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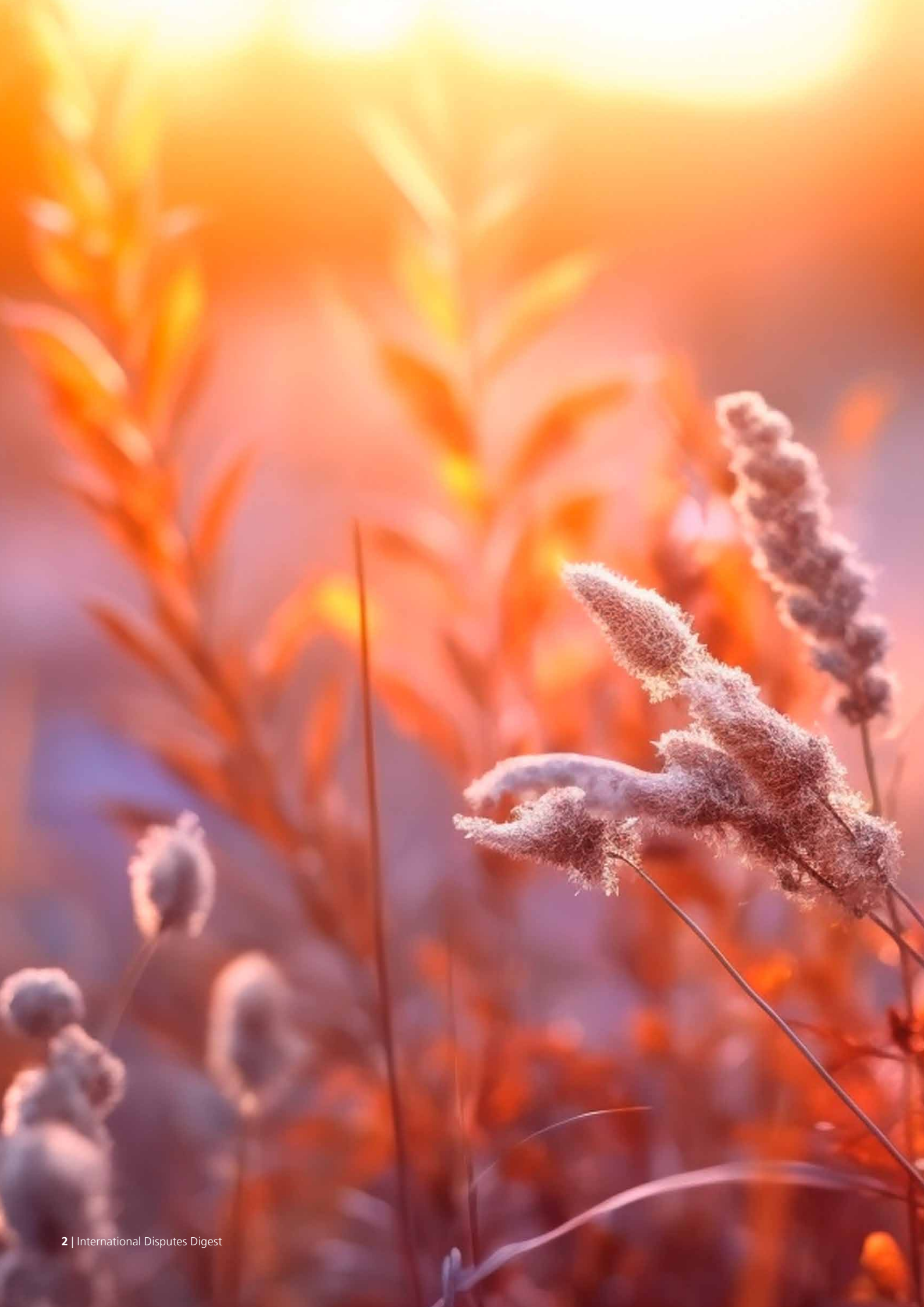

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Introduction

Welcome to our winter 2024 edition of the *International Disputes Digest,* analysing current trends in dispute resolution around the world with insights into the challenges facing the global business community and potential solutions to meet them.

As 2024 draws to a close, those challenges are many, including cybersecurity, instability stemming from the conflicts in Europe and the Middle East, and the opportunities and risks posed by AI.

In this digest, our experts cover a range of topics ranging from the rise of cyberattacks, and the strategies companies can employ to protect their data against them, to competition law enforcement decisions in the UK. Our colleagues in Italy and Sweden also discuss joint tax audits and how they foster tax certainty and dispute prevention, and we consider international perspectives on third party litigation funding, arbitration of real estate disputes and anti-suit injunctions.

We hope you enjoy reading these articles and wish you all the all the best for the festive period and 2025.

David Bridge
Partner, United Kingdom
T +44 2073 6730 21
E david.bridge@cms-cmno.com

Zsolt Okányi
Partner,
Global Head of CMS Disputes
T +36 1 48348 00
E zsolt.okanyi@cms-cmno.com

Responsible third-party civil litigation funding: the status of the EU directive proposal and the Italian and French perspectives

Laura Opilio
Partner, Italy
T +39 06 4781 51
E laura.opilio@cms-aacs.com

Lodovico Mazziotti di Celso
Associate, Italy
T +39 06 4781 51
E lodovico.mazziotti@cms-aacs.com

Élodie Gomes
Associate, France
T +33 1 47 38 57 40
E elodie.gomes@cms-fl.com

Jean-Fabrice Brun
Partner, France
T +33 1 47 38 55 00
E jean-fabrice.brun@cms-fl.com

Key elements and status of the European parliament resolution of 13 September 2022 with recommendations to the Commission regarding the responsible private funding of litigation

On 13 September 2022, the EU parliament adopted the resolution with recommendations to the Commission on the responsible funding of litigation.

The main thrust of the directive that parliament expects the Commission to adopt is to allow access to justice, while introducing common minimum regulatory standards in all member states.

The key elements of the directive include:
— Introduction of an authorisation system for third-party funders to ensure that applicants have an effective opportunity to use third-party litigation funding (**TPLF**) and that adequate safeguards are in place.
— An obligation on third-party funders to act in the interests of the funded claimant, without control over the legal proceedings they fund. A specific declaration may be contained in the agreement.
— Financial requirements that funders should meet and demonstrate on an annual basis.
— Safeguards against conflicts of interest (e.g. the funding agreement can be invalidated if enables the funder to influence decisions regarding the proceedings).
— A prohibition on funders abandoning claimants and leaving them solely responsible for the costs of litigation.

— Limits on the reward that funders are entitled to – at least 60% of the gross settlement or damages should go to the claimants.
— Introduction of defined circumstances whereby the funder can terminate the agreement. The agreement cannot be terminated at the will of the funder.
— Disclosure and transparency obligations. Courts should be informed if the litigation is commercially funded and should know the funding agreement.

When the resolution of the European parliament was initially presented, the Commission replied that – before providing a regulatory framework for TPLF – it would need to wait for member states to implement the Representative Actions Directive, which addresses the matter of the TPLF within the area of collective redress. The Representative Actions Directive should have been transposed into national law by 25 December 2022, but only a few EU member states met the deadline. At this stage, transposition is ongoing.

The Commission is now collecting information on regulations and practices among member states to gain a clearer understanding and detailed opinion on the directive proposal.

Opinion on the directive proposal

The European parliament's proposal for a directive raises doubts about the effective incentivisation of TPLF.

In fact, the directive proposal places a series of strict limitations that restrict the freedom that has allowed the TPLF to spread and grow, both abroad and in EU countries like Netherlands and Germany.

According to a critical approach, the EU parliament's proposal would deter investors/funders from investing in litigation financing, given the tight regulation that would result (especially regarding the reward). Moreover, the regulations tend to be focused on consumer protection (i.e. class actions), and not the funding of high-value cases (i.e. international arbitration) where the parties need a more flexible tool.

For this reason, the Commission is taking time to respond to the European parliament's proposal. A detailed analysis of the practice of this instrument in member states, as well as the involvement of market participants, would give a more practical slant to a regulation that is unlikely to accommodate all the rules proposed by the European parliament.

Italian perspective on Third-Party Litigation Funding

Litigation funding in Italy is not regulated by any law or regulation, and there is currently no reform on the horizon. Despite this, the Italian Supreme Court recently ruled on the issue – finding that TPLF is fully permissible and comparable to the assignment of a litigated receivable/claim.

The Supreme Court's position ensures a more open approach to litigation funding and may mark the way for the sustained growth of TPLF, which is currently common in only a few areas of our legal system.

Ethical criticisms raised by the National Bar Council

There are likely to be numerous potential criticisms surrounding the ethics of TPLF. For example, the National Bar Council emphasised that lawyers cannot use agencies or procurers to acquire clients. A lawyer does not receive an assignment directly from the client but through the funder (who will directly pay the lawyer's fees).

The National Bar Council may be concerned that TPLF could prevent a lawyer from complying with the principles of autonomy and independence throughout the dispute. By virtue of the Deontological Forensic Code, a lawyer must act only with consent of, and in the sole interest of, the assisted party.

Practical developments and case-law pertaining to this institute will help to clarify what kind of conduct is in conflict with the ethical rules in force and what remedies should be adopted to avoid the violation of these rules.

French perspective on Third-Party Litigation Funding

In France, TPLF operates without explicit legislative regulation but is generally considered permissible under existing legal frameworks. Although the practice remains limited compared to other jurisdictions, it has gained traction in international arbitration, where it provides under-resourced parties with the means to pursue claims.

Notably, entities such as Omni Bridgeway, Burford Capital and Vannin Capital have supported French clients in complex, high-stakes litigation, particularly in cross-border disputes.

The National Bar Council (Conseil National des Barreaux or CNB) and the Paris Bar Association (Ordre des Avocats de Paris) have acknowledged the potential benefits of TPLF, particularly in facilitating access to justice.

Yet, concerns persist regarding the need to preserve lawyer independence and avoid conflicts of interest. In a 2015 resolution, the CNB called for a balanced approach to encourage the development of litigation funding while safeguarding ethical standards. Similarly, in 2017, the Paris Bar emphasised the importance of ensuring

that third-party funders not interfere with the lawyer-client relationship or compromise professional conduct.

The European parliament's proposed directive on responsible private funding of litigation could significantly affect TPLF practices in France. By establishing minimum standards across member states, the directive would enhance transparency and consistency.

Its restrictive measures, however, particularly the proposed cap on funders' returns, have drawn criticism from French stakeholders. Leading legal professionals warn that such provisions may deter funders from entering the French market, thereby limiting access to funding for large-scale commercial disputes and international arbitration.

Nevertheless, harmonisation through the directive could provide clarity and stimulate innovation, particularly in areas such as international arbitration, where TPLF is already gaining ground. If carefully implemented, the directive may create new opportunities for growth while ensuring robust ethical safeguards.

As of September 2024, the European Commission concluded its public consultation on TPLF practices, gathering input from member states and legal professionals. France's active engagement in these discussions is essential to ensure that the resulting framework reflects its legal traditions while addressing the practical needs of litigants. The directive presents a valuable opportunity for France to formalise and expand TPLF, provided that the final measures strike an appropriate balance between regulation and market viability.

Cyberattacks: ransomware and its legal outcomes

Roberto Cesar Scacchetti de Castro
Partner, Brazil (FAS Advogados in cooperation with CMS)
T +55 11 3805 0222
E rsca@fasadv.com.br

The rise in cyber incidents in recent years has been staggering, with businesses and economic sectors across the globe grappling with increasingly complex threats. Among the most significant challenges are ransomware attacks, which have evolved from simple data encryption schemes into sophisticated operations involving data theft, extortion, and multi-faceted disruption. This evolution reflects a broader transformation in the cyber-threat landscape, necessitating that organisations adopt more comprehensive and forward-thinking defence strategies.

The sophistication of modern ransomware attacks requires a shift in priorities. It is no longer sufficient to focus solely on preventing the encryption of critical data. Companies must now contend with the broader implications of data breaches, including financial, reputational, and regulatory repercussions. In this context, legal strategies play an essential role in mitigating the risks associated with cyber incidents. By pairing preventive measures with robust legal preparedness, organisations can effectively navigate the complexities of an increasingly hostile digital environment.

Global rise of ransomware attacks

Over the last few years, the threat of ransomware attacks has emerged as one of the most pressing global cybersecurity challenges. The numbers paint a troubling picture: 2,825 ransomware incidents were reported in the US in 2023, an 18% increase from the previous year. The sectors most affected include healthcare, manufacturing, financial services, technology, communications, energy, and retail-industries that form the backbone of modern society and our economies. The financial and operational impact on these industries have been severe, with many organisations facing prolonged disruptions and exorbitant recovery costs.[1]

Europe has not been spared from this threat. In 2023, ransomware cases in Europe increased by over 30% from the previous year, with the LockBit group emerging as one of the most active threat actors.[2] Key sectors targeted in Europe include manufacturing, retail, automotive, entertainment, commerce, and technology. These industries, which often rely on complex and interconnected supply chains, are particularly vulnerable to the cascading effects of ransomware attacks.

The situation in Brazil mirrors this global trend. Reports indicate a staggering 50% increase in ransomware incidents during the first half of 2023, with healthcare, manufacturing, education, and government sectors bearing the brunt of these attacks. Notable ransomware groups such as LockBit, CL0P, and BlackCat have exploited the growing digital interconnectivity of these sectors, underscoring the challenges posed by an expanded attack surface.[3]

1 Federal Bureau of Information (2023). *FBI Internet Crime Report.* [online] Available at: https://www.ic3.gov/AnnualReport/Reports/2023_IC3Report.pdf [Accessed Nov. 26AD].
2 Statista. (2023). Europe: significant cases of ransomware attacks 2023 | Statista. [online] Available at: https://www.statista.com/statistics/1398137/europe-major-cases-ransomware-attacks/ [Accessed 26 Nov. 2024].
3 Data Centre Dynamics (2023). *Brasil sofreu cerca de 1.600 ataques de ransomware no primeiro semestre de 2023.* [online] Datacenterdynamics.com. Available at: https://www.datacenterdynamics.com/br/not%C3%ADcias/brasil-sofreu-cerca-de-1600-ataques-de-ransomware-no-primeiro-semestre-de-2023/ [Accessed 26 Nov. 2024].

