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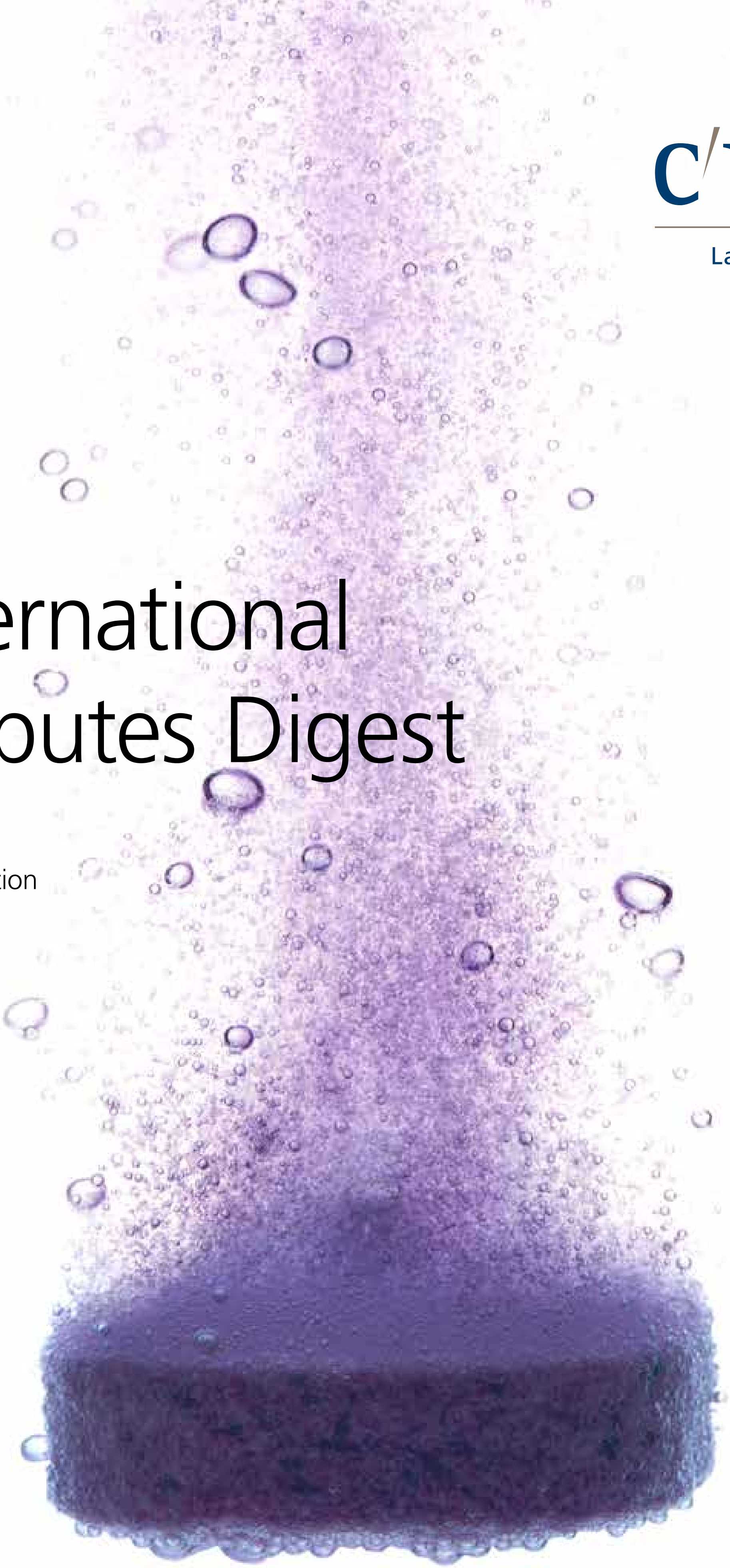
International Disputes Digest

Winter Edition



December 2019

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Introduction

Welcome to the winter edition of our International Disputes Digest, a bi-annual publication featuring analysis and commentary on the key trends currently shaping the global dispute resolution market.

We start by examining whether the launch by many states of specialised, English-speaking courts for international commercial disputes signals a threat to arbitration as an alternative method of dispute resolution. The establishment of International Commercial Courts in high profile jurisdictions such as Singapore, Paris, Frankfurt, Dubai and Abu Dhabi have given parties a further choice between litigation and arbitration although issues such as the language and confidentiality of such proceedings still need careful consideration.

Continuing the theme of risk management, we analyse the recent landmark CJEU Tibor-Trans judgment and its far-ranging implications in Hungary and beyond. The judgment relates to the jurisdiction of national courts to hear follow-on damages claims arising out of cartel price fixing and has created major concerns in the market over its potential impact on the future effectiveness and fairness of such proceedings.

We also consider multi-jurisdictional IP disputes and assess how regulators, organisations and courts are attempting to balance the interests of patent owners and implementers. The requirement that access to Standard Essential Patents (SEPs) should be made under licensing conditions that are fair, reasonable and non-discriminatory (FRAND) has thrown up a number of important procedural questions for the IP disputes community.

