in subsequent legal proceedings – would generally be considered inadmissible. Under German law, the without prejudice principle – acting as an example for civil law jurisdictions – does not constitute a prohibition on the disclosure of evidence *("Beweisverwertungsverbot")* in subsequent legal proceedings but rather expresses a reservation with regard to any legally binding effect on the part of the declaring party.

In international arbitration, the without prejudice principle is considered a transnational and well established principle. Hence, independent of the choice of law, an arbitral tribunal is not barred from determining that settlement discussions are to be protected as confidential and thus inadmissible as evidence.
Finally, even if statements or admissions are protected by the without prejudice principle, this does not prevent the parties from adducing the respective communication in subsequent litigation or arbitration proceedings. Unless an NDA has been signed between the parties, this act would not lead to any legal consequences for the adducing party, even if it is subsequently found that the documents/statements were subject to privilege. In addition, the adducing party will regularly plead that there are doubts as to the application of privilege.

While, if privilege applies, the deciding court or tribunal is prohibited from relying on the respective documents as evidence, in order to reach this conclusion the court must first review the documents and – based on the circumstances of the individual case – carefully determine which statements or admissions are admissible as evidence and which are protected by privilege. Thus, it must have knowledge of their existence and content. This bears the risk that the court or arbitral panel is (subconsciously) not able to completely disregard the content and existence of these documents. In other words, one cannot "unring the bell". Tellingly, it is therefore often a tactical consideration to adduce a document marked as 'without prejudice' into evidence. In conclusion, the without prejudice principle does not offer a total guarantee that the contents of any documents and/or statements made in the context of settlement negotiations will be completely disregarded during subsequent legal proceedings.

The new Arbitration Act 2023 marks Luxembourg's return as a centre of international arbitration

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Luxembourg prides itself on offering a competitive and liberal legal framework that fosters business. One area, however, where Luxembourg in the past could not take pride was its archaic arbitration law. This has now been rectified with the 19 April passage of the **Arbitration Act 2023** that reforms the nation's arbitration law and establishes a modern, simple and complete legal framework, heavily influenced by French international arbitration law and the UNCITRAL Model Law.

Background

Prior to the Arbitration Act 2023, the rules governing arbitration in Luxembourg dated for the most part from 1806 when the Napoleonic Code of Civil Procedure was enacted. Some key reforms took place, in particular in 1939 when the validity of arbitration clauses was recognised, and in 1981 with the modernisation of the rules governing the annulment and recognition of arbitral awards. Luxembourg also ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1983.

However, Luxembourg had largely failed to adopt a competitive legislative framework in support of arbitration. It was acknowledged by the Luxembourg *Conseil d'Etat* in as early as 1981 that Luxembourg was unable to capitalise on its numerous advantages, including economic and political stability, multilingualism, and the large number of legal practitioners accustomed to dealing with international matters, and develop into a choice place for arbitration.

To pave the way for the modernisation of Luxembourg arbitration law, a think tank made up of academics, judges and practitioners was created in 2013. It compared legislation from various jurisdictions and the UNCITRAL Model Law and considered the rules of arbitration of the most recognised arbitration institutions in order to identify the pros and cons of these models.

This work led the Luxembourg government to include, in the governmental programme for 2018-2023, a promise to modernise Luxembourg arbitration law. A draft bill to that effect was introduced in 2020.

The authors of the draft bill were transparent about the objectives for reform:

- The first was to make sure that the approach and concepts of the new system was coherent with existing sets of rules, which are internationally recognised and have proven to be effective. In this regard, the authors of the draft bill copied entire articles from French international arbitration law and the UNCITRAL Model Law, indicating when the wording of the draft bill departs from these rules and why. One clear advantage of this method is to limit the uncertainty arising from the introduction of an entirely new set of rules, as Luxembourg courts and arbitral tribunals will be able to refer, where appropriate, to existing case-law and doctrine, even when foreign and not binding.[1]

- The second was to strike a balance between a liberal system favourable to arbitration and the protection of weaker parties. Certain types of disputes such as those concerning consumer protection, employment matters, and residential leases are therefore non-arbitrable.