As technology continues to evolve, so do the methods employed by cybercriminals. Emerging technologies such as generative artificial intelligence are likely to amplify the complexity and frequency of ransomware attacks, placing additional pressure on organisations to adopt more sophisticated and multidisciplinary approaches to their cyber-security protection. The growing interconnectedness of systems and their reliance on digital supply chains further exacerbate these risks, requiring a proactive and comprehensive response.

Consequences of cyber and ransomware attacks

The impact of ransomware attacks extends far beyond the immediate financial losses associated with ransom payments. The consequences are broad-ranging and multifaceted, affecting nearly every aspect of an organisation's operations and reputation. These consequences can include:

- **Operational disruptions:** System failures resulting from ransomware attacks can halt production, delay service delivery, and disrupt internal communications. The resulting inefficiencies and delays often translate into significant financial losses and strained customer relationships.
- **Financial impacts:** Beyond the ransom itself, organisations face a host of additional expenses, including costs related to system restoration, infrastructure upgrades, legal fees, and potential regulatory fines. For many companies, these financial burdens are compounded by lost revenue and diminished productivity during downtime.
- **Reputational damage:** The exposure of sensitive data, including data belonging to customers, employees, or business partners, can erode trust and damage a company's reputation. Rebuilding credibility after a ransomware incident is a time-consuming and costly process, often requiring extensive public relations efforts.
- **Regulatory sanctions:** Legal frameworks such as the EU's General Data Protection Regulation (GDPR) and Brazil's General Data Protection Law (LGPD) impose stringent requirements on organisations regarding data protection. Ransomware incidents that result in the exposure of personal data can lead to substantial fines, legal proceedings, and heightened regulatory scrutiny.

The cumulative impact of these consequences underscores the importance of proactive measures. Companies must not only work to prevent ransomware attacks but also prepare for their potential fallout through comprehensive planning and partnerships with legal and cybersecurity experts.

Protective measures against cyber risks

Mitigating the risks associated with ransomware requires a combination of technical, administrative, and legal measures. Each plays a vital role in strengthening an organisation's defences and ensuring resilience in the face of cyber threats. Key protective measures include:

1. **Backup maintenance:** Regularly creating and securely storing backups is one of the most effective defences against ransomware. Isolated backups ensure that organisations can restore critical data without yielding to ransom demands.
2. **Security updates:** Timely software and system updates close known vulnerabilities that cybercriminals frequently exploit. Maintaining an up-to-date security posture is an essential component of any effective cybersecurity strategy.
3. **Employee training:** Human error remains a significant vulnerability. By providing continuous training, organisations can equip employees with the knowledge needed to recognise and respond to phishing attempts, social engineering tactics, and other cyber threats.
4. **Multifactor authentication (MFA):** Adding layers of authentication for accessing critical systems significantly reduces the likelihood of any unauthorised access. MFA is particularly effective in protecting sensitive data and systems from compromise.
5. **Network segmentation:** Dividing networks into separate segments and implementing strict access controls limits the spread of ransomware within an organisation's infrastructure. This approach helps contain the damage in the event of an attack.

Strategies for responding to ransomware incidents

Despite the best preventive measures, ransomware attacks remain a persistent threat. A well-defined response plan is essential for minimising damage and ensuring a swift recovery. Effective response strategies include:

1. **Isolation of affected systems:** Disconnecting compromised systems from the network is a critical first step in containing the spread of ransomware. Rapid isolation can prevent further damage and protect unaffected systems.
2. **Efficient communication:** Transparency is key during a ransomware incident. Organisations must notify authorities, stakeholders, and affected individuals promptly, ensuring clear and accurate communication throughout the response process.

3. **Technical investigation:** Conducting a thorough forensic analysis helps identify the root cause of the attack and uncovers potential vulnerabilities that must be addressed. This process is vital to prevent future incidents.
4. **Policy review:** Learning from the incident and updating internal policies, protocols, and training programmes is essential for strengthening defences and reducing future risks.

Legal challenges in ransomware cases

Ransomware incidents present significant legal challenges, which often intersect with regulatory, contractual, and reputational concerns. Organisations may face lawsuits from customers, suppliers, and other third parties affected by the attack. These legal actions can include claims for breach of contract, negligence, or failure to protect sensitive data.

In addition to litigation, organisations may be subject to administrative proceedings and regulatory fines under laws such as GDPR and LGPD. Compliance with these legal frameworks requires organisations to demonstrate due diligence in protecting data and responding effectively to incidents. Failure to do so can result in severe penalties, including financial fines and mandatory oversight.

Legal teams play an integral role in coordinating responses to ransomware incidents. From managing communications with stakeholders and public authorities to overseeing legal proceedings, their expertise is crucial for navigating the complexities of these cases. A strong legal team, supported by robust compliance policies and governance practices, is essential to mitigate the legal and reputational risks associated with ransomware attacks.

Conclusion

The exponential rise in ransomware attacks highlights the pressing need for a multidisciplinary approach to cybersecurity. As threats continue to evolve in complexity, organisations must adopt comprehensive strategies that integrate technological defences, compliance measures, and legal preparedness.

Prevention is not merely a technical necessity but a strategic imperative. Robust cybersecurity measures, coupled with strong governance and proactive legal frameworks, are essential for safeguarding operations, maintaining reputation, and ensuring business continuity. By focusing on protection, prevention, and response strategies, organisations can position themselves to navigate the challenges posed by an ever-evolving cyber-threat landscape.

UK Supreme Court upholds anti-suit injunction in favour of Paris seated arbitration

David Bridge
Partner, United Kingdom
T +44 2073 6730 21
E david.bridge@cms-cmno.com

This article was prepared with the assistance of Magnus Chisholm, trainee solicitor at CMS London.

The recent Supreme Court judgment in *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 has significant implications for arbitration agreements and anti-suit injunctions. This article provides a comprehensive analysis of the judgment, its background, and its potential impact on future arbitration disputes.

Background

The dispute concerned performance bonds issued by UniCredit Bank GmbH (UniCredit) in favour of RusChemAlliance LLC (RusChem) to guarantee the construction of liquefied natural gas and gas processing plants in Russia. The bonds were governed by English law and contained arbitration agreements selecting Paris as the seat of arbitration, without specifying any separate governing law. When RusChem terminated the underlying construction contract and called upon the bonds, UniCredit refused payment due to EU sanctions.

In response to UniCredit's refusal to pay under the bonds, RusChem initiated proceedings in the Arbitrazh Court of St Petersburg, relying upon Russian legislation that confers exclusive jurisdiction on Russian courts over disputes involving foreign sanctions. UniCredit, in turn, sought an anti-suit injunction in the English courts to restrain RusChem from continuing the Russian proceedings. The Commercial Court initially granted an interim injunction, but RusChem challenged the English court's jurisdiction. The Court of Appeal subsequently upheld the injunction, leading to RusChem's appeal to the Supreme Court.

The issues

The question before the Supreme Court was whether the English court had jurisdiction to grant the anti-suit injunction, which required analysis of two issues:

1. Whether the arbitration agreement was governed by English law.
   The first issue required UniCredit to demonstrate that one of the jurisdictional gateways for service outlined in the Civil Procedure Rules applied, providing some link to England and Wales under one of the specified categories. UniCredit relied upon the contract gateway, which applies when a claim is made involving a contract governed by English law. The court was therefore required to decide whether the arbitration agreements were governed by English law.
2. Whether the English court was the proper place to hear the claim.
   Under the second issue, both parties relied on the Spiliada test, which states that the English court should not exercise jurisdiction if there is another more suitable forum for the interests of the parties and the ends of justice.

Were the arbitration agreements governed by English law?

The Supreme Court held that English law governed the arbitration agreements and therefore the English court had jurisdiction to hear the claim. To reach this decision, the Supreme Court had to revisit the law governing arbitration agreements where the parties do not separately specify a choice of law for the arbitration. Lord Leggatt, the author of the judgment, set out the position on this issue in the case *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38 (Enka).*

In *Enka*, it was established that – in the absence of a choice of law within the arbitration agreement – the governing law of the main contract should be applied. The judgment, however, included a caveat indicating that this inference may be negated if the law of the seat stipulates that any arbitration agreement selecting that seat should be governed by the seat's law. Using this caveat, RusChem argued that, by selecting Paris as the seat, the parties must have been aware that, under French law, the arbitration agreements would be subject to French jurisdiction.

The Supreme Court rejected this argument but acknowledged the need for greater certainty in this area. Lord Leggatt remarked that judicial statements should not be treated as statutory law and that the caveat in Enka was *obiter dicta* that should be "disregarded". Instead, the parties should focus on the court's underlying reasoning: that the arbitration agreement is governed by the law agreed upon by the parties, or, in the absence of such an agreement, the law with which the arbitration agreement is most closely connected.

In this case, the governing law clause in the bonds was drafted in broad terms and covered "all non-contractual or other obligations arising out of or in connection with it". The wording did not exclude the arbitration clauses from this choice, and the selection of Paris as the seat did not justify a different result. This interpretation led to the conclusion that the arbitration agreements were subject to English law.

Is the English court the proper place to bring the claim?

Once it was established that the arbitration agreements were subject to English law, the Supreme Court was required to determine whether the English court was the most appropriate forum for issuing an anti-suit injunction. The *Spiliada* test has typically been used to assess whether the English court should exercise jurisdiction over a dispute when there is an argument that another forum is more appropriate.

However, the Supreme Court found that the *Spiliada* test was not applicable in this case, as it applied where there was no contractually agreed forum. Here, the parties had contractually agreed to arbitrate their disputes in Paris under the ICC rules. Lord Leggatt explained that "a strong reason needs to be shown as to why in the particular circumstances the court ought not to exercise its jurisdiction to restrain a breach of the parties' contractual bargain." The fact that the parties had selected Paris as the seat of arbitration did not provide sufficient grounds for the Supreme Court to decline to uphold their agreement to arbitrate by granting the anti-suit injunction.

Two further questions arose. The first was whether it was inconsistent with international comity for an English court to intervene in this dispute between a Paris arbitration and Russian litigation. The Supreme Court concluded that the English court has sufficient interest in enforcing arbitrations agreements governed by English law to allow for such intervention. The second question was whether it was inconsistent with the parties' choice of Paris as the seat of arbitration for the English court to intervene. The Supreme Court held that an agreement to arbitrate should not be interpreted as prohibiting a party from applying to a court for relief where one party acts contrary to this agreement. In any event, the evidence demonstrated that the French court was not available as a forum. Even if it were, the English court's power to grant injunctive relief does not require it to have supervisory jurisdiction.

Commentary

The judgment highlights the pro-arbitration stance of the English court, given that the Supreme Court was willing to issue an anti-suit injunction in favour of arbitration despite the arbitral seat being located elsewhere.

Willingness of the English courts to enforce contractual bargains to arbitrate: The decision provides clear guidance that when English law governs an arbitration, the English courts will uphold contractual choices and grant anti-suit injunctions in support of arbitrations where necessary. While this is unlikely to deter certain parties from pursuing claims in breach of arbitration agreements, the English court's ability to grant anti-suit injunctions will at least prevent the enforcement of a foreign judgment against assets in England and frustrate it in other jurisdictions.

Clarification on the governing law of arbitration agreements: By reaffirming the principles set out in Enka, the court has provided greater certainty for parties drafting arbitration agreements. The decision to disregard the caveat from Enka regarding the law of the seat further simplifies the determination of the governing law.

The decision should also be a clear reminder that parties can avoid uncertainty by simply agreeing on the governing law of an arbitration agreement. Governing law and arbitration clauses are often referred to as "midnight clauses" due to their tendency to be drafted at the last minute. Of all the major arbitral institutions, only the Hong Kong International Arbitration Centre's model arbitration clause includes a provision prompting parties to specify the law of the arbitration clause. Instead, it is more common practice for parties to specify the governing law of the contract and rely on an interpretation that it will also apply to the arbitration clause forming part of that contract. There is no international consensus on this approach, however, with some jurisdictions such as France treating the law of the seat as the governing law. It is therefore advisable for parties to specify the governing law they wish to apply to the arbitration clause.

Impact of the Arbitration Bill 2024: The Enka principles, which were strongly upheld in this case, are likely soon to be replaced by a new default rule, following the Law Commission's review of the Arbitration Act 1996. Clause 6A of the Arbitration Bill 2024, which is scheduled to take effect in 2025, stipulates that an arbitration agreement is governed by the law of the seat of arbitration, unless the parties expressly agree otherwise. This is a departure from the current common law position that the law governing the main contract will be interpreted as applying to an arbitration clause forming part of the contract. In this case, it would mean that French law would have applied to the arbitration agreement.

It is crucial to note that this provision of the Arbitration Bill 2024 will have retrospective effect, applying to all arbitration agreements whenever they were entered into unless they are already the subject of proceedings. Therefore, clients may wish to review their agreements now and seek to agree on the governing law where this may change.