Our experts remain at the forefront of thought leadership in the disputes market and summarise the key themes of an event on third party funding in arbitration hosted by CMS Lisbon and a bilateral exchange on German and Turkish ICC Arbitration held at CMS Frankfurt.

The arbitration focus continues with a fascinating look at the impact of the ground-breaking CJEU *Achmea* decision on Intra-Eu Investment Treaty Arbitration plus separate analysis of the increasing push towards arbitrations to be seated in Africa following domestic and regional legal reforms.

Finally, we examine the major risk issues currently facing global corporations with a trio of articles looking at the reform of directors' liability in Belgium; the spectre of state liability for banking supervision in Bulgaria and the drive towards enhanced anti-corruption measures in Russia.

We hope you enjoy this edition of our International Disputes Digest and welcome your feedback on any of the issues raised.

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New kid on the block: international commercial courts

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Parties to international business transactions often prefer arbitration over litigation before state courts to resolve their disputes. However, with the establishment of English-speaking state courts in several countries, litigation could become more popular. Are specialised international commercial courts an alternative to arbitration – or might they be in future?

In recent years, many states have established specialised English-speaking courts for international commercial disputes. Known as international commercial courts, examples include the Dubai International Financial Centre Courts (DIFC courts), the Singapore International Commercial Court (SICC), the Abu Dhabi Global Market Courts, the Netherlands Commercial Court (NCC), the International Chamber at the Paris Commercial Court, and the International Chamber for Commercial Disputes at the Frankfurt Regional Court. In Belgium, plans to establish the Brussels International Business Court (BIBC) by 2020 have stalled – as the draft bill was withdrawn from the Belgian parliament earlier this year for lack of support. It is therefore uncertain whether the BIBC will become reality.

Both in-house legal counsel and external counsel will in future no doubt seriously consider choosing an international commercial court as a forum for potential disputes. However, as there are still many uncertainties regarding proceedings before the international commercial courts – as well as substantial differences between such proceedings and the common practice in international arbitration – this question needs to be considered very carefully.

Key aspects of proceedings before an international commercial court are set out below.

Language of the proceedings

Before the SICC, the DIFC Courts and the NCC, the entire proceedings will be conducted in English. This applies to all submissions by the parties, any evidence, the oral hearing, as well as the judgment and any other decision of the court.

However, in Germany and France, current legislation requires court proceedings to be conducted in German and French respectively, with only a few exceptions. The use of the English language before the international chambers in Paris and Frankfurt is therefore limited to the submission of evidence, as both courts will accept evidence in English without the need for a translation. The international chamber in Frankfurt will generally allow parties and witnesses to testify at the oral hearing in English. The international chamber in Paris accepts written witness statements in English (oral witness testimony is very uncommon in proceedings before French commercial courts). Apart from those exceptions, the proceedings in Paris must be conducted in French, and in Frankfurt they must be in German. This applies to all written submissions by the parties as well as any communication or decision of the court, including the minutes of the oral hearing. The international chamber in Paris will, however, provide the parties with an official English translation of the final judgment.

Rules of procedure

The SICC does not operate under the standard Singaporean rules of civil procedure; it has its own set of statutory rules. These rules are more flexible and allow the parties, to a certain degree, to adapt the proceedings to their needs. For example, parties to cases without any connection to Singapore may replace the applicable rules of evidence with an alternative set of rules of their choice.

By contrast, proceedings before the NCC and the international chambers in Paris and Frankfurt are subject to the general statutory provisions which govern all civil state court proceedings. However, for the French international chamber and the NCC, there are additional official guidelines which set out how the international proceedings are conducted within the domestic legislative frameworks. The *Protocole relatif à la procédure devant la chambre internationale du tribunal de commerce de Paris* explains how the international chamber of the Paris Commercial Court will interpret and apply the provisions of the French Code of Civil Procedure. Similarly, the *NCC Rules* and *Explanatory Notes* stipulate and explain the specifics of proceedings before the NCC.

Specialised panel of judges

All international commercial courts are composed of English-speaking judges who have special experience in handling international commercial disputes.

— The judges currently serving at the NCC are professional judges of the Dutch judiciary.

— The international chamber of the Paris Commercial Court is staffed solely with merchants as lay judges who serve on an honorary basis and receive a judicial training, as is the case with all commercial courts in France.

— In Germany, cases before the international chamber of the Frankfurt Regional Court are heard by a panel of two lay judges and a presiding professional judge. The professional judge may, with the consent of the parties, decide the case without the lay judges – this option is often chosen in practice.

However, while the panels of the various international commercial courts in Europe are exclusively composed of domestic judges, others have taken a different approach. For example, the SICC has a mixed panel, which is staffed with regular judges from Singapore's Supreme Court as well as "International Judges". The International Judges are individuals, often former judges, from other jurisdictions who have substantial knowledge of and experience in international commercial law. The DIFC Courts go even further: its judges are international and completely independent of the judiciary of the Emirate of Dubai.

