International Disputes Digest

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Contents

Introduction

Welcome to the 2025 Summer edition of the *International Disputes Digest*, a biannual publication that explores the major challenges facing international business and offers practical strategies for surmounting them.

We are now midway through 2025, and global business faces a plethora of obstacles, including trade tariffs, cybersecurity, escalating and continuing conflicts in the Middle East and Ukraine and uncertainty surrounding the emergence of AI.

The current geopolitical landscape may seem unpredictable, but there are ways in which you can (and should) take this instability into account when drafting your contracts to avoid disputes.

With environmental issues still high on the agenda, we explore the European Free Trade Association Court's first substantive environment ruling and how international rulings on climate change and the environment are shaping government policies.

In the field of international arbitration, we invite you to read about the principle of *res judicata*, the planned reform of French arbitration law, and the comparison of English and Singaporean approaches to arbitration during insolvency.

In this edition of the Digest, you will also find insightful articles discussing various areas of dispute resolution across jurisdictions, including: an overview of the Spanish cross-border rules on restructuring plans, tax disputes risk under Pillar Two, the emerging class-action landscape for ultra-processed foods in the UK and US as well as defamation cases in Monaco.

We hope you enjoy reading these articles. As you explore them, feel free to get back to us with any questions, comments and insights.

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From courtrooms to policy: climate change and environmental disputes before international courts and tribunals

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In the age of climate change and biodiversity loss, international courts and tribunals are increasingly called upon to address complex legal questions related to the protection of the environment and public health under international law. These forums have become pivotal in evaluating international state obligations relating to the impacts of climate change, including rising sea levels, wildlife degradation, access to water, and extreme weather events.

As discussions on environmental sustainability intensify at both global and national levels, governments and businesses are increasingly confronted with claims related to climate change and environmental issues. These cases involve issues of state responsibility, the role of private stakeholders, the enforcement of environmental standards, and the protection of affected communities. In this context, international courts and tribunals are not only arbiters of disputes but also influential actors shaping the trajectory of global environmental governance.

The increasing frequency of international environmental disputes marks a crucial turning point in the development of relevant legal norms, presenting both risks and opportunities for businesses. As discussed in this article, the period from 2025 to 2026 is poised to be a defining moment for such disputes. Among the most anticipated developments is the International Court of Justice's expected landmark advisory opinion on the scope of state obligations regarding climate change under international law. Once issued, this opinion is likely to set important precedents for future environmental litigation and arbitration.

As international courts and tribunals continue to engage with these important matters, the implications of their rulings extend beyond the immediate parties involved in each dispute. The outcomes of these cases are poised to influence not only the development of international law norms but also the decisions of domestic lawmakers, regulatory bodies, and national courts that adjudicate climate- and environment-related disputes, which highlights the integral role of international judicial bodies.

International proceedings on climate change and environmental issues

With an expanding body of cases, the following international dispute settlement forums are setting important precedents that could significantly influence domestic legal frameworks:

International Court of Justice (ICJ)

In March 2023, the UN General Assembly adopted Resolution A/RES/77/276, requesting the ICJ to provide an advisory opinion on the scope of state obligations concerning climate change. It posed two main questions: (i) what are international state obligations to protect the climate system from anthropogenic greenhouse gas emissions (GGEs), ensuring the well-being of both present and future generations; and (ii) what are the legal consequences for states that, through actions or omissions, cause significant climate harm, particularly concerning small island developing states and affected people? The UN's request draws upon legal instruments such as the UN Charter, the International Covenant on Civil and Political Rights, and the Paris Agreement.

In December 2024, oral hearings commenced in The Hague, with participation from 96 countries and 11 international organisations. Small island nations have been at the forefront of the initiative. The US, China, and the EU also presented positions. The ICJ allowed submissions from experts to help form an understanding of the scientific basis and impacts of climate change.

Inter-American Court of Human Rights (IACtHR)

Similarly, the IACtHR has been deliberating on a landmark advisory opinion on climate change and state obligations under the American Convention on Human Rights. This followed a request made by Chile and Colombia in January 2023, highlighting considerations for region-specific human rights standards. The request sought guidance, among other things on the duty of states to mitigate and adapt to climate change, including measures to prevent and respond to environmental loss and damage, as well as the protection of vulnerable populations such as children, indigenous people, and environmental defenders.

In April and May 2024, the IACtHR held oral hearings in Barbados and Brazil, inviting submissions from governments, civil society organisations, and academic institutions. Over 600 participants were reportedly involved in the proceedings.

In July 2025, the IACtHR issued its long-anticipated Advisory Opinion No. 32. The court declared that a stable and healthy climate is part of the human right to a healthy environment. The opinion outlines states' obligations to mitigate and adopt measures in response to climate change. The court also held that states must restore damaged ecosystems, regulate both public and private activities, and hold emitters accountable.

European Court of Human Rights (ECtHR)

In April 2024, the ECtHR issued a decision in *Verein KlimaSeniorinnen v. Switzerland,* marking a landmark case in which a European court ruled on the intersection of climate change and human rights. The applicants, a Swiss association of over 2,000 women, predominantly aged 70 and above, argued that their health and well-being were threatened by climate change and global warming, in breach of their rights to life and health under the European Convention on Human Rights. They argued that more deaths than usual occurred during hot summers, and that the defendant had missed its 2020 climate targets. Highlighting the global significance of the case, other governments, NGOs, and UN bodies participated in the proceedings.

The ECtHR held that the defendant had failed to fulfil its positive obligations to protect citizens from the adverse effects of climate change and had taken no timely or sufficient action to mitigate it, thereby endangering the applicants' health and quality of life. It expressed the view that states have a duty to adopt and effectively implement measures to mitigate climate change, with a view to achieving net-zero GGEs within three decades.

International Tribunal on the Law of the Sea (ITLOS)

In May 2024, the ITLOS issued a significant advisory opinion affirming state obligations under the UN Convention on the Law of the Sea (**UNCLOS**) to protect the marine environment from climate change caused by GGEs. This followed a request from a coalition within the Commission of Small Island States on Climate Change, including countries such as Antigua and Barbuda, which sought clarification on UNCLOS obligations regarding the prevention, reduction, and control of marine pollution resulting from the impact of climate change, such as ocean warming, rising sea levels, and ocean acidification.

Investment treaty tribunals

Finally, arbitral tribunals adjudicating investor-state disputes under international investment treaties play a crucial role. In recent years, political, legal, and social debates regarding the environmental impact of certain economic activities have steadily increased. This has led to a growing number of investor-state arbitrations related to the environment. By the end of 2021, the UN noted that approximately 15% of all known treaty-based investment arbitrations had been initiated in relation to circumstances involving an environmental component.

Examples include cases such as *Perenco v. Ecuador*, an investment arbitration concerning the environmental impacts of oil extraction in the Amazon rainforest. In this case, the tribunal ruled that the state has discretion under international law to adjust environmental laws in response to evolving perspectives and the risks posed by certain activities. *In Eco Oro v. Colombia*, the tribunal found that the delimitation of a mining project in a mountain ecosystem – home to native flora and fauna vital for maintaining biodiversity – qualified as a legitimate exercise of the state's power to protect the environment. As with proceedings before international courts, the "precautionary principle" often plays a role in such investment arbitrations. The underlying concept is that states must prioritise proactive planning to prevent environmental damage. Scientific uncertainty regarding the causality, probability, and nature of such damage is considered to justify the right to take action.

Potential implications: what's next?

The decisions of these international courts and tribunals are likely to carry significant political and legal weight at both the international and domestic levels, with implications for governments and businesses alike.

The ICJ's advisory opinion is expected later in July this year. While such opinions are non-binding, it could establish a foundational understanding of state responsibilities regarding climate change that may influence international and national governance, and prompt countries to adjust their environmental policies. The opinion may also guide litigation and arbitration between states and companies, where established principles may be used as arguments, and between companies and individuals, where legal actions might be based on the opinion's findings. Both international tribunals and domestic adjudicators are likely to take the ICJ opinion into account.

Given their previous influential decisions, the IACtHR's and ECtHR's findings are expected to provide authoritative guidance on the human rights dimensions of climate change. The IACtHR's Advisory Opinion is anticipated to influence policies and legal frameworks across the Americas. Similarly, the ECtHR's decision affirms that human rights offer a framework for addressing climate change. This ruling could serve as a guiding principle for the 45 other member states of the Council of Europe.

The ITLOS advisory opinion provides an interpretation of state accountability for maritime pollution resulting from climate change. As such, it is likely to set a precedent for future environmental laws and the use of UNCLOS as a tool for marine protection.

Finally, it will be interesting to see how awards in investor-state arbitrations related to the environment may inform future legal actions and policy decisions by states where foreign investments are made. These cases have become an important framework for environmental considerations in international arbitration. This development is expected to evolve with the conclusion of new international investment treaties worldwide.

Conclusion

Climate-related and environmental decisions by international courts and tribunals are expected to carry legal and political implications at the global and national levels. Businesses will need to closely monitor these developments since they may be directly impacted by regulatory changes and the growing emphasis on environmental responsibility. This includes sustainability practices, climate-conscious policies, and investments in response to emerging international standards. Businesses could seize opportunities by aligning their operations with evolving environmental practices, fostering innovation in new technologies, or engaging in proactive partnerships aimed at addressing concerns. Ultimately, the continued evolution of legal frameworks around climate and environmental issues will not only shape global governance but also create opportunities for businesses worldwide.

Ultra-processed foods: the emerging class action landscape in the US and UK

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Ultra-processed foods

The legal landscape surrounding ultra-processed foods (UPFs) is rapidly evolving, with increasing scrutiny from regulators, consumers, and litigators alike. Recent developments in the US and growing interest in the UK suggest that food manufacturers and retailers should prepare for potential regulatory changes and legal disputes, particularly, class actions style disputes.

Emerging litigation: the Martinez case

In December 2024, a case described as the "first of its kind" on UPFs was filed by Bryce Martinez in Philadelphia against Kraft Heinz, Mondelez, Post Holdings, Coca-Cola, PepsiCo, General Mills, Nestle, Kellanova, WK Kellogg, Mars, and ConAgra Brands. Martinez claims that ingesting these companies' UPFs led him to develop type 2 diabetes and non-alcoholic fatty liver disease at age 16.

The case defines "UPFs" as "industrially produced edible substances that are imitations of food" and alleges that the above companies:

- targeted children in marketing campaigns, leading to chronic diseases;
- deployed practices similar to those used by cigarette manufacturers to create addictive products; and
- engaged in conspiracy, negligence, fraudulent misrepresentation, failure to warn, breach of warranty, and unfair business practices.

The plaintiff cites a significant number of studies linking UPFs to cancers, cardiovascular disease, IBS, dementia and other adverse mental health outcomes in the lawsuit.

Parallels with tobacco litigation

The Claimant's lawyers in the Martinez case have drawn explicit parallels with the tobacco industry and the addictiveness of cigarettes, alleging that American food company executives deployed the "cigarette playbook" to fill the food industry with addictive substances. Several of the allegations are based on the premise that certain food companies were owned by tobacco companies (e.g. Philip Morris and Kraft) and shared their previous research in that industry. This perspective attempts to circumvent causation challenges by focusing on alleged unethical conduct aimed at increasing addiction, rather than putting the onus on claimants to prove direct causation of adverse health impacts from UPFs.

UK developments and legal risks

While direct litigation in the UK appears less advanced than in the US, there are indications that the legal landscape is shifting. A prominent UK claimant law firm is reportedly exploring a class action against major food companies in the UK food and drink sector. Their approach is understood to be at an exploratory stage, with discussions involving think tanks and policy experts. The gambling sector is also understood to be a place of interest due to the similarities in marketing tactics.

The "no win, no fee" case structure prevalent in the UK creates an attractive opportunity for potential claimants to join a class action. This, combined with the relaxation of rules on litigation funding and law firm advertising, has created a climate favourable to mass claims, particularly for US claimant lawyer investment in the UK.

The issue of causation would be a legal hurdle to jump. However, evidence of adverse health issues due to the ingestion of UPFs may emerge through whistle-blowers. Alternatively, if damaging documents enter the public domain via US litigation (in the case of companies with affiliates there), or if documents can be found during disclosure stages, this would not be favourable to possible defendant companies.

The current UK legal framework

Unlike some jurisdictions, the UK does not currently have specific laws or regulations that directly address UPFs. However, the general principles of food safety law still apply, primarily through:

- The Food Safety Act 1990 (the "FSA");
- EU Regulation No 178/2002 (the "General Food Law Regulation"); and
- Regulation (EC) No 852/2004 (the "Food Hygiene and Safety Regulation").

These regulations establish important principles that could form the basis of UPF-related disputes.

Safety assessment

Under the General Food Law Regulation, food is deemed unsafe if it is considered "injurious to health" or "unfit for human consumption".

When determining whether food is safe, the following should be considered:

- normal conditions of use by consumers and at all stages of production, processing, and distribution;
- information provided to consumers, including labelling and other general information available, on avoiding specific adverse health effects from certain foods or food categories.

When determining whether food is injurious to health, the following should be considered:

- probable immediate, short-term, and long-term health effects on consumers and subsequent generations;
- probable cumulative toxic effects; and
- particular health sensitivities of specific consumer categories when food is intended for a specific category of consumers.

This comprehensive approach to safety assessment creates potential exposure for manufacturers of UPFs, particularly as scientific evidence regarding long-term health effects continues to emerge.

Risk analysis and the precautionary principle

The General Food Law Regulation requires food law to be based on risk analysis using available scientific evidence. Crucially, under the precautionary principle, where the possibility of harmful effects is identified even when scientific evidence remains uncertain, provisional risk management measures may be adopted pending further scientific evidence.

This principle could serve as a basis for regulatory action against UPFs even before scientific consensus is fully established, provided the measures are proportionate and subject to review.

Scientific evidence and public awareness

The Scientific Advisory Committee on Nutrition (SACN) published a rapid-evidence update in April 2025 that provides insights into the health impacts of UPFs, noting growing evidence linking UPF consumption to adverse health outcomes including obesity, cardiovascular diseases, and metabolic disorders.