The introduction of Commercial Courts in Germany

Sören Thaden
Senior Associate, Germany
T +49 40 37630 345
E soeren.thaden@cms-hs.com

Marwin Berrer
Senior Associate, Germany
T +49 40 37630 345
E marwin.berrer@cms-hs.com

On 4 July 2024, the German parliament passed the "Act to Strengthen the Jurisdiction of Germany", which introduced Commercial Courts into the civil justice system in Germany. The act will come into force on 1 April 2025 and will permit the federal states to establish Commercial Courts at the higher regional courts.

Many consider this legal reform as desperately needed: that Germany's civil justice system has offered few modern procedural options for major commercial disputes. Hence, parties to international commercial disputes regularly resort to other jurisdictions or arbitration. In particular, disputes over M&A transactions are regularly and exclusively handled by arbitral tribunals rather than the courts. Parties in international disputes have tended to avoid the German civil justice system because of the lack of confidentiality of information in German court proceedings, which are generally held in public, and because proceedings before German courts are conducted in German only.

With the introduction of Commercial Courts, parliament is attempting to turn Germany into a more attractive jurisdiction for commercial disputes and prevent further shifts to arbitration and other jurisdictions.

Commercial Courts for commercial disputes

The Commercial Courts will be established as specialised senates of the Higher Regional Courts and will therefore remain part of the German judicial system. Unlike in "ordinary" civil disputes, the Higher Regional Court will not act as a court of appeal but rather the court of first instance. A decision of the Commercial Court can only be appealed to the Federal Court of Justice. This significantly streamlines the appeal process. As a further deviation from the "ordinary" civil process, the appeal to the Federal Court of Justice is always admissible (i.e. unlike in ordinary German civil proceedings, the Federal Court of Justice does not have to first decide on the admissibility of an appeal, rather upon appeal, any award of the Commercial Court can be reviewed by the Federal Supreme Court).

When the amount in dispute is equal to or exceeds EUR 500,000, the Commercial Courts will have jurisdiction over:

- civil disputes between companies (except those related to industrial property rights, copyrights and claims under the Act on Unfair Competition);
- disputes arising out of or in connection with the acquisition of a company or shares in a company (including where consumers are involved); and
- disputes between a company and its members of the management or supervisory board.

However, the federal states are permitted to limit the jurisdiction of the Commercial Courts to certain areas of law. The aim here is to allow for a high level of specialisation and expertise within the respective Commercial Courts. For example, certain Commercial Courts could specialise in commercial or antitrust disputes between companies, in M&A disputes, or other of the areas outlined in the bullet points above.

In addition to the requirements mentioned above, the Commercial Courts will only have jurisdiction if the parties have expressly or implicitly agreed to refer their dispute to a Commercial Court. Thus, an agreement similar to an arbitration agreement will be required. But even in the absence of such an agreement prior to a dispute, the Commercial Courts will have jurisdiction if the requirements are met, the claimant requests a decision by the Commercial Court in its statement of claim, and the respondent does not object to this request in the statement of defence.

Arbitration as role model

As to how proceedings before a Commercial Court might look, common standards in arbitration are intended to serve as a framework. For example, similar to a case management conference, at an early stage of the proceedings an organisational hearing shall be held. During the hearing the Commercial Court and the parties shall agree on the course of the proceedings, such as deadlines for written submissions or the date of the oral hearing. This intends to prevent the proceedings from dragging on without significant progress as is a not uncommon complaint in regular German proceedings (and which larger disputes would be more vulnerable to).

Another key element of the reform is that the proceedings can be conducted in English if the parties agree either explicitly or implicitly. Such an implicit agreement is inter alia given if the defendant responds in English (without an objection) to a statement of claim submitted in English.

Finally, the confidentiality of information which might otherwise be revealed during the course of proceedings can be maintained. At the request of at least one party, the commercial court may classify information as confidential. Once the proceedings have commenced, the parties are obliged to treat the information as confidential and not use or disclose it outside the proceedings. In addition, the Commercial Court may exclude the public from the hearing.

Implementation underway

Precisely how each of the federal states will establish Commercial Courts remains to be seen.

So far, Hamburg has announced that it will set up a Commercial Court with three senates. Each will focus on corporate law and M&A disputes. The federal states Hessen and Nordrhein-Westfalen plan to establish Commercial Courts at the Higher Regional Court in Frankfurt am Main and Düsseldorf. The federal states will also have the right to establish a joint Commercial Court with cross-border jurisdiction.

Conclusion and outlook

The introduction of Commercial Courts represents a large step taken by the legislature towards strengthening Germany as a jurisdiction for commercial parties to resolve their complex and international commercial disputes. With specialised senates for commercial disputes, the judicial system will be better equipped to meet the demands of sophisticated parties. That starts with the proceedings being conducted in first instance by highly experienced and well-trained German judges from the Higher Regional Courts. It is now for each of the federal states to seize the opportunity presented to them,and establish a presence in this area.

Whether parties will agree on the Commercial Court as a dispute resolution forum (and thus opt against arbitration, or litigation in another jurisdiction) remains to be seen. One major hinderance relates to the enforceability of German awards, particularly outside the EU. In contrast to the enforcement of arbitral awards, the globally recognised New York Convention does not apply to awards from the Commercial Courts. Particularly in non-European countries, the enforceability of arbitral awards depends on the requirements of the state the award will be enforced in, which can lead to uncertainty in the enforcement of a possible German award that the Commercial Court has rendered.

Finally, the substantive law in Germany will remain unchanged. To avoid the risks associated with the "AGB review" (i.e. the restrictive review of general terms and conditions under German law), many parties might refrain from agreeing on the jurisdiction of the Commercial Courts.

Given these uncertainties, arbitration will remain a valid alternative to proceedings in the Commercial Courts. A decision should be determined on a case-by-case basis to determine which of the two options better serves a party's interests.

Battling with the gatekeepers to the European market: CMS acts for medical devices manufacturer who successfully overturns decision made by a Notified Body.

Henrik Nordling
Partner, Norway
T +47 966 25 414
E henrik.nordling@cms-kluge.com

Christian Galtung
Partner, Norway
T +47 992 29 722
E christian.galtung@cms-kluge.com

Introduction

A Notified Body (**NB**) is an entity y that is vested with certain decision-making powers under EU/EEA rules, but whose amenability to judicial review is subject to national procedural rules. Our case concerns the Norwegian NB under the Medical Devices Regulation (**MDR**). In this case, CMS successfully appealed a decision adopted by the Norwegian NB to suspend the "EU passport" of a medical device used throughout Europe and obtained an interim injunction against the decision pending the appeal. The matter involved close cooperation between CMS's life sciences team and the litigation team in Norway, as well as CMS in the UK, Germany and France.

Background

Medical devices sold in the EU/EEA must hold a CE-certificate and bear the CE-mark. This is a symbol that indicates that the equipment complies with the relevant standards in the MDR and confirms that the product has an underlying CE-certificate of conformity. A CE-certificate serves as an entry ticket to the EU/EEA market.

For medical devices, NBs assess, issue and surveil CE-certificates. NBs are private undertakings that have been granted public authority by the member state in which the NB is incorporated. Once issued, a CE-certificate is valid for the whole EU/EEA (i.e. it provides an EU passport for the product). The NBs thus act as gatekeepers for the entire EU market for medical devices, which is estimated to be worth approximately EUR 150bn in 2024.

Manufacturers are free to choose any legally designated NB, in any member state, to provide a CE-certificate. They then enter into a contract with their chosen NB for certification. This is different from the process for pharmaceuticals where there is a central procedure for authorisation.

The present case

The manufacturer in question was based in India (the **Manufacturer**) and had an established certification agreement with the Norwegian NB. The product in question was a cardiological stent (**SUFC**), a tiny mesh cylinder used to hold open narrowed blood vessels around the heart.

There is fierce competition between stent manufacturers. From around [2021], a rival manufacturer launched a pan-European disparagement campaign against the Manufacturer. The rival manufacturer instructed lawyers to lodge complaints with various EU national medical regulators regarding the stent. The substance of the complaints related to the thickness of the stent walls, which are measured in micrometers. At this width, accurate measurement is a science and can be done through various – sometimes conflicting – means.

As a result of the rival manufacturer's actions, in January 2024 the Norwegian NB suspended the CE-certificate for SUFC. The suspension decision halted all further sales of SUFCs (although products already on the market could still be used). This had a significant impact on the medical industry with the affected product accounting for approximately 70% of our client's revenue and being used in approximately 8,000 surgeries per month throughout the EU.

In response, CMS applied for an interim injunction on behalf of the Manufacturer and, in parallel, submitted a formal administrative appeal against the NB's decision. Central to the Manufacturer's argument was that the Norwegian NB's decision was vitiated by serious procedural errors. Both the case management prior to the decision and the grounds for the decision failed to comply with Norwegian administrative law principles and the procedural requirements set out in the MDR. As the case progressed, it became clear that the Norwegian NB had not fully understood that they were exercising public authority subject to review under administrative law.

This raises an important point since the amenability of the NB's decision to judicial review was certain under Norwegian law. The Norwegian state had expressly delegated public authority to the NB to carry out its functions, which made it subject to the Norwegian Public Administration act when adopting decisions. Conversely, the legal position of NBs in other member states appears to be less clear.

Challenging NBs' decisions under administrative law is not a given, and affected parties may have to rely on contractual or tort claims. Such claims are more onerous than a clearcut administrative path. This lack of harmonisation is problematic since the procedural rights of a CE-certificate holder will vary across different NBs.

The main thrust of the Manufacturer's legal argument was based on (i) the NB's failure to state reasons and (ii) the EU law principle of "proportionality". In relation to the second point, the Manufacturer drew on the demonstrable safety of the product and the fact that it is widely used and critically important in certain patient groups. Indeed, it is clear from the MDR that a NB must consider the proportionality of a measure when adopting a suspension decision.

The City Court granted an interim injunction to suspend the effects of the NB's decision. The judge agreed with the Manufacturer's argument that the suspension decision was invalid due to a lack of reasoning and held (our translation):

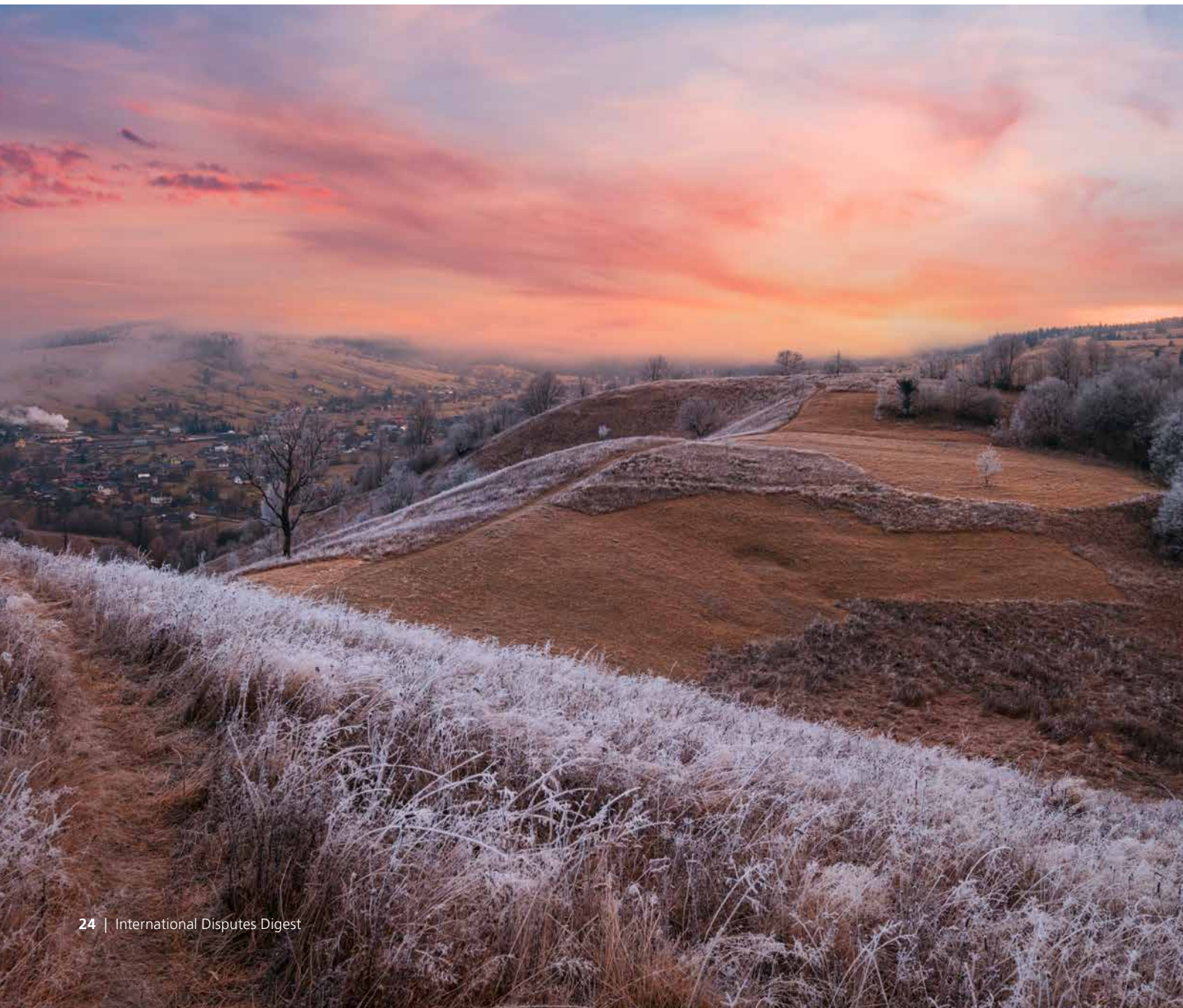
> In this situation, and where it is a product that does not pose a risk to patient safety (which is an overall purpose behind the directive), the stent wall thickness has complied with the requirements of the certification using another accepted measurement method, where the decision is invasive for [the client] and with potential negative effects also for hospitals and their patients, there is strengthened reason to require an assessment of proportionality before deciding to suspend the certificate. The court thus lacks an assessment in the decision of whether it was necessary to suspend the product at the present time, or whether the purpose could have been achieved in another way.