Preferable choice to arbitration?

There are many reasons why parties might prefer arbitration over litigation before a state court.

Flexibility
Court proceedings follow very specific rules and national peculiarities that are often difficult for outsiders to understand. In contrast, arbitration proceedings can be tailored to the needs of the parties. For example, the parties may choose the language of the proceedings and agree on certain procedural rules.

Confidentiality
Unlike arbitration proceedings, state court proceedings are generally public and therefore cannot guarantee confidentiality to the same extent as arbitration.

Expertise
State courts may have specialised chambers for certain categories of disputes. However, a specific type of expertise is not guaranteed. In arbitration, individuals with the appropriate expertise required for the individual case can be selected and appointed as arbitrators.

Enforceability
Arbitral awards are enforceable almost worldwide under the New York Convention on the Recognition and Enforcement of Arbitral Awards. A comparable instrument with global reach for the enforcement of court judgments does not yet exist.

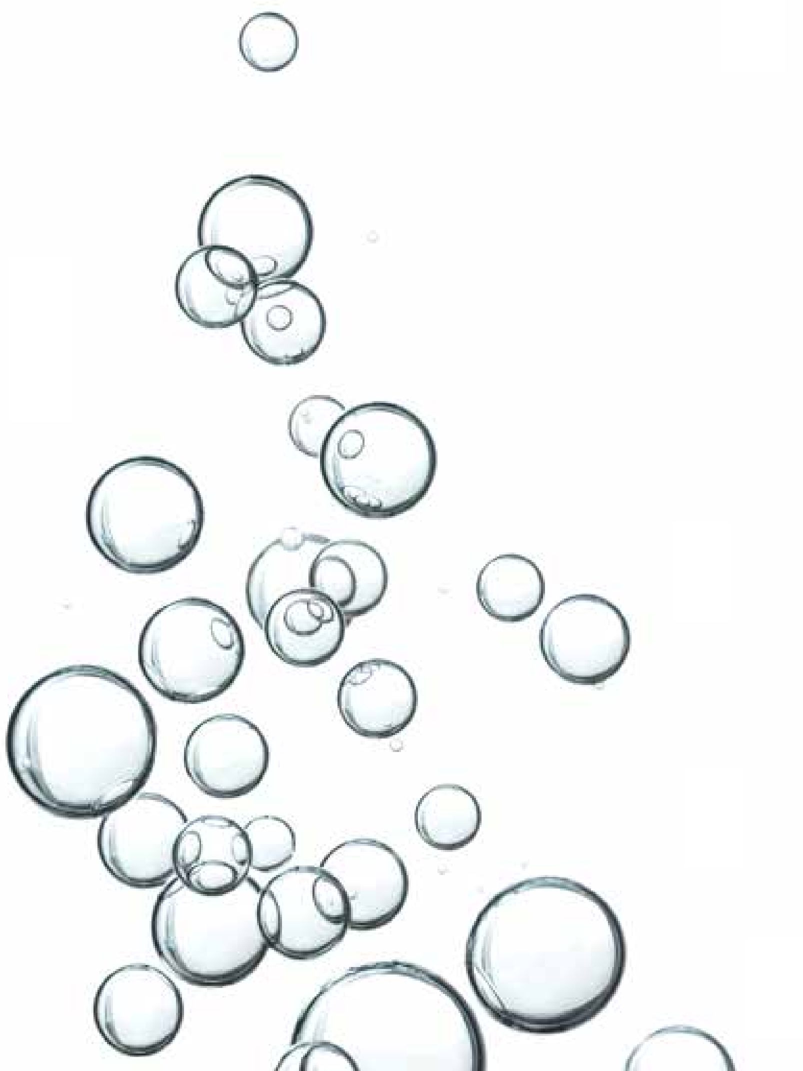
Can international commercial courts offer a more attractive forum than arbitration for the resolution of international commercial disputes?

The most promising candidates in this regard are currently the SICC and – especially for European parties – the NCC, as they offer a modern court infrastructure and their proceedings are conducted entirely in English. The language of the proceedings is an important consideration in international disputes. English is the *lingua franca* of international commerce. Parties generally have an interest in conducting the proceedings in the language of their business relationship and of the contract in question. This not only saves costs for the translation of documents but is also considered fair, as the parties were already using this language long before the dispute arose.

Language is not the only important factor, however. Confidentiality is often perceived as a great benefit of arbitration. Proceedings before international commercial courts are in principle public court proceedings with oral hearings which are generally open to everyone.

Enforceability is another important issue. A successful lawsuit is worthless if the judgment cannot be enforced in the opponent's home country. It is relatively straightforward to enforce the judgments of Member State courts within the EU. In non-EU countries, however, this is often not guaranteed: the Hague Convention on Choice of Court Agreements, whose contracting states undertake to mutually recognise and enforce judgments, currently only applies to the EU Member States' relations with Mexico, Singapore and Montenegro. The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has not yet entered into force. By contrast, the New York Convention on the Recognition and Enforcement of Arbitral Awards has 161 contracting states.