- The third was to reject the distinction made in French law between international and domestic arbitration.

We will not review here all the features of the Arbitration Act 2023 but instead focus on the scope of intervention of the Luxembourg judicial courts in the arbitration process.

The "compétence-compétence" principle

One noteworthy addition of the Arbitration Act 2023 is the introduction of the French law principle of "competence-competence". As in French law, this principle has a positive effect in that the arbitral tribunal can rule on its own jurisdiction, including in relation to the existence or validity of the arbitration agreement. It also has a negative effect. A court seized with a dispute covered by an arbitration agreement must decline jurisdiction, although there are limited exceptions.

These exceptions include where the arbitration agreement is invalid as a result of the non-arbitrability of the subject matter or where, for any other reason, it is manifestly null or inapplicable. Contrary to French law, the composition of the arbitral tribunal is not an obstacle to a Luxembourg court finding that it has jurisdiction on the basis of this exception.

Another exception relates to interim measures (of a probational, provisional or conservatory nature) where the arbitral tribunal has not yet been composed or where the arbitral tribunal is unable for any reason to make such orders (e.g. third-party attachment measures).

"Juge d'appui"

Also imported from France, the *"juge d'appui"* or supporting judge has jurisdiction to resolve procedural difficulties arising from the arbitration process.

The Luxembourg *juge d'appui*[2] will have jurisdiction where the seat of arbitration is in Luxembourg or, if no seat was agreed upon, where (i) the parties have elected Luxembourg procedural law to govern the arbitration process; (ii) the parties have conferred jurisdiction to Luxembourg judicial courts to resolve disputes relating to the arbitration process; or (iii) there is a significant connection with Luxembourg, such as where the defendant has its seat in Luxembourg or where the place of performance of the contract is Luxembourg. The *juge d'appui* will also have jurisdiction in any case where there is a risk that justice may be denied.

Its jurisdiction extends to disputes relating to the appointment and recusation of arbitrators, the extension of the time limit for the award to be made (for these, the *juge d'appui* will only have jurisdiction if the arbitration institution does not intervene) and to ordering (upon invitation of the arbitral tribunal) a third party to disclose evidence.

[1] Under Luxembourg law, there is no concept of a binding precedent.

[2] By default, this will be the President of the District Court of Luxembourg City, unless the parties have specifically elected the President of the District Court of Diekirch for the role.

Challenging arbitral awards made in Luxembourg

The only recourse before the Luxembourg courts available to the parties against an award made in Luxembourg is the action for annulment.[3] It is available as soon as the award is issued and within one month of its due service/notification. An annulment will only be granted if:

- the arbitral tribunal has wrongly declared itself competent or incompetent;
- the arbitral tribunal was improperly constituted;
- the arbitral tribunal has ruled without complying with its terms of reference;
- the award is contrary to public policy;
- the award is not reasoned, unless the parties have exempted the arbitrators from giving reasons; or
- there has been a violation of the rights of the defence.

Under the previous regime, this action for annulment was brought before the District Court and was subject to an appeal. It also had a suspensive effect, meaning that the award was not enforceable during this procedure. This action is now brought directly before the Court of Appeal with no appeal available. In addition, it does not suspend the enforceability of the award unless the Court of Appeal specifically orders such suspension upon request of the Claimant.

A recourse named "tierce-opposition" is, however, available to persons who were not parties to the arbitration but who were negatively impacted by the arbitral award. It is brought before the court, which would have had jurisdiction if no arbitration had taken place.

Enforcement of foreign awards in Luxembourg

Arbitral awards made in Luxembourg or abroad are recognised and enforceable in Luxembourg only after having received the "exequatur" by an order of the President of the competent District Court sought on an ex-parte basis. This can usually be obtained in a matter of days.

Regarding foreign awards, the only available recourse for the party resisting enforcement is an appeal against the exequatur order.