In order to obtain an injunction, the Manufacturer also had to convince the court of the urgency and need for immediate relief. The court gave decisive weight to the interests of patients for whom the SUFC is the preferred device and whose lives may depend on the product:

> Given that there are approximately 8,000 operations per month where the product is used, the consequence of the decision could be that patients die in situations where [SUFC] is more suitable than other products on the market.

Jurisdiction to hear the administrative appeal against the NB's decision fell to the Norwegian Medicines Authority. The fact that the City court had already granted an injunction was no doubt helpful since it is de facto difficult for a government body at an intermediate level to disagree with a court's interpretation of the law. Not unexpectedly, the appeals body also concluded on the merits that the suspension decision was invalid. The suspension decision was thereby annulled with final effect.

Following the NB's erroneous suspension decision, the Manufacturer decided to move its products to an alternative NB. The right to voluntary transfer from one NB to another is clearly set out in the MDR. Despite this, the Norwegian NB would only agree to approve the voluntary transfer if the Manufacturer made certain concessions. This demand for concessions from the Norwegian NB illustrates how NBs operate at the intersection of public-law prerogatives and private-law obligations and liabilities – a toxic mix, which is prone to confusion. This raises questions from an EU freedom-of-movement perspective, as well as from a more rudimentary administrative law angle.



Indirect conflict of interest leads to set aside of an ICC award in USD 15bn dispute: the Paris Court of Appeal's "Opportunity Fund" judgment of 2 May 2024

Jean-Fabrice Brun
Partner, France
T +33 1 47 38 55 00
E jean-fabrice.brun@cms-fl.com

Stivian Kostadinov
Associate, France
T +33 1 47 38 40 41
E stivian.kostadinov@cms-fl.com

The decision has fostered greater vigilance regarding the independence of arbitrators, particularly in situations involving indirect conflicts of interest.

As part of privatisations in Brazil that began in the 1990s, a consortium made up of a group of companies called Opportunity and Telecom Italia filed bids for a major fixed-line telephony contract.

Shortly after the consortium won the contract in 1998, relations between its members deteriorated, leading to various disputes. To settle their differences, the parties signed a settlement agreement in 2005, under which Telecom Italia agreed to pay USD 65m to Opportunity.

In 2012, clearly dissatisfied , Opportunity initiated ICC arbitration proceedings against Telecom Italia, seeking the settlement's cancellation. In a 1 September 2016 award, the Arbitral Tribunal dismissed Opportunity's claims.

On 5 December 2016, Opportunity filed an application before the Paris Court of Appeal to set aside the award.

A year later, it also initiated revision proceedings under Article 1502 of the French civil procedure code, alleging procedural fraud by Telecom Italia.

As part of the revision proceedings, Opportunity uncovered indirect business ties between the Chair of the Arbitral Tribunal and Telecom Italia. Specifically, the Chair was revealed to be a partner at Gide Loyrette Nouel, a leading French law firm, which included partners who, beginning in 2013, had represented Vivendi, Telecom Italia's reference shareholder since 2015.

Given these business ties and the de facto control Vivendi exercised over Telecom Italia, the ICC accepted the challenge to the Chair of the tribunal, despite the fact this individual never personally worked on cases for the Vivendi group.

Opportunity subsequently raised these facts in the set aside proceedings before the Paris Court of Appeal, which was asked to examine the conflict of interest affecting the independence of the Chair of the Tribunal.

Despite the indirect nature of the conflict of interest, the Paris Court of Appeal ruled that these business links represented an objective situation of a conflict of interest that was likely to give rise to reasonable doubt in the minds of the parties as to the arbitrator's independence.

Relationship between Vivendi and Telecom Italia

The Court observed that:

- Vivendi became Telecom Italia's reference shareholder in June 2015, initially holding 14.9% of the shares, then gradually increasing its stake until it reached 24.9% in March 2016;
- Vivendi has publicly stated in a press release its intention to make a "long-term" commitment to Telecom Italia;
- In December 2015, Vivendi appointed four members to Telecom Italia's board of directors, and its chairman of the management board was appointed vice-chairman of the company in April 2016. Although Vivendi did not control Telecom Italia in a legal sense under Italian law, its influence was, in the court's view, significant, particularly during the period of the arbitration.

According to the court, this involvement proved that Vivendi had a clear interest in the outcome of the arbitration with considerable financial stakes for Telecom Italia given that the claims amounted to several billion dollars.

Relationship between the Chair of the Arbitral Tribunal's law firm and Vivendi

The Court found that Gide provided recurring legal services to Vivendi and its subsidiaries both before and during the arbitration. Although Telecom Italia pointed out that the fees Vivendi paid to Gide were a modest EUR 16,473 in 2017, representing only 0.0092% of the firm's turnover (this level of fees seems low when compared to the services that Gide is said to have provided to the Vivendi group), the Court dismissed the argument on the basis that the business relationship between Gide and Vivendi was stable and long-lasting.

In this respect, the Paris Court of Appeal also noted that during the challenge proceedings, Gide expressly stated its preference for maintaining its collaboration with Vivendi over its involvement in the arbitration process. According to the Court, this statement was a clear illustration of the strategic importance of Vivendi for the firm, demonstrating the close ties between them.

In conclusion, the Court held that, even if the personal integrity of the Chair of the Arbitral Tribunal had not been called into question, the existence of indirect business links between a third party with an interest in the arbitration (Vivendi) and the Chair's firm was sufficient to create a situation of an objective conflict of interest. In other words, the business ties gave rise to reasonable doubt in the minds of the parties as to the arbitrator's independence. On these grounds, the Court set aside the arbitration award of 1 September 2016.

Increased vigilance by arbitrators with this decision

Because decisions to set aside arbitration awards on the basis of arbitrator independence are relatively rare, each constitutes an important source of law in this area. The decision of the Paris Court of Appeal should interest practitioners in that it adopts a broad and objective conception of the conflicts of interest to which arbitrators may be exposed.

Arbitrators, who are also partners in major business law firms, must be aware that their awards may be set aside because of conflicts of interest that are not only indirect, but doubly indirect. In other words, an award may be set aside on this basis despite the interposition of another lawyer (a partner) and another group company (a holding company) between the party and the arbitrator.

Given most large law firms have a vast portfolio of clients, arbitrators will face practical difficulties in gaining full knowledge of the clients of their partners and also of entities over which those clients exercise influence (de jure or de facto). The number of entities making up a group, as well as the complexity of its organisation, will be factors in the vulnerability of the awards rendered.

Therefore, major law firms must implement reliable internal conflict-check procedures. Extra vigilance is required to identify, before an arbitrator is appointed, any relationships likely to raise a reasonable doubt as to the arbitator's independence. In the absence of such measures, law firms risk the setting aside of awards and also damaging their reputation.

The corollary of the risks faced by arbitrators lies in the opportunities for setting aside awards open to the parties.

Parties seeking to overturn an award could rely on relationships, however minimal and indirect, between the firm of one of the arbitrators and one of the parties to challenge the arbitrator's independence on objective grounds. In certain cases, it will be in the parties' interest to entrust a business intelligence firm with the task of identifying business connections that may have been unintentionally concealed due to their remote nature.

Another procedural stage is underway

In conclusion, in addition to the set aside proceedings initiated against the first ICC award, Opportunity also filed set aside proceedings against the revised award (rendered on 24 August 2020), relying primarily on the set aside of the initial award.

In a second decision of 2 May 2024, the Paris Court of Appeal reopened debate on this matter but has not yet issued a ruling. Under French law, when a revised award is subject to set aside proceedings, case-law holds that grievances targeting the initial award alone cannot justify setting aside of the revised award. It will therefore be interesting to review the arguments raised by Opportunity in this second set aside proceeding to determine whether the claims concerning the independence of the Chair of the Tribunal that issued the first award were presented in another form or with additional developments.

Arbitration in land and property disputes – a missed opportunity?

Nick Wood
Partner, United Kingdom
T +44 20 7524 6037
E nick.wood@cms-cmno.com

Antoni Hajdon
Senior Associate, United Kingdom
T +44 20 7067 3574
E antoni.hajdon@cms-cmno.com

Alex Reading
Associate, United Kingdom
T +44 114 318 3081
E alex.reading@cms-cmno.com

Arbitration is an internationally recognised, confidential and binding process used to resolve disputes between two or more parties. As expressed by Supreme Court Justice Lord Neuberger: "There appear to me to be a number of reasons why people prefer arbitration … two of them are privacy and expert tribunal".

Because arbitration is widely used in some sectors due to these benefits, this article explores why it is not more widely used in land and property matters, and asks the question – Are we missing an opportunity by not using arbitration more extensively?

Why arbitrate rather than litigate?

The English legal system enjoys a sound reputation for its independent judiciary and undoubtedly this jurisdiction is a major player in global dispute resolution.

The courts have an ongoing central role to play, and not every dispute is suitable for arbitration. Part of the role of legal practitioners is to seek the most suitable resolution process for any given dispute.

In recent years, English courts have been subject to high workloads, in parallel with budget cuts, which have generally increased the time that it takes for a judgment to be given. Court rules and procedures are often complex and can result in a prolonged process and high costs.

Arguably, arbitration can bring about an expedited and confidential decision, made by an expert in their field and at a lower cost than court proceedings.

The use of arbitration in other practice areas

Arbitration is already widely used and recognised in construction disputes and international commercial disputes.

The option of selecting arbitrators most suited to complex disputes, based on their background and/or expertise is a strong draw. However, this is not the only factor as demonstrated, for example, by the regular use of arbitration in construction disputes and notwithstanding the specialisation of the judges in the Technology and Construction Court in England & Wales.

Given the increasingly international nature of the property market, arbitration appears to provide parties in different jurisdictions with the potential for a neutral venue and a process that all parties understand from the outset. This should have appeal where, for example, a buyer and seller are based in different jurisdictions and might be concluding a contract for property in yet another jurisdiction.

So, are there legal technicalities that prevent wider adoption of arbitration? At first glance, it would appear not.

What could arbitration be used for in the land and property disputes sphere?

In many key EMEA jurisdictions, there is no legal barrier for parties to refer most common property related disputes to arbitration. Although this is the case theoretically, arbitration is still not widely used for land and property disputes.

Arbitration is well suited for dealing with contractual disputes. It can bind parties who have contracted with each other and are parties to the dispute (and the arbitration agreement). Where an award is not binding on certain groups, however, such as a public land registry, a court can in many jurisdictions render the enforceability of that award against those groups in support of the arbitral award.

Arbitration in land and property disputes can be effectively used in almost all areas but might be particularly effective in:

— Disputes over break rights/options in a lease, or termination rights in a contract;
— Breaches of covenant/obligation as to assignment of a lease and applications for consent or dealings (often arising in landlord and tenant relationships);
— Breaches of repair and reinstatement obligations;
— Interpretation and construction of contracts (e.g. sale contracts, leases and finance agreements);
— Valuation and overage disputes.

In England, examples include taking break disputes, breaches of covenant as to assignment, and interpretation and construction of contracts:

Break disputes: We routinely see break disputes as to whether a tenant has met the pre-conditions of the break, if vacant possession has been given, and which parts of the rents must be paid for the break to operate. This is the paradigm example of a dispute where the parties need certainty, and need it quickly. These are not complicated matters that need long trials with countless satellite court applications. The parties need fast, effective resolution with a specialist dispute resolver. A long complex dispute process can leave the parties uncertain about the status of the lease contract, which is unsatisfactory.

Breaches of covenant relating to assignment and applications for consent: An arbitrator in their award can expeditiously deal with questions such as: Is the proposed incoming assignee reasonably capable of meeting the lease covenants? Is the package of security offered by the assignee reasonable in the market? Is it justifiable for the landlord to insist on a rent deposit? Has there been an unreasonable delay in the landlord dealing with an application for consent?

Interpretation and construction of contracts: Disputes regularly arise between parties over questions of interpretation and compliance with terms and conditions of contracts. Where the parties differ in their opinions, an arbitrator (with substantial expertise and experience in the property sector) can identify the points in dispute and provide an award in an expedited timeframe in comparison with litigation.

What are the advantages of arbitration for property disputes?

Many arbitral institutions now have procedures available to allow summary determinations and provide emergency relief and sanctions. In many jurisdictions, the powers of arbitrators are increasing. For example, the Arbitration Bill (in England) seeks to modify the Arbitration Act 1996 in a number of ways, which makes arbitration an even more suitable and attractive alternative to litigation. The Bill proposes that an arbitrator should have the power of summary dismissal and that arbitrators have court powers in support of arbitration proceedings, which include orders relating to the sale of goods, interim injunctions and the appointment of a receiver.

The rules of an arbitration are determined principally by the arbitration agreement, which is agreed between the parties. Unlike in litigation, arbitration has an increased flexibility in proceedings and procedure needed to dispose of the matter (e.g. including more targeted or limited disclosure). Where it is run well, arbitration can, in many scenarios, result in an award far faster and at a lower cost than a court judgment.

An arbitration award can even have a wider enforcement reach than a court judgment. Under the New York Convention, an arbitration award is, generally, globally recognised and mutually enforceable amongst the 172 contracting states including Spain, Germany and Saudi Arabia.

The ability to appeal an arbitration award is also far more limited than with a court judgment. The narrower scope for appeal therefore provides the parties with a greater level of finality to a dispute.

