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International Disputes Digest

July 2024

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Introduction

Welcome to the Summer 2024 edition of the *International Disputes Digest*, our bi-annual publication exploring the latest trends and solutions to the challenges facing global business.

Those challenges include the continuing war against Ukraine and in the Middle East, in addition to others such as climate change and Artificial Intelligence. In this edition, our experts in Brazil explain the impact of AI on resolving disputes and why robots will not replace arbitrators anytime soon. Separately, our colleagues in the Netherlands describe how Dutch litigation is leading the way in making both governments and companies accountable for policies resulting in climate damage, and how this litigious trend is defending biodiversity.

The case of the Sultan of Sulu and how the passage of time in arbitration agreements might affect the integrity of an arbitration clause is the topic of analysis by our experts in Paris. We also consider the envisaged changes to the 7th edition of the SIAC Rules, a hot off the press analysis of the recently published 2024 IBA Guidelines on Conflict of Interest in International Arbitration, and our 2024 UK Banking Disputes Report, amongst other topics.

We hope that you will enjoy reading these articles and please do contact the authors if you have queries in relation to them.

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Artificial Intelligence in arbitration: use, challenges and limitations

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Artificial Intelligence **(AI)** is a branch of computer science focused on developing systems and algorithms capable of performing tasks that would typically require human intelligence. For example, AI can recognise patterns, solve problems, and present information.

The potential of AI is vast, and its use will bring significant changes to all areas of society, including the practice of law.

Regarding the area of Dispute Resolution and arbitral procedures, AI is capable of reviewing and analysing large volumes of data and information, as well as automating repetitive tasks that require significant time and effort. Therefore, AI can be considered a highly useful tool for legal practitioners, especially lawyers working in law firms.

The main advantage of AI is the reduction of time spent by lawyers on administrative tasks and document management. As a result, clients' legal costs are reduced, and lawyers are able to focus on more strategic and complex issues.

It is worth noting, however, that the unrestricted application of AI in law is still at an early stage and is presenting challenges and limitations that must be considered by lawyers, judges, and arbitrators.

How AI operates

AI works by using algorithms and large amounts of data to accumulate knowledge and learn from previous experiences. Over time, the system improves, allowing it to identify patterns of behaviour and information to help verify the output it generates.

Often, however, the information fed to the AI tool from which it learns and acquires knowledge is not easy to verify, making it extremely difficult to audit or review the database used by the AI developer.

The international community has already pointed out cases where AI has presented erroneous conclusions, especially when used for more complex and sophisticated issues, which raises questions about its potential use by legal practitioners, particularly concerning complicated legal matters.

Considering the lack of AI regulation in many parts of the world, AI's use must comply with the ethical and legal principles of each jurisdiction where it is used. AI regulations must also promote reliability and well-defined criteria for information tracking to provide greater security to those who use it.

Use of AI in arbitration

Today, we can envision the use of AI in conducting both national and international arbitrations. The tool promises to improve efficiency, increase the speed of procedures, reduce costs, and optimise the time spent by lawyers, arbitrators, experts and Arbitration Chambers.

The following are examples of the possible use of AI in arbitral proceedings:

— **Document review:** AI is capable of reviewing and categorising large volumes of documents and information, helping to quickly identify key information relevant to a party's claim and reducing time and cost in conducting the review.

— **Review of pleadings and testimonies**: AI can assist lawyers in reviewing requests and testimonies, as well as helpfully organising the content received.

— **Preliminary analysis:** AI can analyse arbitration precedents, predict results or the possibility of negotiations, and assist parties in deciding whether to proceed with litigation or negotiate.

— **Case management:** AI case management can assist arbitrators and lawyers in conducting procedures more effectively, through automation of scheduling, deadline control and management of information and documents.

— **Legal research and precedent analysis:** AI can help lawyers find laws and precedents applicable to a specific case, improving the quality of the work developed.

— **Transcription and translation of texts:** In international arbitrations, AI can be an important tool for translating texts into other languages, as well as transcribing testimonies in a foreign language.

— **Choice of arbitrators:** AI is capable of researching the academic and professional background of arbitrators, and their performance in previous cases. Since many arbitrations are confidential, the information available may be limited.

— **Compliance and due diligence:** AI can assist parties and lawyers in identifying potential conflicts of interest, as well as in the applicability of laws and regulations to the specific case.

— **Information security and privacy:** AI can improve the security of confidential or sensitive information in arbitration, detecting and preventing violations of data protection regulation.

— **Decision support:** AI can assist arbitrators in analysing evidence and identifying patterns, as well as presenting relevant information brought by the parties, helping the Arbitral Tribunal to make decisions more swiftly.

— **Virtual arbitrators or mediators:** Some AI tools have been developed to act as arbitrators or mediators, aiming to assist in preliminary negotiations and fact gathering.

As seen, there are several possibilities for the use of AI in arbitral proceedings.

The implementation of AI, however, is not so simple, and the process poses risks and challenges that legal practitioners must overcome.

Challenges for the use of AI in arbitration

In a preliminary and theoretical analysis, the use of AI in arbitral proceedings could be extremely advantageous, as demonstrated above. However, whether due to inherent peculiarities of arbitration or non-negotiable legal principles, the practical application of this tool deserves attention.

The first and primary challenge in using AI in arbitration is the confidential nature of arbitral proceedings, which prevents the underlying algorithm from learning and processing new data due to the scarcity of information.

Scarcity of information is further exacerbated by the absence of repetitive patterns since arbitral proceedings do not generate precedents and arbitrators are not obliged to follow binding precedents.

Confidentiality in arbitration also hampers the algorithm's ability to ensure transparency of information due to data protection and privacy regulations now prevalent in many jurisdictions.

Beyond the issue of confidentiality, another question arises: would it be appropriate or even ethical for decisions to be based on or even decided by algorithms without human supervision?

The lack of transparency over the underlying data used by the AI is a concern to the international community as parties must understand the origin of the information used in important legal decisions.

Moreover, it has been observed that AI often presents fabricated or untrue information, which is highly problematic in the context of use in arbitral proceedings.

Another concern is the difficulty that AI could have in understanding the broader context of an arbitral dispute, which may involve applicable legislation, cultural aspects of each jurisdiction and the profile of the parties involved. All these factors influence the resolution of a given dispute.

Regarding the selection of arbitrators, it can be questioned whether parties, by mutual agreement, could realistically appoint a programmer behind an AI system as an arbitrator.

In arbitral proceedings, parties are free to choose any arbitrator they trust. Thus, if the parties mutually decide to appoint a programmer with an AI tool that they trust as an arbitrator, then, theoretically, there would be no impediment to choosing an arbitrator created by AI.

However, the principles of impartiality, independence, and neutrality of an arbitrator in arbitrations are equally essential conditions for the validity of the procedure. Currently, AI does not guarantee the application of these principles because, as mentioned above, it is not possible to verify the database used by AI, which evidently complicates compliance with these principles.

The same reasoning applies to the guarantees of due process and the arbitrator's impartiality in arbitral proceedings. The failure of an AI arbitrator to observe these guarantees could result in the nullity of an arbitral award, which would be a detriment to the security and effectiveness of the procedure.

As for the use of AI in arbitral hearings, this is also a controversial issue.

AI can transcribe in real-time what the parties and arbitrators say in a hearing, and seek arguments and evidence contrary to the claims of the opposing party, witnesses, and experts. In these cases, however, AI cannot not guarantee that the responses and information obtained are accurate or even correct, potentially leading the Arbitral Tribunal into error.

Conclusion

From all that has been discussed above, AI clearly has much to offer legal practitioners, especially in arbitral proceedings, since AI can facilitate and expedite the work of lawyers, arbitrators, experts, and the Arbitration Chamber.

However, until AI is broadly regulated in jurisdictions around the world, the technology's application remains limited. If professionals decide to use AI in arbitral procedures, they should be aware of the risks mentioned above, adopt a cautious approach, and respect the principles and guarantees required by law.

Beyond borders: the global influence of Dutch 'Climate Litigation'

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In recent years, there has been a shift in how both governments and businesses are held accountable for their climate responsibilities (as reflected in the Disputes Digest 2023 summer edition). The Dutch courts have assumed a pioneering role in this development. In this article, we will discuss the issues that are relevant and explore the potential impact of this development on a variety of sectors in the Netherlands and abroad. Using the insurance sector as an example, this article illustrates the far-reaching consequences of Dutch climate litigation for national and international businesses.

Climate Litigation in the Netherlands

(a) Imposing human rights obligations on the government

Urgenda, a Dutch foundation focusing on sustainability and innovation, conducted ambitious and pioneering climate litigation against the Dutch state, marking the first case of its kind in the Netherlands. Its objective was to compel the Dutch state to accelerate the reduction of greenhouse gas emissions beyond the targets set by the existing policy. It succeeded. In its ruling of 20 December 2019, the Dutch Supreme Court mandated the Dutch state to cut greenhouse gas emissions by 25% by the end of 2020 compared to 1990 levels, whereas the existing policy prescribed a 20% reduction. The Supreme Court based its ruling on the UN Climate Convention and the state's legal obligations to protect the life and well-being of citizens in the Netherlands under the European Convention on Human Rights **(ECHR)**. The ECHR requires member states to guarantee their residents the rights and freedoms set out in the ECHR, including Article 2 protecting the right to life, and Article 8 protecting the right to respect for private and family life.

The international impact of the Urgenda case was recently reflected by the European Court of Human Rights **(ECtHR)** in the *Verein KlimaSeniorinnen and others v. Switzerland* case (ECtHR 9 April 2024, 53600/20). The complainants explicitly referred to the Urgenda ruling to substantiate the duty of a state to do its part. On 9 April 2024, the ECtHR ruled in favour of the complainants. In its ruling, the ECtHR directs member states to establish reduction goals for net neutrality in greenhouse gas emissions by approximately 2050. This is a less definitive approach than the Urgenda precedent, mandating a specific 25% reduction in CO_2 emissions by 2020, but the ruling can be considered pivotal in holding states accountable for their climate policies.

If states are held accountable for their climate policies, this begs the question: what are the responsibilities of 'polluting' businesses?

(b) Imposing human rights obligations on polluting businesses

The Dutch association Milieudefensie, also known as Friends of the Earth Netherlands, has also been preoccupied with this question. Through legal proceedings, Milieudefensie has tried to compel Shell to significantly reduce its CO_2 emissions and has been successful, at least in the court of first instance.

Milieudefensie based its claim on tort law and substantiated it by invoking human rights, particularly Article 2 and Article 8 of the ECHR, which encompass the right to life and the right to respect for private and family life. Additionally, the claim was supported by soft law instruments, such as the UN Guiding Principles on Business and Human Rights, the UN Global Compact, and the OECD Guidelines for Multinational Enterprises. The court of first instance ruled in favour of Milieudefensie and mandated Shell to cut greenhouse gas emissions by establishing explicit reduction targets.

Currently, the case is on appeal. Shell has contested the ruling, arguing that climate policy is the responsibility of governments, not individual corporations. The court of appeal's decision is anticipated in November 2024.

Since the appeal is pending, drawing conclusions based on the above would be premature. However, the court of first instance's ruling should be considered a signal to polluting businesses that they may be held accountable for their emissions and, more generally, societal and human rights obligations. Such companies should bear in mind that they may be expected to proactively contribute to climate change mitigation.

If polluting businesses can be held accountable for their emissions, then what about the companies enabling them by financing, advising, or insuring?

(c) Imposing human rights obligations on pollution-enabling businesses

Encouraged by its unanticipated success in the Shell litigation, Milieudefensie is currently attempting to widen the circle of businesses liable for societal and human rights obligations. It has identified 30 "major polluting companies" by considering CO_2 emissions, industry sectors, and whether they operate internationally. Milieudefensie expects these companies to develop far-reaching climate plans.

The selected companies include Shell, already involved in proceedings with Milieudefensie, and ING, the largest bank in the Netherlands. Milieudefensie has sent ING a "notice of liability for unlawful climate policy". Milieudefensie demands that ING align its climate policy with the Paris Agreement, reduce its CO_2 emissions by at least 48%, and ensure it is not linked to the adverse climate impact of large business clients (by ceasing to finance and support polluting clients). Should ING neglect to comply, Milieudefensie will go to the Dutch courts to obtain an injunction to stop this unlawful conduct and prevent more damage.