Thus, while international commercial courts unquestionably make litigation more attractive for internationally active companies, arbitration still has its benefits and will continue to play an important role for the foreseeable future.



CJEU ruling has far-ranging implications for follow-on damages claims

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The Court of Justice of the European Union (CJEU) recently ruled on the jurisdiction of national courts to hear follow-on damages claims arising from cartel price fixing. While the ruling aims to deliver justice to the victims of cartels, its long-term implications for the effectiveness and fairness of follow-on damages proceedings leaves considerable room for concern.

On 29 July 2019, the CJEU handed down its ruling in *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks NV* (Case C-451/18), which was referred to it by a Hungarian second instance court. The underlying case related to a follow-on action for damages commenced following the 2016 European Commission decision finding the existence of an illegal cartel between international truck manufacturers (Decision C (2016) 4673 in Case AT.39824 – Trucks). The Commission found that the manufacturers, including DAF Trucks, had colluded on pricing, including the gross price increases of trucks in the EEA, and on the passing on of the costs of emission technologies, which resulted in a continuous infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) between 1997 and 2011.

The follow-on action for damages was brought by Tibor-Trans, a Hungarian freight transport company which had invested in the lease of new trucks during the cartel period. Tibor-Trans, as an end user and indirect purchaser, did not lease the trucks from the manufacturers involved in the cartel but through DAF Trucks dealerships in Hungary. For this reason, Tibor-Trans filed a claim for *non-contractual* damages against DAF Trucks resulting from the collusive arrangements in which DAF had participated. DAF Trucks challenged the jurisdiction of the Hungarian courts, arguing that the collusive arrangements took place in Germany, entailing the jurisdiction of the German courts, and there was no contractual relationship between Tibor-Trans and DAF Trucks, meaning DAF Trucks could not reasonably expect to be sued in the Hungarian courts.

The Hungarian court made a reference to the CJEU for a preliminary ruling concerning the interpretation of Article 7(2) of Regulation No 1215/2012 (Recast) (the Brussels I Regulation). This provides that a person member state, in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. The question submitted was whether the place where the victim claims to have suffered damage can be considered to be *"the place where the harmful event occurred"* even where the action is directed against a cartel participant with whom the victim does not have a direct contractual relationship.

Location of harmful event

The CJEU found that in an action for follow-on damages caused by an infringement of Article 101 TFEU, *"the place where the harmful event occurred"* under Article 7(2) of the Brussels I Regulation covers the location of the market affected by that infringement, meaning the place where prices were distorted and where the victim claims to have suffered the damage. The CJEU considered that this was not affected by the fact that the cartel member concerned was not in a contractual relationship with the victim. As the affected market in the case at hand was Hungary, the CJEU held that the Hungarian courts have jurisdiction.

The judgment of the CJEU is undoubtedly commendable for its approach insofar as it responded to the question in a way that is compatible with the values set forth in the TFEU, in particular the principle of proximity. The decision strengthens the position of parties bringing claims for damages, by stating that the courts of the member state where the affected market is located are best placed to assess such claims. Furthermore, by ruling that jurisdiction is based on the market affected by the infringement, the CJEU accorded relevance to the fact that competition law infringements extending to the whole of the EEA result in the distortion of competition in all national markets of the EEA member states, and therefore the costs of cartelised goods that are passed on to the purchaser shall be considered direct damage.

These factors certainly favour cartel victims and help their pursuit of claims for compensation in respect of competition law violations. However, the *Tibor-Trans* decision also gives rise to several concerns with regard to judicial effectiveness and fairness, and may entail the fragmentation of follow-on proceedings in cases of internal market violations under Article 101.

Far-reaching consequences

The CJEU stated that a cartelist can reasonably expect to be sued in the member state where its anticompetitive conduct has distorted market conditions, instead of the place where the conduct itself took place. However, this finding entails far-reaching consequences for the implementation of TFEU and competition law values and principles.

First, the CJEU referred to the objective of predictability in order to justify its approach. But if cartel victims are allowed to sue for damages in the place where the market prices were distorted and their damage occurred, the place of the proceedings will be entirely the claimant's choice. This outcome creates significant uncertainty from the cartelist's perspective, as it could result in 31 parallel proceedings against the same cartel member, based on the same illegal conduct, but under 31 different legal systems and applicable substantive laws within the EU and the EEA. This would result in the fragmentation of proceedings aimed at claiming compensation in relation to cartel activities and serves as an additional burden on the infringing entities.

Second, this unpredictability would generate inequality among the cartel victims themselves because differences in law between national courts will result in differing legal options for obtaining compensation, different standards of proof and different amounts of compensation awarded. In addition, the obligation on victims to mitigate their damage will also differ under different national laws.