The parties are also able to specify the composition of an arbitral tribunal. In many property-related claims, a sole arbitrator may well be more suitable than a panel, further streamlining the process and lowering costs. For example, in a lease agreement, the parties could provide for a lawyer-arbitrator to deal with a break option notice dispute (i.e. whether a break notice had been validly served or the option exercised) or provide for a surveyor-arbitrator to deal with a dispute over completion of, for example, fit-out works.

Confidentiality

An arbitration award is generally confidential and details of the award might only enter into the public domain as a consequence of, for example, an appeal being made to a court in relation to the award. Arbitration can be viewed by some as a potential barrier to the development of case-law and precedent.

In our view, that does not have to be the case. Legislation was passed in the UK in 2022, which introduced an arbitration scheme for landlords and tenants for commercial rent arrears during the COVID-19 pandemic. Awards over rent arrears were published, excluding any confidential or commercially sensitive information (unless the party waived the exemption and agreed to its publication).

We view this approach as the best of both worlds. It – develops case law and ensures confidentiality where required. Our view is that this approach could be expanded.

Conclusion

The absence of arbitration in property disputes is not the result of fundamental legal or jurisdictional issues.

Hence, when sale contracts or lease drafts are being prepared, the question should be asked – Is there a good reason why an arbitration clause is not being added to deal with specified disputes? Only if parties push against the status quo will we begin to see arbitration more widely adopted in property disputes, and experience the resulting benefits of these arbitrations.

Arbitration may not be the norm when it comes to property disputes in our region. However, based on an application of the merits of arbitration to the typical disputes that arise in this sector, we must ask ourselves: Shouldn't it be?

The Universal Judgment ruling of the Court of Rome: an in-depth analysis

Paola Ghezzi
Partner, Italy
T +39 06 47815 1
E paola.ghezzi@cms-aacs.com

In a landmark case, the Italian state has been found liable for its inadequate policies to combat human-induced climate change and the ongoing rise in global temperatures. The ruling by the Court of Rome represents a significant shift from the positions taken by other European courts and has triggered debate about the responsibilities of states in addressing climate change.

Overview of the case

In 2021, over 20 organisations focused on human rights and climate advocacy, alongside a considerable number of individual claimants, initiated legal proceedings against the Presidency of the Italian Council of Ministers. The claimants alleged that the Italian state, as the entity responsible for ensuring a stable climate, has a proactive obligation to put an end to the continuous rise in temperatures by effectively reducing greenhouse gas emissions and controlling the degenerative effects of the climate in the collective interest, including that of future generations.

The claimants argued that the Italian state had breached its obligations by failing to implement adequate measures to reduce carbon dioxide (CO2) emissions, thereby allowing global temperatures to exceed pre-1990 levels. Specifically, they highlighted that Italy had neither enacted nor planned the necessary steps to limit temperature increases to 1.5°C above pre-industrial levels, as stipulated by the 2015 Paris Agreement and reinforced by the 2018 Special Report on Global Warming.

A key point in the claimants' argument was the inadequacy of the National Integrated Energy and Climate Plan (Piano Nazionale Integrato per l'Energia e il Clima – PNIEC), which outlines Italy's policies and measures to meet the energy and climate objectives established by the EU. The claimants stated that the PNIEC fails to protect fundamental human rights as guaranteed by the Italian Constitution, including the right to health and the state's obligation to safeguard inalienable human rights through its political, social, and economic responsibilities, as well as compliance with various international and supranational standards.

Consequently, the claimants framed their argument within the context of the "persistent breach of the State's protective duties," asserting a form of "climate liability" against the Italian state, falling within the scope of tort liability and of the general obligation of the damaging party to compensate, and sought to compel the court to order the Italian government to amend the PNIEC to ensure a 92% reduction in national CO2 emissions by 2030 compared to 1990 levels.

Government's response

In response to the lawsuit, the Prime Minister's Office raised several defences. They contested the following:

— the admissibility of the claim, arguing that it sought a court order against the state regarding the exercise of its legislative, governmental, and administrative powers;
— the jurisdiction of the ordinary courts to hear such a case;

— the standing of the claimants to initiate legal proceedings; and
— the existence of state liability, emphasising that there is no civil obligation for states to take specific measures regarding climate change due to its global nature.

The Court's decision

In February 2024, after a thorough review of the international regulatory framework and acknowledging the unprecedented nature of the case – given that it sought judicial action in a domain traditionally governed by political decision-making – the Court of Rome declared the claim inadmissible due to a lack of jurisdiction.

The Court ruled that there is no enforceable obligation on the State to reduce emissions to the extent requested by the claimants. It stated that evaluating the legality and appropriateness of various measures taken by the State to combat climate change and aimed at achieving the objectives of combating climate change as identified at European and international level, does not fall within the range of interests that can be protected in ordinary judicial courts. The Court noted that decisions regarding the management of anthropogenic climate change, which involve complex socio-economic and cost-benefit analyses, are the responsibility of political bodies and cannot be adjudicated by the judiciary. As a result, the rights of individuals for protection against the detrimental effects of climate change on their health and well-being cannot be asserted in an ordinary court setting.

Furthermore, the Court highlighted that alternative legal remedies are available under both European and Italian law. Claims related to "conduct and omissions attributable to the exercise of public powers in combating anthropogenic climate change" are subject to the legitimacy of administrative acts, which fall under the jurisdiction of administrative courts.

Implications of the ruling

This ruling represents a significant divergence from the positions taken by other European courts, such as those in the Urgenda case in the Netherlands, the Affaire du Siècle in France, and the Neubauer case in Germany. These courts have recognised the right of individuals to seek judicial protection against states that fail to fulfil their obligations under international law to combat climate change. Moreover, the Court of Rome's decision overlooks a well-established principle: legislative choices that impact fundamental rights are subject to constitutional, supranational, and technical-scientific constraints, particularly concerning CO2 emission reduction targets aligned with international commitments.

The Court's ruling also raises concerns about the scrutiny of governmental decisions regarding environmental policy, especially when such choices may infringe upon conventionally recognised fundamental human rights. This principle underscores the importance of accountability in government action, particularly in light of the increasing urgency of climate change.

Notably, while the lawsuit was pending, an amendment was made to the Italian constitution to explicitly protect the environment, ecosystems, biodiversity, and animal rights, as well as to promote sustainable development for the benefit of future generations. This constitutional reform is particularly relevant to the claim regarding the right to a "stable and safe climate," a right echoed in the European Green Deal of 15 November 2020, and supported by UN Resolution 48/13, which recognises a clean, healthy, and sustainable environment as a fundamental human right.

Recent developments

The judgment has been appealed to the Rome Court of Appeal, with the prospect for overturning the first-instance ruling bolstered by recent favourable outcomes in similar cases in other jurisdictions. Additionally, emerging scientific data indicates that Italy has already exhausted its "carbon budget" – the maximum amount of cumulative anthropogenic CO2 emissions the nation can produce without compromising its commitment to limit global warming.

The first hearing in the appeal process is scheduled for early next year, indicating that a resolution to this critical issue will take considerable time. The outcome of this case could have profound implications for environmental policy and the accountability of states in their commitment to combat climate change.

New legislation on efficient shareholder dispute resolution in the Netherlands

Bart-Adriaan de Ruijter
Partner, the Netherlands
T +31 20 3016 426
M bart-adriaan.deruijter@cms-dsb.com

Dominique Glazener
Partner, the Netherlands
T +31 20 3016 439
M dominique.glazener@cms-dsb.com

Pieter Hof
Partner, the Netherlands
T +31 20 301 62 05
M pieter.hof@cms-dsb.com

As of 1 January 2025, a new law to facilitate efficient shareholder dispute resolution will enter into force in the Netherlands.

Shareholder disputes negatively impact business operations, so resolving conflicts quickly and efficiently with the right expertise is essential. If there are no proper leaver and exit arrangements in place, shareholders can fall into deadlock.

In the Netherlands, one of the key legal mechanisms available to ensure the practical and efficient resolution of (i) shareholder and joint-venture disputes in relation to Dutch legal entities, and (ii) international corporate disputes involving Dutch (holding) companies is the *enquêteprocedure*, or 'inquiry proceedings', which are a form of procedure that take place before a specialist national court, the Enterprise Chamber (*Ondernemingskamer*).

Where a shareholder dispute cannot be resolved, the Dispute Resolution Act (*geschillenregeling*) allows certain parties to seek an order from the district court requiring a shareholder to be bought out or to buy out another shareholder. However, this regime is inefficient and claims can drag on for years.

As of 1 January 2025, this has been resolved with the introduction of a one-stop shop for shareholder disputes under the new dispute resolution law: the Law on Adaptation of Dispute Resolution and Clarification of Admissibility Requirements for Inquiry Proceedings ('**Wagevoe**').

Under Wagevoe, the admissibility requirements for the Dispute Resolution Act have been broadened and it is expected that the Enterprise Chamber will be able to resolve disputes within companies better and faster, with an efficient dissolution of shareholder relations.

In this article, we elaborate on this option of inquiry proceedings before the Dutch Enterprise Chamber, the current Dutch Dispute Resolution Act, the new mechanism under Wagevoe and our conclusion.

Unique specialised court for injunctions in relation to mismanagement and deadlocks

Inquiry proceedings can be requested by the following parties (among others):

- shareholders and holders of depositary receipts[1] of a company with an issued capital not exceeding EUR 22.5m, holding (combined) at least 10% of the shares/certificates;
- shareholders and holders of depositary receipts of a company with issued capital exceeding EUR 22.5m, holding (combined) at least 1% of the shares/certificates;
- shareholders and holders of depositary receipts of a listed company that represent a value of at least EUR 20m (if that is less than the requirement of 1% of the issued capital);
- the legal entity itself (acting through its management/executives or its supervisory/non-executive board); and
- a trustee in bankruptcy.

During inquiry proceedings, the Enterprise Chamber conducts an investigation into the affairs and policies of a company when there are "well-founded reasons to doubt a correct policy".

The key feature of the inquiry proceedings is that the Enterprise Chamber has the power to order far-reaching provisional measures in order to resolve possible mismanagement and/or a deadlock between the shareholders, such as suspending managing/supervising directors and appointing independent temporary directors.

Proceedings before the Enterprise Chamber often lead to a settlement between the shareholders achieved through the use of court-appointed directors who take on a role akin to that of a mediator and can apply pressure to reach a settlement: indeed, the Enterprise Chamber has an excellent track record in facilitating the settlement of high-value international disputes.

On the other hand, if a settlement cannot be reached and if the investigation ultimately reveals mismanagement (*wanbeleid*) within the company, then the Enterprise Chamber has extensive powers to take (limitative) final measures in relation to the company, such as setting aside resolution, dismissing a director, or even dissolving the company.

However, under the current inquiry proceedings system, the Enterprise Chamber does not have the power to order a measure for the (definite) transfer of shares. Instead, Dutch law currently requires that a party wishing to procure the divestment of a shareholder after an inquiry, proceedings must make a separate application to the civil court pursuant to the Dispute Resolution Act.

Mechanism for buy-out and squeeze out of shareholders

If repairing relations between shareholders is not possible, shareholders may need to part ways for optimal long-term value creation and to address ongoing disruptions in mutual relations.

The Dispute Resolution Act offers two key possibilities for dispute resolution:

1. One or more shareholders who (solely or jointly) hold at least one-third of the shares, may seek an order that another shareholder who, through his conduct, harms or has harmed the interests of the company in such a way that a continuation of his share ownership can no longer be reasonably tolerated, be required to transfer his shares ('buy-out') (*uitstoting*).
2. A shareholder whose rights or interests are harmed, as a result of the conduct of one or more of his co-shareholders, in such a way that a continuation of his shareholdership can no longer reasonably be expected of him, may seek an order that his co-shareholders are required to buy up his shares ('buy-up') (*uittreding*).

Claims under the Dispute Resolution Act are made at the district court in first instance (and to the Enterprise Chamber on appeal). However, in practice, such claims prove to be problematic as the Dutch district courts are busy and, being non-specialist, more than often lack the necessary expertise in this area. This leads to long turnaround times in the proceedings and can prevent efficient dispute resolution. There has, therefore, been a long-standing call for improvement and, as a result, on 1 January 2025, Wagevoe will finally enter into force.

Wagevoe: a new dispute resolution one-stop shop

The purpose of Wagevoe is to achieve a more integrated, low-threshold, expert, and specialised resolution for all shareholder disputes with one specialist court, the Enterprise Chamber, able to combine shareholder disputes and split up shareholders.

[1] Depositary receipts for shares constitute a special category of shares under Dutch law: the ownership of the shares is split. The shares are held by a Trust Office Foundation (STAK). The STAK is the legal owner of the relevant shares, while the holder of the depositary receipt is the beneficial owner of the shares. The legal owner has the voting rights attached to the shares, while the beneficial owner receives the dividend.

As of 1 January 2025, the Enterprise Chamber will act as the only dispute resolution body where parties can initiate combined proceedings.

This is a positive development in the context of a more efficient one-stop shop handling of shareholder disputes. The Enterprise Chamber's specialisation in this area will lead to more efficient application of the Dispute Resolution Act, making it easier and faster for shareholders to part ways.

In short, the changes under Wagevoe on dispute resolution include the following:

— dispute resolution will be concentrated in the Enterprise Chamber (with the possibility of appeal to the Supreme Court);
— dispute resolution will apply to Dutch limited liability companies, with the exception of listed companies;
— the scope of the dispute resolution scheme will be widened to include depositary receipt holders; and
— the grounds on which a buy-out can be ordered will be broadened: in particular, the court can take into account the conduct of a shareholder in other capacities (e.g. as a director or as a private individual) when weighing interests.