While the claims against pollution-enabling businesses are still in the early stages, climate organisations like Milieudefensie seem committed to using legal channels to enforce corporate responsibility for climate action. As these cases progress, they could set important precedents for environmental responsibility in various sectors.

This responsibility is even more evident, with a growing trend of holding business directors personally liable and subject to criminal prosecution for their roles in pollution-enabling activities. Increasingly, regulations and case-law indicate that directors are also expected to bear responsibility, not only towards the company they govern but also towards stakeholders and society at large. Claims for damages are no longer limited to companies. It is conceivable that a court could find improper management if directors fail to take adequate measures to reduce CO_2 emissions within their companies and among their customers.

Climate-related regulations

It is important to note that the legal landscape is shaped not only by court precedents related to climate litigation, but also by changing regulatory frameworks. For instance, climate-related regulations are becoming increasingly comprehensive. New European regulations have recently come into effect or are in the preparation stages. These include the Corporate Sustainability Reporting Directive, the Sustainable Finance Disclosure Regulation, and the Corporate Sustainability Due Diligence Directive. In the Netherlands, the draft Responsible and Sustainable International Business Act is currently pending.

Insurance sector as an example

To illustrate the potential ramifications of evolving jurisprudence and legislation on climate responsibilities, we can look at the insurance sector and discuss its climate-related liability risks in more detail.

The context in which insurers operate is rapidly changing as extreme droughts, floods, forest fires, subsidence, and storms are becoming more frequent and result in serious damages. It is a challenge to keep these risks affordable and insurable. Insurers are currently grappling with questions about the adequacy of existing insurance products, the applicable terms and premiums, and whether certain exclusions should apply.

In addition to the questions derived from climate change-related damage, insurers are under pressure to comply with ever-evolving climate regulations. This may expose the insurer to liability claims if their policies lag behind applicable standards or perform below the standards of sustainability adopted by other companies.

Generally, insurers face an increasing risk of exposure to climate tort claims. Should the Dutch Shell case or litigations against ING succeed, insurers (including those operating internationally) may expect to be among the businesses targeted next. Several insurers have already been named in Milieudefensie's list of 30 major polluting companies.

Arguably, insurers have a duty of care to advance sustainable practices since the insurance sector, both in the Netherlands and globally, plays a significant role in fostering sustainability. Insurers are capable of exerting influence both directly and indirectly. Directly, through their core business, the insurance practice. Through instruments like deductibles, insured sums, limited coverage, exclusions, termination options, and inquiries at the time of application or renewal of coverage, insurers can encourage policyholders to embrace sustainability. Indirectly, insurers wield influence through their investment strategies and the use of premiums.

While some insurers are already engaged in sustainable practices with the adoption of proactive policies and are shifting towards a client base committed to sustainability, this trend is expected to grow since judicial and legislative developments (and financial exposure) are compelling them to do so.

Potential impact of the newest developments

The legal actions and initiatives outlined above show that a wide range of public bodies and commercial organisations could be held liable for human rights obligations or violation of newly introduced regulations. Not only governments but also polluting companies (e.g. Shell) and pollution-enabling companies (e.g. ING) should be aware of the potential risks of having to defend themselves against climate-related claims.

We note that internationally operating companies should consider the possibility of potential claims in the Netherlands due to the Act of the Settlement of Mass Claims in Collective Action, which allows for easier collective action. This makes the Netherlands a favourable jurisdiction for addressing environmental and human rights issues (see the winter edition of Disputes Digest 2023).

The court rulings and regulations discussed in this article underline the importance of compliance across industries. In particular, we anticipate heightened exposure to liability in sectors such as industrial manufacturing, agriculture, automotive, financial services, consultancy and the legal profession due to their climate-related activities.

Conclusion

In conclusion, the discussions and court cases mentioned above illustrate a profound shift towards accountability for climate-related responsibilities across a spectrum of businesses. Dutch courts have been at the forefront of climate litigation globally, most notably with the Urgenda case.

These court rulings, combined with evolving regulatory frameworks, are creating a landscape in which both governments and direct and indirect polluters face increased litigation risks. In particular, companies such as Shell and ING have been at the forefront of these legal challenges, underlining how the scope of liability has been extended to financial and advisory sectors that enable or support polluting activities. As climate litigation continues to develop, there is transformative pressure on industries and sectors to adopt high environmental standards. In short, the effects of climate litigation are spreading like wildfire.

2024 IBA Guidelines on Conflicts of Interest in International Arbitration

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The IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) should be recognised as the single most important soft-law instrument in international dispute resolution. They reflect *best practice* standards pertaining to impartiality and independence of arbitrators, as well as disclosures in specific circumstances. Even though they are not legally binding, these Guidelines are frequently incorporated into arbitration agreements and rules. They are applied or referred to as a *benchmark* in challenges to arbitrators or arbitral awards.

The IBA Guidelines provide a widely accepted framework for identifying and managing conflicts of interest in international arbitration. By offering standardised criteria, they promote consistency and predictability in arbitration proceedings. They help ensure that arbitrators are free from conflicts of interest that could compromise their independence and impartiality, thereby safeguarding the fairness and legitimacy of arbitration.

The 2024 revision

Since their introduction in 2004, the IBA Guidelines have become a go-to guide for arbitrators, counsel, and arbitral institutions in identifying conflicts of interest and assessing the need for disclosures. The Guidelines were first revised in 2014. A decade later, the IBA Guidelines have been updated, following a survey held among arbitration professionals and stakeholders by the IBA Arbitration Committee in 2022 and a public consultation.

While the 2024 amendments may appear relatively modest in comparison to the changes adopted in 2014 and amount to *fine-tuning* rather than an overhaul, they introduce notable updates, which align the IBA Guidelines with the recent developments in arbitral practices worldwide.

The two-part structure has been retained. Part I covers the overarching principles concerning impartiality, independence and disclosure. Part II lists common scenarios in international arbitration, which are categorised in a 'Red', 'Orange' and 'Green' traffic-light system.

Principles

General Standard 1 (General Principle of Impartiality and Independence) now confirms that the obligation of impartiality and independence does not extend to the time period during which an award may be challenged before any relevant courts or other bodies (i.e. arbitration institutions). This amendment clarifies that the obligation of impartiality and independence ceases once the tribunal has made its final award. However, the obligation does extend to the time reserved for any correction to the arbitral award. The IBA Guidelines now provide that where a dispute is referred back to the same arbitral tribunal, a fresh round of disclosure and review of conflicts *will* be necessary as opposed to *may* in the 2014 Guidelines.

The amendment to General Standard 2 clarifies that when a justifiable doubt exists (examples can be found in the Non-Waivable Red List), an arbitrator should decline the appointment in question or refuse to act. A new General Standard 3(e) has been introduced, which advises arbitrators against accepting

appointments, or resigning following an appointment if they believe disclosure is necessary, but the arbitrator is impeded by professional secrecy rules or other confidentiality obligations.

General Standard 4 (Waiver) has been updated to include a presumption of knowledge of any facts or circumstances that a party would have discovered upon a "reasonable enquiry", thus reflecting the parties' *duty of curiosity.* This reiterates the responsibility of a party to conduct its own investigations in relation to potential conflicts of interests involving arbitrators (whether currently appointed or to be appointed in the future). A failure by a party to object to an arbitrator within 30 days after gaining knowledge (through disclosures or otherwise) of a fact or circumstance that could amount to a potential conflict of interest constituted a waiver of that party's right to "raise any objection based on such facts or circumstances at a later stage". The exceptions, of course, are the Non-Waivable Red List items or the Waivable Red List items, for which the express consent of all involved was not obtained. General Standard 4 has now been revised to extend this rule to any facts or circumstances that a party could have learned through "a reasonable enquiry […] conducted at the outset or during the proceedings."

In General Standard 6 (Relationships), to adjust to the evolving structure of international legal practices, the IBA Guidelines now make a more general reference to the arbitrator's employer (rather than simply a reference to a law firm).

Specific scenarios: new disclosure obligations

The traffic-lights system lists common situations likely to occur in arbitration practice and provides non-exhaustive examples of where a conflict of interest may be present or perceived:

- The Red List consists of two parts: Non-Waivable and Waivable Red Lists; where a conflict of interest exists from the perspective of a reasonable third person having knowledge of the relevant facts and circumstances. The Waivable Red List covers situations that are serious but not as severe as the Non-Waivable Red List.
- The Orange List; where, in the eyes of parties, doubts may arise as to the arbitrator's impartiality or independence, and the arbitrator has a duty to disclose such situations.
- The Green List; where no appearance and no actual conflict of interest can exist, and arbitrators have no duty to disclose such situations.

No substantive changes were made to the Red List. The Green List introduces a single new circumstance in the 2024 Guidelines when the arbitrator, acting as arbitrator in another matter, heard testimony from an expert appearing in the current proceedings.

The most significant changes were introduced to the Orange List, which was expanded. Disclosure is now required when:

1. The arbitrator currently serves, or has acted within the past three years, as an expert for one of the parties or appointed by counsel in unrelated matters (3.1.6 and 3.2.9)
2. The arbitrator and another arbitrator are lawyers in the same law firm or have the same employer (3.2.1)
3. The arbitrator has, within the past three years, been appointed to assist in mock-trials or hearing preparations on more than three occasions by the same counsel or the same law firm (3.2.10)
4. An arbitrator and counsel for one of the parties currently serve together as arbitrators in another arbitration (3.2.12)
5. An arbitrator and their fellow arbitrator(s) currently serve together as arbitrators in another arbitration (3.2.13)
6. The arbitrator is instructing an expert appearing in the arbitration proceedings for another matter where the arbitrator acts as counsel (3.3.6)
7. The arbitrator has publicly advocated a position on the case, whether in a published paper or speech, through social media or on-line professional networking platforms, or otherwise (3.4.2)
8. The arbitrator holds an executive or other decision-making position with the administering institution or appointing authority regarding the dispute and in that position has participated in decisions in the arbitration (3.4.3).

Final comments

The 2024 revisions to the IBA Guidelines on Conflicts of Interest in International Arbitration include changes in arbitral practice since 2014 and reflect recent debates within the international arbitration community. In the coming years, the IBA Guidelines will continue to play a crucial role in promoting transparency, fairness, and integrity in international arbitration. Their consistent application is necessary to help protect arbitration from the criticism and potential abuses to which it is exposed as a private method of dispute resolution, and contribute to the effectiveness and credibility of arbitration.

CAJAC: potential new rules for arbitration proceedings between Africa and China

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China's status as one of the world's largest producers and commercial traders, dealing with over 126 countries as of 2024, is well known. What many people do not know, however, is that over 53 of the countries China deals and trades with are in Africa.

Establishment of CAJAC

Growing trade and investment between China and Africa are just some of the factors that led to the establishment of the Chinese Africa Joint Arbitration Centre **(CAJAC)** in 2015. Other factors include the diversity of individual legal systems across African countries and the need for neutral and cost-effective mechanisms for resolving commercial disputes between African and Chinese parties.

Members of the CAJAC include the Arbitration Foundation of Southern Africa **(AFSA)**, Shanghai International Arbitration Centre, Beijing International Arbitration Centre, Shenzhen Court of International Arbitration, Nairobi International Arbitration Centre and the Organization for the Harmonization of Business Law in Africa. Reflecting its membership, the CAJAC has the mandate and jurisdiction to administer alternative resolution mechanisms for international trade and commercial disputes arising between China and other African countries, specifically along the African Belt and Road and in the formation of a BRICS countries (Brazil, Russia, India, China and South Africa) arbitral mechanism.

Importantly, the establishment of CAJAC is a departure from the standard African framework adopted for international arbitration, which is based on European and western practices and precedents similar to those of the United Nations Commission on International Trade Law **(UNCITRAL)** (on which China's international arbitration legislation is not based).