The Arbitration Act 2023 also provides for limited grounds for denying the exequatur whether at the level of the application for exequatur or at the appeal level, although these provisions remain subject to the application of the New York Convention to which Luxembourg is a party and which therefore applies in most cases.

Conclusion

The success of Luxembourg as a seat of arbitration is not something that can be legislated. This Arbitration Act 2023, however, removes most legal obstacles to this success and strongly enhances the attractiveness of arbitration in Luxembourg by reinforcing the enforceability of awards made in Luxembourg.

Nonetheless, the choice between commercial arbitration and litigation is also a question of balance between time, cost, and confidentiality on which the Arbitration Act 2023 has little to no impact.

Litigation has traditionally been the preferred choice for resolving disputes in Luxembourg in most situations, mostly due to its low cost.

One factor that could tip the scale is the increasing complexity of commercial disputes in Luxembourg, which is proportionally related to the increasing complexity of regulations and business/financial practices.

Luxembourg courts often struggle to deal with these highly complex disputes, resulting in situations where both the process and the outcome can be frustrating for litigants (and the judges).

The development of arbitration in Luxembourg is inevitable for high-stakes complex commercial disputes.

[3] There is also the possibility of making an application for a review of the award *(recours en révision),* which is brought before the arbitral tribunal but, if such arbitral tribunal cannot be re-composed, can be brought before the Court of Appeal. The scope of such recourse is, however, limited to instances of (i) fraud, if revealed after the award is made; (ii) the discovery of crucial evidence undisclosed by the other party; and (iii) where evidence or testimonies are judicially declared as false after the award is made.

Precautionary measures in the exequatur for the recognition of foreign arbitral awards

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Increasingly, obtaining a favourable arbitral award in an international dispute is not enough. A successful outcome in international arbitration proceedings is often contingent on the actual enforcement of the relevant arbitral award. However, across all jurisdictions, there are some practical issues that need to be navigated in order to enforce an award, and Spain is no exception.

Firstly, the enforcement of foreign arbitral awards in Spain is not automatic, and requires an exequatur procedure. In this regard there are sometimes discrepancies about the competent court to hear the exequatur procedure. The Spanish Law on International Legal Cooperation on Civil Matters governs this matter in conjunction with treaties relating to recognition and enforcement to which Spain is a party. These include: the 1958 New York Convention, the 1961 European Convention on International Commercial Arbitration (Geneva Convention), the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention) and several bilateral treaties. In certain aspects, the Spanish Law on International Legal Cooperation on Civil Matters is incomplete, so it is necessary to refer to Spanish Arbitration Law or Spanish Judiciary Law. It has been established, based on the Spanish Judiciary Law and in line with the Spanish Arbitration Law, that the competent court to hear exequatur procedures for foreign arbitral awards should be the Civil Chamber of the High Court of the appropriate Autonomous Community.

Even though the Spanish Law on International Legal Cooperation allows an applicant to apply for recognition and enforcement of an arbitral award through the same writ, the aforementioned issues regarding the appropriate court to hear the exequatur proceeding has led to the assumption among practitioners that it is best to obtain the successful recognition of the arbitral award from the Civil Chamber of the High Court of the Autonomous Community as a first step, and then to request its enforcement. This is due to the fact that the Spanish Judiciary Law establishes that the competent court for the enforcement of foreign arbitral awards is the Court of First Instance with territorial jurisdiction (therefore, a different court to the one competent for the exequatur procedure).

The foregoing scenario leads to the obvious conclusion that the delay related to navigating two different court proceedings before different courts may cause difficulties in actually enforcing the arbitral award and affect the likelihood of successful recovery.