Media coverage of UPF-related issues has increased dramatically in recent years, from a handful of mentions in national UK newspapers in 2020, to hundreds of mentions in the last two years (2023 – 2025). This part has been possibly driven by the book, Ultra-Processed People, by Chris van Tulleken, which was first published in April 2023 and has won awards. The heightened public awareness, combined with advocacy from NGOs and food campaigners like Jamie Oliver, creates an environment conducive to litigation.

Potential claims in the UK context

An initial question for any claims brought in the UK regarding UPFs is: What is meant by "UPFs"? There are multiple different definitions, few if any are precise. Any definition may well be dictated by the nature of any claim.

While specific claims would depend on circumstances, potential legal claims in the UK might include:

1. **Product liability claims:** under the Consumer Protection Act 1987, UPFs could potentially be deemed defective products if they cause harm to consumers.

2. **Negligence claims:** following the principles established in Donoghue v Stevenson, manufacturers could face claims for failing to take reasonable care regarding the formulation, testing, or marketing of UPFs.
3. **Consumer protection claims:** the Digital Markets, Competition and Consumers Act 2024 could form the basis of claims related to misleading labelling or marketing of UPFs.
4. **Misrepresentation claims:** alleged untrue statements by manufacturers about the healthfulness or safety of their products could lead to misrepresentation.

The factual bases for such claims might include:

— **Addictiveness:** claims that UPFs are engineered to be addictive, similar to cigarettes;
— **Satiability:** allegations that UPFs confuse normal satiety signals, leading to over consumption;
— **Health harms:** claims linking UPFs to specific health conditions, including cancers, diabetes, and obesity; and
— **Inadequate labelling:** claims that manufacturers failed to warn about potential risks.

Recommendations to food companies

Given these developments, food companies should consider taking proactive steps to mitigate legal risks:

— **Product portfolio assessment:** identify potential UPFs within your portfolio using the NOVA established classification system.
— **Scientific literature review:** assess the "state of the art" of current scientific literature regarding UPFs and associated health risks, including evidence that might be relied on by potential claimants.
— **Documentation review:** identify key internal custodians likely to have been involved in decision-making processes around UPFs and map where relevant documents are stored.
— **Risk assessment implementation:** conduct and regularly update risk assessments based on the growing scientific evidence.
— **Information disclosure evaluation:** review product labelling and consumer information to ensure consumers are adequately informed about potential health effects.
— **Expert engagement:** consider instructing experts in anticipation of potential litigation.
— **Media strategy development**: develop a comprehensive media strategy for addressing litigation threats and responding to negative publicity.

Conclusion

The legal landscape surrounding UPFs is rapidly evolving, with increasing interest from regulators, consumers, and litigators. While the UK lacks specific UPF regulations, existing food safety frameworks and civil causes of action provide ample grounds for potential disputes. The Martinez case in the US offers a preview of litigation strategies that might be deployed while increasing activity by UK claimant firms suggests similar cases could emerge domestically.

Given the substantial financial exposure associated with these claims that could amount to millions, potentially involving large claimant classes and significant individual damages, food companies would be well-advised to take proactive measures to assess and mitigate their legal risks. Because there is a perception that these companies have deep pockets, court judgments for damages may be easily enforceable. As scientific understanding of UPFs evolves, companies that stay ahead of these developments will be in the best position to navigate this challenging legal landscape.

Permitting arbitrations to proceed during insolvency: new developments in Singapore

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Common law courts frequently encounter the conflict between arbitration law and insolvency regimes. There remains no international convention on the subject and courts of individual countries are left with a patchwork of developing case-law to determine where the boundaries should lie.

For example, should arbitration proceedings against a respondent subject to insolvency proceedings be permitted? English courts have addressed the question on several occasions over the past 20 years, but there is scope for more definition as to the relevant thresholds to be met. In early 2025, the Court of Appeal in Singapore (**SGCA**), in *Sapura Fabrication Sdn Bhd v GAS* [2025] SGCA 13 (***Sapura***), faced the same question and approved a less open-ended test in a decision which may influence future thinking in the common law world.

It has long been established in England that for the court to permit proceedings to continue, there must be some reason why it would be inequitable to permit a prohibition to apply on proceedings and only in "exceptional" cases will the creditor not be required to participate in such machinery as may be put in place by the administrator or liquidator for determining claims (*AES Barry Ltd v TXU Europe Energy Trading (In Administration)* [2004] EWHC 1757 (Ch), ***AES Barry***).

AES Barry was cited in *Ronelp Marine Ltd v STX Offshore and Shipbuilding Co* [2016] EWHC 2228(Ch) (***Ronelp***), where Norris J expanded on the concept of exceptional cases:[1]

[1] *Ronelp*, at [31]

> The term "exceptional" is protean: but in this context I think it means that the applicant creditor must demonstrate a circumstance or combination of circumstances of sufficient weight to overcome the strong imperative to have all the claims dealt with in the same way (and in the instant case by the insolvency court). That said, a domestic court, recognising the general desirability of having one insolvency estate under the management of one insolvency court, should not be too ready to find the factors of "sufficient" weight (but, given the nature of the decision, is unlikely to be assisted by the extensive citation of judgments which simply show the assessments made by other judges).

In *Ronelp*, the Court did grant permission for Commercial Court proceedings to continue against a Korean company that became the subject of a rehabilitation order, which was granted recognition in England. Norris J approached the question of which of the two potential proceedings would be more appropriate for resolving the dispute. He noted the "strong imperative" to leave matters to the insolvency court. However, his decision turned on reasons including the following:

- the case involved a difficult point of English law on illegality;
- expert evidence indicated that the Korean court would be likely to suspend its proceedings in order to allow the English court to determine that issue: and
- the Commercial Court proceedings were already well advanced and the parties had expended considerable costs on them.

Norris J cited *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch) (***Cosco***), where Briggs J had permitted an arbitration to proceed against a Swiss company subject to bankruptcy proceedings in its home jurisdiction. Briggs J relied on the fact that the dispute involved a longstanding question of English law about liens on charterparty sub-hire and on how London arbitrators experienced in shipping law would be well placed to determine that. In doing so, he commented he was approaching the matter as:[2]

[2] *Cosco*, at [53]

> One of broad discretion, the question being which route for the resolution of the underlying dispute is likely best to serve the interests of justice, being that which is right and fair in all the circumstances.

It is clear in English law both that the courts will approach the question as one of comparing the relative procedural advantages of the competing processes and that only in exceptional cases will the courts allow proceedings to override or compete with the insolvency procedure. *Ronelp* and *Cosco* provide examples of situations, which will be regarded as sufficiently exceptional cases.

It has also been recognised that while the same approach is applicable for both administration and liquidation, the different statutory purposes of those procedures respectively must be taken into account in the exercise of weighing up the circumstances. The purposes of liquidation are to achieve the orderly liquidation of the insolvent company's assets for creditors on a *pari passu* basis, and the minimisation of proceedings, which might disrupt that process or cause unnecessary costs, whereas those of administration are wider, encompassing attempts to rescue the company. The significance of such different purposes has been recognised both in a domestic context (*Financial Conduct Authority v Carillion plc (In Liquidation*) [2020] EWHC 2146 (Ch)) and in relation to the recognition of foreign insolvency proceedings (*Re Pan Ocean Co. Ltd.* [2015] EWHC 1500 (Ch), where an arbitration against a Korean company in rehabilitation was permitted to proceed).

In principle, there is no clear difference of approach where the competing procedure is one of arbitration rather than court proceedings. Particular features of the arbitration, however, may be a factor weighed in the balance, such as the specific expertise of the arbitrators. Similarly, the Singapore courts recognise the inherent tension between two competing legal principles: the enforcement of arbitration agreements and the collective nature of insolvency proceedings in serving the interests of creditors and/or to give debtor-companies 'breathing room' to restructure.

In *Sapura*, the SGCA clarified that the policy of enforcing arbitration agreements does not invariably trump the policy objectives of the insolvency regime in all circumstances. The SGCA reaffirmed that the court has the discretion to allow claims to be "carved out" from moratoriums arising from restructuring proceedings. The SGCA, however, diverged from the English approach by rejecting the focus on "exceptional circumstances" as the test for determining whether a claim should proceed through insolvency mechanisms or arbitration.

The SGCA in *Sapura* distinguished between the objectives of restructuring and liquidation. It noted that a moratorium in restructuring gives the debtor "breathing space" to formulate a viable proposal while liquidation focuses on achieving a fair and orderly process to maximise the value that may be realised from the assets of the estate.[3] The SGCA held that this distinction must inform the court's approach to carve-out applications. Specifically:[4]

> In the court's evaluation of the circumstances of the case, more weight may be given to considerations that directly touch on the rationale for moratoria in restructuring proceedings, i.e., to give a debtor breathing room to put forward a proposal. This allows the court to give effect to the purpose of the moratorium while preserving the court's flexibility to assess carve-out applications on a case-by-case basis.

Importantly, the SGCA considered, but ultimately rejected the "exceptional circumstances" test, finding no compelling justification to adopt this approach in Singapore.[5] It criticised the formulation set out in *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327, which adopted the Ronelp approach, holding:[6]

> With respect, the test set out in Top Builders is vague and does not assist the court in determining when and how a creditor may satisfy the threshold of "exceptional circumstances". The wording of the test simply connotes, without more, a broad balancing exercise between two sets of interests, albeit one weighted against a particular outcome.

[3] *Sapura*, at [59].
[4] *Sapura*, at [66].
[5] *Sapura, at [67].*
[6] *Sapura, at [62].*

The SGCA affirmed that the starting point is that restructuring proceedings are a unitary process for the resolution of the rights involved. Singapore courts, however, may still exercise their discretion to allow particular claims to be carved out. This discretion was to remain guided by the factors identified in Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd [2023] 3 SLR 1604, which are specific, non-exhaustive markers to balance the various considerations and interests at stake:[7]

- The timing of the application for a carve-out;
- The nature of the claim;
- The existing remedies;
- The merits of the claim;
- The existence of prejudice to creditors or the orderly administration of the restructuring proceedings; and
- Other miscellaneous factors such as the potential avalanche of litigation, proportionality of costs, and the views of the majority creditors.

Significantly, the SGCA in Sapura also held that Singapore courts do not have a mandatory obligation to grant carve-outs to moratoriums in restructuring proceedings to allow claimants to pursue arbitration claims. The SGCA disagreed with the lower court's finding that a carve-out had to be ordered where the arbitration agreement remained valid and where the dispute fell within its scope, in view of the Singapore court's mandatory obligation to enforce arbitration agreements.[8]

The SGCA noted that accepting the lower court's finding would significantly reduce the effectiveness of a moratorium in restructuring contexts, the purpose of which is to afford a company "breathing room" to put forward a proposal. In the SGCA's view, this purpose would be severely compromised:[9]

> "[I]f it could be easily circumvented by the invocation of a prima facie valid arbitration agreement automatically overruling the policy considerations of the insolvency proceeding."

With the SCGA rejecting "exceptional circumstances" as a sufficient test, the question arises as to whether the two approaches are really that different. While the English approach to dealing with arbitration claims in insolvency is firmly based on the "exceptional circumstances" test, the Singapore courts adopt a more defined but flexible approach, focusing on various factors for granting carve-outs to allow creditors to pursue arbitration. There is, nevertheless, a common thread in that both jurisdictions share an emphasis on conducting a context-specific inquiry that considers the purpose of the specific insolvency regime before permitting arbitration claims to proceed.

[7] *Sapura*, at [25] & [67].
[8] *Sapura*, at [94].
[9] *Sapura*, at [98].

The evolution of ESG litigation risk for multinationals

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Introduction

Evolution is a fundamental biological concept concerning the adaptation of species to their changing environment.

ESG litigation risks related to climate change and biodiversity are also evolving. While there has been a recent backlash against broad ESG legislation and the strict obligations it places on companies, the accelerating effects of climate change are driving increased activism and negative media attention for corporates more generally.

This shift is influencing the public perception of what responsible (ESG) governance looks like and is supported by emerging case law and scientific evidence, thus heightening the risk of reputational damage and potential liability for multinationals and their directors and officers.

In the recent landmark case *Lliuya v. RWE* the Higher Regional Court of Hamm in Germany recognised that major greenhouse gas emitters can, in principle, be held liable under German civil law for contributing to climate-related harms. This creates a significant legal precedent: large corporate emitters may bear responsibility for climate impacts. It even confirms that climate responsibility transcends national borders. In this contribution, we will outline the evolution of ESG litigation risk for multinationals.

Strict ESG legislation on supply chains

In the European Union (EU), the Corporate Sustainability Reporting Directive (CSRD) – an EU directive which contains reporting obligations about ESG impact in the value chain – and the Corporate Sustainability Due Diligence Directive (CSDDD) – an EU directive that mandates certain companies to conduct due diligence on human rights and environmental impacts within their operations and value chains – the legal framework is becoming stricter for companies in relation to climate change and biodiversity pursuant to the European Green Deal.

However, in the recent challenging geopolitical and economic times, ESG – and biodiversity in particular – has shifted into the background for commercial ventures. Their primary focus has been on keeping business going, and lobby groups have been pushing for less ESG legislation.

This year, the change of emphasis has resulted in the EU's "Clean Industrial Deal" initiative, with a significant limit on the scope of the CSDDD, CSRD and a delay in their implementation.

Although the scope of these regulations is more limited, and there is less emphasis on civil liability, it is still important to note that the new legislation introduces more general strict due diligence obligations to a company's own operations, subsidiaries and direct business partners.

Even in the absence of a legal framework with clear obligations, under generally accepted business principles (so-called "soft law") there can already be the attribution of damages resulting from climate change and biodiversity harm based on general tort law, and the universal due diligence obligations of companies (based on UN Guiding Principles on Business & Human Rights).

At the same time, it is important to note that in relation to biodiversity, the EU already has laws in place with specific due diligence obligations for supply chains, resulting in the EU Natura 2000 Network of protected areas. This aims to safeguard Europe's most valuable and threatened species and habitats and comprises 18% of EU land and 8% of its maritime territory.