Potential Changes to CAJAC Rules

In 2021 and 2022, there had been talks on significant reforms to China's arbitration laws, which include, among others, reforms relating to:

a. foreign arbitral institutions permitted to conduct foreign-related arbitration business in mainland China;
b. arbitration agreements and the *kompetenz-kompetenz* doctrine that proposes a departure from the requirement that an arbitration agreement contain the essential elements of (a) an intention to arbitrate, (b) matters that are subject to arbitration, and (c) a designated arbitration commission. The proposal only requires the element of an intention to arbitrate in order to validate an arbitration agreement;
c. tribunals empowered to grant interim relief,

including Chinese courts, arbitral tribunals and emergency arbitrators;

d. grounds for setting-aside and non-enforcement of arbitral awards whereby the proposed amendment will unify the grounds for setting aside domestic awards and foreign-related awards; and
e. Ad hoc arbitration in that Ad hoc arbitration proceedings will now be permitted for foreign-related commercial disputes.

If adopted, these reforms are expected to impact current CAJAC rules and promote the establishment of new rules that will bridge the gap between China and Africa and support the adoption of an exclusive dispute resolution mechanism, such as CAJAC, between China and the African continent.

Conclusion

The success of CAJAC and the vision it encompasses cannot be understated. It has laid the foundation for much needed discussions among BRICS (Brazil, Russia, India, China and South Africa) countries on the arbitrational mechanisms currently in use and the need for reforming them given the admission of Egypt, Ethiopia, Iran and the United Arab Emirates to BRICS, and the growing need for a uniform dispute resolution mechanism to serve the member states.

CMS Banking Disputes Report 2024

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In partnership with the litigation analytics company, Solomonic Litigation Intelligence, CMS has published its Banking Disputes Report 2024. The Banking Disputes Report 2024 is a data-driven review of the UK's Banking and Finance sector's dispute-related activity that identifies key trends, how banking disputes are being determined in 2024 and what might lie ahead. *Click here to download the full report.*

Key findings of the 2024 report:

— The Banking and Finance sector had the highest volume of new High Court claims filed in 2023. This trend continued into Q1 2024. A high volume of claims in the Banking and Finance sector is not uncommon (the sector tends to compete for the highest volume of claims each year with the Professional Services sector and the Construction sector). However, the volume of claims filed in 2023 in the Banking and Finance sector was the highest volume since Solomonic started tracking data in 2014. The claims data includes claims filed against banks and other financial institutions, as well as claims filed by these parties.

— The claims data for 2023 demonstrated the "long tail" of market events with claims still being filed following the collapse of Lehman Brothers in 2008. In contrast, there is also evidence of a more recent trend: claimant law firms looking to file claims quickly after market events to establish a reputation as the lead claimant firm on a matter.

— The Financial Ombudsman Service **(FOS)** has reduced pending complaint volumes and wait times for decisions over the last year. In 2024, the FOS is expecting a rise in complaints of fraud, irresponsible lending, and account closures, as well as the same (high) volume of complaints regarding motor finance commission payments as in 2023.

— Use of the British Banking Resolution Service **(BBRS)** by Small and Medium-sized Enterprises **(SMEs)** remains subdued and the future of the BBRS remains uncertain.

— Various interest groups are calling for a new banking dispute resolution tribunal to be formed to allow SMEs to determine banking disputes without having to incur the often significant legal costs associated with High Court proceedings.

— Arbitration is consistently used by the Banking and Finance sector to determine disputes. Data from the London Court of International Arbitration shows that the Banking and Finance sector has accounted for 25% of its total caseload on average over the last six years.

High Court claims filed in the UK involving banks over the last year included:

— A high number of claims brought by litigants in person against retail banks.

— Various claims related to Norwich Pharmacal/ Bankers Trust disclosure orders seeking information from banks to trace the flow of funds following fraud.

— Numerous claims under guarantees, including personal guarantees, where the principal obligor has defaulted.

— Multiple claims for differing types of relief where banks have frozen a customer's account and/or purported to end the banking relationship. For example, injunctions were sought to compel banks to complete a compliance review and give access to funds held, as well as to restrain a bank from terminating a customer's contract. Claims were made for restitution for failure to release funds to customers; damages for closing an account without notice; and breach of mandate for failing to pay out funds on instruction.

— Various examples of "follow on" claims brought against banks based on regulatory findings.

— Claims that alleged fraudulent misrepresentation against banks. In one case, a participant in a syndicated loan arrangement alleged fraudulent misrepresentation against an investment bank as the original lender and arranger of the syndicated loan.

— Various examples of claimants (often litigants in person) seeking to claim that mortgages were void, requiring the repayment of sums paid to the bank during the life of the mortgage.

Our report takes a deeper dive into the following UK banking litigation hot topics for 2024:

— **Debanking –** the claims data for 2023 show claims filed in the High Court after the termination of a customer banking relationship. This follows a high-profile debanking scandal in the UK in 2023. However, a 2024 High Court judgment addressed some of the challenges faced by such claims.

— **Class actions –** class action risk is on the rise generally across Europe and banks continue to feature in pending claims across all available UK class action regimes. This trend is very likely to continue throughout 2024 and beyond.

— **Motor finance commission claims –** motor finance secret commission claims are increasing in the UK and 2024 will be an important year in defining whether these claims are viable and shaping where and how such claims are to be determined.

— **ESG litigation –** ESG litigation action against banks and other financial institutions in the UK are in the early stages. As we move through 2024 and into 2025, the FCA is likely to take some form of regulatory action under anti-greenwashing rules about to be introduced and litigation either via activists or claimants seeking commercial returns.

— **The future of the Quincecare duty –** important case law in 2023 narrowed the boundaries of claims based on a breach of the Quincecare duty (i.e. a bank's duty to refrain from processing a payment instruction if inquiry of the payment reveals fraud to the customer). However, we are likely to see a continuation of these claims in 2024 and beyond, and therefore we look at the available judicial guidance on what might amount to red flags for putting a bank on inquiry of potential fraud and how claims might be reframed on the basis of an alleged "retrieval duty" (i.e. a bank's duty to try promptly to recover payments that have been made pursuant to fraud).

— **Redress schemes –** following the public and political spotlight placed on redress schemes in the UK in 2023 and into 2024 as a result of the Post Office/Horizon scandal, we look at the 2023 report by the All-Party Parliamentary Group on Fair Business Banking into redress schemes and what a good scheme looks like from a consumer's perspective.

For further information on the above topics, please download our *full report*.

Participation of third parties in proceedings before the Court of Justice of the European Union

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The role of third parties in CJEU proceedings

A third party in court proceedings is a person or entity other than the plaintiff or defendant, who may or may not have a legal relationship with either of the parties that are the subject of the litigation. A third party may be a person or organisation that voluntarily, on its own initiative, provides the court with a legal, factual or expert opinion on the subject matter of the litigation (also known as an *'amicus curiae'*).

In the context of the admissibility of the participation of a third party, in proceedings before the Court of Justice of the European Union **("CJEU")**, the following types of proceedings must be distinguished:

a. preliminary proceedings brought as a result of questions referred to the CJEU for a preliminary ruling by the national courts of the member states;
b. proceedings brought as a result of direct actions, which include:
   - actions for failure to fulfil obligations;
   - actions for annulment or failure to act brought against the EU institutions; and
   - other direct actions.
c. proceedings on appeals against judgments of the CJEU.

Proceedings for a preliminary ruling

The Statute of the CJEU does not provide for the participation of third parties (other than those expressly mentioned in Article 23) in preliminary ruling proceedings and, consequently, for the submission of an amicus curiae by such persons. However, this does not mean that the participation of a third party in such proceedings is impossible.

In accordance with Article 23 of the Statute of the CJEU, a third party may submit its written observations to the CJEU in preliminary ruling proceedings where it has been admitted to participate in the main proceedings (i.e., in the proceedings before the national court, which has referred a question to the CJEU for a preliminary ruling on the basis of Article 267 of the Treaty on the Functioning of the European Union **("TFEU")**).

The CJEU has indicated that:

"By the term 'parties', that article refers solely to the parties to the action pending before the national court (Case 62/72, Bollmann v Hauptzollamt Hamburg-Waltershof [1973] ECR 269, paragraph 4). (...) *Consequently, a person who has not sought or been granted leave to intervene before the national court is not entitled to submit observations to this Court under that provision."* (Case C-181/95, paragraph 6)

The same position has been adopted by the CJEU in other cases such as C-403/08 and C-429/08. The third party should therefore become a party to the dispute or an intervener at the national level in order to be able to participate in the preliminary proceedings before the CJEU.

Thus, if a third party (e.g. a business organisation, professional association or NGO) wishes to intervene in the proceedings before the CJEU, it is necessary to consider the possibilities of participating in the case before the national court.

In most jurisdictions, it is permissible for a third party to intervene on the side of one of the litigants. An intervener has the same rights and obligations in legal proceedings as the party to which it has joined. However, the intervener must meet specific standing requirements. In particular, it must be able to demonstrate its own legitimate interest in having a particular judgment. Some jurisdictions such as Poland also allow specific third parties such as NGOs, business organisations, consumer organisations or certain public authorities to intervene as a party in cases that concern their area of activity or impact the interests of their members.

A more liberal approach was taken by the CJEU in Case C-266/16, in which the CJEU allowed the Moroccan Confederation of Agriculture and Rural Development to participate in the preliminary ruling procedure before the CJEU, even though the Confederation was not a party to the proceedings before the national court. The national court had only permitted the Confederation to join *"as an interested party"* in the proceedings pending before it. Similarly, in Case C-426/16, the Global Action in the Interest of Animals **("GAIA")** was accepted as an intervening party by the CJEU because the national court in Belgium had admitted this organisation to participate in the proceedings before the national court due to a *"collective moral interest"* in the protection of animal welfare.

It is therefore possible, in certain circumstances, for an entity to seek admission to the preliminary ruling procedure as an interested party, even if it is not acting as a party before the national court. However, eligibility for admission is subject to the prior acceptance of the interested party status by the national court.

In practical terms, it is most advantageous for a third party to intervene in the proceedings before the national court at the stage *before* the national court refers questions for a preliminary ruling to the CJEU. In that case, the third party may participate in the entire proceedings before the CJEU and provide its written observations.

However, it is also possible to intervene in the main proceedings after the national court has referred questions for a preliminary ruling to the CJEU. In such a case, the third party must accept the state of the case as it stands at the time that the CJEU is informed of its accession (Article 97 of the Rules of Procedure of the CJEU). If the third party intervenes in the proceedings after the expiry of the time-limit for the submission of written observations, and a hearing has been set in the case, the third party will not be entitled to submit written observations, but may still participate in the hearing.

Direct actions and appeals against the judgments of the General Court

The possibilities for third parties to intervene in proceedings initiated by direct action or in appeal proceedings against the judgments of the General Court are broader than in preliminary ruling proceedings.

Article 40 of the Statute of the CJEU provides that the right to intervene is available to any person if that person can justify an interest in the outcome of a case submitted to the CJEU. However, such a person may not intervene in cases between:

a. member states;
b. the institutions of the Union; or
c. member states and the institutions of the Union (Article 40(2) of the Statute of the CJEU).

According to the well-established position of the CJEU, an "interest in the outcome of the case" must be understood *as a direct and present interest in the outcome of the claims made in the case and not as an interest in relation to the pleas or arguments raised.* As a general rule, *an interest in the outcome of a case can only be regarded as sufficiently direct if that outcome is capable of altering the legal position of the person seeking leave to intervene* (per the order of the President of the CJEU dated 10 March 2023, C 611/22 P, paragraph 7).

However, it is settled case-law of the CJEU that *a representative professional association, whose objective is to protect the interests of its members, may be granted leave to intervene where the case raises questions of principle, which are liable to affect those interests of the association's members* (per the order of the CJEU dated 27 April 2023, C-337/22 P, paragraph 9).

Intervention is objectively limited in that the intervener may only support, in whole or in part, the claims of one of the parties. It may not put forward its own claims (per the judgment of the CJEU dated 4 February 2020, C-515/17 P).