Third, the above chain of implications would also entail significant financial burdens for the defendant. The cartel member concerned – having already paid a fine in relation to cartel activities during the proceedings before the Commission – would also have to bear additional costs resulting from having legal representation in proceedings launched in different Member States due to differences in applicable substantive law.

Although it is too soon to analyse further the implications of the decision on claims founded upon the Commission's findings of violations of the internal market, we can foresee a fair degree of procedural chaos occurring when victims of these violations – in many cases international companies conducting business in several countries – bring claims in different courts against the same cartel member for the same violation of Article 101 TFEU. One potential benefit is that compensation claims arising from the cartel arrangements could be settled through joined proceedings before one court with jurisdiction based on the place of the harmful act. – Where the place of harm is the same for all the victims, they would be equal in this sense – which would result in the adjudication of the claims by the same court and under similar procedural and substantive law. Ultimately the issue will turn into a question of risk management on the part of the claimants, as they will have to weigh up the costs and benefits of having separate actions in each jurisdiction or seeking damages at the seat of the defendant.

IP disputes: a global view

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Intellectual property (IP) is the core of any new technological development and is often one of a company's most valuable assets. Effective protection of IP is therefore essential. At the same time, today's IP disputes often reflect the global integration of enterprises and therefore involve various jurisdictions. But with varying quality levels of IP legal protection in different regimes, consistent and effective protection is far from straightforward.

Key decision makers in international enterprises often moan about a lack of expertise and the risk of cost explosions in IP disputes. In some countries, such as Germany, specialised patent chambers may be well known for their judicial quality in IP matters, as well as for their rather time- and cost-efficient decision-making processes. Nevertheless, it is difficult to offer practical and effective solutions that take into account the global cross-links of IP disputes on a national level. This is because national jurisdictions are limited to the territory of their respective courts and the enforcement of national court rulings abroad often proves difficult.

Protecting IP rights in a digital world

IP disputes frequently arise in the context of licence agreements, raising questions over the entitlement to royalties as well as the validity of IP rights under different national laws. Disputes over technology standards are becoming increasingly frequent. Standards play an important role in modern technology. The Internet of Things (IoT), as well as progressing digitalisation in all industrial sectors, depends on standardised technologies, especially in data and communication processes. Autonomous driving and Industry 4.0 likewise depend on standardised technologies.

Standard technologies are typically protected by IP rights, especially patents. Patents underlying a standard technology are called standard essential patents (SEPs). Potential users and implementers of SEPs can only compete on the market if they can access these patents on competitive terms. At the same time, effective SEP protection is crucial for patent owners and the market itself since, if SEPs are not effectively protected, owners will not continue to contribute innovative technologies to the standardisation process. Standard-setting organisations, regulators and courts, have therefore tried to balance the interests of patent owners and implementers by requiring that access to SEPs is made available under licensing conditions that are fair, reasonable and non-discriminatory (FRAND).

What is FRAND?

There are no easy answers to this question. Disputes over FRAND conditions often relate to entire patent families under various national laws. Many thousands of patents owned by multiple parties may cover a standard and an individual licensor may be seeking a royalty for a portfolio of tens or hundreds of patents.

FRAND disputes are typically globally cross-linked. Additionally, national court rulings in FRAND disputes risk producing legal fragmentation due to their limited jurisdiction and can amplify inconsistencies in determining FRAND terms. It is quite common for several parallel IP disputes to be pending in a number of jurisdictions, thereby increasing the risk of inconsistent decisions and a significant increase in costs.

Resolving FRAND disputes through arbitration and ADRF or IP disputes in general, and FRAND disputes in particular, arbitration and alternative dispute resolution (ADR) mechanisms can offer solutions that meet the parties' need for both expertise and time and cost efficiency. Most importantly, however, arbitration and ADR mechanisms effectively overcome deficiencies in the enforceability of decisions in global IP disputes. Under the New York Convention of 1958, an arbitral award can be enforced in all the 161 member states worldwide, including key countries in the technology sector such as China, India and the US. As for mediation, the Singapore Convention on Mediation was signed on 7 August 2019 by 46 countries – including China, India and the US, but no EU member state to date. The Singapore Convention aims to facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across borders.

Traditionally only a relatively small number of procedures in international arbitration have concerned IP matters. One main reason for this could be that their arbitrability has been viewed critically in the past, especially when it comes to IP 'core disputes' concerning patent validity. This is because IP rights generally have an *erga omnes* effect, whereas arbitral awards and other ADR mechanisms are limited to an *inter partes* effect.

Today, however, the arbitrability of IP disputes, is broadly acknowledged, at least as far as commercial matters are concerned. Even with respect to core disputes an 'indirect *erga omnes* effect' could be established if the arbitral tribunal obliges the patent holder to waive, revoke or transfer their IP right. Solutions are therefore available that address the critics' concerns.