Furthermore, this biodiversity legal framework has been intensified recently with specific due diligence obligations (and impact) in the supply chains of businesses throughout Europe:

— **The EU Timber Regulation** (2013) makes it illegal to place timber on the EU market that has been logged in violation of the laws in the country of origin.
— **The EU Conflicts Mineral Regulation** (2017) aims to prevent the use of minerals that may be funding armed conflict. It focuses on ensuring responsible sourcing of tin, tantalum, tungsten, and gold from conflict-affected and high-risk areas.
— **The EU Battery Regulation** (2023) sets requirements for various aspects, including hazardous substances, carbon footprint, recycling efficiency, and due diligence in the supply chain.
— **The EU Revised Environmental Crime Directive** (entered into force on 20 May 2024) aims at establishing minimum rules on the definition of criminal offences and penalties in order to improve the protection of the environment. It is viewed as a huge success by environmental activists, who had been campaigning for stricter rules against a so-called "ecocide" for years.
— **The EU Nature Restoration Law** (entered into force in August 2024) sets binding targets to restore degraded ecosystems, particularly those with the most potential to capture and store carbon.
— **The EU Deforestation Regulation** (which will enter into force on 30 December 2025) requires companies trading in cattle, cocoa, coffee, oil palm, rubber, soya and wood, as well as products derived from these commodities, to conduct extensive diligence on the value chain to ensure the goods do not result from recent deforestation, forest degradation or breaches of local environmental and social laws.

With this evolution of the legal framework, in combination with more reporting obligations, companies can expect their business operations and supply chain to be under more scrutiny with regards to their impact on climate change and biodiversity

Evolution of case law

Building on the existing legal framework, international case law surrounding ESG litigation is evolving rapidly. In the past year, several landmark cases have signalled a significant shift from holding states accountable for climate inaction to extending responsibility to businesses – including potential liability for environmental damages:

— *Klimaseniorinnen*: On 9 April 2024 the European Court of Human Rights ruled that the state of Switzerland violated the European Convention on Human Rights by failing to adequately address climate change. This is the first climate change litigation in which an international court has ruled that state inaction violates human rights.
— *Milieudefensie v. Shell:* On 12 November 2024 the Court of Appeal in the Hague (Netherlands) confirmed that protection against climate change is a fundamental human right (with reference to landmark cases like Urgenda and Klimaseniorinnen). This obligation does not only apply to states but also extends to companies in certain sector, which have a significant impact on global emissions. This sets a precedent for corporate responsibility in addressing climate change. While the court did not impose specific reduction targets on Shell, it affirmed that companies have a duty of care to align their business models with the goals of the Paris Agreement. This ruling underscores the importance of integrating climate considerations into corporate strategies and highlights the potential legal risks for companies that fail to do so.
— *Lliuya v. RWE*: On 28 May 2025 the Higher Regional Court of Hamm in Germany recognised that major greenhouse gas emitters can, in principle, be held liable under German civil law for contributing to climate-related harms and even damages arising therefrom (although at the moment it's difficult to prove causality). As in previous climate cases, the court concludes that companies have a duty of care that is more or less independent of permits and public law rules. Furthermore, responsibility for the consequences of climate change transcends national borders.

Evolution of general views on 'good' ESG Governance

The general views on good governance are evolving as well.

In August 2024 the World Economic Forum embraced the evolving role of directors in a "nature positive world" (What are directors' duties in a 'nature positive' world? | World Economic Forum).

According to World Economic Forum the "nature positive" concept is emerging as a vital strategy for businesses. This approach emphasises halting and reversing biodiversity loss, ensuring that natural ecosystems are preserved and enhanced.

The World Economic Forum underlines that environmental risks are significant business risks. Corporate directors have a pivotal role in this transition. They need to incorporate biodiversity and ecosystem health into their risk management frameworks, identifying and mitigating potential threats to the natural environment. This proactive approach protects the company's interests and contributes to broader environmental resilience. Incorporating environmental risk assessments into business continuity planning can enhance the company's ability to respond to ecological disruptions.

International research of February 2024 (ESG and CEO turnover around the world – ScienceDirect) shows that CEOs of listed companies are already held accountable in ESG-related shareholder actions (i.e. ESG litigation) for negative media coverage of the ESG incidents. This connection is both statistically and economically significant: multivariate tests indicate that CEOs are roughly nine percentage points more likely (24.0% versus 14.6%) to lose their position when their firms face extreme ESG risk. It is important to note that media coverage of an ESG issue has two components, pecuniary (shareholder loss) and non-pecuniary (media shaming), and both increase the likelihood of a turnover. This suggests that non-monetary considerations (board's conscientiousness, media shaming of board) are at play in some of the CEO turnover decisions.

Conclusion

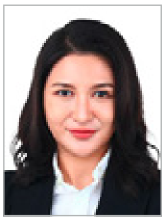
We are continuing to see a significant evolution of ESG litigation with scrutiny of corporate behaviour and, in the future, there is likely a significant risk of liability both for companies and their officers.

This is empowered by the evolution of legislation, case law and general views in combination with more activism resulting in more legal actions and funding hereof.

Therefore, it is advisable for multinationals and their directors to have a proactive approach in the climate transition and risk management.

As Darwin notably explained: It is not the strongest of the species that survives, nor the most intelligent, but the **one most adaptable to change.**

Recent developments in Indonesian Arbitration Law



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Arbitration plays a central role in resolving both domestic and international commercial disputes in Indonesia. However, Indonesia's principal legislation governing the resolution of civil disputes through arbitration and alternative dispute resolution, Law No. 30 of 1999 on Arbitration and Alternative Dispute Settlements ("**Arbitration Law**") has remained unchanged for over two decades. As global arbitration practices continue to evolve, there are interpretive ambiguities in the Arbitration Law that have prompted calls for reforms. In response, two significant measures have been recently introduced to enhance legal clarity and align Indonesia's arbitration regime with international standards.

The first is the Supreme Court Regulation No. 3 of 2023 ("**SCR 3/2023**"), which redefines the concept of public policy and provides procedural guidance on arbitrator appointments, award registration, enforcement, and security measures. The second is the Constitutional Court Decision No. 100/PUU-XXII/2024 ("**2024 Constitutional Court Decision" or "Decision**"), which refines the definition of international arbitral awards. Together, these developments strengthen enforcement mechanisms and mark a step forward in modernising Indonesia's arbitration framework.

Supreme Court Regulation No. 3 of 2023

Redefining 'public policy'
Issued in October 2023, SCR 3/2023 introduces several key reforms to Indonesia's arbitration framework, notably the redefinition and clarification of the concept of public policy.

Previously, public policy was defined in Article 4(2) of Supreme Court Regulation No. 1 of 1990 on the Execution Procedures for Foreign Arbitral Awards ("**SCR 1/1990**") as "*the fundamental principles of the entire legal system and society in Indonesia*". This occasionally led to unpredictable outcomes in the enforcement of arbitral awards in Indonesia, as the Indonesian courts would invoke a wide range of societal and governance considerations under the public policy exception.

Article 1(9) of SCR 3/2023 now narrows and refines this concept. Public policy is now defined as:

» Everything that constitutes the very foundation essential for the functioning of the legal system, economic system, and socio-cultural system of the Indonesian community and nation.

By explicitly including reference to economic and socio-cultural systems, SCR 3/2023 provides clearer boundaries and reduces judicial discretion in its application.

Historical instances where the Indonesian courts have relied on the public policy exception to deny recognition and enforcement of foreign awards include:

- *Astro Nusantara BV v. PT Ayunda Prima Mitra* (Supreme Court Decision No. 01 K/Pdt.Sus/2010) – the courts refused to enforce an anti-suit injunction issued in an SIAC award on the grounds that such an order amounted to an intervention in the ongoing judicial process of Indonesia by a foreign arbitral tribunal. This "violates the sovereignty of the Republic of Indonesia".
- *Bankers Trust International v. PT Mayora Indah Tbk*. (Supreme Court Decision No. 02 K/Ex'r/Arb.Int/Pdt/2000) – the courts refused to enforce an LCIA award because the underlying legal relationship which formed the basis of the arbitral award was still the subject of an ongoing dispute before the Indonesian courts.
- *E.D. & F. Man (Sugar) Ltd v. Yani Haryanto* (Supreme Court Decision No. 1205K/Pdt/1990) – the Supreme Court refused enforcement of a London seated arbitral award as there had been parallel proceedings in Indonesia which found the underlying contract to be void ab initio for violating Indonesian public policy.

These cases illustrate the challenges caused by the previous broad interpretation, underscoring the significance of the reforms introduced by SCR 3/2023.

Appointment of Arbitrators

SCR 3/2023 also introduces much-needed procedural clarity to the appointment of arbitrators – an area previously marked by ambiguity. While the Arbitration Law allows parties to seek assistance from the Head of the District Court when they are unable to agree on the appointment of arbitrators, it lacked a well-defined mechanism. Article 4 of SCR 3/2023 now establishes a clear and structured process:

- A party, or both parties jointly, may submit a request to the District Court for the appointment of an arbitrator or arbitral tribunal. The District Court must respond within 14 days.
- Following the appointment, either party may challenge the appointment within an additional 14-day period, provided there is credible evidence indicating the arbitrator's lack of independence or impartiality.

By introducing fixed timelines, this reform significantly improves procedural certainty and reduces the risk of delays in the arbitral process.

Registration and Enforcement of Domestic and International Arbitral Awards

SCR 3/2023 introduces significant procedural reforms aimed at streamlining the registration and enforcement of arbitral awards in Indonesia. Under this new regulation, arbitral tribunals are now required to submit registration applications electronically through the Court Information System to the Court Registrar:

- Domestic arbitral awards must be registered within 3 days of submission.
- International arbitral awards must be registered within 14 days.

If the award is not voluntarily complied with, the prevailing party may apply online to the Head of the District Court for full or partial enforcement. The court must then:

- Decide on the enforcement of a domestic award within 30 days.
- Issue an exequatur for international awards within 14 days, and decide on recognition and enforcement within 30 days of registration.

These timelines enhance procedural efficiency and reduce uncertainty in the enforcement process.

Enforcement of Security Seizure

Another notable reform under SCR 3/2023 relates to the enforcement of security seizures. While Article 32(1) of the Arbitration Law empowered arbitral tribunals to order security seizures, it lacked guidance on the enforcement of such orders.

Article 29 of SCR 3/2023 now fills this gap by requiring tribunals to register any security seizure order with the relevant court, which is then responsible for carrying out the execution. Following execution, the court must notify the arbitrator or arbitral institution of the execution within 2 days. This procedure promotes fairness, transparency, and enforceability of interim measures.

Other Procedural Enhancements under SCR/2023

SCR 3/2023 further refines the interplay between annulment and enforcement proceedings. Where a domestic award is subject to both enforcement and annulment applications, enforcement is suspended until the annulment process is resolved.

Additionally, SCR 3/2023 outlines a more structured approach for domestic annulment proceedings – including the reading of the application and response, potential interlocutory hearings, submission of evidence, and the issuance of the final ruling. These procedural enhancements seek to minimise procedural abuse and improve transparency in Indonesia's arbitration framework.

Constitutional Court Decision No. 100/ PUU-XXII/2024

In 2024, the Constitutional Court clarified the definition of an 'international arbitral award' under Article 1(9) of the Arbitration Law.

Article 1(9) of the Arbitration Law defines an 'international arbitral award' as follows:

> International Arbitral Award refers to [i] an award which is rendered by an arbitral institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or [ii] an award which is rendered by an arbitral institution or individual arbitrator, of which, according to legal provisions of the Republic of Indonesia, it shall be deemed as an international arbitral award. *[Emphasis Added]*

This provision has two limbs. An award qualifies as an international arbitral award if it is:

1. rendered outside the jurisdiction of the Republic of Indonesia; or
2. deemed as international under Indonesian law.

The second limb – which relies on the term "deemed" – has been criticised for its vagueness and lack of statutory guidance, resulting in inconsistent judicial interpretation and legal uncertainty. The absence of clear criteria has provided the courts broad discretion in classifying awards, blurring the distinction between domestic and international arbitrations, and creating opportunities for procedural manipulation.

Three key cases illustrate the inconsistency in interpretation:

— *Pertamina v. Lirik Petroleum:* An ICC award was classified as international based on factors such as the foreign seat of the institution, the use of foreign currency, and the use of English – despite both parties and the underlying contract being Indonesian, and the place of the execution of obligation was Indonesia.

— *PT Daya Mandiri Resources Indonesia and PT Dayaindo Resources Internasional.*, Tbk v Suek AG and PT Indiratex Spindo v. Everseason Enterprises, Ltd: The Supreme Court relied solely on the territorial origin of the award – classifying it as international on the basis that it was rendered abroad.

— *Fico Corporation Co. Ltd. v. BANI and PT Prima Multi Mineral:* a Jakarta seated award was classified as international simply because one party was a foreign entity.

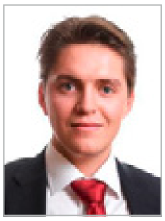
To resolve this uncertainty, the 2024 Constitutional Court Decision ruled for the removal of the term "*deemed*" from the second limb of Article 1(9). This Decision reinforces a territorial approach to the process of defining international arbitral awards. The place where the award is issued is a primary factor in determining an award's status.

This ruling enhances legal certainty and reduces the scope for judicial discretion in classifying arbitral awards. It also strengthens Indonesia's alignment with international arbitration norms, particularly the territoriality principle recognised under the New York Convention.

Conclusion

The reforms introduced by way of SCR 3/2023 and the 2024 Constitutional Court Decision represent significant progress in Indonesia's arbitration landscape. By clarifying the definition of public policy, establishing clear procedures for arbitrator appointments, streamlining registration and enforcement processes, and, reinforcing a territorial approach to the exercise of defining international arbitral awards, these measures address longstanding issues of ambiguity and procedural uncertainty. Further refinements may still be needed to ensure complete legal certainty, but these developments contribute to a more predictable, transparent and use-friendly environment for domestic and international stakeholders.