Future-Casting: Disputes and Sustainability in Singapore, Australia and the United Kingdom

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"An ounce of prevention …" – APAC urged to embrace sustainability and ESG as litigation and regulation are on the rise

Sustainability and ESG are now buzzwords in the Asia-Pacific **(APAC)** with the inundation of ESG-focused financial products in the region. Yet, the regional landscape for ESG-related litigation remains relatively limited with most cases in Singapore involving the prosecution of individuals or companies for corruption-related charges.

The lack of ESG-related litigation in the region, however, is not expected to last as more ESG-focused legislation and circulars addressing environment, social and governance continue to be released by local authorities. In this article, we will dive into some of the more interesting ESG developments and examine their implications on the wider litigation landscape.

We will also look at how ESG-related litigation risk is maturing in the UK as a comparison.

Regulation of ESG Funds by MAS

With the influx of ESG-focused investment schemes and retail funds into Singapore, the Monetary Authority of Singapore **(MAS)** launched several codes and regulations with a view to reducing the instances of greenwashing. Some of these include the Code on Collective Investment Schemes **(CIS Code)**, the Securities and Futures (Offers of Investments) Collective Investment Schemes) Regulations 2005 **(SF(CIS)R)** and Circular No. CFC 02/2022 on Disclosure and Reporting Guidelines for Retail ESG Funds **(MAS Circular)**.

In particular, the MAS Circular and the Third Schedule of the SF(CIS)R lays out mandatory disclosure in the prospectuses of ESG-focused financial products. The prospectus must:

— disclose the ESG focus of the specific scheme (e.g. climate change, the reduction of greenhouse gas emissions, or achieving a low carbon footprint);
— detail the relevant ESG criteria, methodologies or metrics used to measure the attainment of the scheme's ESG focus, whether they are third-party or proprietary ratings, labels, or certifications;
— detail the risks associated with the scheme's ESG focus and investment strategy;
— describe the sustainable investing strategy of the scheme, incorporating the binding key elements of that strategy and explaining how the investment process will be implemented on a continuous basis; and
— if the scheme uses a benchmark index to measure the progress of how the scheme's ESG goals are being achieved, explain how the benchmark index is consistent with or relevant to the scheme's investment focus.

The MAS Circular also sets out Enhanced Reporting and Disclosure requirements in the annual reports of these ESG funds. The annual report must include:

— a narrative on how and the extent to which the scheme's ESG focus has been met during the financial period, including a comparison with the previous period (if any);
— the actual proportion of investments that meet the scheme's ESG focus (if applicable); and
— any action taken by the scheme to attain its ESG focus.

In addition, the MAS Circular provides that, where appropriate, additional information regarding the ESG Fund, its manager or index provider should also be disclosed to investors or prospective investors on the manager's website or by other appropriate means. Such information includes:

— how the ESG focus is measured and monitored;
— related internal or external control mechanisms in place to monitor compliance with the scheme's continued ESG focus;
— sources and usage of ESG data or assumptions made where such data is lacking;
— due diligence carried out in respect of the ESG related features of the scheme's investments; and
— any stakeholder engagement policies that may shape the corporate behaviour of companies that the scheme invests in and contribute to the attainment of the scheme's ESG focus.

Climate-related disclosures for SGX-listed issuers and large non-listed companies

In February 2024, the Accounting and Corporate Regulatory Authority **(ACRA)** and Singapore Exchange Regulation **(SGX RegCo)** announced details on mandatory climate reporting for Singapore Stock Exchange-listed issuers and large non-listed companies.

The mandatory climate-related disclosures **(CRD)** will be introduced using a phased approach, with all listed issuers mandated to report and file their annual CRD using requirements aligned with the International Sustainability Standards Board **(ISSB)** standards from FY2025.

For large non-listed companies **(NLCos)** (companies with an annual revenue of at least SGD 1bn and total assets of at least SGD 500m) the mandatory reporting of CRD annually will begin in FY2027. ACRA will monitor the experience of listed issuers and large NLCos before introducing reporting requirements for other companies.

As some companies are already reporting their CRD using other international standards and frameworks, ACRA will exempt large NLCos with parent companies that are reporting CRD under certain circumstances. A large NLCo whose parent company reports CRD using ISSB-aligned local reporting standards or the equivalent will be exempted from reporting and filing CRD with ACRA, provided that the large NLCo's activities are included within the parent company's report that is available for public use. Other large NLCos whose parent companies report CRD using other international standards and frameworks (for example, the Global Reporting Initiative Standards or the Task Force on Climate-related Financial Disclosures Recommendations) will be exempted from reporting their CRD with ACRA for a transitional period of three years from FY2027 to FY2029. Whether these exemptions will be extended will depend on global developments on the adoption and recognition of other standards and frameworks.

The ACRA initiative to mandate CRD reporting by businesses is a sign of Singapore's commitment to sustainability and environmental responsibility with a view to making Singapore a global business hub. By advancing climate reporting within the business community, the nation hopes to tackle the pressing challenges of climate change and to equip companies to be able to meet the demands from their lenders, customers and investors for sustainability-related information.

Case Study: ASIC v Mercer Superannuation

Within APAC, the Australian Securities and Investments Commission **(ASIC)** commenced civil penalty action in early 2023 against Mercer Superannuation **(Mercer)** at the Federal Court of Australia, alleging greenwashing by Mercer in the reporting of the sustainability of its investments. The ASIC alleged that Mercer, which oversees AUD 65 bn in assets, misled members about its Sustainable Plus fund by claiming that it excluded companies involved in carbon-intensive fossil fuels. However, Mercer was found to have made significant investments in 15 companies involved in carbon-intensive fossil fuels, including BHP, Glencore, AGL Energy and Whitehaven Coal. Mercer was also found to have invested in 34 companies across the alcohol and gambling sectors, including Budweiser, Carlsberg, Heineken, Crown Resorts and Tabcorp, despite informing members that investments from these two sectors were excluded.

This case carried particular importance for the Australian courts as it was the first greenwashing litigation of its kind in the financial services industry. The barrister appearing on behalf of the ASIC, Tim Begbie, KC, urged the Australian Federal Court to impose a penalty that sends a strong message of deterrence against future wrongdoing. The intention was to avoid undermining businesses that expend effort and costs into structuring their financial products and services to reflect consumer sustainability and governance concerns. A deterrent sentence will dissuade recalcitrant parties from making false claims about the sustainability of their businesses.

The ASIC has since launched further legal action against other investment funds and superannuation giants, such as Vanguard, Active Super and Future Super, signalling that ESG and sustainability-related litigation are no longer a thing of the future, but very much part of present-day reality in the APAC region.

Workplace Fairness Legislation: a safeguard against workplace discrimination

Focusing on the 'social' and 'governance' elements of ESG, the Singapore government has been working with the Tripartite Partners – the Ministry of Manpower **(MOM)**, the National Trade Unions Congress **(NTUC)** and the Singapore National Employers Federation **(SNEF)** – to come up with legislation prohibiting workplace discrimination.

Due to be enacted in the latter half of 2024, the Workplace Fairness Legislation **(WFL)** aims to eradicate workplace discrimination with respect to five sets of characteristics:

1. age;
2. nationality;
3. sex, marital status, pregnancy status, caregiving responsibilities;
4. race, religion, language; and
5. disability and mental health conditions.

The WFL will cover all stages of employment from pre-employment (i.e. the recruiting phase) to in-employment (i.e. for appraisal, promotion and training), and end-employment (i.e. during termination or dismissal).

Interestingly, the WFL will only govern direct discrimination, defined as "making an adverse employment decision because of any protected characteristic", but not indirect discrimination, because the Tripartite Committee is concerned that prohibiting indirect discrimination may impose burdensome legal obligations on employers and cause greater uncertainty for employers and employees alike.

The WFL will work hand-in-hand with the existing Tripartite Guidelines on Fair Employment Practices to ensure employers enact anti-discriminatory practices in the workplace. However, unlike the upcoming WFL, the Tripartite Guidelines do not have the force of law in Singapore.

Employers will also be required to put in place proper grievance-handling processes to avoid situations where employers may attempt to retaliate against those who report workplace discrimination and harassment. Retaliatory actions may include wrongful dismissals, unreasonable denial of re-employment, unauthorised salary deduction, deprivation of contractual benefits, harassment and any other act done to victimise the individual who made the report.

Claims relating to workplace discrimination will undergo compulsory mediation at the Tripartite Alliance for Dispute Management **(TADM)** first with referrals

to the Employment Claims Tribunal **(ECT)** for adjudication a last resort. Employers will also have their interests safeguarded given that the ECT is empowered to strike out frivolous claims from disgruntled employees making baseless allegations against their employers.

ESG-related litigation from an UK perspective

In the UK, organisations are increasingly being targeted by activists who are bringing novel legal claims on ESG-related matters to create public attention for their complaints and drive changes in corporate behaviour.

Recent examples of activist claims in the UK include:

— *Client Earth v Shell* (2023), where Client Earth alleged that the Shell board was in breach of directors' duties in failing to adopt and implement an energy transition strategy that aligns with the Paris Agreement.
— Client Earth's attempt to judicially review a decision by the Financial Conduct Authority **(FCA)** in 2023 to approve the prospectus of a UK oil and gas company.

Both claims by Client Earth were ultimately unsuccessful. However, an important purpose behind the legal claims of activists is to raise the profile of the issues at the centre of these complaints and to ensure that boards are aware that corporate actions may be subject to public challenge.

In addition to the activist actions described above, there is a growing risk of ESG-related litigation from claimants who are seeking commercial returns. Some examples of the types of litigation risks in the UK include:

— Consumer-led litigation and group action risk with sophisticated claimant law firms and litigation funders seeking out opportunities to pursue claims. There is a risk of consumer claims where "green" investments or other products have been sold on a misleading basis.
— "Securities litigation" where shareholders are bringing claims against companies as a result of alleged losses suffered. These claims are brought under the statutory liability regimes provided for by the UK Financial Services and Markets Act 2000 and common law claims in fraud or negligent misstatement. Claims are usually brought by way of group action and there is an increasing risk of these claims arising from ESG-related market disclosures and ESG-related corporate scandals.
— Claims in the context of commercial agreements or M&A transactions, where a counterparty considers that the information provided was inaccurate. These types of claims are likely to increase as ESG-related disclosures become more commonplace.
— Claims for the alleged misconduct of companies within their supply chain and also parent company responsibility for the actions of overseas subsidiaries.
— Shareholder derivative claims alleging breach of director duties. For example, ESG-related claims may allege breach of section 172 (duty to promote the success of the company having regard to the company's operations on the community and the environment) and section 174 (duty to exercise reasonable care, skill and diligence) of the English Companies Act 2006.
— Claims against directors arising from a statement in a directors' report, strategic report, directors' remuneration report or any separate corporate governance statement where it is alleged that they have been dishonest or reckless in making the relevant statement or knew it concealed a material fact (per section 463 of the English Companies Act 2006).

Unsurprisingly, many of the ESG litigation risks currently prevalent in the UK are likely to start materialising in Singapore and Australia in the near future, given the maturing regulatory landscape and growing awareness of ESG breaches in the APAC region.

Conclusion

The increased focus on ESG regulation in Singapore is likely to mean a corresponding increase in ESG-related litigation in the near future. This is already taking place in Australia and the UK, and companies in Singapore and the APAC region are advised to ramp up their ESG-related capabilities and study current and future regulations to avoid becoming embroiled in costly ESG disputes that could result in reputational damage.

Apart from climate and environment-related regulation, true sustainability requires companies to take a broad, holistic approach to their environmental, social and governance challenges. Upcoming legislation and regulations on employers should also be a focal point for companies as they strengthen their ESG policies. The old adage 'an ounce of prevention is worth a pound of cure' comes to mind and this is an opportune moment for companies to make ESG compliance a priority in their businesses.

The new Proposal for a Spanish Class Action Law

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Introduction

The proposal for a Spanish law on class actions (the "Class Actions Bill") represents a significant legislative development aimed at improving the procedural mechanisms for collective redress in Spain. The bill is aligned with European Union directives on collective redress and seeks to provide an effective legal framework for the protection of collective interests. This summary details the main provisions, objectives and implications of the draft law, aimed at an audience familiar with the legal terminology and concepts.