Conclusion

As of 1 January 2025, the international business community can benefit from the improvements offered by the new Wagevoe in relation to the governance of Dutch companies and their holdings.

The expectation is that shareholder disputes will rise in these turbulent times when tensions are on the rise between shareholders over short-term profits and sustainable long-term value creation. On top of that, the number of bankruptcies throughout Europe is rising significantly, which will also impact shareholder cooperation.

It is advisable to agree upon effective exit- and leaver-arrangements in the beginning of a business relationship. However, if no good arrangements are in place and/or they fail to work in the specific circumstances, then the new Wagevoe in the Netherlands can facilitate a resolution by offering relief.

Under the new law, the Netherlands will offer a one-stop shop before the Dutch Enterprise Chamber with an excellent track record in international shareholder disputes. Here, all parts of a shareholder dispute can be resolved in a cost-efficient manner by a specialised court that has a comprehensive set of powers (including the power to force transfers). Wagevoe, therefore, promises to be a useful tool in international disputes and risk management.

Law and technology: the future of commissioning in South Africa

Siphokazi Kayana
Director, South Africa
T +27 72 482 4721
M siphokazi.kayana@cms-rm.com

Charlene Ferns
Associate, South Africa
T +27 71 877 0893
M charlene.ferns@cms-rm.com

In the litigation process, an affidavit is a written statement made by an individual under oath, in which the individual concerned swears and/or declares to the relevant court that the information they are providing is a true and accurate representation, and therefore legally binding.

Under South African law, the formalities for deposing an affidavit are prescribed by the Justice of the Peace and Commissioners of Oaths Act 16 of 1963 (the "**Act**") and the Regulations Governing the Administration of an Oath or Affirmation (the "**Regulations**"). The Act and Regulations require that a deponent must sign their affidavit in the presence of a Commissioner of Oaths and acknowledge the prescribed oath or declaration as being legally binding.

Should an affidavit be commissioned away from the physical presence of a commissioner (i.e. virtually via Zoom or Microsoft Teams), an opposing party could potentially argue that the affidavit does not legally comply with the formal requirements prescribed in the Act. If that legal argument succeeds, the affidavit could consequently be treated as potentially not valid by the relevant Court, consequently nullifying any potential defence or claims raised in that document.

As archaic as this legal requirement may be, especially in light of the predominance of virtual proceedings in other jurisdictions, courts in South Africa still continue to view this requirement as binding. However, this requirement has recently become a heated topic of debate among various judges.

In the matter of *Knuttel NO and Others v Shana and Others* (2021), the Court considered whether an affidavit commissioned virtually due to the deponent having contracted COVID-19 would be deemed as compliant in terms of the Act. Having considered all relevant factors, the Court concluded that there had been substantial compliance when it came to the commissioning of the affidavit, and hence the affidavit was determined to have been validly deposed to by the deponent.

In the judgment of *ED Food v Africa's Best Foods* (2022), the Court was tasked with deciding whether affidavits deposed over video conferencing were substantially compliant with the Act. In this case, the Court relied on previous judgements such as *Liebenberg N.O. and Others v Bergrivier Municipality* (2013) (CC)[1] *and Uramin t/a Areva Resources Southern Africa v Perie* (2017)[2] to justify its reasoning that courts should adapt

[1] The court in Liebenberg N.O. and Others v Bergrivier Municipality (2013) (CC) held that the approach or test to be applied is whether there has been compliance with the relevant precepts in such a manner that the objects of the statutory instruments concerned have been achieved.

[2] In the case of Uramin t/a Areva Resources Southern Africa v Perie (2017), the court stated that courts must adapt to the requirements of the modernities which they operate in and upon which they adjudicate. They further held that the Constitution and the Rules enjoin the courts to make the necessary developments on a case-by-case and era-by-era basis.

to the modern trend of technology. The Court ultimately held that given the circumstances surrounding the case, there was substantial compliance with the Act and Regulations and therefore determined that such affidavits, although technically not compliant, would be accepted.

In the most recent case of *VJS v SH* (2024), a similar situation arose in which the Court considered whether an affidavit, which had been virtually deposed to, could be considered compliant in terms of the Act. Notably, the judge stated in the ruling that although cases such as *S v Munn* (1973) justify the requirement of physical presence as necessary to ensure that the witness fully understands the solemnity of the act they are performing, the principle remains the same whether the witness participates virtually or through an audio-visual link.

As observed by the Court in this case, the applicable Act was passed over 60 years ago when video conferencing and the internet were not yet envisaged, and the truth of the matter remains that almost every type of civil application across the various courts of South Africa requires a signed and commissioned affidavit. The Court further reiterated that the modernisation of the civil litigation process within South Africa would provide several advantages including reduced costs, the prevention of unreasonable delays and the quicker resolution of cases. In closing, the Court called for the applicable Regulations to be amended to bring them in line with modern technology trends by allowing the electronic signing and commissioning of affidavits.

Given the above, it appears the courts are adopting a stance that favours a more liberal interpretation of the applicable Act and Regulations. This stance has been adopted despite the potential argument raised in some recent cases[3] that it is not for a court to develop legislation, which is the jurisdiction of the legislature according to the doctrine of the Separation of Powers.

As emphasised by the Court's call to amend the Regulations in *VJS v SH*, adopting a more modern approach to commissioning affidavits could provide many multi-national businesses who frequently litigate in South Africa a more time efficient and simplified means of deposing affidavits. Such a change would, in turn, result in a reduction of costs usually associated with the laborious process of commissioning, and would offer Courts, international clients and the overburdened South African legal system a much-needed reprieve.

[3] Lexis Nexis South Africa (Pty) Ltd v Minister of Justice and Correctional Services (2024) and Nedbank v Altivex 15 (Pty) Ltd and Others (2024).

Joint Audits: The Route to Tax Certainty and Effective Dispute Avoidance *A focus on Italy and Sweden*

Beatrice Fimiani
Partner, Italy
T +39 06 47815 305
E beatrice.fimiani@cms-aacs.com

Jonathan Johansson
Senior Associate, Sweden
T +46 8 50 72 00 30
E jonathan.johansson@cms-wistrand.com

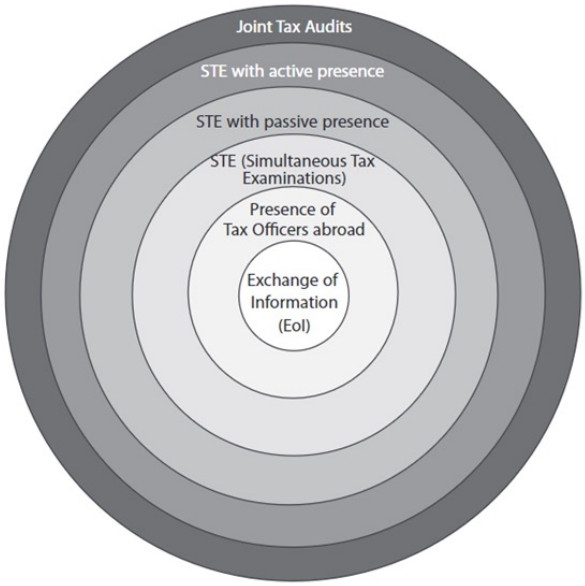
The Organisation for Economic Co-operation and Development (**OECD**) published a report in 2019 titled *"Joint Audit 2019 - Enhancing Tax Co-operation and Improving Tax Certainty"* (the "**Report**"). The Report highlights the important role Joint Audits can play in ensuring tax certainty and effective dispute avoidance. In an increasingly globalised world, a unilateral approach to cross-border matters is less effective and requires more advanced cooperation instruments. The Report identifies various forms of mutual assistance, ranging from a simple request for information to Joint Audits.

What is a Joint Audit?

A Joint Audit involves tax auditors from different jurisdictions working together to review the tax compliance of a taxpayer, typically a multinational entity.

What is the purpose of a Joint Audit?

The objective of a Joint Audit is to ensure that taxable income is allocated appropriately among the involved countries, thereby minimising disputes and reducing the risk of double taxation. This collaborative approach enables a comprehensive examination of the relevant facts and circumstances surrounding cross-border transactions, which can often be complex and contentious.



This graphic has been taken from the OECD's report (OECD (2010), Joint Audit Report, OECD Publishing, Paris, available at www.oecd.org/tax/administration/45988932.pdf.

What are the benefits of a Joint Audit?

The benefits of conducting a Joint Audit include:

Efficiency: Collaboration enables tax authorities to streamline processes, reducing the time and resources needed to resolve disputes.

Clarity for taxpayers: Taxpayers are only required to provide documentation once and are not caught between the conflicting demands of different tax administrations.

Reduced risk of double taxation: They help to clarify how income should be taxed across jurisdictions, thereby reducing instances of double taxation.

What is the legal framework for a Joint Audit?

The legal basis for Joint Audits varies between jurisdictions. The following elements are governed by domestic law:

— the procedural framework for the Joint Audit case selection process;
— preparation specific to the Joint Audit; and
— the conduct and completion of the Joint Audit.

Joint Audits also often include provisions from international agreements such as bilateral tax treaties or regional regulations. For example, the European Commission's Directive 2021/514/EU on Administrative Cooperation known as "DAC 7" which facilitates administrative cooperation between Member States.

What are the stages of a Joint Audit?

Generally, a Joint Audit has the following stages:
Proposal submission: A proposal for a Joint Audit is submitted by one tax authority to its counterpart in another country. The proposal includes details about the taxpayer, the transactions under review, and the audit period.

Discretionary decision: The receiving tax authority evaluates the proposal and decides whether to participate in the Joint Audit. If approved, both authorities agree on the scope and methodology of the Joint Audit.

Conducting the Joint Audit: Tax auditors from both jurisdictions conduct the audit simultaneously, sharing information and findings throughout the process. This direct collaboration helps to avoid inconsistencies that could arise from separate audits.

Final agreement: At the end of the audit, the tax authorities aim to agree on the tax position of the taxpayer based on jointly determined facts.

If an agreement is reached, it typically negates the need for further dispute resolution procedures, such as mutual agreement procedures under international treaties.

Focus on Italy: What are the recent rule changes in relation to Joint Audits?

The Italian legislator has recently introduced specific forms of tax cooperation between domestic and foreign administrations (Article 3 of Legislative Decree No. 13 of 12 February 2024), in line with the DAC 7 and the provisions of Directive 2011/16/EU.

Advanced administrative cooperation ("AAC")
The new provisions regulate the instruments of "advanced administrative cooperation" in a more organic and uniform manner and involves closer cooperation between the tax authorities in EU Member States. They have also introduced the use of AAC with non-EU Member States, in accordance with the provisions applicable to EU Member States and the specific agreements in force at bilateral or multilateral level.

Cooperation between Member States
Under the new provisions, the tax administration "shall endeavour" to reach an agreement with the competent authorities of the other Member States on the taxpayer in question. It also provides that a final report will be drawn up at the end of the Joint Audit process setting out a) the results of the Joint Audit and b) the points on which the competent authorities agree. The final report must be communicated to the taxpayer concerned within 60 days.

The tax administration will carry out Joint Audits in an agreed and coordinated manner with the other Member State officials involved. Language arrangements will be based on the laws and procedures of the host country. Participating Member State officials may not exercise powers of control wider than those conferred on them by their country's legislation.

Process for Joint Audits taking place in Italy
The tax administration appoints a representative to direct and coordinate the activities and will adopt the necessary measures to ensure that:

— participating Member State officials may request data and information from the persons concerned and examine documents together with Italian officials, in accordance with the Italian procedural rules;
— evidence collected during the Joint Audit may be evaluated, including for admissibility, under the same legal conditions that would normally apply to evidence collected during an ordinary audit; and
— the taxpayer subject to or concerned by the Joint Audit are granted rights and obligations similar to those granted to persons subject to an ordinary audit.

Focus on Sweden: What is the scope and legal framework of Joint Audits?

In Sweden, Joint Audits fall under the regulatory framework of the Swedish Tax Procedures Act (the "**TPA**") and the Law on the Administrative Cooperation within the EU in the Field of Taxation (the "**LASEU**"). The administrative measures involved include the following:

- **Audits (Chapter 41, TPA):** Formal inspections of books, records and other documents connected to the business, even if they do not have book-keeping obligations in Sweden.
- **Requests for information (Chapter 37, TPA):** Demands for specific data or documentation.
- **Enforcement measures (Chapters 44 and 45, TPA):** In cases of non-cooperation, the Swedish Tax Agency can escalate actions to include penalty orders or evidence preservation measures.

Importantly, if another Member State has equivalent legislative measures, additional activities such as site visits or equipment inspections may also be undertaken. For instance, Chapter 42 of the TPA enables inspections to ensure compliance with requirements like maintaining personnel ledgers.

Joint Audits undertaken in Sweden are governed by Swedish law to ensure fairness and compliance. The audited party is guaranteed the same rights as with any Swedish domestic investigation. These rights include the requirement to notify the individual or entity of the audit decision and its purpose.

Audit decisions must specify:

- The purpose of the audit;
- The officials authorised to conduct it; and
- The specific provisions under which the audit is being conducted.

If EU officials participate in the audit, the subject must be informed of their involvement. While EU officials can pose questions and examine records, they must adhere to Swedish procedural rules.

Joint Audits present unique challenges, particularly regarding the interplay of different legal systems. To address these, the framework includes safeguards to ensure that:

- **Compliance with domestic law:** All measures taken in Sweden are governed by Swedish law, even when part of an EU collaborative effort.
- **Legal consistency across borders:** Participating officials (both domestic and foreign) must act within the bounds of the Swedish legal framework.
- **Fair treatment:** The audited parties are guaranteed the same rights and protections as they would under Swedish domestic investigations.