Drawing a green line in the fjords: EFTA court on economic gains v ecological protection



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On 5 March 2025, the European Free Trade Association (**EFTA**) Court delivered its landmark advisory opinion in Case E-13/24, *Friends of the Earth Norway and Others v The Norwegian Government.* In its judgment, the Court affirmed that general economic interests, including profitability, cannot justify ecological deterioration under the Water Framework Directive (Directive 2000/60/EC). This represents the EFTA Court's first substantive environmental ruling and highlights the increasing relevance of environmental law in both EU and EEA legal frameworks.

Introduction

Although the EEA Agreement and the EU are fundamentally geared towards economic integration, Case E-13/24 illustrates that economic considerations do not automatically prevail over environmental protection. The case concerned the interpretation of the exemption "overriding public interest" in Article 4(7)(c) of the Water Framework Directive (**WFD**), 2000/60/EC. Specifically, the EFTA Court was asked to determine whether economic considerations (e.g. revenues from industrial activity, tax income for the state and municipalities, employment generation, and shareholder returns) could justify the ecological deterioration of a water body. The EFTA Court was also asked to consider whether ensuring the supply of critical raw materials, either globally or within the EEA, could qualify as an "overriding public interest".

The opinion from the EFTA Court is notable for several reasons. It is the EFTA Court's first judgment concerning environmental law and the first time the EFTA Court and the Court of Justice of the EU have examined the substantive limits of the exemption "overriding public interest" in Article 4(7)(c) WFD. More importantly, the EFTA Court's judgment also underscores the growing procedural potential and legal potency of environmental law across the EU and EEA.

Background

The case referred to the EFTA Court arose from a challenge to the legality of a pollution permit issued to a private, listed mining company. The permit allows the mining company the right to deposit approximately 170 million tonnes of mining waste into Førdefjord, a pristine fjord located on Norway's west coast. It is undisputed that the activity would result in an irreversible deterioration of the fjord's ecological status, downgrading it from "good" to "poor" as defined under the WFD.

Article 4 of the WFD prohibits deterioration in the ecological or chemical status of water bodies unless the criteria for an exemption under Article 4(7) are met. The question in this case was whether the exemption provided in Article 4(7)(c) – specifically, the concept of "overriding public interest" – had been correctly interpreted and applied.

The Norwegian government justified the permit on the grounds of anticipated revenue from the mining activity, arguing that this revenue would be beneficial for Norwegian society through wages, shareholder returns and income tax.

In 2022, two Norwegian environmental organisations challenged the validity of this permit in court. Although the Oslo District Court upheld the permit, the case was appealed. The Borgarting Court of Appeal subsequently referred several questions to the EFTA Court for an advisory opinion, resulting in the advisory opinion in E-13/24.

The assessment of the EFTA Court

Economic considerations in question

The EFTA Court concluded that only interests that genuinely serve the public, and not merely private or commercial interests, can qualify under Article 4(7)(c). Private benefits (e.g. profits for shareholders or revenue for private entities) cannot, by definition, constitute an "overriding public interest". This conclusion flows directly from the wording "overriding public interest".

Moreover, in paragraph 42, the Court added that it is not sufficient for an economic consideration to serve the public interest. It must also be of such significance – due to its context or other contributing factors – that it is sufficiently important to qualify as overriding.

Crucially, the EFTA Court underlined that virtually all profit-generating activity, either state or private owned, yield ancillary public benefits, such as employment, tax revenues, and shareholder returns. If such knock-on effects were sufficient to justify ecological deterioration, the integrity of the WFD's protective regime would be fundamentally undermined.

Consequently, the EFTA Court concluded that income generated from economic activity (e.g. wages for employees, shareholders income, or tax revenue) cannot, in and of itself, constitute an "overriding public interest" within the meaning of Article 4(7)(c) WFD.

Employment effects and access to critical raw materials

The EFTA Court extended its reasoning regarding the economic considerations to employment effects. As a rule, the EFTA Court found that general employment effects are a natural and expected knock-on effect of economic activity and, as such, insufficient to justify an exemption. Nevertheless, it did not exclude the possibility that, under exceptional circumstances such as in regions suffering from significant depopulation and social need, employment effects could constitute an "overriding public interest", if duly substantiated.

The EFTA Court also considered whether securing access to critical raw materials could constitute a justification. The EFTA Court acknowledged that the EU Critical Raw Materials Act (Regulation (EU) 2024/1252), though not yet incorporated into the EEA Agreement, might be relevant for interpretative guidance.

The EFTA Court, however, held that the classification of a mineral as "critical" in relation to the EU Critical Raw Materials Act does not automatically make its extraction an "overriding public interest". To qualify, it is necessary to demonstrate that the project's purpose, the scarcity of the mineral, and its significance to the EEA's strategic objectives justify such a designation. Purely global supply considerations were deemed insufficient since they lack the required link to EU or EEA interests.

Key takeaways

The following takeaways can be derived from the EFTA Court decision:

- **Primacy of environmental and ecological considerations** – The ruling affirms the WFD's role as a protective mechanism against the deterioration of the ecological and chemical status of water bodies across Europe. Environmental standards cannot be overridden solely for reasons of general economic gain.
- **Economic considerations alone are insufficient** – The generation of tax revenue, employment effects and shareholder profits, however beneficial, are typical outcomes of economic activity and do not, in themselves, amount to an "overriding public interest" under Article 4(7)(c) WFD
- **Employment effects relevant only in exceptional circumstances** – While general employment considerations are inadequate to justify an exemption, they may be taken into account where a project demonstrably addresses severe regional depopulation and social deprivation.
- **Strategic access to critical raw materials must be EEA-focused** – The designation of a raw material as "critical" is not, in isolation, sufficient to constitute an "overriding public interest". The specific project must serve the strategic interests of the EU/EEA and contribute to securing supply within the internal market. Projects aimed primarily at global markets will not meet this threshold.
- **Broader legal impact across the EU and EEA** – The judgment enhances legal clarity and strengthens environmental protection under the WFD. It provides a clear precedent for future cases involving "overriding public interest" and striking a balance between economic development and protection of water resources across the EU and EEA.

Report on the planned reform of French arbitration law: towards a consecration of the autonomy of French arbitration law

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Following reforms carried out in the UK, Luxembourg, Italy, Greece, Switzerland, China and Morocco, France is also considering reforming its arbitration law to strengthen the competitiveness of Paris as a place of arbitration.

To this end, the Minister of Justice established a Committee in November 2024 led by François Ancel, Judge at the Cour de Cassation (French Supreme Court) and Professor Thomas Clay.

This Committee, composed of arbitration practitioners and bringing together judges, academics, lawyers and representatives of arbitration institutions, issued an 80-page report containing more than 40 proposals for reform and a draft Code of Arbitration on 20 March 2025. The Committee's ambition was driven by a desire to enshrine the autonomy of arbitration law while promoting substantial amendments to make French arbitration law more flexible, protective and efficient.

Some of the most significant proposals made by the Committee include:

1. The establishment of a Code of Arbitration enshrining the autonomy of arbitration law;
2. Strengthening the powers of the judicial judge known as the "supporting judge"; and
3. Reforms regarding post-award recourses.

The establishment of a Code of Arbitration enshrining the autonomy of arbitration law

The most significant proposal is the introduction of a Code of Arbitration. While most of the rules governing arbitration in French law are currently scattered across more than twenty different pieces of legislation, the proposed code would bring them together in one place.

Based on the observation that such fragmentation affects the overall understanding of French arbitration law, the Committee drafted a Code of Arbitration, which aims to allow greater clarity of French arbitration law. This strengthens its international attractiveness and raises the possibility of having a multilingual version of this unique legislative instrument.

In addition to enshrining several longstanding principles in arbitration – such as the autonomy of the arbitration agreement, the priority of the arbitrator to rule on its own jurisdiction, speed and loyalty of the proceedings, confidentiality, and the recognition of awards set aside abroad – one of the Code's major innovations would be the unification of arbitration law through the creation of a common body of text for domestic and international arbitration. Currently, the provisions in the French Code of Civil Procedure relating to arbitration distinguish between domestic and international arbitration. More specifically, most provisions relating to international arbitration are governed by reference to those relating to domestic arbitration, sometimes making it difficult for international practitioners to handle this legislative tool.

The Committee also noted that this choice was justified by the fact that "the criterion of internationality is itself porous, as one quickly switches from domestic to international without even realising it". The Committee considers that when the parties conclude their arbitration clause, they are unaware of the nature of an eventual dispute, and therefore whether it will be domestic or international, while the arbitrator exercises the same judicial function regardless of whether the dispute is domestic or international.

Therefore, the draft Code of Arbitration as currently proposed would be divided into general provisions applicable to both domestic and international arbitration, along with rules specific to each. There will also be special provisions governing arbitration procedures in specific areas such as family, labour, consumer law, intellectual property, or administrative matters.

Strengthening the powers of the judicial "supporting judge" (*Juge d'appui*) to enhance the effectiveness of arbitration

One of the objectives of this reform is to make arbitration more efficient. To this end, the Committee considers that the arbitrator should be able to "benefit from the support of the state judge so that he can carry out his mission successfully".

The Committee suggests that the powers of the supporting judge be extended beyond issues relating to the constitution of the arbitral tribunal. The supporting judge would have extended powers to prevent the denial of justice and to ensure the willingness of the parties to have recourse to arbitration. The role of the supporting judge would also be reinforced in the event that referring the matter to an arbitrator is impossible or when the issuance of an award within a reasonable time is compromised. It could also have jurisdiction in the event of a serious failure of the arbitration centre or to prevent a brutal application of institutional arbitration rules that would lead to a denial of justice.

Furthermore, the Committee suggests granting the supporting judge the new power to enforce interim or provisional measures ordered by an arbitral tribunal or an emergency arbitrator. This is one of the most notable proposals of the reform as it would have the effect of strengthening the decisions taken by the arbitrators during the proceedings.

Proposals for reform of post-award recourses

The proposal for an autonomous procedural regime concerning arbitration-related litigation before the Court of Appeal

In France, Courts of Appeal have jurisdiction to hear the recourses against arbitral awards, and in particular actions for annulment against awards rendered in France, with the Paris Court of Appeal being preeminent due to territorial jurisdiction for actions for annulment of awards rendered in Paris.

The Committee suggests establishing an autonomous procedural regime before the Court of Appeal specifically for the arbitration-related litigation which would be provided for in the Code of Arbitration (and no longer in the French Code of Civil Procedure). This would include compulsory procedural timetables, the abolition of the possibility for the Court of Appeal to rule on the merits (currently only possible in domestic arbitration), and the possibility for the Court to hear arbitrators (or to take their written statements), when their independence or impartiality is called into question.

The Committee also suggests incorporating into the Code of Arbitration certain rules already applicable before the International Commercial Chamber of the Paris Court of Appeal such as allowing the production of documents in English without translation, or the possibility for parties, counsels, witnesses, experts to speak English before the Court.

Innovations and proposals for new post-award recourses

The Committee suggests distinguishing between the "recognition" and the "exequatur" of the award, opening the possibility for a party to only request the recognition of the substantial effectiveness of the award, an alternative to the request for exequatur of the award, which grants it recognition and enforceability in the French legal order.

Another new feature proposed by the Committee is the creation of an action before the *Tribunal judiciaire* (first instance court for exequatur) to render unenforceable in France an arbitration award issued abroad should it be considered contrary to French *ordre public*. The decision would be subject to review by the Court of Appeal based on the five traditional criteria under French law for setting-aside an award:

— the arbitral tribunal has wrongly declared itself competent or incompetent;
— the arbitral tribunal has been irregularly constituted;
— the arbitral tribunal has ruled without complying with the terms of reference;
— the principle of adversarial proceedings has not been respected; or
— recognition or enforcement of the award would be contrary to international public policy.

If the reform is implemented, this would be a major innovation. The losing party could act to prevent enforcement of the award in France without waiting for the winning party to bring an action for exequatur, as is currently the case given that an award issued abroad cannot be subject to an action for annulment in France.

This report, which has provoked a wide range of reactions, marks an important first step in the reform of French arbitration law. During the last Paris Arbitration Week in April 2025, the French Minister of Justice announced that two additional rounds of consultations should be expected in autumn 2025 and spring 2026, with a possible adoption of a Code of Arbitration in autumn 2026.

OECD’s Pillar Two and managing tax dispute risks

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The Pillar Two initiative could increase the likelihood of tax disputes and action should be taken to manage that risk

What is Pillar Two?

Pillar Two is an OECD-led initiative which results in a global minimum tax regime applicable to groups with revenues of over EUR 750m. For the UK, and many other jurisdictions, it went into effect in 2024.

Now is therefore the time to consider tax dispute risk vis-à-vis Pillar Two. For many groups, this will be relevant from an audit perspective, and technical issues may be emerging either from auditor engagement, or more generally as groups are affected by the details of Pillar Two.

Even where material Pillar Two tax exposures are not anticipated, the compliance and information-gathering processes required are often significant. Data may be required which have never been previously for tax purposes.

Registration processes and timeframes differ between jurisdictions. Registration deadlines in some key jurisdictions have already passed and in others they are about to fall due. In any case, the technical complexity of the rules means that filing positions must be considered well in advance of the deadline for submitting returns.

The details of the rules and their application in particular contexts remain the subject of much lobbying, including by industry bodies across various sectors, and discussions with tax authorities. In the UK, HMRC’s draft guidance on Pillar Two was recently the subject of a consultation process, with further changes anticipated. Meanwhile, individual taxpayers are discussing their own positions with tax authorities in an attempt to arrive at filing positions which are both technically compliant and feasible to comply with from a data perspective. Certain context-specific areas of uncertainty (e.g. relating to opaque consolidated entities of insurers) are emerging and are currently the subject of significant lobbying. Groups will need to consider in detail an extensive regime of elections, with complex points of interaction between elections. In many cases, hastily enacted rules are only now being tested against real-life fact patterns.