Main provisions of the draft law

Scope and objectives
The main objective of the Class Action Bill is to facilitate the aggregation of claims where a large group of individuals have been similarly affected by an unlawful practice. This includes consumer protection, environmental damages, data protection and other types of claims where collective interests may be at stake. By consolidating these claims, the bill seeks to enhance judicial efficiency, reduce litigation costs and improve access to justice.

Standing and representative entities
A notable feature of the bill is the specification of who has standing to bring class actions. The bill allows certain qualified entities, primarily consumer associations and other non-profit organisations, to represent the interests of the affected class. These entities must meet specific criteria to ensure that they have the capacity and standing to act on behalf of the class, including financial solvency and a proven track record of defending collective interests.

Types of class actions
The Class Action Bill provides for the adoption of two main types of class actions:

1. Opt-in class actions: these actions require potential claimants to actively join the lawsuit. This model ensures that only those who explicitly consent to be part of the action are included.
2. Opt-out class actions: this model includes all potential claimants within the defined class (i.e. without requiring the claimants to actively join the lawsuit) unless they explicitly opt-out from taking part in the action. This approach is designed to maximise participation and address collective harm more comprehensively.

Procedural aspects
1. **Initiation and certification:** The process begins with the filing of a class action by a qualified entity. The court must then certify the action, assessing whether the criteria for a class action are met, including the commonality of issues and the adequacy of the representative entity. This certification step is crucial to filter out frivolous or inappropriate claims and ensure that the class action mechanism is used judiciously.
2. **Notification and communication:** Once a class action is certified, the representative entity must notify potential claimants. The bill provides that clear and effective communication strategies must be deployed to ensure that affected individuals are informed about the action and their rights. This includes the use of various media outlets and platforms to reach a broad audience.

3. **Conduct of proceedings:** Class actions under the Class Action Bill are designed to streamline procedural steps and encourage efficient resolution. This includes provisions for case management conferences, the ability to consolidate similar claims, and the use of alternative dispute resolution mechanisms where appropriate. The draft law also emphasises the importance of proportionality, ensuring that the procedures do not become unduly burdensome for either party.

Remedies and damages
The draft law allows for a range of remedies, including injunctive relief, damages and restitution. A significant feature of the bill is the potential for awarding punitive damages in cases involving particularly egregious conduct by either party. The distribution of any damages awarded must be managed in a transparent manner, with mechanisms in place to ensure that affected individuals receive their fair share. The draft law also contemplates the creation of a compensation fund managed by a court-appointed administrator for the distribution of collective damages.

Financing and costs
The financing of class actions is a critical issue addressed by the Class Action Bill. It allows for third-party financing under regulated conditions to ensure transparency and avoid conflicts of interest. In addition, the draft law provides guidelines for the recovery of legal costs, often adhering to the "loser pays" principle, but with protections to avoid undue financial burdens on representative entities.

Appeals and settlements
The draft law establishes specific procedures for appealing decisions in class actions, recognising the need for review by higher courts to ensure fairness. It also encourages settlements as a means of resolving class actions efficiently. Any proposed settlement must be approved by the court, which will assess its fairness and appropriateness to the affected class. The bill ensures that settlements are not used to circumvent the legal protections afforded to claimants.

Implications and considerations

Impact on legal practices
For legal practitioners, the introduction of the Class Action Bill requires a deeper understanding of class litigation strategies and associated procedural nuances. Law firms may need to develop specialised teams to handle these types of cases, given their complexity and the potential for significant financial and reputational implications for clients.

Consumer protection and access to justice
The draft law, once enacted, is expected to significantly improve consumer protections by providing a more robust mechanism for addressing widespread harms. It also promotes access to justice by reducing barriers for individuals to seek redress, especially in cases where individual damages would not justify the costs of individual litigation.

Regulatory and compliance considerations
Companies operating in Spain should pay particular attention to the implications of the Class Action Bill for their compliance programmes. The possibility of class actions raises the stakes for non-compliance with consumer protection laws, data privacy regulations and other relevant legal standards. Proactive compliance and risk management strategies will be essential to mitigate the risk of class action litigation.

Potential challenges
Although the project offers numerous benefits, it also presents challenges. The risk of abusive litigation, the complexity of managing large-scale class actions, and the potential overburdening of judicial resources are concerns that will need to be addressed. Effective judicial oversight, clear procedural guidelines, and safeguards against frivolous claims will be crucial to the successful implementation of the project.

Conclusion

The Spanish Collective Actions Bill represents a crucial step in modernising Spain's approach to collective redress. By providing a structured and effective framework for collective actions, the draft law seeks to improve access to justice, enhance consumer protection and ensure the efficient resolution of widespread damages. Legal professionals, businesses and consumers will need to adapt to this new landscape, recognising both the opportunities and challenges it presents. With careful implementation and monitoring, the Class Actions Bill has the potential to significantly improve the legal redress mechanisms available in Spain, bringing them in line with European standards and best practices.

Building cost-effective arbitration clauses: drafting tips and strategies for clients in SEE/CEE

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In the SEE/CEE region, arbitration proceedings often have the undeservedly bad reputation of being overly expensive, with parties forced to break the bank for legal fees and arbitration costs. However, while this may be the case in some situations, an expensive arbitration usually results from brashly drafted arbitration clauses which may be effective but are not cost-effective.

The costs of arbitration proceedings can be reduced drastically by drafting an arbitration clause best suited for the contract at hand. Not all arbitration clauses should follow the same pattern, as factors such as the value of the contract and the parties (e.g. their nationality, location of their seats) will vary.

Nevertheless, the points below are a few tips that companies in the SEE/CEE region should consider when drafting an arbitration clause:

— **Choose local law as applicable law for the contract –** Parties in the SEE/CEE region often provide for a law which they are not familiar with in their arbitration clauses. It is also common for parties, eager to finish the negotiations, to unwisely agree to the law chosen by their counterparty without realising the future effect of this decision. This is an important consideration when drafting an arbitration clause as the cost of the arbitration proceedings will vary drastically if the parties choose, for example, English or French as the applicable law instead of Serbian, Montenegrin or another local law. This is especially the case where parties in the transaction have no connection to the UK, and significantly increases the costs of arbitration proceedings. Furthermore, hiring UK or France-based legal professionals well-versed in these legal system will be more costly than hiring legal experts from the SEE/CEE region where a local law has been chosen.

— **Choose a local arbitration institution –** The arbitration proceedings before the local arbitration institutions, such as the Permanent Arbitration Court at the Croatian Chamber of Economy, Permanent Court of Arbitration at the Chamber of Commerce and Industry of Serbia are more cost-effective than arbitration proceedings before institutions such as the ICC, LCIA, and PCA. For example, an arbitration proceeding for a EUR 100,000 dispute will cost you approximately EUR 6,000 at the Croatian Chamber of Economy and EUR 7,700 at the Serbian Chamber of Commerce. An arbitration proceeding before the ICC will cost you more than EUR 30,000, which is almost five times the cost of taking the proceedings before local arbitration institutions. Therefore, companies should carefully consider the choice of an institution and make sure that it is the best fit in the event of a dispute.

— **Choose an affordable city for the place of arbitration –** The parties usually opt for cities that are also the seat of the arbitration institution they have chosen: London for the LCIA, Paris for the ICC, and The Hague for the PCA. Such locations are not mandatory or cost-effective since these cities are known for being expensive in terms of accommodation, food and travel costs. You can choose a city which is drastically more affordable, such as Belgrade (offering well-connected air lines with most of the European cities), Budapest, or even smaller cities like Subotica close to Serbian-Hungarian border and Palic lake, which will reduce the costs of arbitration proceeding substantially. The only thing you need for the arbitration proceeding is a spacious conference room where the parties and tribunal can be comfortable. Such conference rooms can be found in most medium-sized cities.

— **Choose the local language as the language of the proceedings –** Choosing the local language, provided that the parties and members of the tribunal are fluent in it, can eliminate translation costs. These can be very high in foreign jurisdictions if there is a significant amount of evidence to be presented to the tribunal. This is especially valid for languages spoken in the territory of former Yugoslavia.

— **Provide for mediation or negotiation precondition –** Resolving disputes through alternative methods before resorting to arbitration can be more time consuming, but cost-effective. Therefore, consider requiring mediation or negotiation as a precondition to arbitration while drafting your arbitration clause as this could significantly reduce the potential costs of arbitration proceedings.

— **Provide for an expedited procedure –** Rules for expedited procedures tend to apply automatically when the amount in dispute is below a defined threshold. However, you can also choose to opt in for the expedited procedures for larger disputes, depending on the arbitration institution. These procedures are highly cost-effective, significantly reducing the expenses associated with arbitration. They are also time-efficient, taking considerably less time to resolve, which can further save on operational costs. This allows businesses to reallocate resources into growth and development rather than keeping funds tied up in reserves. As the saying goes, "time is money", and opting for expedited procedures exemplifies this perfectly.

— **Provide for a single arbitrator:** You can always choose a single arbitrator instead of a panel of arbitrators to resolve your dispute. Choosing a single arbitrator over a panel of arbitrator can result in significant cost reductions. Not only will you be saving on fees for the arbitrators, but you will also be saving associated expenses such as travel costs and accommodation.

In conclusion, drafting the arbitration clause should be more than just a task on your to-do list, or something that is done quickly and thoughtlessly in an eagerness to close a transaction. Drafting arbitration clauses should be a strategic move that can save money and set the stage for quicker, more efficient dispute resolutions that will keep your business running smoothly.

By implementing these tips and strategies when drafting an arbitration clause, you can prevent major headaches down the line. So, dive into the details, draft withdiligence, and equip yourself with clauses that safeguard your interests efficiently and effectively.

Sultan of Sulu, or the passing of time in international arbitration

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"The proud do not prevail for long but vanish like a spring night's dream. In time the mighty, too, succumb: all are dust before the wind." As the *Tale of the Heike* reminds us, all things must disappear one day, and arbitral institutions are no exception. Two recent matters in France and the US illustrate the diverse approaches taken by state jurisdictions to handle the eventual disappearance of those in whom the parties had placed their trust and, by contrast, the evolution of French case-law to preserve the efficiency of arbitration clauses.

France: *Sultan of Sulu* and a novel necessity of renewal of the intent of the parties

In 1878, Jamalul Alam Kiram, the Sultan of Sulu whose realm covered part of the island of Borneo and the nearby Sulu archipelago, and two private individuals, Alfred Dent and Baron Gustavus Von Overbeck, signed a contract whereby the Sultan ceded to the individuals a number of rights and obligations over territories in North Borneo. In return, a sum of money was to be paid annually to him and, upon his death, to his descendants. For decades, the agreement continued to be executed between the descendants of Jamalul Alam Kiram and eventually the state of Malaysia, succeeding to the rights of Dent and Von Overbeck following the State of Sulu (now Sabah) joining Malaysia in 1963.

The contract contained a clause which – although its scope is disputed by the parties due in part to its redaction in the jawi script of the classical Malay language – mandated that any dispute between the parties be submitted to the now-defunct office of the British Consul-General in Brunei.

In 2013, a self-proclaimed Sultan of Sulu attempted a military invasion of Sabah, and Malaysia stopped paying the price stipulated in the agreement. Eight Filipino citizens claiming to be the successors of Jamalul Alam Kiram brought an arbitration claim in Spain against the State of Malaysia, claiming breach of contract. In 2020, a partial award was rendered by the Spanish arbitrator fixing the seat of arbitration in Madrid. The claimants filed an application in France for *exequatur* of this partial award before the Paris judicial court, which was granted.

Malaysia appealed the judgment, claiming in part that even if the 1878 agreement included an arbitration clause, this clause had lapsed due to the disappearance of the office of the British Consul General in Borneo. The claimants, however, affirmed that the arbitration clause was valid despite the disappearance of the proposed arbitrator.

In the meantime, a final award on the merits was rendered in Spain, which granted USD 14.92bn to the claimants.