Furthermore, there is also the possibility of requesting the adoption of interim measures while the exequatur procedure is ongoing. The first question that arises in this regard concerns the confirmation of which court would have jurisdiction to hear the interim measures application (taking into account that the exequatur procedure is heard by the Civil Chamber of the High Court of the appropriate Autonomous Community and the enforcement proceeding takes place before the Court of First Instance). The answer to this question is established in article 8.3 of the Spanish Arbitration Law, which states that for the adoption of interim measures the competent court shall be that of the location where the arbitral award is to be enforced, or in the absence thereof, that of the location where the interim measures shall be effective. Therefore, the relevant application of interim measures shall be filed with the Court of First Instance with jurisdiction to hear the enforcement of the arbitral award, or in the absence thereof, that of the location where the interim measures shall be effective.

As a result, the claimant seeking interim relief while the exequatur procedure is ongoing would have to file two separate writs before two different courts: the first, requesting the recognition of the foreign arbitral award (to be filed before the Civil Chamber of the High Court of the appropriate Autonomous Community); and simultaneously, the second, requesting the adoption of interim measures (to be filed before the Court of First Instance with jurisdiction to hear the enforcement of the arbitral award or in the absence thereof that of the location where the interim measures shall be effective). In the writ of application for the adoption of interim measures, the applicant must comply with the Spanish legal requirements for interim relief in general but focus on the scope of the recognition and subsequent enforcement of the foreign arbitral award.

In practice, the structure of the said application is similar to the one used in writs of claim in main proceedings and can be divided into two sections:

- Factual basis in which the main facts of the dispute are set out. Jointly with those facts, the applicant may provide documentary evidence. In this case, the relevant description would refer to the arbitration proceedings, the decision reached in the arbitral award and the facts that will lead the court to believe that there is a risk that the respondent will not be able comply with the arbitral award upon its enforcement (e.g. delicate financial situation of the respondent).

— Legal grounds. In this section, the applicant should define which specific interim measure is requested (e.g. preventive seizure of assets) and prove the existence of all the conditions needed for it to be granted. The referred legal requirements are the appearance of legal standing (*fumus boni iuris*) and the risk of delay (*periculum in mora*).

— Moreover, the applicant should include in the request an offer to provide security, specifying the type or types of security offered (e.g. cash, a personal guarantee) and justifying the value of the one proposed. The posting of security is aimed at preventing the party affected by the measure from bearing damages arising from the said measure.

Spanish law refers to "*fumus boni iuris*" or the appearance of legal standing as a requirement for interim measures to be granted. The applicant must provide evidence that a verdict in their favour is sufficiently likely to be granted at the end of the main proceeding. In this case, the aim would be to prove that the Civil Chamber of the High Court of the Autonomous Community would grant the recognition of the foreign arbitral award. This may be achieved, for example and among other ways, by proving that none of the causes established in the 1958 New York Convention for the refusal of the recognition of an arbitral award occur in the case at hand.

The Spanish legislator refers to *"periculum in mora"* (risk of procedural delay) in the sense that interim measures may only be granted if the court is satisfied that failure to grant the interim measures sought could lead to circumstances preventing or hindering the effectiveness of the protection that may be granted, and/or the enforcement of an eventual judgment in favour of the applicant. Applying the referred legal requirement to this scenario, the risk to be prevented is that the delay related to obtaining the recognition of the arbitral award through the exequatur procedure will create a situation where, when the time comes to enforce the arbitral award, the enforced party will not have sufficient assets of enough value to cover the relevant debt.

Whereas the general rule is that the court will hear the respondent prior to deciding on the application of interim measures, it is also noteworthy that Spanish law allows in exceptional cases that the interim measures are adopted *inaudita parte* (i.e. without hearing the respondent prior to the adoption of the interim relief and hearing them afterwards instead). For this expedited procedure to be granted, the applicant needs to evidence that there are extraordinary circumstances of urgency or that hearing the respondent prior to the adoption of the interim measures may put the effectiveness of the interim relief at risk.

Even though there are some aspects of Spanish law that would be better consolidated before the same court and set out in a clearer way in the relevant rules, it is safe to say that mechanisms are available for claimants who have obtained favourable foreign arbitral awards and who are seeking to protect the effectiveness of these awards.

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