This technical complexity and compliance burden arise against a backdrop of what might have been argued to be an existential challenge. President Trump decided to remove the US from the OECD global tax deal in response to how an element of Pillar Two (specifically, the under-taxed profit rule) would affect the US and as a result of the difficult interaction between Pillar Two and the US Global Intangible Low-Taxed Income (“GILTI”) regime. Further, draft legislation in section 899 of the One Big Beautiful Bill Act raised the spectre of retaliatory US tax measures against taxpayers in jurisdictions which impose the under-taxed profit rule (and certain other taxes which are regarded as “unfair foreign taxes”).

At the time of writing, it seems that discussions between the US and G7 may have reached a solution on these issues, subject to formal adoption by the OECD. If so, it seems that section 899 may be withdrawn. However developments in this area are fast paced and the legislative detail of any solution reached in respect of the US will merit close analysis for affected groups.

Global context

Tax is increasingly a global issue. Tax collection is important where inflation and debt rises, alongside the economic challenges represented by the cost-of-living crisis. Similarly, allocation of taxing rights, including transfer pricing, remains a hot topic for tax authorities across the globe. The number of transfer pricing enquiries illustrates this, as does an increase in international issues in dispute. As of 31 March 2024, GBP 14bn of the tax under consideration in enquiries by HMRC's Large Business Directorate related to international matters. UK transfer pricing yield stood at GBP 1.8bn in 2023 and 2024 with 128 transfer pricing enquiries settled during the period.

It is crucial that multinationals take appropriate action to protect against double taxation where there is competition between tax authorities for collection. This is likely to include taking advice to ensure that appropriate transfer pricing measures are applied, retaining advice and documentation in case of audit, and considered implementation and regular review of policies, particularly where factual circumstances have changed.

In the context of Pillar Two, careful consideration may be needed to determine the relevant taxing jurisdiction. Furthermore, many of the technical complexities of the internal operation of the Pillar Two rules give rise to potential areas of double taxation. Pillar Two legislation has been enacted in haste and there are contexts in which it does not appear to operate as a cohesive whole. For example, areas of potential double taxation arise for insurers holding opaque consolidated investment entities. Even where no Pillar Two exposure is ultimately anticipated, it may be necessary to consider making one or more elections to arrive at that result, with the potential interaction of several of the available elections being another area of uncertainty giving rise to concerns of double taxation.

Why might Pillar Two increase the likelihood of disputes?

Pillar Two has resulted in technical complexity and a significantly increased compliance burden. New rules, guidance and processes are likely to lead to an increase in tax authority audit activity. This is likely to involve tax authorities looking into consistency of approach and accuracy in implementation, arising from the need for each jurisdiction to enact its own Pillar Two implementing legislation. A number of potential areas of uncertainty are being resolved through the issuing of guidance from the OECD and jurisdictions where there is significant potential for implementation differences to arise. As a rule, where there is uncertainty, there is risk of challenge.

Although tax authorities may consider matters unilaterally, in a global setting a joint audit may be used to allocate taxing rights (see CMS article from an Italian and Swedish focus: https://cms.law/en/nld/publication/cms-international-disputes-digest-2024-winter-edition/joint-audits-the-route-to-tax-certainty-and-effective-dispute-avoidance.

How will Pillar Two disputes be resolved?

Parallels with the policy objectives of Pillar Two may be drawn with those of the UK's diverted profits tax (**DPT**) regime, which seeks to counteract contrived arrangements used by large groups (typically multinationals) that erode the UK's tax base. This was a unilateral measure brought into effect on 1 April 2015. It seeks to tax companies from a UK perspective and does not allocate profits between jurisdictions. Reform of the DPT is expected following consultation.

In a UK context, there have been arguments about whether DPT falls outside of the provisions of double tax treaties (**DTT**), which could risk double taxation. The uncertainty over whether DTT protection would be provided in a DPT context is illustrated by Glencore *Energy Ltd and another v HMRC* [2019] UKFTT 438 (TC) ("***Glencore***"), which was followed by the introduction of legislation to allow relief against diverted profits tax as a result of the mutual agreement procedure (s114A Finance Act 2015). The legislation was intended to provide certainty. This matter, however, illustrates the challenge of managing double taxation globally alongside unilateral measures intended to impact the domestic tax system.

As *Glencore* demonstrates, it is important that provisions are explicit to protect against double taxation in circumstances beyond the norm, or, where the usual taxes are not applicable, to ensure that all parties have clarity and certainty about dispute-resolution mechanisms.

Given the likelihood of multi-jurisdictional disputes arising from Pillar Two, dispute resolution in this context has long been on the OECD's agenda. On 20 December 2022, the OECD issued its Public Consultation Document on Pillar Two – Tax Certainty for the GloBE Rules.

The OECD's Public Consultation Document concludes that the following mechanisms might be employed by multinationals involved in Pillar Two disputes: (i) reliance on the Convention on Mutual Administrative Assistance in Tax Matters (MAAC) to facilitate the exchange of information between states' respective competent authorities regarding interpretation of the rules; and (ii) initiation of the mutual agreement procedure (MAP) in the applicable double tax treaty with the aim of removing any double taxation by agreement.

Additionally, the OECD proposes incorporating new alternative dispute resolution provisions into domestic law and potentially adopting a multilateral convention to address Pillar Two disputes.

On its most recent Tax Certainty Day (15 November 2024), the OECD referred to ongoing work on a multilateral convention, with discussion focussing on a common legal basis and scope. The possibility of expanding the OECD's International Compliance Assurance Programme was also discussed.

Of these mechanisms, the MAP, which is in place in many double tax treaties, provides access to dispute resolution to allocate taxing rights between states. However, this mechanism is poorly equipped to deal with Pillar Two disputes. Article 25(1) of the OECD Model Convention does not provide a route to bringing Pillar Two disputes, principally because the requirement that there is "taxation not in accordance with a tax treaty" would typically not be met. The consultation procedure under Article 25(3) is an alternative route: "The competent authorities of the Contracting States [...] may also consult together for the elimination of double taxation in cases not provided for in the Convention." However, this does not give the taxpayer the right to initiate the process and would not assist in any matter outside of double taxation. Furthermore, any interaction with domestic laws would require consideration in this context.

The process offers limited opportunities for taxpayers to be involved, relying instead on competent authorities agreeing between themselves. Similarly, not all taxes may be covered. Even where cases are within MAP not all result in resolution. Some authorities are unable to reach agreement. BEPS action 14 seeks to make dispute resolution measures more effective by addressing obstacles to MAP and the absence of arbitration procedures in treaties.

Importantly, domestic remedies must work alongside MAP (or arbitration or other dispute resolution methods). Similarly, any bilateral process should provide an effective resolution mechanism. This includes accessibility, timely resolution and a clear understanding of domestic tax authorities on the interaction of bilateral measures with their domestic resolution procedures. Transparency between tax authorities and taxpayers, plus a commitment to engagement, will be essential.

Act now to manage risk

Where there is uncertainty, risk management is key. Consideration should be given to technical analysis to assess the position and apply new provisions accurately across the globe. It is important to identify potential issues at an early stage, allowing for proactive discussions with tax authorities.

Similarly, ensuring appropriate implementation of policies and maintaining robust documentary records may be helpful. Records should be retained both for tax technical positions taken and underlying data and compliance. A clear internal audit trail will foster clear discussions with tax authorities and provide the ability to respond swiftly and concisely to tax audits. (Note that disclosure should be considered carefully to ensure accuracy and that the appropriate information is provided). Retention of records for the time period covering the risk of audits or assessments may be critical.

As part of the CMS global network, with tax capability in over 70 offices, the CMS UK Tax Disputes & Investigations team is well-placed to advise on all forms of contentious tax matters. We advise taxpayers on technical issues in relation to Pillar Two as part of our tax advisory services, and we can assist with all aspects of tax dispute prevention, management and resolution.

Qualification of a dealership agreement: franchise or selective distribution?

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Introduction

On 18 March 2025, the Amsterdam Court of Appeal issued an important ruling in a case between the United Opel Dealers Netherlands (VODN), the Association of Groupe PSA Contract Partners Netherlands (VGPCN) and an importer/manufacturer. The core issue of the case was whether the dealer and repairer agreements between car companies and the importer/manufacturer could be considered franchise agreements under Dutch law.

Background

The predecessors of the importer/manufacturer had entered into agreements with their dealers and repairers for the sale and repair of vehicles of the Opel, Peugeot, Citroën and DS brands. These agreements were terminated in 2021 and replaced by new agreements. VODN and VGPCN argued that these agreements were franchise agreements according to Article 7:911 of the Dutch Civil Code, which entails certain rights and obligations.

Judgment

The court ruled that the agreements could not be considered franchise agreements. The main reasons for this are:

1. Franchise Formula: a franchise agreement requires a specific franchise formula that determines a uniform identity and appearance of the businesses within the chain. The court found that the operational, commercial and organisational requirements imposed on the dealers were not sufficient to constitute a uniform franchise formula. Many dealers operated under their own name and had their own identity, which does not fit a franchise formula.
2. Selective Distribution: the agreements between the dealers and the importer/manufacturer were seen more as part of a selective distribution system. This system imposes certain qualitative requirements on dealers to be allowed to sell the products, but this does not automatically mean that it is a franchise. The court emphasised that this form of distribution has been common in the automotive industry for decades and was not considered a franchise.
3. Compensation Element: for a franchise agreement, it is essential that a fee is paid for the right to operate a franchise formula. The court found that the financial benefits received by the importer/manufacturer from the dealers and repairers could not be seen as such a fee.

Conclusion

The ruling of the Amsterdam Court of Appeal confirms that not all agreements between dealers and importers/manufacturers can automatically be considered franchise agreements. This has important implications for the automotive industry, where selective distribution is a common system. The ruling emphasises the importance of clear criteria for what can and cannot be considered a franchise, thereby protecting both the rights of dealers and the obligations of importers/manufacturers.

Contracting in the context of the new geopolitical landscape

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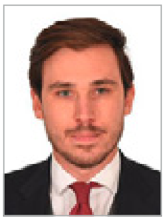

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In recent years, the world has been confronted with significant geopolitical changes. Examples include the COVID-19 pandemic, the ongoing conflict between Russia and Ukraine, which has led to sharply increased gas prices and the current trade war, where parties are increasing or threatening to increase import tariffs.

Geopolitical changes impacting commercial parties

These geopolitical developments present challenges for commercial parties, who are, in principle, obliged to comply with the contracts they have made. To avoid being exposed to unexpected risks or burdens, parties must anticipate geopolitical changes when entering into contracts.

The interests of the parties will vary. For example, a buyer might seek to avoid any changes to the purchase price, terms, or obligations under a purchase agreement as a result of increased import or export tariffs. On the other hand, a seller might want to avoid being required to fulfil its original obligations if circumstances change significantly.

Specific contractual provisions

One of the ways parties can adapt to uncertain environments is by including specific provisions in their contracts. Such contractual clauses may include *force majeure*, hardship, termination and price adjustment provisions, Incoterms, and clauses on alternative dispute resolution.

Force majeure

Force majeure clauses remove liability for unforeseeable and unavoidable events that prevent parties from fulfilling their contractual obligations. These clauses typically cover natural disasters and human-made catastrophes and usually permit non-performance, withdrawal, or termination of contracts.

The interpretation, limitations, and impact of *force majeure* contractual clauses vary depending on the applicable law and the specific wording of the provision. *Force majeure* provisions typically apply only to unforeseeable events, and so may not cover challenges which are generally now seen as foreseeable, like the current trade war. There is a required causal link between the *force majeure* event and the fulfilment of the contract. Many systems and provisions require the event to be a significant obstacle, sometimes interpreted as "impossibility", but the exact threshold depends on the applicable law and the wording of the clause. For example, export bans and other government actions that make performance impossible could qualify as *force majeure* events, while increased challenges like higher tariffs, may not meet the necessary threshold of impossibility.

Hardship

Hardship provisions can be used when circumstances change, and are intended to cover cases where unforeseen events fundamentally change the balance of a contract, with an excessive burden being placed on one of the parties. Generally, these clauses require the parties to negotiate in good faith to reach a reasonable amendment to the contract. If the parties cannot agree, a third party, such as an arbitrator, is often appointed to resolve the issue.

Unless explicitly agreed on, the right to renegotiate is not the right to unilaterally change or terminate the contract. Parties may also agree in advance on the consequences of hardship by requiring price reductions or partial release from obligations.

It is important to note that, even if there is no hardship provision in the contract, in some legal systems an obligation to renegotiate may arise from general principles of reasonableness and fairness or good faith, like in the Netherlands and Italy.

Termination provisions

Since geopolitical changes may lead a party to want to terminate the contract, it is often wise to specify in a termination clause the specific circumstances under which termination is allowed. For example, the imposition of certain tariffs could be expressly included as a condition allowing termination (*force majeure* events and hardship situations may also be listed among the circumstances). It could be specified that such situations must go on for a certain period of time before termination is allowed.

Price adjustment

Parties have various options to reduce the risk of unexpected price increases by allocating or sharing the risk of price fluctuations. A common approach is to include price adjustment provisions in their contracts.

Examples of price adjustment provisions include: cost-based adjustment provisions, where the price is adjusted in line with changes in the cost of raw materials, labour, and similar factors; index-based adjustment clauses, which allow price adjustments in accordance with an economic index to reflect economic trends; and time-based provisions, which provide for price adjustments at specified time intervals.

Incoterms

In contracts concerning the delivery of goods, parties could include Incoterms rules, which are a set of eleven internationally recognised standards published by the International Chamber of Commerce (**ICC**). These rules are designed to minimise misunderstandings by clearly defining the responsibilities, costs, and risks associated with the transportation of goods.

Incoterms specify which party is responsible for arranging and paying for transport, which party bears the risk of loss or damage during transport, which party must provide insurance, and which party is responsible for handling import and export formalities. In times of geopolitical change, parties can strategically use Incoterms to allocate according to their needs in response to threats, such as increased tariffs. For example, by opting for Ex Works (**EXW**) instead of Delivered Duty Paid (**DDP**), a seller can avoid exposure to unpredictable export and import duties and tariffs.