On 6 June 2023, the Paris Court of Appeal (Paris, 6 June 2023, n°21/21386) ruled that although the parties had validly agreed upon arbitration to settle their disputes, it could be inferred from historical documentation that the reference made to the British consul general in Borneo was inseparable from the personal trust that the parties placed in the office holder at the time, William Treacher. The Court therefore found that the clause had lapsed due to the disappearance of the office of British Consul General in Borneo in 1946. In the absence of a new agreement between the parties regarding the arbitrator to be designated, the arbitration clause was unenforceable.

The ruling's reasoning is debatable as although the Paris Court of Appeal, in support of its findings, asserts that the reference to the Consul-General was made *intuitu personae* to William Treacher, his name is not mentioned in the clause. Furthermore, one could reasonably have expected, due to the nature of the contract and the foreseeable effects of the passing of time, that Treacher would eventually pass on, in all likelihood before the lapsing of the agreement, which provided for the continuation of the contract after the death of the original signatories. The parties therefore would likely have wanted arbitration to take place in spite of the death of their preferred arbitrator, regardless of the latter's personal qualities.

When faced between the choice of protecting the effect of the arbitration clause (i.e. the intent of the parties that disputes be settle by arbitration) and that of respecting the (alleged) will of the parties regarding its implementation, the Court made the choice of following the latter, leading to the parties' primary intent of entrusting the matter to arbitration being effectively superseded.

US: *Baker Hughes Saudi Arabia v. Dynamic* and a restrictive approach to the consent to arbitration

On 14 September 2021, the Emirates Maritime Arbitration Centre **(EMAC)** was merged via royal decree of the Ruler of Dubai with the Dubai International Financial Centre **(DIFC)** in order to form the new Dubai International Arbitration Centre **(DIAC)**.

The royal decree ordering the merger provides, under its article 6 (a), that *"All agreements to resort to arbitration at [EMAC and DIFC], concluded by the effective date of this Decree, are hereby deemed valid. The DIAC will replace the Abolished Arbitration Centres in considering and determining all Disputes arising out of the said agreements unless otherwise agreed by the parties thereto."* It was therefore the intent of the arbitral institution, although not necessarily that of the parties, that any prospective arbitration under its predecessors' rules be transmitted to DIAC.

A dispute emerged between the Saudi subsidiary of American energy company Baker Hughes and several subsidiaries of offshore oil & gas specialist Dynamic Industries International regarding the supply of materials, products and services for an oil project to be performed by Dynamic in Saudi Arabia.

The contract between the parties stated that any dispute would be referred to by either party to, and finally resolved by, arbitration under the Arbitration Rules of the DIFC with the DIFC in Dubai being designated as the seat of the arbitration proceedings.

Baker Hughes Saudi Arabia brought the dispute before the United States District Court for the Eastern District of Louisiana, to which Dynamic opposed the arbitration clause and petitioned the Court for a motion to dismiss for *forum non conveniens* or to compel arbitration. In response, Baker Hughes Saudi Arabia claimed that the disappearance of the DIFC made the arbitration provision unenforceable despite the DIAC's overt claim to being its successor.

On 6 November 2023 *(Baker Hughes Saudi Arabia Co. v. Dynamic Industries et. al., n° 2:23-cv-1396, 6th November 2023),* the Louisianian court dismissed Dynamic's claim for *forum non conveniens* due to the lack of an available forum before which to enforce the arbitration clause and ruled, in line with earlier cases, that it was outside of its powers to rewrite the parties' contract and compel arbitration in a forum to which the defendant had not contractually agreed since *"whatever similarity the DIAC may have with the DIFC, it is not the same forum in which the parties agreed to arbitrate".*

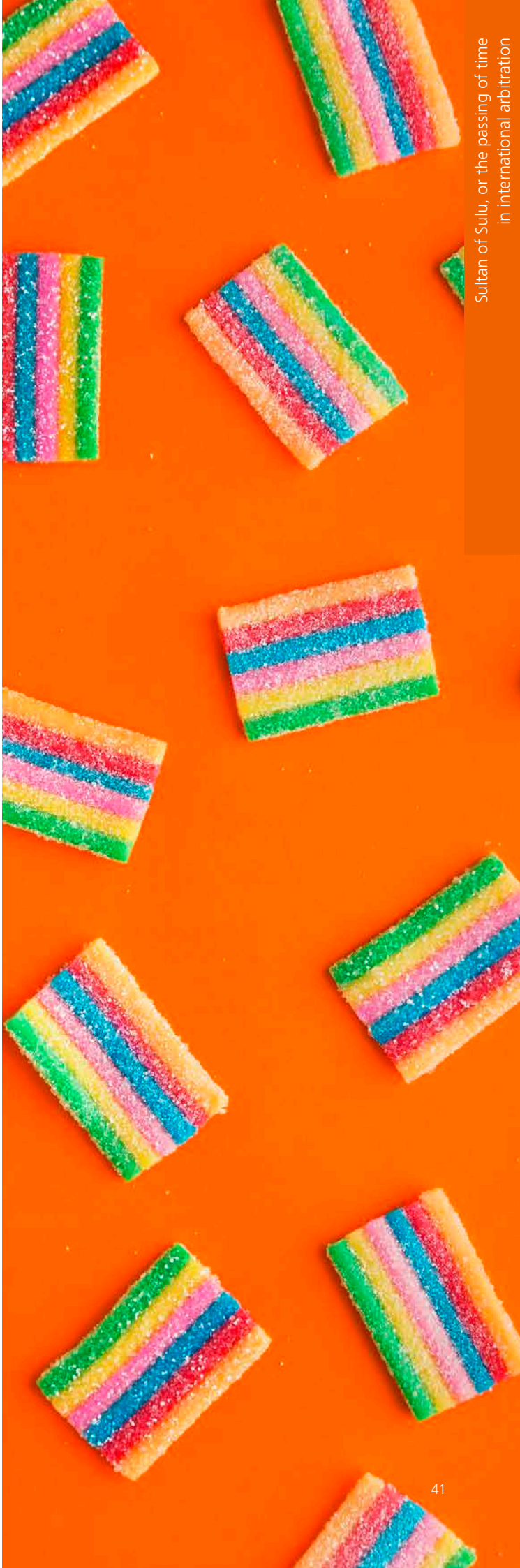
From a French perspective, the ruling serves to illustrate the comparative friendliness of French jurisdictions to arbitration, and, by extension, the peculiarities of the *Sultan of Sulu* case. It is indeed case-law in France that the disappearance of an arbitral institution does not in itself prevent arbitration from taking place before its successor (Paris, 20 March 2012, n° 10/23578), as it is the will of the parties to arbitrate, rather than the particulars of the planned arbitration, which should in principle prevail. This position is shared by other civil law jurisdictions around the world (see, in Brazil, *Lojas v. Capital,* n° 0008851-23, 19 August 2023).

The position of French jurisdictions has long been not to frustrate the lawful will of the parties to remove a dispute from the jurisdiction of national courts, it being illustrated by the fact that art. 1452 *et seq.* and art. 1505 4° of the French Civil Code provide that a party in risk of a denial of justice may ask a French support judge to appoint an arbitrator as long

as the will of the parties to arbitrate is clear, even when the dispute presents no link with France.

Therefore, it remains to be seen in the coming years whether the *Sultan of Sulu* ruling announces a shift from the long held preference in French jurisdiction for the efficiency of arbitration clauses towards a more restrictive understanding of the will of the parties.

In any case, any party planning on arbitration as a means of dispute resolution may want to plan for the eventual demise of those in whom they place their trust. Indeed, if all men and even states are mortal, arbitral institutions are doubly so.



The new wave in ESG Litigation: biodiversity litigation

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Introduction

Biodiversity, which can be defined as the variety of life within species, across species and across ecosystems, is key for sustaining living conditions on earth and is linked to the availability of fresh water, oxygen, soil to grow food and protection against dangerous sun exposure. However, as revealed in international scientific reports, biodiversity faces significant challenges.

Indeed, biodiversity is a hot topic, an emerging international ESG claim trend (see the Climate Litigation Report of Grantham Institute 2023, *https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf* (lse.ac.uk)), and at this moment the first collective biodiversity lawsuits have been started in the Netherlands and UK.

Research by Cambridge University[1] shows that approximately 50 rights-based biodiversity **(RBB)** claims have been filed around the world. In comparison, human rights and climate change **(HRCC)** litigation is far more developed with already more than 2,000 cases file worldwide.

Developments in case-law and legislation as catalyst for RBB litigation

It is expected that RBB litigation will grow rapidly due to the urgency to protect biodiversity. In this respect, proven legal concepts and strategies in HRCC litigation can be used as blueprints for RBB litigation.

In addition, there are recent legislative developments, such as the Corporate Sustainability Reporting Directive **(CSRD)** and the Corporate Sustainability Due Diligence Directive **(CSDDD),** which mandate stricter reporting and due diligence obligations related to biodiversity and will be explained in greater detail below.

Developments in case-law

The broader interpretation of human rights-based jurisprudence and concepts in relation to socio-economic rights in HRCC litigation, including, for example, in respect of 'standing' and 'harm', often serves as a basis for RBB litigation.

The best-known examples of HRCC litigation in the Netherlands are the Urgenda case against the Dutch state and the Shell case of May 2021. The legal concepts used in these cases are being applied to other HRCC litigation.

On top of national case-law, there is international confirmation that human rights must include protection against dangerous climate change in the Climate Granny Case rendered by the European Court of Human Rights (ECtHR).

In addition, the link between human rights and biodiversity is increasingly recognised internationally.

In 2021, the UN Human Rights Council affirmed the right to a clean, healthy and sustainable environment, explicitly noting the negative impact of biodiversity loss on this right.

[1] A Rights Turn in Biodiversity Litigation, César Rodriguez-Garavito and David R. Boyd, Cambridge University

The UN General Assembly followed in 2022 with a similar recognition, stressing that biodiversity loss poses a serious threat to the human rights of both current and future generations. This loss, according to other UN treaty bodies and rapporteurs, directly affects fundamental human rights such as the right to life, health, and food, and also affects the rights of children and indigenous peoples.

Increase of international legislation and agreements

The Paris Agreement served as a catalyst for the increase in HRCC litigation since 2015.

For RBB, Kunming-Montreal Global Biodiversity Framework **(GBF)** and the 'Paris Agreement of Nature' performed an equal function. This non-binding framework is based on the UN Convention on Biological Diversity of 1992.

Article 10 of the Biodiversity Treaty contains an obligation to adopt measures for the use of biological resources to avoid or minimise the adverse impact on biological diversity.

In addition, multiple legislative developments will create stricter norms on biodiversity.

The Biodiversity Treaty includes interesting side agreements with certain obligations such as the Glasgow Leaders' Declaration on Forests and Land Use.

At EU level, there are ambitious biodiversity legislative initiatives following the Green Deal (EU Nature Restoration Plan and Zero Pollution Action Plan). The Taxonomy Regulation determines the types of business activities with a positive impact on biodiversity.

In annexes to the recently adopted CSDDD, it is explicitly stated that the above-mentioned biodiversity obligation is included in the due-diligence obligation. This will have significant impact on biodiversity obligations.

A similar but softer due-diligence obligation can also be indirectly applied to international companies based on the UN Guiding Principles on Business & Human Rights and the OECD Guidelines on Business Conduct.

The reporting obligations in the CSRD also have an impact on biodiversity. In this respect, it is also relevant that the Climate Disclosure Standards Board **(CSDB)**, Global Reporting Initiative **(GRI)** and European Financial Reporting Group **(EFRAG)** are working on several standards, such as the Biodiversity Standard.

Other relevant legislative developments include the 'Finance for Biodiversity Pledge', which relates to the financing of biodiversity.

In certain jurisdictions legislation is already in place that provides rights to nature, such as rivers, including Ecuador, Canada, New Zealand, India and Bangladesh.

Improvement of scientific evidence and guidance in urgency, damages and direct causal connection

Scientific insights form the foundation for HRCC litigation, both in demonstrating the need for action and in formulating legal arguments.