Arbitration and ADR mechanisms can be beneficial for resolving IP disputes as they:

— ***Provide for global solutions,*** taking into account multiple legal regimes. Since arbitration and ADR are based on party agreement, these dispute resolution mechanisms are not limited to the territory of a national court. Arbitration and ADR can therefore be applied to patents granted in different jurisdictions.

— Provide for ***specific expertise*** in the dispute resolution process because the arbitrator, mediator or expert can be chosen by the parties according to their professional competence and expertise in the relevant sector. This is particularly important in IP disputes because these matters typically require a high level of technical and economic understanding, combined with specific legal expertise both in substantive and procedural law.

— May be ***quicker than litigation*** as they typically do not provide for an appeal. The parties can agree shortened deadlines to accelerate the overall process. Some arbitral institutions offer rules for fast-track proceedings. The International Chamber of Commerce (ICC), for example, has an expedited procedure and emergency arbitrator rules. On an international level, the United Nations Commission on International Trade Law (UNCITRAL) is working on a framework on expedited arbitration.

— ***Promote the principle of equality of arms.*** The parties can agree on a neutral forum and choose a language of proceedings to eliminate any perceived home court advantage.

— Are ***private*** and, if the parties agree, they can be combined with non-disclosure agreements to ensure confidentiality beyond the hearing room.

Agreeing to ADR or arbitration

As a consensual mechanism, both arbitration and ADR require a party agreement. The parties can either agree to submit their dispute to arbitration or ADR when a conflict is already pending, or they can include a corresponding clause already in their contractual agreements. In this regard, some standard-setting organisations require patent owners who participate in standards setting activities to submit to arbitration clauses for the settlement of FRAND disputes. Furthermore, agreements to arbitrate FRAND disputes have been included in settlements between competition authorities and licensors in cases where the licensors were accused of violating their obligation to license their patents at FRAND terms under the applicable competition laws.

Under the principle of party autonomy, different ADR mechanisms can be selected and combined both with litigation and arbitration. The parties can also include escalation rules in their arbitral clauses, which require them to attempt to reach a consensual solution through mediation or expert determination before starting an arbitral procedure. The parties can further opt for a targeted use of arbitration or ADR by submitting the dispute to arbitration or ADR only individually, or in part. Furthermore, ADR mechanisms – typically expert determinations or mediation – can in principle be used as a supplementary tool at any stage of an arbitration or litigation.

While FRAND disputes can be handled under regular arbitration rules, they differ from typical commercial disputes in several ways. The World Intellectual Property Organisation (WIPO) has issued rules for FRAND arbitrations to address their specific requirements. The IP Dispute Resolution Forum of the Max-Planck-Institute for Competition and Innovation (IPDR) has issued FRAND ADR Case Management Guidelines that can be used irrespective of the applicable institutional or ad hoc procedural rules.

Outlook

Both arbitration and ADR mechanisms can provide for tailor-made solutions which specifically address the global cross-links of an IP dispute and meet the need for specialist expertise. Against this background, arbitration and ADR mechanisms are likely to play an increasingly important role in the settlement of IP disputes.

Third party funding in international arbitration

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The claim that arbitration is a quicker, cheaper, alternative to court litigation is not heard as often as it used to be. High value, complex international arbitration can now be as expensive as going to court. The advent of third party funding has, however, given parties considering international arbitration a further option to consider.

The use of third party funding has increased in recent years in international arbitration as parties have looked to overcome the cost hurdle that often constitutes an obstacle to the commencement of an arbitration proceeding, particularly in disputes involving high-value claims. The rise of third party funding and the challenges that it has generated in international arbitration were among the topics discussed during a conference held on 16 May 2019 at CMS Lisbon at which CMS Lisbon partners, Joaquim Shearman de Macedo and Nuno Pena together with Richard Bamforth, partner at CMS London, and Luke Arbuthnot, Executive Director and Senior Counsel at Goldman Sachs, sought to debunk some of the myths around third party funding in international arbitration.

What is third party funding?

In broad terms, third party funding is the financing of some or all of a party's costs and expenses in arbitration by a third party not involved in the dispute – the so-called funder. Funders will look to finance claimants, or defendants with a significant counterclaim, in high value claims likely to result in a damages award. Non-monetary claims are usually not considered suitable for funding. In exchange for their investment made, the funding agreement may provide for a success fee for the funder in the event the funded party succeeds or, more commonly, a percentage of the amount recovered or a multiple of the amount of the funding provided. Typically, the percentage earned is very rarely less than 20% and may extend up to 50%, depending on the complexity of the case, the funder's appetite for risk and the agreement made between the funder and the funded party. If the case fails, the funder loses its investment and is not entitled to any payment.

The funder's perspective

When deciding to invest, the funder will always have regard to the fact that its primary goal is to profit from its investment. Like any investment, the funding entails risks for the funder. Before investing, the funder will therefore need a clear view of the potential downsides, and risk assessment is essential when making a decision on funding.