Alternative dispute resolution

Geopolitical changes can increase the risk of disputes between parties, such as disagreements over the use of *force majeure* or hardship provisions. In some cases, it may be beneficial to include contractual clauses for alternative dispute resolution methods, such as mediation or arbitration. Various factors (e.g. cost, enforceability, and speed) can make alternative dispute resolution more advantageous than litigation. Whether alternative dispute resolution is preferable, however, depends on the specific circumstances and the relevant jurisdiction.

Key takeaway

Parties should clearly define which situations are covered and not covered by the relevant contract clause. This might involve specifying the events that fall under the provision, and establishing a causal link between these events and any resulting non-performance. However, it's important to strike a balance, as defining the provision too narrowly could limit its usefulness in unforeseen circumstances. Additionally, the contract should detail when and how notice should be given to invoke the clause and outline the obligations of the invoking party to mitigate the effects of the event.

International instruments

Several international instruments have been developed to promote uniformity and simplicity. These international instruments can also be used as tools by parties when drafting contracts to anticipate uncertainties and unpredictability arising from geopolitical changes.

Examples of these international instruments include the clauses of the ICC, the UNIDROIT Principles of International Commercial Contracts 2016 (**PICC**), the Principles of European Contract Law (**PECL**), and the United Nations Convention on Contracts for the International Sale of Goods (**CISG**). These instruments offer comprehensive frameworks and model provisions, addressing issues such as *force majeure* and hardship. Parties may be inspired by the drafting in these instruments. They can also supplement their contracts by stipulating that the contract is governed by these frameworks.

The ICC has drafted, among others, *force majeure* and hardship clauses. These clauses can be directly included in the contract, incorporated by reference or serve as a basis for drafting tailor-made provisions.

The PICC and PECL also contain clauses on *force majeure* and hardship. For these to apply, the parties must have agreed that the contract is governed by the PICC or PECL. They may also apply if parties have agreed that their contract is governed by 'general principles of law, *lex mercatoria*, or the like', or when parties have not chosen any applicable law. The PICC can also be used to interpret or supplement international and domestic law.

The CISG contains a *force majeure* provision as well. As the CISG does not have a specific provision dealing with hardship, whether the CISG also covers hardship is debatable. Hardship may, in certain circumstances, be inferred from Article 79 CISG, although this interpretation is not recognised in all jurisdictions. The CISG governs cross-border sales contracts of goods when the parties are domiciled in states that are party to the CISG or when the rules of private international law lead to the application of the law of a state party to the CISG, unless the applicability of the CISG has been excluded.

Applicable law

Domestic law can also supplement contracts and assist parties to anticipate uncertainties arising from geopolitical changes.

As every jurisdiction has its own set of laws and may have different and sometimes mandatory rules for cases of *force majeure* and hardship, it is important to carefully consider which domestic law should be applied to a contract. The best choice of domestic law depends on the specific needs of the parties.

For example, in the Netherlands, Article 6:258 of the Dutch Civil Code (**DCC**), which constitutes mandatory law, states that, at the request of one of the parties, the court may modify the consequences of a contract or dissolve it in whole or in part on the grounds of unforeseen circumstances of such a nature that, according to standards of reasonableness and fairness, the other party cannot be expected to maintain the contract unchanged. Such modification or dissolution may even be given retroactive effect. In principle, it is not possible to exclude the application of this legal provision.

In recent years, Article 6:258 DCC has frequently been used in connection with the COVID-19 pandemic. One example is retail business owners who had to close their business due to COVID-19 restrictions have invoked this article to seek relief from paying full rent. In this regard the Dutch Supreme Court has ruled that the COVID-19 pandemic can, in principle, be considered an unforeseen circumstance for rental agreements concluded before 15 March 2020, unless there are specific indications to the contrary. Parties may want to take such national developments into account when choosing the applicable law in their contracts.

Similarly, Article 1467 of the Italian Civil Code states that, at the request of one of the parties, the court may terminate the contract in the event of changed circumstances (e.g. an excessive burden arising). In general, the Italian perspective is that contracts must always be interpreted in good faith. The parties may choose to refer the determination of the subject matter of the contract to a third party. In this case, if the third party's decision is clearly unfair or incorrect, the determination can be requested from the court.

Conclusion

The evolving geopolitical landscape requires parties to carefully consider and address potential uncertainties when drafting contracts. By incorporating tailored contractual provisions (i.e. *force majeure*, hardship, termination, price adjustment, and alternative dispute resolution provisions and Incoterms) parties can better manage the risks posed by unforeseen events. Inspiration can be drawn from international instruments, like those discussed in this article. It is essential to determine which national law will govern, especially considering potentially overriding mandatory rules, changes in jurisdiction, and the flexibility found in national case law.

Res judicata in international arbitration

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Res judicata, the doctrine that prevents the relitigation of matters already decided by a competent court or tribunal, is a cornerstone of legal certainty and efficiency in dispute resolution.

In the context of international arbitration, the application of *res judicata* is fraught with complexity. This complexity arises from divergent domestic legal traditions and inconsistent practices by arbitral tribunals. The recently published IBA Arbitration Committee's Report on *Res Judicata* in International Arbitration (2025) analyses these challenges and advocates for the development of an autonomous, transnational, arbitration-specific standard for *res judicata*. This article explores the current landscape, the challenges faced, and the case for a harmonised approach.

Background: the principle of *res judicata*

Res judicata is a universally recognised legal principle, present in all domestic legal systems and considered a general principle of international law. It ensures that a final judgment or arbitral award is binding and precludes the relitigation of matters previously decided. *Res judicata* has both preclusive (i.e. negative) effects – barring relitigation – and conclusive (i.e. positive) effects, allowing a party to invoke the finality of a decision in subsequent proceedings. The principle serves to protect parties from repeated litigation, promote legal certainty and efficiency in dispute resolution.

Despite its universal recognition, the operation and scope of *res judicata* vary significantly across legal systems, particularly between common law and civil law traditions. These differences manifest in terminology, the breadth of preclusion, and the procedural or substantive characterisation of the doctrine.

Current status of *res judicata*: a comparative overview

The report provides a detailed comparative analysis of *res judicata* as applied in selected common law and civil law jurisdictions, focusing on both domestic judgments and the *res judicata* effects of arbitration awards.

Common law jurisdictions

- **Australia** recognises three forms of estoppel:
  - cause of action estoppel;
  - issue estoppel; and
  - Anshun estoppel (preclusion of issues that could have been raised previously).
- In common law **Canada**, the doctrine of *res judicata* is based on case-law and contains two aspects: cause of action estoppel and issue estoppel. In circumstances where the requirements for *res judicata* are not met, it is also possible to preclude relitigation by the application of the doctrine of abuse of process.
- In **England and Wales,** *res judicata* is used as an umbrella term containing distinct legal principles with distinct origins, such as:
  - cause of action estoppel;
  - the "doctrine of merger" – once a judgment has been given in favour of a claimant, the cause of action is extinguished following which the claimant's sole right is upon the judgment;
  - issue estoppel – a decision on a particular issue, which is a necessary element that must be decided in the initial proceedings, will be binding for that issue in subsequent proceedings (against the same parties or their privies);

the rule in Henderson v Henderson – an estoppel extending to matters which might have been, but were not raised in the initial proceedings, unless there are special circumstances that justify otherwise; and
  - it may be an abuse of process to duplicate proceedings.
- Under **US** common law, there are two distinct doctrines of preclusion: issue preclusion and claim preclusion, which are collectively referred to as *res judicata*.

Civil law jurisdictions

- Argentina, Belgium, Brazil, France, Germany, Italy, Japan, Poland, Romania, Spain, Sweden, and Switzerland all recognise *res judicata*, typically applying a "triple identity" test: same parties, same object or claim, same cause of action.
- The scope of *res judicata* in civil law systems has traditionally been narrower, often limited to the dispositive part of the judgment. There is a trend, however, toward broadening the doctrine, with some jurisdictions now extending preclusion to necessary reasoning and issues that could have been raised.
- Some civil law jurisdictions (i.e. France, Belgium, Italy, Spain) have evolved to require parties to present all relevant grounds and facts in the initial proceedings, aligning more closely with the broader approach of common law systems.

Convergence and divergence

The report notes an emerging trend toward convergence between common law and civil law standards, particularly regarding:

- preclusion of claims raised in previous proceedings;
- preclusion of issues actually litigated; and
- preclusion of matters that could and should have been raised (i.e. abuse of process).

Significant divergences remain, however, regarding the scope of *res judicata* (e.g. whether it covers only the dispositive part or also the reasoning) and the treatment of issue preclusion.

Res judicata in international arbitration: current practices

International arbitral tribunals have not developed a coherent or uniform approach to *res judicata*. The main approaches are:

- **Application of the law of the seat (*Lex Arbitri*):** Most tribunals apply the *res judicata* standard of the seat of arbitration, treating it as a procedural matter. This is often done without detailed reasoning or consideration of party expectations.
- **Application of the substantive law:** Some tribunals apply the *res judicata* standard of the substantive law governing the contract, especially if the parties have argued on that basis.
- **Hybrid or autonomous approaches:** A growing number of tribunals consider both domestic law and general principles, such as the International Law Association's, (**ILA**) Report and Recommendations on *Res Judicata* (2006), or adopt an autonomous standard tailored to the needs of international arbitration, especially where neither the law of the seat nor the substantive law is clearly appropriate.

Analysis: challenges and inconsistencies

The report identifies several key challenges with the current practice:

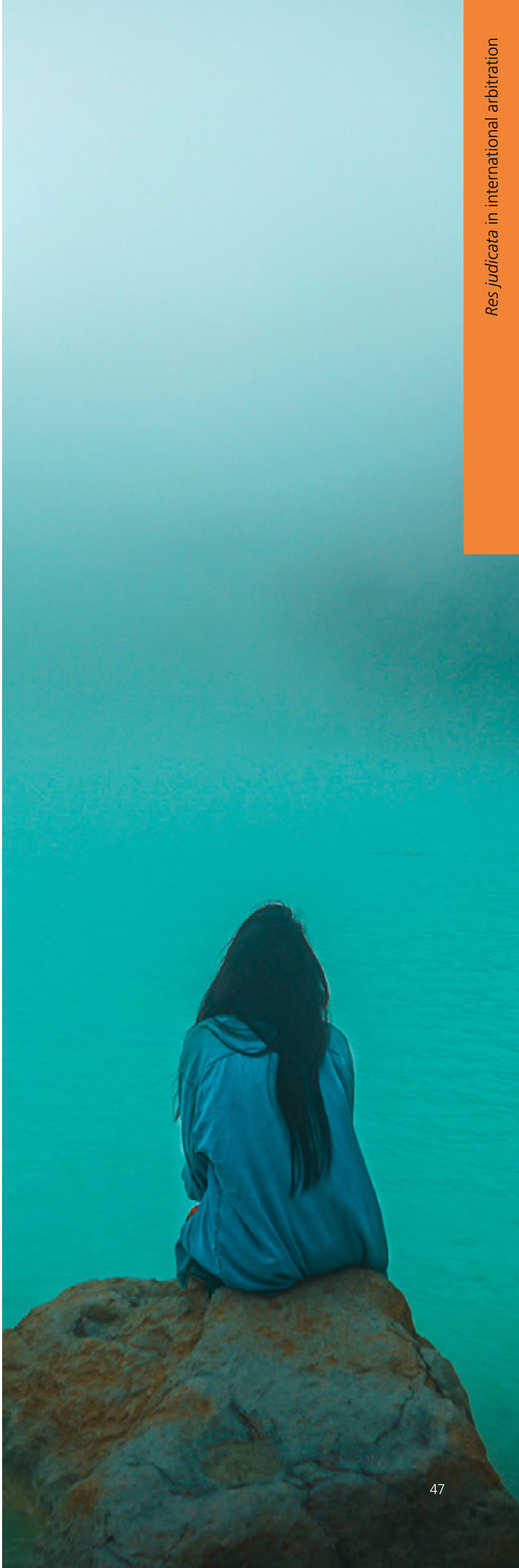
- **Uncertainty in choice of law:** There is no clear or consistent methodology for determining which law governs *res judicata* in arbitration. Tribunals apply different approaches, often without clear reasoning.
- **Divergent domestic standards:** The scope and requirements of *res judicata* differ significantly between jurisdictions, leading to unpredictability in the preclusive effects of awards.
- **Inappropriateness of domestic standards:** Domestic *res judicata* rules are designed for court judgments and may not be suitable for the specific features of international arbitration, which values efficiency, finality, and party autonomy.
- **Inefficiency:** The lack of a clear standard leads to increased costs and delays, as parties must argue over which *res judicata* standard applies and tribunals must spend time resolving these issues.

The case for an autonomous standard

The report argues that the differences between civil law and common law jurisdictions, while important, are not an insurmountable obstacle to establishing an autonomous, arbitration-specific *res judicata* standard. It is both desirable and possible for the IBA Arbitration Committee to develop a soft law instrument (i.e. guidelines) on an autonomous *res judicata* standard for international commercial arbitration. Such guidelines should provide a clear, uniform standard for the *res judicata* effects of commercial arbitration awards in subsequent commercial arbitrations. The guidelines should focus on objective *res judicata* (identity of claims and cause of action) and not address subjective *res judicata* (identity of parties) or investment arbitration at this stage. The guidelines should be non-binding and allow parties and tribunals to opt for domestic standards where necessary to ensure enforceability.

Conclusion

The current reliance on domestic *res judicata* standards in international arbitration is unsatisfactory due to inconsistency, unpredictability, and inefficiency. There is a growing consensus within the arbitration community for the development of an autonomous, arbitration-specific standard. The IBA Arbitration Committee is well-placed to lead this initiative by developing guidelines that reflect the needs of international arbitration, promote finality and efficiency, and can gain broad acceptance among stakeholders. As international commercial disputes grow in complexity and number, the adoption of a harmonised approach to *res judicata* is essential to ensure the continued effectiveness of international arbitration.