As a result, RBB litigation often chooses equally reliable sources and many of the studies have topics that overlap.

In 2022, the Science Based Targets Initiative was initiated to set science-based targets for companies to maintain biodiversity. In May 2023, the Science-Based Targets for Nature **(SBTN)** were revealed, which is considered a significant step forward for organisations to combat the global challenge of nature loss by balancing scientific rigor and feasibility. The guidance includes integrated technical guidance enabling companies to assess and prioritise their environmental impact on freshwater quality and quantity alongside land targets for the protection and restoration of terrestrial ecosystems. These targets aim to reduce negative impact and enhance a positive outcome for nature and people across companies and their direct operations and supply chains. The SBTN emphasises the interconnectedness of biodiversity, climate change, and sustainable business practices.

Conclusion

Biodiversity litigation is the new kid on the block in ESG litigation, but it has the potential to significantly impact businesses in the near future.

RBB litigation is maturing rapidly due to lessons learned in HRCC litigation and other developments.

Multinationals should be aware of this trend and consider adequate measures and governance improvements to avoid or minimise the negative effects that its business operations and supply chains may have on biodiversity.

Foreign investment protection in Peru and its active role in ICSID arbitration

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Peru has a legal framework for the promotion and protection of foreign investments, which consists of the 1993 Peruvian Constitution, specific legislation, a large number of Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) with Investment Chapters and investor-state dispute settlement mechanisms.

As a member state of the International Centre for Settlement of Investment Disputes Convention (the **"ICSID Convention"**) since September 1993, Peru has played an active role in investment arbitration, given the large amount of cases the State arbitrated involving many different types of investment activities. Peru has also adopted the State Response and Coordination System in International Investment Disputes (SICRECI) as of December 2008.

This article explains the legal framework adopted by Peru for the promotion and protection of foreign investments in the country.

The 1993 Peruvian Constitution and the Peruvian Arbitration Law

Peru's 1993 Constitution states that private initiative is free and exercised in a social market economy. National and foreign investments are also subject to the same conditions, with certain exceptions.

The Peruvian Constitution provides that disputes under contractual relations are to be resolved in the State's Judicial Branch or through arbitration, in accordance with dispute settlement mechanisms that may be provided under the relevant contract or in accordance with the law. The Constitution also establishes that the State and other public legal entities may submit their disputes arising from contractual relationships for resolution through national or international arbitration in the manner provided by national law.

The Peruvian Arbitration Law under Legislative Decree No. 1071 of September 2008 is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985 (as amended in 2006). This law establishes a monist system that applies to national or international arbitrations in Peru, with only a few exceptions.

In accordance with its membership of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the Interamerican Convention on Commercial Arbitration of 1975 (the Panama Convention), Title VIII of the Peruvian Arbitration Law provides for the recognition and enforcement of foreign arbitral awards. Pursuant to this law, ICSID arbitral awards are treated as a final judgment handed down by Peru's national courts, as also established in Article 54.1 of the ICSID Convention.

Investment treaties celebrated by Peru

During the 1990s Peru entered into a wide range of BITs, with the objective of promoting and protecting foreign investments in the country. These treaties were signed by Peru during the 1990s are considered first generation treaties, given their limited content and scope. Second-generation BITs were subsequently forged between Peru and Colombia in 2007, and Japan in 2008. As at the time of writing this article, Peru has signed 33 BITs.

Peru signed its first FTA in April 2006, the Peru – United States Trade Promotion Agreement (the **"US FTA"**), which entered into force in February 2009. After the US FTA, a new period of investment treaties began for Peru, with the creation of various FTAs.

Several of these FTAs contain Investment Chapters, such as its FTAs with Australia, Canada, Costa Rica, Chile, China, Mexico, Singapore, and South Korea. Peru also has multilateral free trade agreements with Investment Chapters under the Additional Protocol of the Pacific Alliance of 2016 (which was signed by Chile, Colombia, Mexico and Peru) and, more recently, the Comprehensive and Progressive Agreement for Transpacific Partnership of 2018 (CPTPP) which entered into force in January 2022.

All of these investment protection treaties contain investor-state dispute resolution mechanisms, such as arbitration before the ICSID, *ad hoc* arbitration under the UNCITRAL Arbitration Rules or other systems that the disputing parties may agree upon. At the time of writing, Peru has also been involved in five investment arbitration cases operating under UNCITRAL Arbitration Rules, which are administered by the Permanent Court of Arbitration of the Hague (the **"CPA"**).

In addition, concession contracts in Peru typically contain arbitral agreements that include the option of international arbitration for higher amounts in dispute (between USD 10m and USD 30m mainly with ICSID and UNCITRAL. Some Legal Stability Agreements and Licence Contracts for the Exploitation of Hydrocarbons also contain ICSID clauses, which provide greater protection for foreign investors. These protections derive from the Peruvian constitution that recognises national and international arbitration in contracts with the State.

The State Response and Coordination System in International Investment Disputes

In December 2006 the Peruvian state adopted Law No. 28933 which established the State Response and Coordination System in International Investment Disputes (SICRECI), a centralised system in charge of the administration of Peru´s defence in investment arbitrations. On October 2008, Peru enacted Supreme Decree No. 125-2008-EF, which regulates Law No. 28933.

The SICRECI consists of:

1. a coordinator (the Ministry of Economy and Finance or **"MEF"**);
2. a Special Commission which itself forms part of the MEF; and
3. the public entities of the central government that have either signed contracts granting rights or guarantees to investor concessionaries, or represent Peru in the signing of investment protection treaties.

The Special Commission is directly involved in the administration of the defence of the State in investment arbitrations. The Commission's permanent members include representatives from the MEF (acting as President), the Ministry of Foreign Affairs, the Ministry of Justice and Human Rights, and the Agency for the Promotion of Private Investment. The Special Commission also has non-permanent members for each case, including: (1) a representative of the Ministry of Commerce and Tourism, in disputes involving investment treaties; and (2) a representative of each public entity involved in the investment dispute.

The Special Commission represents Peru in the direct settlement negotiations with foreign investors and appoints the law firms that will work on the defence of the case. In general, Peru is represented by distinguished foreign law firms together with local counsel, which is one of the reasons Peru has achieved good results in its cases.

Peru´s active role at the ICSID

As of the time of writing this article Peru has been involved in a total of 44 ICSID cases, consisting of 25 concluded cases and 19 pending cases. Each of these investment arbitrations deal with different types of disputes concerning various sectors such as mining, hydrocarbons, infrastructure, banking, road concessions, electricity concessions, ports concessions, telecommunication concessions, among others.

As many as 17 of Peru´s ICSID cases are based on contracts: 13 are concession contracts, two are licence contracts for the exploration and exploitation of hydrocarbons, and two are stability agreements. These cases are very different, and are not the result of a specific political decision by the State.

In general, Peru has achieved good results in ICSID cases considering the large number of cases in which it has been involved. However, in recent years there has been an increase in cases where the State has lost (i.e. amounting to a total of eight cases). These lost cases involved investment treaties, concession contracts, and stability agreements.

Conclusions

Peru has a solid legal framework for the promotion and protection of foreign investments, which includes the 1993 Peruvian Constitution, the 2008 Peruvian Arbitration Law (based on the UNCITRAL Model Law), and several BITs and FTAs with Investment Chapters. The SICRECI, led by the MEF and the Special Commission, plays a key role in representing the Peruvian State in investment arbitration, for which it uses distinguished law firms. As of today, Peru has been involved in 44 ICSID cases (25 concluded and 19 pending). Seventeen of these cases are solely contractual in nature, and 27 are based on investment treaties. Peru also has investment arbitrations under the UNCITRAL Arbitration Rules administered by the CPA.

Although Peru's results before the ICSID continue to be positive, the scales are beginning to tip in the other direction. Peru had unfavourable results on eight occasions and more losses are possible given the large number of ICSID arbitrations now in progress.

Impact of the new Belgian tort law (Book 6 to the Belgian Civil Code) on insurance risks

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On 1 February 2024, the Belgian parliament adopted the law for a new Book 6 of the Belgian Civil Code, which contains new rules on tort liability. The main aim of the legislation is to codify the current rules and to write down what is now confirmed by case-law. While the fundamental principles of Belgian tort liability remain largely unchanged, the adoption of 55 articles replaces the previous 6 and will inevitably lead to innovations and important changes.

The new rules, which apply to facts that give rise to liability occurring after the legislation's official enactment, will enter into force six months after the rules are published in the Belgian State Gazette. A specific date has not yet been confirmed, but the new rules will probably come into force on 1 January 2025. The introduction of the new Book 6 will have a significant impact on insurance. In this article, we will discuss some of the fundamental changes brought on by the Act and the implications of these changes on insurers. While this article provides a glimpse into key points introduced by the new Book 6, this study is not exhaustive. Insurers should familiarise themselves with all the changes so that they can adapt their practices accordingly.

Importantly, while the new Book 6 provides supplementary provisions, the Belgian Insurance Act remains predominantly mandatory, taking precedence over Book 6. However, the new provisions will supplement parts of the law not addressed in insurance and other agreements.

Furthermore, the new Book 6 should be read in conjunction with Book 1 of the Belgian Civil Code, which contains general provisions and defines certain terms. For insurers, it might be advisable to consider whether the current wording used in insurance contracts needs to be amended to bring it into line with the new terminology.

Concurrence

One significant change introduced by the new Book 6 is the shift in the regime governing concurrence. The current regime is based on a general prohibition of concurrence. This means that it is not possible to combine contractual and non-contractual liability claims, subject to some exceptions, which causes problems in practice.

While the distinction between contractual and extra-contractual liability will remain in the new Book 6, the principal prohibition of concurrence will be erased, and concurrence will become the basic rule. This will allow a contracting party to choose between contractual and non-contractual liability claims against co-contractors. If an injured party seeks compensation from his co-contractor on a non-contractual basis for non-performance of a contractual obligation,

the co-contractor may invoke certain contractual defences. However, this is not possible in the case of damage resulting from (1) impairment of physical or psychological integrity; or (2) a fault committed with intent to cause damage.

These new concurrence rules may extend coverage obligations under liability insurance covering extra-contractual liability, necessitating careful consideration by insurers.

Abolition of the quasi-immunity of auxiliary agents

Current law applies the quasi-immunity of the auxiliary agent. If an employee, company director or subcontractor commits a fault in the course of his duties as an auxiliary, the customer (i.e. the principal) who has suffered damage as a result of that fault is legally prevented, except in exceptional circumstances, from making a claim directly against that employee, director or subcontractor. The customer or principal can only bring a claim against its own contractual counterparty (i.e. the contractor). In other words, auxiliary agents are quasi-immune to claims by the principal.

This regime is now to be abolished. Under the new rules, the principal will not only have a contractual claim against its contractual counterparty, it will also have a second tort claim directly against the auxiliary. Faced with such a claim, the auxiliary can base its defence on both contracts. It can rely on the terms and liability limitations in the contract concluded between itself and the contractor to which the principal is not a party. It can also rely on the terms and limitations of liability in the contract concluded between the contractor and the principal. This shift may complicate claims handling and require adjustments in insurance underwriting and premium assessment.

Moving away from classical organ theory in the context of liability of legal entities

Additionally, the new Book 6 departs from the classical organ theory regarding the liability of legal entities, where the actions of directors are directly imputed to the legal entities.

The new Book 6 abandons this principle and introduces objective liability. Legal entities will be liable without fault for the harmful consequences of errors committed by members of their organs (including *de facto* directors) during and as a result of the performance of their duties. This change might require certain insurance policies (e.g. D&O policies) and definitions to be revised to comply with the new legislation. In addition, the shift from direct liability of legal persons to qualitative liability may also indirectly affect the coverage provided by certain insurance policies.

Liability for one's own deed

Article 1382 of the old Belgian Civil Code will be replaced by Article 6.5 of the new Book 6. It will be important to change the terminology in insurance contracts to reflect this.