The process of evaluating a potential investment usually begins with the signing of a confidentiality agreement between the funder and the party seeking finance. Thereafter the funder's first step is to conduct extensive due diligence and to make a detailed analysis of the potential investment before agreeing to provide funding. In this regard, key factors to be assessed by a potential funder are likely to include:

— the value of the claim and its complexity;

— the amount of funding needed;

— the claim's prospects of success;

— whether counterclaims will be made;

— the ease of enforcement of any arbitral award to be rendered; and

— the jurisdiction in which the arbitration takes place.

This last factor is particularly important as some jurisdictions are more amenable to funding than others. In some common law jurisdictions funding is unlawful and is considered to be contrary to public policy. For example, Hong Kong permits funding in arbitration but funding of litigation remains prohibited by law.

Benefits and downsides

Arbitration has the advantage of being a process which is – or should be – less formal than court proceedings and which often has a higher degree of specialisation. However, the maxim that arbitration is "faster and cheaper" is not heard as often as it used to be. Indeed, it is possible that parties have to spend more on arbitration since, in addition to their own legal fees, they also have to pay arbitrators' fees and expenses. Cost may therefore be a factor which deters parties who otherwise have a good claim from bringing that claim to arbitration. In these scenarios, third party funding emerges as a mechanism that may provide access to justice for under-resourced parties and also goes some way to preserving equality between parties in ensuring that cases are not decided on the basis of unequal economic resources. Indeed, even for financially stable or well-resourced parties, third party funding may still be attractive as it enables them to manage their resources better and to invest sums that otherwise would have had to be allocated to (and tied up in) fighting the arbitration in other areas of their business.

Nevertheless, like any investment, there are downsides to funding mechanisms. First, cases that are the subject of funding still tend to be the higher value ones, so the extent to which they provide access to justice is limited.

Second, even though the funder should have no control over the case it decides to finance, and indeed this is a fundamental tenet of ensuring that the funding arrangement is lawful, the fact of funding may raise concerns. For example, in relation to settlement, the funder who seeks to benefit from the amount ultimately payable may have a different perspective to that of the party itself.

Third, and perhaps most importantly in arbitration funding, the advent of third party funding has raised concerns regarding the effect of the involvement of the funder on the independence and impartiality of the arbitrators, which is one of the fundamental principles of arbitration. Indeed, the impartiality of an arbitrator may be called into question whenever an arbitrator and the funder have any kind of pre-existing relationship.

We may see situations where repeated appointments of an arbitrator are made by parties funded by the same third party or where an arbitrator on a funded arbitration acts as counsel to another party in a separate dispute funded by the same party. It is also becoming more common for arbitrators to sit on the investment committees of funders (who are looking to them for guidance based on their significant market experience). These scenarios all raise questions as to whether an obligation to disclose third party funding should be imposed on parties and what should be the scope of that disclosure.

Is there a need to disclose the funding?

The duty to disclose the existence of third party funding is a topic that has generated much discussion in the arbitration world and on which there is still no consensus. The argument for disclosure centres on the need to maintain the credibility and integrity of the arbitral proceedings, with the key points being the existence of funding and the identity of the funder. There is currently no general obligation on a funded party to disclose that it is being funded, and the majority of the arbitral institutions and national laws do not regulate third party funding at all – let alone specify any duty of disclosure. However, the disclosure of third party funding may in some cases be seen as a benefit as, if a funder has taken on a case, it will only do so if it has a strong, independent, opinion on the merits of the case. This fact of itself may convey the potential strength of the case to the opposing party and potentially increase the prospect of settlement.

Increasing concerns over the principle of transparency has prompted a recent trend towards disclosing the existence of third party funding. The disclosure question was addressed in the 2018 report of the ICCA-Queen Mary Task Force on Third party Funding in International Arbitration. Chapter 4 of the Task Force's Report[1], "Disclosure and Conflicts of Interest", suggests a general duty of disclosure of the existence of third party funding and the identity of the funder. Some arbitral institutions have changed their rules with the aim of introducing provisions about the disclosure of funding. The Hong Kong International Arbitration Centre, for example, amended its arbitration rules[2] in 2018 and introduced new provisions to require the disclosure of the existence of a funding agreement and its terms, as well as the funder's identity (Article 44). Likewise, in investment treaty arbitration, ICSID proposed an amendment to its Arbitration Rules in 2018 that would introduce a duty to disclose the existence of third party funding and the name of the funder as well as an obligation to disclose any changes that may occur after the initial disclosure. It is not yet certain whether these proposed amendments will be accepted – the vote will take place in October 2020 – but the direction of travel seems clear.

The trend therefore seems to be in favour of establishing a duty to disclose the existence of third party funding and the identity of the funder, thereby reducing concerns over the principles of impartiality and independence of the arbitrators, but with all other particulars of the funding agreement remaining confidential.