Sports law – litigation and regulation are on the rise

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A new wave of sports disputes is reshaping the future of professional sport and sports regulation in the UK and Europe.

Amid commercial expansion, heightened media scrutiny, and evolving athlete expectations, players, unions, governing bodies, and regulators are increasingly turning to legal mechanisms to resolve complex disputes at the intersection of sport, law, and commerce.

In this article, we highlight recent examples concerning tournament scheduling, transfer regulations and player health. We also look more broadly at how sports-related litigation risk is evolving in the UK and Europe.

Football

Football continues to serve as one of the most prominent areas for high-stakes litigation.

FIFPRO v FIFA
In 2024, a coalition of players' unions, including FIFPRO Europe and national associations from the UK and France filed a lawsuit before the Belgian courts against FIFA with the intention of having the case referred to the European Court of Justice ("**ECJ**").

They allege that the organisation's decision to expand the Club World Cup and unilaterally dictate the football calendar infringes upon players' fundamental rights, such as their entitlement to annual paid leave and protections against excessive workload.

Simultaneously, a formal complaint was lodged with the European Commission, alleging abuse of dominant position by FIFA for bypassing key stakeholders in its decision-making.

FIFA has defended its position stating that the expanded Club World Cup is essential for the global growth and commercial sustainability of football. It argues that the international match calendar is developed following extensive consultation with stakeholders and complies with applicable employment and competition laws, maintaining that player welfare remains paramount in its decision making.

The case touches aspects of both competition and employment law and its outcome could set a significant precedent for how scheduling and consultation are legally handled across professional sport.

FIFA v BZ

Player transfer regulations were in the spotlight after former player Lassana Diarra brought proceedings against FIFA after he found that FIFA's transfer rules prevented him from changing clubs after his contract with Lokomotiv Moscow was terminated following a dispute over unpaid wages in 2015.

The case was brought before the Belgian courts, which referred it to the ECJ.

In a landmark ruling issued in October 2024, the ECJ found that FIFA's rules – which imposed financial penalties and restricted players from joining new clubs following contract termination – violated key EU principles, including freedom of movement and competition law.

The judgment led to FIFA amending its transfer regulations in December 2024 to bring them into compliance.

Barcelona v La Liga

FC Barcelona has recently been involved in proceedings following La Liga's initial refusal to register two of its players for non-compliance with financial fair play regulations ("**FFP**"). The case is centered on conflicting assessments of projected income used by the club to justify its player salary budget.

Three independent audit firms reviewed the club's financial accounts. Two of them declined to validate certain projected incomes as "reasonably expected". La Liga expressed concern that these unverified figures might have been used to inflate artificially the club's allowable spending under the 1:1 income-to-expenditure ratio applied by the FFP rules.

Despite La Liga's initial assessment, the Spanish sports authorities reversed that decision and allowed the players to be registered. However, the decision was based on technical legal grounds rather than FC Barcelona's financial position.

The decision, made by Spain's National Sports Council, was based on procedural grounds – specifically, that the joint Spanish football federation and La Liga committee which imposed the registration restrictions was not authorised to make such decisions and did not follow the appropriate procedures within the relevant regulations.

The case has a number of legal ramifications, as La Liga has expressed its willingness to take action against the only auditing company that validated FC Barcelona's revenues and to appeal the decision of the sporting authorities.

LA Liga v Cloudfare

La Liga has been undertaking sustained efforts to combat illegal streaming of football matches, seeking to protect the commercial interests of rights holders and licensed broadcasters. A recent ruling by Barcelona's 6th Commercial Court (1005/2024-H) granted La Liga authority to implement a dynamic IP blocking system targeting pirated content.

However, the decision has seen significant opposition from certain internet service stakeholders, particularly Content Delivery Networks ("**CDNs**"). In response to the enforcement of these measures, several parties filed applications to annul the ruling. Their primary concern was that the blocking of entire IP addresses, without more precise filtering parameters, could inadvertently restrict access to legitimate content hosted on those same IPs.

Despite criticism regarding the proportionality of the measure, its compatibility with net neutrality principles and potential interference with fundamental rights such as freedom of expression, the courts have upheld the system twice: first in the initial ruling, and again in response to a challenge brought by Cloudflare, a US company that provides CDNs and other services.

Cloudflare has subsequently filed an appeal with the Spanish Constitutional Court, on the basis that La Liga's blocking measures are disproportionate. Cloudflare argues that La Liga's blocks should be an option of last resort and should never be applied to technologies such as DNS or VPN services.

Cloudflare also suggests that parties affected by improper blocking should be compensated and that rights holders and service providers should work together to combat piracy, rather than blocking being implemented at the network level.

La Liga's blocking measures are the subject of increasing controversy and political debate. The decision of the Constitutional Court will be eagerly awaited by the rights holders and service providers alike.

Tennis

PTPA v ATP

The spotlight has also recently turned to professional Tennis. In March 2025, the Professional Tennis Players Association ("**PTPA**"), supported by elite players including Novak Djokovic, has launched coordinated legal action across multiple jurisdictions in the US, UK, and EU.

The PTPA's filings allege that tennis's governing bodies – the ATP, WTA, ITF, and ITIA – have operated as a "cartel" engaging in anti-competitive behaviour, overburdening players with excessive scheduling, and consistently excluding them from critical decisions affecting their earnings, health, and professional calendars.

The claim highlights a growing trend of players seeking more control over their sporting schedule, citing health concerns similar to those raised in the FIFPRO claim. However, the PTPA case also seeks greater commercial autonomy for tennis players.

Tennis's governing bodies have strongly denied the allegations, with the ATP calling the lawsuit "entirely without merit".

Rugby

Players v World Rugby

Significant litigation is unfolding in the UK in relation to Rugby, where over 300 former professionals are suing World Rugby, the Rugby Football Union, and the Welsh Rugby Union in the UK in relation to allegations that head injuries sustained whilst playing the sport have led to neurodegenerative disorders (also known as the 'Concussion Litigation').

Former players, many of whom have been diagnosed with various medical conditions including early-onset dementia and chronic traumatic encephalopathy allege that the governing bodies failed to take reasonable steps to protect them from repeated head injuries.

They claim that medical evidence about the long-term impact of concussions was ignored and that governing bodies allowed excessive match loads and insufficient recovery time, particularly at the professional level.

The case represents one of the most serious player welfare challenges faced by a governing body to date and has opened wider discussions about duty of care, informed consent, and liability in contact sports. The proceedings are currently ongoing.

Conclusion

The litigation landscape of sport across the UK and Europe is changing rapidly. Athletes, unions, and governing bodies are increasingly turning to the courts to define the rules of engagement in areas previously governed by internal processes or informal negotiation. From landmark challenges to international match calendars and transfer systems, to claims around player health, anti-competitive conduct, and financial governance, sports-related litigation is no longer niche – it is becoming a central part of how modern sport is structured and regulated.

The cases discussed above show a clear trend: legal scrutiny is intensifying as the commercial value of sport continues to balloon, resulting in an increasing number of legal challenges against sports' governing bodies.

As commercial pressures mount and player welfare moves further up the agenda, litigation risk in sport will continue to rise, particularly where regulatory frameworks lag behind evolving legal and social standards. Stakeholders must now view legal strategy not merely as a reactive measure to emerging issues, but as an active, integral part of shaping and sustaining success in the business of sport.

Cross-border Spanish rules on restructuring plans

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The Spanish Consolidated Insolvency Law (*Texto Refundido de la Ley Concursal* or **TRLC**), enacted by Royal Legislative Decree 1/2020, is the cornerstone of insolvency and restructuring regulation in Spain. It consolidates and modernises Spain's insolvency laws and aligns them with EU directives and regulations. Alongside other core functions, the TRLC establishes a comprehensive framework for restructuring plans aimed at preventing insolvency or the reorganisation of insolvent companies.

In a globalised economy, Spanish companies often have assets, creditors, or group affiliates abroad, making cross-border restructurings increasingly common and complex. This article provides an overview of the cross-border rules on restructuring plans under the Spanish Consolidated Insolvency Law, focusing on jurisdictional issues, plan content, creditor treatment, court involvement, and recognition of foreign restructuring measures.

Legal framework and European context

Spain's insolvency regime is deeply integrated with EU insolvency law. The TRLC incorporates provisions from:

— EU Insolvency Regulation No. 2015/848 (EIR) which governs jurisdiction, recognition, and cooperation between EU member states in insolvency proceedings.

— Directive (EU) 2019/1023 on preventive restructuring frameworks which harmonises preventive restructuring tools to enhance debtor viability and maximise creditor recoveries.

In particular, the TRLC incorporates provisions from these instruments in relation to cross-border restructurings involving entities, creditors, or assets located in multiple jurisdictions.

Jurisdiction and applicable law in cross-border restructurings

Jurisdiction for insolvency and restructuring proceedings is generally based on the debtor's Centre of Main Interests (**COMI**), defined as the place identifiable by third parties as being where the debtor regularly administers its interests. If the debtor's COMI is in Spain, Spanish courts have exclusive jurisdiction to commence main insolvency or restructuring proceedings.

If the debtor has assets or branches in other EU member states, those jurisdictions may commence secondary insolvency proceedings to protect local interests, subject to the rules in the EIR Spanish courts maintain jurisdiction over the main restructuring plan but must cooperate with courts in other jurisdictions.

The terms of the restructuring plan affecting creditor rights and debtor obligations are primarily governed by Spanish law when proceedings are commenced in Spain. However, contracts governed by foreign law remain subject to that law in respect of validity and enforcement, which can complicate cross-border restructurings.

Types of restructuring plans under the TRLC

Preventive Restructuring Plans: Designed for debtors facing financial difficulties but not yet insolvent, these plans aim to restructure liabilities and avoid insolvency. They can be implemented extrajudicially or with court supervision.

Insolvency Restructuring Plans: If insolvency proceedings have begun, restructuring plans are proposed to reorganise the debtor's business and liabilities, often with increased court oversight.

Group Restructuring Plans: Recognising the complexities of multinational groups, the TRLC allows for coordinated restructuring plans for groups of companies, including those with cross-border elements. Courts can designate a group representative to facilitate cooperation between multiple proceedings.

Content and scope of restructuring plans in cross-border contexts

Spanish restructuring plans allow significant flexibility, including debt rescheduling or deferral, debt forgiveness (i.e. haircuts), debt-to-equity conversions, modification of creditor ranking and asset or business transfers.

In cross-border cases, plans must consider the rights of foreign creditors and the enforceability of plan provisions under foreign laws. Modifications affecting creditors outside Spain require international cooperation and sometimes additional procedures to ensure recognition and enforcement abroad.

Creditor classes, voting, and fair treatment

Creditors are grouped by similarity of rights, ensuring equitable treatment. Typical classes include secured creditors, unsecured creditors, employees, and public creditors. Foreign creditors are classified according to the nature of their claims, even if governed by foreign law.

Voting mechanism: Each creditor class votes on the restructuring plan. Approval generally requires a majority by number and amount within each class.

The TRLC also permits a cram-down mechanism allowing courts to approve plans despite opposition from some creditors, provided the plan meets fairness and feasibility criteria.

Inclusion of foreign creditors: Foreign creditors have the right to participate in the process. Spanish courts ensure proper notification and respect procedural rights, enabling them to vote and object where appropriate. Their participation is crucial for plan legitimacy and for securing recognition in foreign jurisdictions.

Judicial supervision and plan approval

Spanish courts play an active role in supervising restructuring plans, both in preventive and insolvency proceedings. Their responsibilities include reviewing the restructuring plan's compliance with legal requirements, ensuring the plan treats creditors fairly and respects priority rules and also verifying the debtor's viability and the plan's feasibility.

Courts coordinate with foreign jurisdictions, particularly in EU member states, through mechanisms established by the EIR and bilateral cooperation. This cooperation aims to harmonise restructuring efforts across borders and avoid conflicting rulings.

Recognition and enforcement of foreign restructuring plans

EU recognition: Under the EIR, insolvency and restructuring proceedings, that were opened in an EU member state, are recognised across other member states, including Spain. Spanish courts enforce foreign restructuring plans approved by competent foreign courts unless such enforcement violates Spanish public policy.

Non-EU jurisdictions: Recognition and enforcement of restructuring plans from non-EU jurisdictions depend on treaties, Spanish private international law or principles of reciprocity. These cases may require separate local proceedings for enforcement in Spain.

Group restructuring in cross-border settings

Group restructuring addresses the challenge of coordinating the restructuring of multiple entities within a corporate group. The TRLC permits the appointment of a group representative to coordinate proceedings involving multiple group members; submission of joint or coordinated restructuring plans for group companies, whether located domestically or abroad; and enhanced cooperation between courts overseeing different group members' restructurings.

This mechanism facilitates holistic restructuring strategies that maximise value preservation across the entire corporate group.

Protection of creditors and public policy considerations

Spanish law ensures the protection of creditors' rights in cross-border restructurings. Secured creditors generally retain their rights although the plan may include agreed modifications. In addition, employee claims enjoy privileged treatment, and public creditors, including tax authorities, are provided with protections.

Spanish courts retain the authority to refuse enforcement or recognition of foreign restructuring decisions that conflict with fundamental Spanish legal principles or public policy.

Practical challenges in cross-border restructuring

Cross-border restructurings are inherently complex due to differences in insolvency laws, creditor rights, and court procedures across different jurisdictions. Coordination among courts, insolvency representatives, and advisors are essential to harmonise timelines and outcomes.

Enforcement of restructuring plan modifications on foreign creditors or assets may require additional steps, such as recognition procedures or separate enforcement actions, potentially causing delays and uncertainties.

Effective communication, including translation of key documents and proper notification to foreign creditors, is critical to ensure their meaningful participation and reduce any litigation risks.

Cross-border restructurings demand multidisciplinary expertise, involving insolvency lawyers, tax advisors, and financial consultants familiar with multiple jurisdictions.