The new Article 6.6 lists two types of faults, namely the breach of a statutory rule and the breach of the general standard of care. The definition of the general standard of care has also been amended and the law includes a list of criteria that can be taken into account to meet this standard. The following list is a codification of case-law:

- The reasonably foreseeable consequences of the conduct;
- The proportionality of the risk of the harm occurring, its nature and extent in relation to the efforts and measures necessary to prevent it;
- The state of the art and scientific knowledge;
- The requirements of good workmanship and good professional practice; and
- The principles of good management and organisation.

Liability of minors

Furthermore, regarding the liability of minors, the bill introduces an interesting distinction between minors under the age of 12 years and minors between the ages of 12 and 18 years.

A minor under the age of 12 years cannot be held liable for his/her own fault or for any other act giving rise to liability.

A minor between the ages of 12 and 18 years is liable for damage caused by his/her own fault or any other event giving rise to liability, but this minor is subject to the discretion of the court, which may decide that no compensation is due or that the compensation is limited. The court must decide in accordance with the principles of equity, taking into account the circumstances and the situation of the parties, including their financial situation.

Importantly, if the minor´s liability is covered by an insurance contract, the court cannot decide that no compensation is due or limit compensation to an amount lower than the amount covered by the insurance contract. This is in line with existing case-law of the Belgian Court of Cassation.

Contrary to what was initially proposed, compulsory family insurance was not introduced because there was too much opposition from the insurance industry.

Causal link

Traditionally, causation in Belgian law has been determined by the doctrine of equivalence, which states that without fault, the damage would not have occurred as it did.

This rule is now codified in the new Book 6. However, recognising that this doctrine has sometimes led to absurd outcomes, the new Book 6 introduces several exceptions or mitigations.

One such exception is the concurrent cause exception, which acknowledges that the doctrine of equivalence fails when several events occur simultaneously, and each event is sufficient in itself to cause the damage. For instance, consider a scenario where two arsonists start fires on opposite sides of a building simultaneously, and both fires combine to burn down the building. Under the traditional doctrine of equivalence, neither arsonist may be held liable because each could argue that the damage would have occurred regardless of their actions. However, the new Book 6 remedies this by considering each event as a cause of the damage.

Another exception is provided in cases of manifest unreasonableness, where the link between the event giving rise to liability and the damage is so remote that it would be manifestly unreasonable to attribute the damage to the defendant. This exception aims to address situations where the causal link is uncertain or too distant to hold the defendant liable.

Additionally, the new Book 6 introduces the concept of causal uncertainty. In cases where there is uncertainty about a person's fault as the cause of the damage, some form of proportional liability will be imposed based on the likelihood that their fault caused the damage. This concept resembles the doctrine of loss of chance, applied at the level of causation rather than damage.

Furthermore, the new Book 6 includes an article on uncertainty regarding the identity of the liable person. This provision ensures, for example, that several companies that have sold a defective product contribute to compensation in proportion to their market share. This rule, based on the Dutch example, aims to ensure fair distribution of liability among multiple parties involved in causing the damage.

These changes in causation rules are aimed at addressing complexities and uncertainties in determining liability, ensuring a fair and just outcome in cases where multiple factors contribute to damage. Insurers will need to consider these nuances when assessing claims and settling disputes under the new legal framework.

Loss

Finally, under the new Book 6, anyone liable for damage is obliged to make full reparation, considering the concrete condition of the injured party. This principle reaffirms the fundamental obligation to compensate for harm caused. For insurers, this underscores the importance of considering the specific circumstances of the injured party when assessing claims and determining appropriate compensation.

A notable addition to the compensation rules is the concept of profit transfer to the benefit of the injured party when the liable party has infringed a right of the injured party or damaged their reputation with the intention of making a profit.

Regarding future damages, the new Book 6 introduces an innovation allowing the court to award interest if justified by overriding reasons relating to the protection of the injured party.

Given that the new Book 6 introduces articles defining different aspects of loss, including specific terms or types of damages, insurers will need to review these definitions and terminologies to ensure consistency with those used in their insurance policies. This alignment is crucial for clarity and transparency in claims processing and settlement.

Draft 7th Edition of the SIAC Rules: an overview of progressive reforms and key changes

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Introduction

In August 2023, the Singapore International Arbitration Centre **(SIAC)** introduced the draft 7th Edition of the SIAC Rules. In addition to substantively expanding the current SIAC Rules **(6th Edition Rules)** from 41 to 65, the Draft Rules introduce progressive reforms and key changes aimed at enhancing efficiency and flexibility in international arbitrations administered by the SIAC. The concept of proportionality is expressly introduced, with Draft Rule 3.5 providing that the SIAC and the Tribunal "shall act in the spirit of these Rules" and "shall endeavour to ensure… the expeditious and cost-effective conduct of the arbitration proportionate to the complexity of the claim and the amount in dispute".

The Draft Rules are expected to come into force later this year. Parties to existing SIAC arbitration agreements and parties who intend to include SIAC arbitration agreements in their documents should be aware of the key changes proposed by the Draft Rules. We set out some of the key changes proposed by the Draft Rules and highlight some issues that may arise for consideration.

Proposed Key Changes

Simplification of Processes & Increasing Collaboration

Measures are being introduced to ease case administration and simplify the process of commencing an arbitration. It is no longer mandatory to include a copy of the contract and arbitration agreement in the Notice of Arbitration **(NOA)** (Draft Rules 6.3 (d) and (e)).

The Draft Rules also aim to increase collaboration between parties in constituting the Tribunal. Parties are only required to comment on the number of arbitrators and procedure for the constitution of the Tribunal (Draft Rules 6.3 (g)), doing away with the current requirement under the 6th Edition Rules to nominate the arbitrator at the outset. The President of the SIAC Court may also use a list procedure to appoint a sole arbitrator or a presiding arbitrator in certain situations (Draft Rule 19.8). Parties should consider these provisions in their strategy for arbitrator appointments.

New Streamlined Procedure, Changes to the Expedited Procedure and Emergency Arbitration Process

The proportionality principle is reflected in the new Streamlined Procedure for claims up to SGD 1m, or where the circumstances warrant (Draft Rule 13.1). Draft Schedule 2 provides that parties may agree to have their claims determined by a sole arbitrator based on written submissions and documentary evidence only, without the entitlement to request for document production, or to file any fact or expert witness evidence. The final award must be issued within three months from the date of the constitution of the Tribunal, and will state the reasons on which it is based in summary form unless the parties agree otherwise. The Tribunal's fees and SIAC's costs are not to exceed 50% of the maximum amounts provided under the SIAC's Schedule of Fees unless determined otherwise by the Registrar.

The Expedited Procedure is now expanded to include claims of up to SGD 10m (Draft Rule 14.1(b)) (an increase from SGD 6m under the 6th Edition Rules) and where "the circumstances of the case warrant (it)" (Draft Rule 14.1(c)), which is wider than the alternative ground of "exceptional emergency" under the 6th Edition Rules.

The commencement and procedures of an Emergency Arbitration **(EA)** are streamlined. An EA application may now be filed prior to the filing of an NOA. Any challenge to the appointment of an Emergency Arbitrator must now be made within 24 hours from the date of receipt of the notice of appointment or from the date the circumstances became known or should have reasonably been known to that party (instead of within two days under the 6th Edition Rules). The Emergency Arbitrator must establish a schedule for the application within 24 hours of their appointment (instead of within two days under the 6th Edition Rules) and must make an order or award within ten days from the date of his/her appointment (instead of 14 days under the 6th Edition Rules) unless the Registrar extends the time.

Streamlining of existing consolidation and joinder provisions

The scope of when multi-contract and multi-party disputes may be heard by the same Tribunal is expanded. It is now possible to consolidate two or more pending cases "under SIAC's administration", as well as cases where "the arbitration agreements are compatible and (…) a common question of law or fact arises out of or in connection with all the arbitrations".

Greater Powers for Tribunal to Manage Proceedings

Tribunals are provided with greater powers to ensure fair and proportionate proceedings (relative to the cost and conduct of the proceedings). This includes providing the Tribunal with the power to determine issues preliminarily within 45 days where parties agree the determination will expedite resolution and the power to terminate arbitration or issue sanctions and awards in case of non-participation or non-compliance by a party.

Safeguarding the Composition of The Tribunal

The Draft Rules now address situations where parties engage in "sharp practices" by exploiting procedural rules for strategic advantage. These practices include deliberate attempts to stymie or disrupt proceedings and range from deliberate failures to comply with Tribunal's orders, failure to pay arbitral deposits, changing legal representation, or challenging the arbitrator. Tribunals will have the power to refuse proposed changes to party representatives, after considering the parties' views to "safeguard the composition of the Tribunal". (Draft Rule 10.5). While representation changes may be legitimate, this refusal power will allow Tribunals to consider such changes and safeguard against engineered conflicts of interest regarding Tribunal members.

However, refusal of a proposed change of party representative could risk rendering an award unenforceable if a party was unable to present properly its case. Article V(1)(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 **(New York Convention)** provides that a court may refuse to recognise or enforce an award if the party the award is invoked against successfully proves that it was unable to present its case.

Nonetheless, the threshold appears to be high. Courts have interpreted Article V(1)(b) to mean that parties must have an opportunity to be heard at a "meaningful time and in a meaningful manner"[1] and that Article V(1)(b) "concerns the impossibility rather than the difficulty of presenting one's case."[2]

In the ICSID Case No ARB/05/24 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, the Tribunal held that the late participation of Respondent's counsel who was from the same set of Chambers as the President of the Tribunal was "inappropriate and improper" and prohibited further participation of the proposed counsel in the case. The Tribunal held that under the ICSID Convention and as "a judicial formation governed by public international law", it had "an inherent power to take measures to preserve the integrity of its proceedings". However, as private commercial international arbitrations do not have the same protection under public international law and international conventions, these Draft Rules provide the Tribunal with the express power to maintain the integrity of its composition.

Proceeding with Less than Three Arbitrators

In the event of death, incapacity, resignation, withdrawal, or removal of an arbitrator in a three-member Tribunal during the course of the arbitration, the SIAC Court or the President may now determine that it is more appropriate to proceed with the arbitration without appointing a substitute arbitrator, after considering the views of the parties and the remaining arbitrators (Draft Rule 30.3). Article V(1)(d) of the New York Convention provides for challenges to awards on the ground that the "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties…". The provision of this power to the SIAC Court and the President under the Draft Rules means that parties would have agreed to proceed without a substitute arbitrator.

Updated Digital Practices

Provisions are introduced for modernised digital practices to provide greater flexibility, convenience, and cost savings for parties.

The SIAC Gateway is a centralised online case filing platform onto which all communications and documents are uploaded from the commencement of the arbitration. Hearings can be conducted in-person, hybrid or through video/teleconference (Draft Rule 39.2). Additionally, Tribunals are also required to discuss information security measures with parties to protect electronically shared data, reflecting the increased use of remote technologies in international arbitration (Draft Rule 61).

Other New Provisions

Other new provisions reflect and respond to developments in the practice of international arbitration, including (i) disclosing any third-party funding relationship in the NOA (Draft Rule 38); (ii) adopting environmentally sustainable procedures for the arbitration (Draft Rule 32.4(b)); and (iii) requiring the President is to consider principles of diversity and inclusion when appointing an arbitrator (Draft Rule 19.5). The Draft Rules also expressly provide that where the parties are of different nationalities, the sole or presiding arbitrator must be of a different nationality than the parties (unless otherwise agreed or it is appropriate not to be) (Draft Rule 19.7).

Conclusion

The Draft Rules refine existing arbitral processes and provide new measures that respond to the evolving needs of arbitration users at a time when international arbitration practice and specialised dispute areas continue to develop.

[1] Iran Aircraft Indus. v. Avco Corp., Courts of Appeals, Second Circuit, United States of America, 24 November 1992, 92-7217, 980 F.2d 141, 146; Karaha Bodas Co. (Cayman Islands) v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Indonesia), Court of Appeals, Fifth Circuit, United States of America, 23 March 2004, 02-20042, 03-20602.

[2] De Maio Giuseppe e Fratelli snc v. Interskins Ltd., Court of Cassation, Italy, 21 January 2000, 671, XXVII Y.B. Com. Arb. 492 (2002).

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