Audit material is protected under Swedish law. Only authorised individuals (including the auditors, supervisory personnel, and designated officials from the Swedish Tax Agency) may access these materials. This restriction also applies to EU officials, ensuring a consistent standard of confidentiality.

The success of Joint Audits depends on clear coordination between the participating authorities. A representative from the Swedish Tax Agency oversees and manages Joint Audits conducted in Sweden. The representative is responsible for ensuring compliance with Swedish legal standards and facilitating collaboration with other Member States.

Joint Audits may involve various activities, including:

- Reviewing records on-site;
- Issuing directives for compliance; and
- Applying enforcement measures, such as penalties, if cooperation is lacking.

The activities undertaken need not be identical across participating states. Each country determines the most appropriate and proportionate control measures based on its legal framework.

Swedish Tax Agency officials can participate in activities conducted in other EU Member States. Their actions are limited to what would be permissible under both Swedish law and the host state's legislation. If conflicts arise between the legal frameworks, the Swedish Tax Agency may either refrain from participating or limit its involvement to compliant activities. For example, Swedish auditors cannot review documents if Swedish law or the host state's law prohibits such access under specific circumstances.

What does the future of Joint Audits look like?

As both Joint Audits and EU directives on the exchange of information between authorities become more prevalent, they stand to play a central role in the EU's strategy to combat tax evasion and improve tax compliance. For businesses and individuals, this development underscores the importance of maintaining robust compliance practices, particularly for cross-border operations.

International Arbitration in Ukraine: The Current Landscape

Susanne Schwalb
Partner, Germany
T +49 89 23807 109
M susanne.schwalb@cms-hs.com

Nika Rassadina
Senior Associate, Germany
T +49 89 23807 252
M nika.rassadina@cms-hs.com

A short guide to rules and practices of arbitrating in Ukraine or with Ukrainian parties

Both efforts to attract private investment into Ukraine for reconstruction and development and the country's accession to the EU mean that Ukrainian businesses are more attractive as potential business partners for many German executives, meaning their legal teams are increasingly assessing the Ukrainian commercial legal system.

Although potential investors are often interested in the question of 'de-risking' (i.e. whether an investment has an acceptable risk profile), many will ask more technical questions, for example, whether Ukrainian counterparties would agree to a foreign law jurisdiction, or an arbitration clause in their contracts. This article focuses on commercial arbitration in Ukraine, with Ukrainian parties, and explores the general commercial law framework and the nuances of investment arbitration in Ukraine.

Commercial legal framework in Ukraine

Navigating different legal systems and cultures in transnational commerce is as inevitable as adjusting to time zones when traveling. Fortunately, European civil law lawyers might find that the Ukrainian legal system is not that different to their own.

The first consideration is selecting the governing law of a commercial agreement, which will be unique to each contractual relationship. Two factors, however, might provide comfort to a civil law lawyer in respect of Ukrainian civil and commercial law. Firstly, Ukraine is a civil law country, and historically its system has been influenced by German law, similar to many countries in Central and Eastern Europe. Specifically, the Soviet-era civil codes were largely based on the German Civil Code. While Ukraine adopted modern civil and commercial codes in 2003, many structural and conceptual commonalities with German and German-influenced systems of civil law remain. Secondly, whilst negotiating its EU membership, Ukraine undertook to make its national laws compatible with the EU *acquis*. Ukraine's legal and institutional reforms are ongoing and are being closely monitored by its partners.

With the judicial reform at the heart of the Ukraine's adjustment to rule-of-law standards, EU investors may prefer to rely on EU national courts or on a neutral forum for international arbitration than Ukrainian courts, for the time being. Whether a Ukrainian counterparty would be willing to accept a foreign court as the forum for dispute resolution is a matter of commercial sensibility and contractual trade-offs. From a European party's perspective, it will also be important to consider whether and under what conditions a title obtained in the EU courts is recognisable and enforceable in Ukraine. Until recently, the answer to this question largely depended on the principle of reciprocity, which offered little by way of a reliable legal framework. In September 2023, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters came into force between the EU and Ukraine, which may facilitate the recognition and enforcement of EU court rulings in Ukraine in the future.

Arbitrating with Ukrainian companies or in Ukraine, however, might be a preferable (and reasonable) alternative.

Commercial arbitration with Ukrainian parties

Ukrainian companies with a history of international transactions are familiar with international arbitration.

In the 1990s and early 2000s, many US and UK law firms entered the legal markets of the ex-Soviet republics, bringing with them a broad acceptance of foreign and, particularly, English law as the governing law of commercial contracts. What was initially a preference for a stable legal system, with well-established contract laws, is now the commercial standard when dealing with foreign counterparties.

The same applies to the choice of forum for foreign dispute resolution. English courts are frequented by parties from Ukraine and eastern Europe in cases that often have no connection to England or Wales. Institutional arbitration with a seat in Europe has also gained broad acceptance with the LCIA, ICC, and VIAC now having a caseload from Ukrainian parties. DIS Rules with Germany as the seat of arbitration are not as popular as London or Vienna, but a German-speaking party may well offer this alternative. For example, continental European companies operating with the model contracts by the European Federation of Energy Traders (**EFET**) frequently opt for Option B (German law and the DIS Rules), instead of Option A (English law and LCIA Rules).

There are, of course, exceptions to the general rule. Firstly, in some areas, for example, procurement law, it is rare to see a foreign seat of arbitration or foreign institutional rules. Civil elements of disputes arising from public procurement contracts and those relating to state privatisation, however, are generally arbitrable and can lead to an arbitration with its seat in Ukraine. Secondly, Ukrainian SMEs with less international experience might find foreign arbitration burdensome, for example, due to language barriers and costs. Of course, costs might also be significant for a European party, depending on the size of the contract, particularly when arbitrating in Ukraine is a much cheaper alternative.

Selecting arbitration outside of Ukraine poses questions in respect of recognition and enforcement of the resulting award. As Ukraine is a member of the 1958 New York Convention, however, there are limited grounds on which the Ukrainian courts can refuse to recognise or enforce an arbitral award. The New York Convention grounds are also reflected in Article 36 of the Law of Ukraine on International Commercial Arbitration (Arbitration Act), the key legislative act governing international arbitration in Ukraine, and in Article 478 of the Code of Civil Procedure of Ukraine.

In practice, Ukrainian courts have acted favourably towards recognition and enforcement of foreign awards. Unlike Russian courts, Ukrainian courts generally have avoided stretching grounds to refuse recognition and enforcement under the New York Convention by invoking *ordre public*. Ukraine's 2017 arbitration law reform further enhanced the quality of judicial review by entrusting jurisdiction over the recognition and enforcement of foreign awards to the Kyiv appellate civil court with the Supreme Court acting as an appellate instance.

Russia's full-scale war of aggression and the introduction of martial law in Ukraine have not changed the Ukrainian courts' generally pro-arbitration stance. For example, in February 2023, the Ukrainian Supreme Court upheld enforcement of a domestic arbitral award against a Ukrainian state-owned enterprise operating in the defence sector, ruling that such enforcement does not violate public order, even in martial law. Similarly, currency restrictions enacted in Ukraine under martial law did not, according to the Supreme Court, hinder enforcement of an arbitral award. While not binding, Ukrainian Supreme Court decisions are highly authoritative.

Overall, while specific contractual arrangements may call for an arbitration with a seat in Ukraine, Ukrainian parties with some international experience will often accept foreign arbitration as a dispute resolution mechanism, and Ukrainian courts have generally recognised and enforced foreign awards in line with international standards.

Commercial arbitration in Ukraine

Arbitrating in Ukraine may become increasingly familiar to those with experience in international arbitration.

As mentioned above, international arbitration seated in Ukraine is governed primarily by the Arbitration Act, adopted in 1994 and updated various times since. The international element of an international arbitration under Ukrainian law is derived from the foreign seat of one of the parties to the transaction. Subject to minor deviations, the Arbitration Act is a *verbatim* adoption of the 1985 UNCITRAL Model Law. In addition to the Arbitration Act, the Code of Civil Procedure of Ukraine governs the setting-aside procedure, recognition and enforcement of foreign awards, and judicial assistance to the arbitration proceedings. Furthermore, the arbitrability of commercial disputes is governed by the Commercial Procedural Code of Ukraine, which also stipulates the presumption of validity and enforceability of an arbitration agreement.

Ukrainian lawmakers have been developing Ukrainian arbitration law with a view to positioning Ukraine as an arbitration-friendly jurisdiction. The 2017 reform was instrumental to this and introduced several major changes, including:

— Enshrining the principle of interpretation of the arbitration agreement in *favorem validitatis* in order to preserve its validity.
— Moving the first-instance review of arbitration-related matters to the appellate civil courts, with the Supreme Court of Ukraine acting as an appellate court.
— Empowering the courts to assist arbitration proceedings by granting interim measures and orders on preserving and taking evidence. In line with the UNCITRAL Model Law standards, the issues Ukrainian courts have jurisdiction to rule on in the presence of a valid arbitration agreement are limited to the following: the power of the court to review the preliminary decision of the arbitral tribunal on its own jurisdiction, setting aside the award rendered in Ukraine, recognition and enforcement of foreign awards, and the assistance powers of the courts.

Ukrainian courts have tried to uphold the legislature's pro-arbitration stance and Ukrainian arbitration lawyers tend to agree that the risk of a Ukrainian court intervening to frustrate or delay an arbitration seated in Ukraine is low.

Apart from Ukraine as a seat, parties may consider having a case administered by the Ukrainian arbitration institution – the International Commercial Arbitration Court (**ICAC**) under the auspices of the Ukrainian Chamber of Commerce and Industry.

The outbreak of full-scale war did not distract the ICAC from its work. The number of registered cases grew significantly in 2023 with 584 cases compared to 374 in 2022 and 298 in 2021. Approximately half of the cases registered by the ICAC in 2023 were international arbitrations, with parties from Switzerland and Germany frequently featured, for example (although primarily as respondents).

ICAC Rules are based on UNCITRAL Rules, but with a strong emphasis on the role of the institution. An example of this is the *de facto* mandatory appointment of arbitrators from a closed list of ICAC-approved names, the most recent list containing 115 arbitrators, of whom 71 are foreign practitioners. Whilst it is possible that such restrictions i.e., on parties choosing their own arbitrator, might cause them to treat the ICAC with caution, it is important to note that top Ukrainian arbitration practitioners, with considerable international experience, are on the ICAC list. Those who have used the ICAC have reported that the quality of arbitration is usually high.

In 2022, ICAC Rules were amended twice to improve the procedures that regulate submission and service of documents, including claims, which can be sent via electronic mail, and oral hearings, which can be conducted via videoconferencing. They also introduced "arbitration-mediation-arbitration" and "mediation-arbitration" procedures.

Overall, the arbitration infrastructure in Ukraine is well-developed and would meet the expectations of a sophisticated foreign party to proceedings.

Investment arbitration and Ukraine

Ukraine is also no stranger to investment arbitration, both as the home state of the investors bringing claims and as the respondent state. For example, following the illegal annexation of Crimea by Russia in 2014, several Ukrainian companies brought (and won) cases against Russia for interfering with their investments.

Ukraine is a party to international law instruments that protect the rights of investors. Upon their ratification, international treaties become part of the national legislation in Ukraine and take precedence over the national law in case of a conflict. The sole exception to this rule is the provisions of the Constitution of Ukraine which takes precedence in all cases.

As a member of the 1965 ICSID Convention (which sets special rules for investment arbitration proceedings established at the World Bank in Washington, DC), Ukraine has also concluded bilateral investment treaties (**BITs**) with many EU countries. The future of these instruments, however, is uncertain as Ukraine's accession to the EU would make any arbitration thereunder *intra*-EU and, as such, not in line with EU law (according to the Court of Justice of the European Union (**CJEU**)).

Investors should therefore consider including a separate arbitration clause in their contracts with government or state-owned enterprises. Clearly, investment protection and dispute resolution mechanisms will become more robust in the coming years, given that legal certainty and access to neutral adjudication are central to the overarching European political agenda to increase investment flows into Ukraine.

Mediation in the Netherlands: an obligatory step in dispute resolution?

Simon Polkerman
Counsel, the Netherlands
T +31 20 3016 223
E simon.polkerman@cms-dsb.com

Lissa Boersma
Advocaat, the Netherlands
T +31 20 3016 496
E lissa.boersma@cms-dsb.com

Mediation is a form of alternative dispute resolution in which parties, guided by an independent person, known as a mediator, identify and assess options and negotiate an agreement to resolve their dispute. This differs from most other forms of dispute resolution, where the parties relinquish control over the outcome of their dispute to a third party in a position of authority, such as a court judge or an arbitrator.

Mediation is characterised by three key principles:

1. Autonomy meaning that the parties make decisions about the dispute freely and independently.
2. Voluntariness ensuring that no party can be compelled to participate in or continue the mediation process against their will.
3. Confidentiality allowing parties to speak openly with one another without that what is shared will be disclosed outside the mediation process.

Mediation has gained significant traction across the Netherlands and other jurisdictions in Europe. With its emphasis on collaboration and efficiency, mediation offers a compelling alternative to traditional litigation and arbitration. In the Netherlands, a recent Supreme Court ruling has introduced pivotal clarity on the enforceability of mediation clauses, signalling a potential shift toward making mediation a more obligatory step in resolving disputes. This development reflects broader international trends, where mediation is being integrated more deeply into legal frameworks. This article addresses the mentioned recent judgment of the Dutch Supreme Court, its implications for Dutch mediation, and the wider context of mediation in an international perspective.

Dutch Supreme court: binding nature of a mediation clause?