Conclusion

Spain's Consolidated Insolvency Law provides a modern framework for restructuring plans, effectively integrated with EU insolvency law. Its provisions enable Spanish courts to manage complex cross-border restructurings through clear jurisdictional rules, flexible plan mechanisms, creditor protections, and cooperation with foreign jurisdictions.

For multinational debtors or groups, the TRLC's group restructuring tools and judicial coordination mechanisms offer practical means to achieve comprehensive, cross-border restructuring solutions. Nevertheless, successful cross-border restructurings require meticulous planning, cooperation, and expertise to navigate jurisdictional nuances and enforcement challenges.

Monaco issues new jurisdictional threshold on cross-border defamation cases

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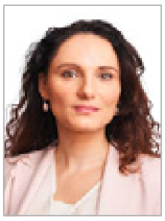

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In a series of legal battles, Monegasque courts tackled a defamation case that underscores the complexities of jurisdiction in cross-border disputes. The case, brought by a foreign businessman against a foreign media service, revolved around articles published on a website, allegedly defaming the businessman by linking him to the Russian government and Kremlin.

CMS Monaco Criminal Law team contributed to the emergence of a new jurisdictional criterion for defamation, based on the notion of territorial connection.

The plaintiff, a foreign businessman with several passports and residency in the Principality of Monaco, filed a direct summons against our client, the Finish national news media, YLEISRADIO OY, and its director of publication, to appear before the Monegasque Correctional Tribunal for having published on its website two articles in English and two articles in Finnish on the financing and ownership structure of the Helsinki Shipyard.

The articles indicated that the plaintiff, via a foreign company, was the main shareholder of the shipyard and is reported to have close links to the Russian Federation and the Kremlin. The plaintiff argued that, within the geopolitical context, such comments are defamatory and requested damages, in addition to the removal of the articles from the website.

Monegasque law allows for direct private prosecution of defamation claims, without the need for investigations, and has certain unfavourable procedural provisions for international defendants. At the time, Monaco courts accepted universal jurisdiction over public defamation cases on the internet.

By the time the Monegasque summons was served in Finland on YLESIRADIO OY, the deadline for the admissibility of any evidence of truthfulness was about to expire, and our CMS team worked around the clock to carry out factual investigations in four languages. The result was a defence brief that included the following:

- The incompetence of the Monegasque courts;
- The truthfulness of the disputed comments;
- The non-defamatory nature of the disputed comments; and
- The good faith of YLEISRADIO OY's journalists.

To challenge the issue of Monegasque jurisdiction, CMS elaborated arguments based on "forum shopping" and on the "freedom of expression in a democratic society".

In a context where established case-law at the time held that Monegasque courts had universal jurisdiction in defamation cases where the Internet publication was accessible from Monaco, the CMS team was forced to debate the merits of the defamatory nature of the disputed articles.

Ultimately, our team convinced the Correctional Tribunal to overturn the established jurisprudence, which stated in its ruling:

» Although it has been ruled that acts of public defamation are deemed to have been committed in any place where the offending statements were received, when said statements were disseminated via the internet, strict conditions must be applied to this jurisdiction, which cannot be universal.

In fact, although they may have been accessible from the Principality of Monaco, the disputed writings must have been intended for the Monegasque population in particular. […]

Thus, even if the publication of these articles on the internet made them accessible to the Monegasque public, they were in no way written or distributed for their attention or information, so that in the absence of any other criterion of connection to the Principality of Monaco, such as the Monegasque nationality of a party to the criminal proceedings, as provided for in certain cases by the Code of Criminal Procedure, the criminal court must declare itself incompetent.

On appeal, the plaintiff argued that:

— in the context of the Principality of Monaco, where citizens have historically been in minority, the "Monegasque population" includes foreigners who have Monegasque residency: and
— many Monegasque residents speak English or work in the maritime industry and could have been interested in reading the Helsinki Shipyard articles.

The plaintiff also argued that the statements disparaged his reputation among people working in the Monegasque maritime industry with or for him.

Information gathered by CMS's criminal investigation team from open and closed sources refuted these allegations.

The Court of Appeal confirmed the first instance decision, reiterating that the articles were not directed at the Monegasque public and thus did not fall under Monaco's jurisdiction.

The plaintiff appealed before the Court of Revision, arguing that the lower courts violated article 6§1 of the European Convention of Human Rights and Monegasque criminal procedure and freedom of expression laws.

The Court of Revision upheld the decisions of the lower courts and clarified that the threshold test on jurisdiction should consist of whether the act of publication can be linked to the territory of the Principality. The "link" needs to be found in the comments themselves or in the way they were published. In a context where the population of most of the world's major cities is now cosmopolitan, the "target audience" can only be an indication of the existence of such link, the real criterion being the connection to the territory itself.

The high court rejected the plaintiff's arguments that the articles' accessibility in Monaco and the plaintiff's residency were sufficient to establish jurisdiction. It ruled that the mere Monegasque residency (as opposed to nationality) of the alleged victim or perpetrator is insufficient to give jurisdiction to the Monegasque courts.

By discouraging "forum shopping" practices and ensuring that jurisdiction is based on a genuine connection to the territory, the Monegasque courts have confirmed the fundamental principle of freedom of expression.

Are China's rules on the Implementation of Anti-foreign Sanctions Law and Provisions on Foreign IP Disputes restraints on the freedom to litigate?

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The State Council of China recently released the Provisions on Implementation of the Anti-foreign Sanctions Law of the People's Republic of China (**AFSL Provisions**), which took effect on 23 March 2025. The AFSL Provisions serve as more detailed regulations following the Anti-foreign Sanctions Law (**AFSL**), which came into force on 10 June 2021. In addition, on 13 March 2025, the State Council published the Provisions on the Settlement of Foreign-related IP Disputes (**IP Disputes Provisions**), which have been in effect since 1 May 2025.

Whilst both pieces of legislation provide helpful clarification, they also partly increase the burden on enterprises conducting international business with China.

I. Countermeasures against foreign litigation

1. AFSL Provisions targeting litigation against China's interests

Article 19 of the AFSL Provisions reserves the power of China's government to take countermeasures against "promoting and implementing litigation by any foreign country, organisation or individual", which the Chinese government deems will "endanger the sovereignty, security, and development interests of China", regardless of where such litigation is brought.

Relevant subjects involved in the above proceedings may face countermeasures, including:

- restriction from entering China;
- sealing up, detaining, or freezing of property (including intellectual property and other intangible assets) within China;
- prohibition or restriction on transactions and cooperation;
- compulsory property enforcement; and
- other stricter countermeasures.

There is no published precedent to date where this provision has been applied. So far, articles published in China only discuss examples presenting certain political background, such as the governments of several US states suing relevant Chinese state authorities and demanding compensation on the grounds of China's alleged hoarding of personal protective equipment during the pandemic. Therefore, one could conclude that this provision will be limited to cases of a "high-level" political nature, and ordinary commercial disputes will not be affected. The wording of the AFSL Provisions, however, is broad and does not explicitly exclude litigation initiated by private enterprises against Chinese counterparts.

2. IP Disputes Provisions privileging Chinese holders' intellectual property rights

The IP Disputes Provisions provide a nexus between IP disputes that recently have required the Chinese legislator's special attention and the ASFL's regulatory framework. Article 15 and 16 of the IP Disputes Provisions emphasise that "containment or suppression" against China and "discriminatory restrictive measures" (**DRM**) against Chinese citizens and organisations taken "under the guise of IP disputes" fall within the scope of AFSL. These provisions make clear that countermeasures can be taken against what the Chinese government believes to be foreign countries' containment, suppression and DRM "under the guise of IP disputes", and civil lawsuits can be brought by Chinese entities affected by them. This may include legal proceedings in Standard-Essential Patent (**SEP**) cases and other international IP disputes in which Chinese enterprises are a party.

The concepts of "DRM", "containment" and "suppression" are introduced in Article 3 of the AFSL, but no laws or regulations provide a statutory definition of these terms. The term "discriminatory" bears some legal meaning (i.e. negative treatment without legitimate reasons and can be used in a legal context). In contrast, "containment" and "suppression" are ambiguous, non-legal terms, which causes uncertainty as to what constitutes "containment" or "suppression" of China.

The IP Disputes Provisions echo recent judicial practice. On 15 January 2025, China's Supreme People's Court issued China's first anti-anti-suit-injunctions in an SEP litigation filed by Huawei against Netgear, prohibiting Netgear and its affiliates from seeking anti-suit injunctions in the US and other foreign courts that would restrict Huawei from initiating or continuing patent infringement proceedings in China. This case demonstrates the government's heightened focus on IP disputes with foreign counterparts. The SEP disputes between Samsung and ZTE,, whereby Samsung has filed lawsuits against ZTE in several regions around the globe on SEP licensing and the Brazilian State Court in Rio de Janeiro granted a provisional injunction against ZTE's Brazilian 5G patents, have also caught people's attention. Though there are no actions taken against Samsung to date, the IP Disputes Provisions provide a potential legal basis for actions or countermeasures to be taken in the future, including anti-suit-injunctions. Foreign entities that issue proceedings in other jurisdictions, in defiance of these measures, may face legal consequences such as fines or the refusal to recognise and enforce foreign judgments and arbitral awards in China.

In the absence of clear guidelines on the scope of litigations that are deemed to "endanger the sovereignty, security and development interests of China" under the AFSL Provisions, legal uncertainty may continue and clarification in future regulations or interpretations will be necessary.

II. Other important content of the AFSL Provisions

Besides the litigation-related provisions described above, the AFSL Provisions also deal with other issues which are of major importance for China-related business of foreign companies.

1. Legal consequences of implementing, or assisting with implementing, DRM against Chinese citizens or entities

The AFSL entitles Chinese individuals or organisations to bring lawsuits to demand cessation of infringement and compensation for losses against any organisation or individual that "implements or assists in implementing" the DRM taken by any foreign country against them.

In addition to such civil outcomes, the AFSL Provisions also provide for administrative measures to be taken against such organisations or individuals, including:

- conducting interviews;
- ordering to make correction; and
- other corresponding measures.

It is worth noting that, same as the corresponding civil liability, the above administrative penalties not only apply to domestic entities and FIEs but also apply to foreign entities. In addition, "other corresponding measures" gives enforcement authorities wider administrative discretion.

2. Legal implications of not executing China's countermeasures

The AFSL obliges onshore organisations and individuals to implement China's countermeasures to safeguard China's interests against DRM against Chinese citizens or organisations, or interference with China's internal affairs by foreign countries, or individuals and organisations that have directly or indirectly participated in the formulation or implementation of DRM. For example, if China's countermeasures prohibit or restrict the onshore organisations or individuals from activities such as conducting relevant transactions or cooperation with certain individuals and organisations that interfere in China's internal affairs, the onshore organisations and individuals must implement such countermeasures. "Onshore organisations and individuals" include foreign-invested enterprises (**FIEs**) established in China and foreign individuals appointed as their company representative/management personnel.

The AFSL Provisions further set out the competent authorities' duties of enforcement of countermeasures and grant those authorities the power to conduct investigations and consultations in respect of the same. It might be more common for enterprises in China to receive requests from the competent departments of the State Council to conduct such investigations and consultations, particularly those involved in actions covered by the AFSL. To ensure compliance and mitigate legal risks, companies should prepare in advance.

The AFSL Provisions offer more clarity by setting forth the following legal consequences for failure to execute China's countermeasures:

- order to make a correction;
- prohibition or restriction from engaging in government procurement, bidding, or tendering;
- prohibition or restriction from participating in activities related to the import and export of goods and technologies, or international trade in services;
- prohibition or restriction on receipt or provision of data or personal information from or to foreign countries; and
- prohibition or restriction from leaving or staying in China.

3. New exemption mechanism

In addition, the AFSL Provisions provide for special application for exemption to conduct relevant activities with organisations and individuals against whom countermeasures have been taken. Such application must be submitted to the competent departments of State Council supported by relevant facts and justification. This exemption mechanism is a new measure under the AFSL Provisions, since the AFSL did not include an exemption mechanism. The evidentiary requirements, review timelines, and substantive evaluation criteria of the exemption mechanism remain subject to further clarification.

III. Conclusion

The AFSL Provisions and the IP Disputes Provisions signal a potential shift in China's approach to cross-border litigation and dispute resolution. The explicit linkage of foreign IP disputes to the AFSL indicates China's readiness to potentially weaponise administrative tools to deter foreign judicial interventions, such as anti-suit injunctions. By empowering authorities to impose countermeasures against foreign proceedings deemed to threaten China's interests, including private IP disputes, these provisions result in greater risk for multinational enterprises engaged in cross-border disputes involving Chinese entities, and underscore the importance of proactive risk assessment in dispute resolution strategies.

In addition, the AFSL Provisions strengthen China's administrative authority to monitor compliance and enforcement of the AFSL and show its growing commitment to protect its interests. Actual enforcement may gain momentum in the wake of additional US tariffs and sanctions and, probably to a lesser degree, measures taken by the EU and other countries.

It would be desirable for the State Council to provide clarity on the AFSL Provisions. However, this uncertainty is likely to remain. Not only domestic enterprises and FIEs operating in China, but also foreign enterprises and organisations, should try to balance these Chinese compliance standards against other duties and responsibilities in their global operations or activities, in particular those resulting from conflicting sanctions regimes of other jurisdictions.

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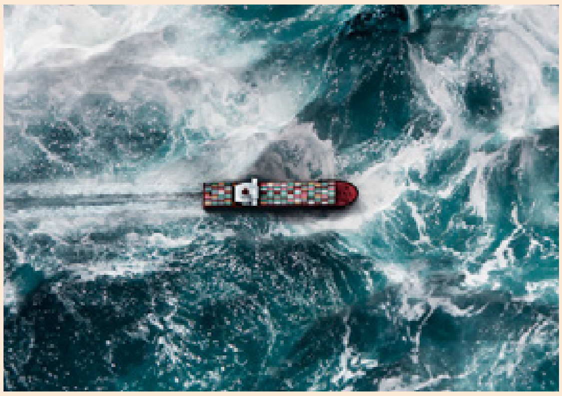

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