On 12 July 2024, the Dutch Supreme Court rendered decision ECLI:NL:HR:2024:1078 (the Judgment) addressing a key question: how binding is a mediation clause that is agreed in a contractual agreement? The case involved two professional parties, CSW and PPSB, who had agreed that any disputes would first be resolved through mediation and, if unsuccessful, through arbitration.

When a dispute arose between the parties in 2018, PPSB initiated arbitration proceedings without attempting mediation. CSW invoked the mediation clause and requested the arbitrator to either declare themselves incompetent or stay the proceedings. The arbitrator rejected both requests and proceeded to adjudicate the dispute.

Following the arbitration, CSW petitioned the Dutch Court of Appeal to annul the arbitral awards, arguing that a valid arbitration agreement was lacking since the parties had not first attempted mediation as stipulated. The Dutch Court of Appeal held that PPSB was justified in interpreting the arbitration clause as not imposing a binding obligation to mediate. Consequently, it rejected CSW's claims. CSW then appealed to the Dutch Supreme Court, which was tasked with determining whether a mediation clause could obligate parties to mediate before initiating legal or arbitral proceedings. Given the parties' decision to opt for (international) arbitration, this question is also relevant from an international perspective and in case of cross-border disputes.

Interpretation and enforceability of mediation clauses under Dutch law

The Judgment clarifies that mediation clauses in contracts must be interpreted using the so-called Haviltex standard, a cornerstone of Dutch contract law, which was established by the Dutch Supreme Court in 1981 (ECLI:NL:HR:1981:AG4158 (*Ermes c.s./Haviltex*)). When interpreting an agreement using the Haviltex standard, one must not only consider the linguistic meaning of the text but also the reasonable expectations and mutual intentions of the parties at the time the agreement was entered into. For professional and commercial entities, these expectations are shaped by their expertise and the specific context of the contract's negotiation.

The Judgment states that the enforceability and scope of a mediation clause depends heavily on its interpretation. The meaning of the clause is determined by the reasonable expectations and intentions of the parties under their specific circumstances. Mediation clauses may range from being non-binding to imposing an enforceable obligation to mediate before initiating legal or arbitral proceedings. The inherent non-binding nature of mediation itself does not preclude the possibility of creating such an obligation.

The Judgment established that a mediation clause can impose a binding obligation on parties to attempt mediation before pursuing litigation or arbitration. This marks a significant departure from the traditional view of mediation as a purely voluntary process. By recognising the enforceability of such clauses, the ruling reflects the Dutch legal system's growing emphasis on alternative dispute resolution as a mechanism to resolve disputes collaboratively and efficiently.

The Judgment emphasised that mediation is fundamentally a process focused on effort rather than outcome. While parties are required to participate in good faith, they cannot be compelled to achieve a resolution due to the voluntary nature of mediation. This distinction highlights mediation as a non-binding, cooperative approach, distinct from adjudicative processes such as arbitration or court proceedings.

Balancing enforceability and judicial access

A critical aspect of the Judgment is its reconciliation of enforceable mediation clauses with the right of access to the courts, as guaranteed by Article 6 of the European Convention on Human Rights (ECHR). If a mediation clause is interpreted as requiring mandatory mediation before initiating legal or arbitral proceedings, and one party bypasses mediation, the court (or arbitrator) may, at the request of the other party, stay the proceedings to allow the mediation obligation to be fulfilled. However, courts and arbitrators are not required to stay proceedings. They may decide to proceed if, for instance, the case is urgent or if mediation would be futile. This nuanced approach ensures that mediation does not become an unreasonable barrier to judicial recourse.

Another issue addressed by the Supreme Court in the Judgment was when a party may unilaterally end their participation in mediation. This question also depends on the interpretation of the mediation clause. The Supreme Court emphasised that the application of a mediation clause must not infringe on parties' right to judicial access in an unacceptable manner, as protected under Article 6 ECHR.

The specific case and its outcome

In the case at hand, the Court of Appeal had interpreted the mediation clause as not imposing a binding obligation to mediate. The Supreme Court upheld this interpretation, finding it legally sound and factually grounded. Consequently, the Supreme Court rejected the appeal, leaving the arbitrator's decision on the underlying dispute intact.

The Judgment highlights the Dutch legal system's careful balancing act between promoting mediation and safeguarding access to justice. By framing mediation as a complementary, rather than compulsory, step, the ruling strengthens its role as a practical and efficient alternative to traditional dispute resolution. At the same time, it ensures that fundamental principles of justice and accessibility are upheld.

An important question arises regarding the potential consequences of failing to comply with a mediation clause. Non-compliance might result in the annulment of an arbitrator's decision if mediation has not been attempted. For example, in the case under consideration, CSW initiated proceedings to annul the arbitrator's decision. However, this attempt was rejected by the Court of Appeal, and the decision was later upheld by the Supreme Court. Additionally, it is plausible that failure to comply with a mediation clause could give rise to liability for damages, although this issue was not addressed in the Judgment. Considering the growing prevalence of mediation, along with an increase in mediation clauses and related disputes, it is reasonable to expect a future Dutch ruling addressing the consequences of non-compliance with such clauses.

Mediation in other jurisdictions: a shift toward mandatory mediation?

The opinion issued by the Advocate General (Conclusion Advocate-General R.H. De Bock, ECLI:NL:PHR:2024:103, for Dutch Supreme Court 12 July 2024, ECLI:NL:HR:2024:1078) – who in the Netherlands advises the Supreme Court on pending cases – offers compelling insights into international perspectives on mediation clauses. In this opinion, the Advocate General elaborated on the lack of consensus regarding the enforceability of mediation clauses beyond Dutch borders. Under English law, however, mediation clauses in arbitration agreements are generally deemed enforceable, and German case law firmly holds that professional parties may be bound by mandatory mediation clauses they have agreed upon. Similarly, French law recognises the enforceability of mediation clauses as legally binding. In Belgium, mediation clauses are even enshrined in statutory law, which explicitly provides that if a mediation clause exists, the court, upon the parties' request, must suspend proceedings until the parties confirm that the mediation process has concluded.

Based on these findings, the Advocate General concluded that there are no principled objections to the premise that a mediation clause can carry binding force. The Supreme Court reached the same conclusion. This decision signals an emerging trend within the Dutch legal framework toward embracing mandatory mediation, aligning with developments in other jurisdictions.

Decoding competition law enforcement decisions in the UK

Neil Baylis
Partner, United Kingdom
T +44 20 7067 3457
E neil.baylis@cms-cmno.com

Brian Sher
Partner, United Kingdom
T +44 20 7524 6453
E brian.sher@cms-cmno.com

Rhiannon Pugh
Senior Associate,
United Kingdom
T +44 20 7367 2672
E rhiannon.pugh@cms-cmno.com

Lucy Charatan
Associate, United Kingdom
T +44 207 3673 664
E lucy.charatan@cms-cmno.com

The UK's Competition & Markets Authority (**CMA**) can investigate any business operating in the UK, even if the business's headquarters are located abroad.

In a first-of-its-kind report, the CMS Antitrust, Competition and Trade team has completed a rigorous analysis of competition enforcement in the UK. The analysis considers all 164 CMA competition law investigations under the Competition Act 1998, as well as all Competition Appeal Tribunal (**CAT**) appeals since the early 2000s.

In the links below, CMS experts Neil Baylis and Rhiannon Pugh provide further details of our analysis:

Decoding CMA and CAT decisions – video series – Neil Baylis – Media – VIMP

Competition video series – Rhiannon Pugh – Sector trends – Media – VIMP

Takeaways

The essential points from these presentations are as follows:

— The CMA has a high success rate – 50% of investigations result in an infringement decision.
— The consumer and retail sector tops the chart as being the most investigated.
— Technology, life sciences and building & construction are not far behind.
— There are stark differences between sectors in the way the CMA pursues its investigations.
— In almost three quarters of cases resulting in an infringement decision, parties benefitted from leniency and/or settlement.
— Over a third of the CAT appeals brought against CMA decisions have been successful with almost 40% of appeals being partially successful.

— The CMA has rolled-out a digital data monitoring tool, which it has used in the musical instruments sector. We expect this tool, and similar AI tools undergoing development in the coming years, to result in more investigations into e-commerce practices.
— We expect the CMA to continue to use its powers to pursue new theories of harm in response to changing technological, environmental and consumer conditions.
— Green agreements and environmental topics will increasingly be on the CMA's radar. The CMA has published guidance on the assessment of green agreements vis-à-vis UK competition law and introduced a new "open door" policy under which companies can actively seek the CMA's blessing for green agreements.

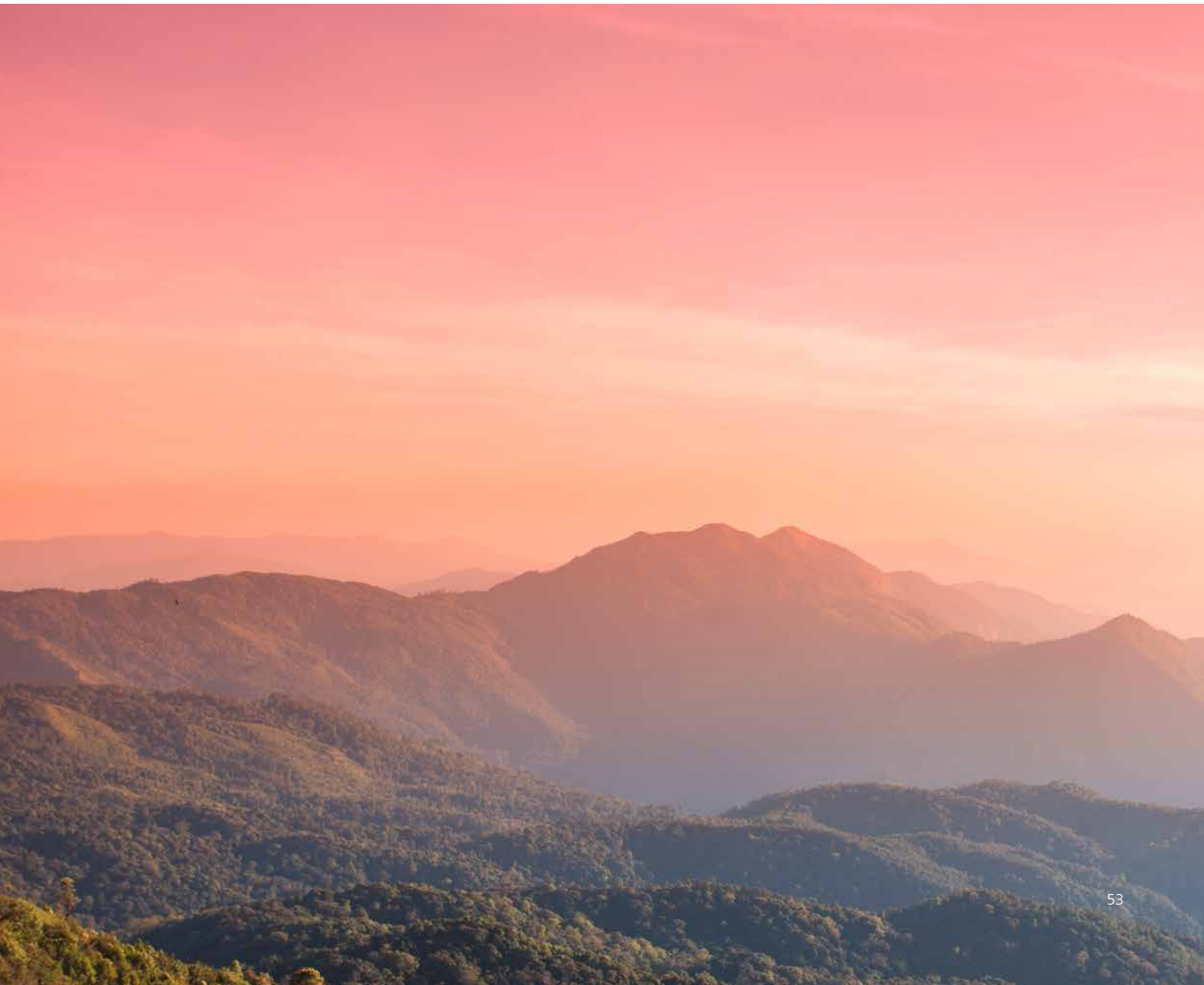
Looking forward

In addition to the analysis of all the OFT and CMA Competition Act decisions to date, we also set out below the trends we see shaping the competition landscape in the near future. These trends include:

— The continued focus on e-commerce.
— Increased willingness of the CMA to tackle novel theories of harm.
— Focus on green agreements and environmental topics.
— Evolving enforcement in digital markets, which focuses on more than just the big players.
— Heightened attention on labour markets.
— A growing role of the CAT in policing the CMA.

Access the full report below

Decoding CMA and CAT decisions – UK competition law enforcement report



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CMS Technology Transformation Report

Explore the second edition of the CMS Technology Transformation Report, a comprehensive publication dedicated to exploring the risks and opportunities associated with technology implementation. In the report, we analyse data from a survey of more than 500 GCs, senior in-house counsel and risk managers and compare their current concerns to the views expressed in our previous survey from 2022.

CMS European Class Actions Report 2024

Analysing data from class action proceedings across Europe from the past five years, the report maps a true picture of class action risk for international businesses. Now in its fourth year, the CMS European Class Action Report 2024 shows further growth in the overall number of class actions, and with it, increased quantum. With its data-driven approach, the report provides an accurate picture of what is happening in Europe.

CMS Expert Guides

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The guide covers over 45 countries in the Americas, Asia-Pacific, MENA, Sub-Saharan Africa, the CEE and Western Europe and provides a comprehensive overview of arbitration law in those jurisdictions.

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