Treatment of privileged information

The difficult question of the treatment of privileged information to funders was also addressed in the ICCA Task Force Report. Understandably, funding requires the sharing of highly sensitive information which usually requires the signing of confidentiality agreements in order to prevent information leaks. This in turn gives rise to concerns over privilege (and waiver). Confidentiality agreements should therefore reflect the rules governing privilege in the relevant jurisdiction, as the way in which privileged information is treated varies between jurisdictions. In this regard, it is noteworthy that Chapter 5 of the Task Force Report recommends that arbitral tribunals treat the information shared with the funder as protected against disclosure.

Outlook

Third party funding is now an established part of the landscape in common law countries and increasingly in civil law jurisdictions which are involved in arbitration. The mechanism has emerged as appealing both to parties to arbitration and to investors, but it has brought several challenges to practitioners. Those challenges are being addressed as they arise and this is enabling third party funding to become an essential tool in the armoury of claimants, whether they are impecunious or not.

1 https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf
2 https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf

Arbitration in Africa – what does the future hold?

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The rise of international investment in Africa has come hand-in-hand with a rise in both commercial and investment disputes, with the latter arising particularly from bilateral and multilateral investment treaties, as well as other regional arrangements. In recent years arbitration has become the dispute resolution method of choice in these types of disputes, mainly driven in the commercial field by the telecoms, energy, natural resources and construction industries. Investment arbitration is booming, – in 2019, 28% of ICSID arbitrations involved states in the Middle East, North Africa and Sub-Saharan Africa. How has this change come about, and what does the future hold for arbitration in Africa?

How African nations approach arbitration

"The re-localisation of arbitration to African venues is an idea whose time has come." This statement, from the keynote speech of Judge Yusuf, the president of the International Court of Justice, to the ICCA Congress in May 2016, highlights the increasing push for arbitrations to be seated in Africa and to reduce the number of cases being exported outside the continent.

A number of legal reforms, both domestic and regional, have helped create an environment for African arbitration to continue to thrive. These reforms include the updated OHADA Uniform Act on the Law of Arbitration and the Revised Rules of Arbitration of the Common Court of Justice and Arbitration (CCJA). The aim of these reforms has been both to promote arbitration within the OHADA states, ensuring the arbitration process remains expedient and transparent, as well as to make the CCJA a more attractive centre for arbitration to promote disputes being heard domestically within the OHADA states.

There are now 11 African states that have adopted the UNCITRAL Model Law on International Commercial Arbitration, following South Africa's adoption of the Model Law in November 2017 through its International Arbitration Act. Alongside this, 37 out of the 54 African states are now signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Together, these developments have paved the way for the rise of arbitration across the continent, enabling Africa to gain both international recognition and grow in stature.

ICC and LCIA in Africa

The London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) – the two most widely recognised arbitral institutions globally – have in recent years played a pivotal role in the development of Africa-related arbitration.

The LCIA, in conjunction with the Government of Mauritius, ran a well-known joint venture – the LCIA-MIAC arbitration centre – promoting Mauritius as a centre for international arbitration. While the LCIA is no longer involved, the MIAC continues to operate as an independent arbitration institution on the international scene. The LCIA itself is still very much involved in Africa-related disputes, its 2018 Annual Casework Report showing a continued increase in the percentage of arbitrations involving African parties.

Table 1 gives a summary of the available Africa-related statistics for LCIA arbitrations:

	2016	2017	2018
Percentage of cases with African parties	**7.9%**	**5.2%**	**8%**
Number of Africa-seated arbitrations	**3**	**1**	**2**
Number or arbitrations with the applicable law of an African state	**3**	**2**	**5**
Number of African arbitrators appointed	**9**	**9**	**9**

The ICC's commitment to the continued development of arbitration in African, and importantly of African arbitrators, is shown in the establishment of the ICC African Commission. It was set up in 2018 to *"coordinate ICC's expanding range of activities and growth on the continent"* against a backdrop of the rapidly growing African economies and an increase in African cases filed with the ICC court. The activities run by the ICC include the ICC Africa Conferences, with the 5th conference scheduled to take place in Lagos, Nigeria, in June 2020.

A summary of the recent available Africa-related statistics from the ICC is shown in Table 2:

	2016	2017	2018
Percentage of cases with African parties	**6%** (188 parties)	**9%** (208 parties)	**7.9%** (182 parties)
Number of Africa-seated arbitrations	**6** (0.6%)	**13** (2.1%)	**13** (1.9%)
Number of African arbitrators appointed	**33** (2%)	**58** (3.9%)	**46** (3.1%)

Development of African arbitral institutions

While both the ICC and LCIA have played a role in the growth of arbitration in Africa, the continent has also seen the rapid expansion of domestic and regional institutions driving forward both domestic and international arbitration. For example, the Kigali International Arbitration Centre (KIAC) received 23 case filings in the year to June 2018, with 74% of these originating domestically, and the remaining 26% from outside Rwanda. In the same year, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) saw 77 new cases filed (compared with 65 in the previous year) involving 28 non-Egyptian parties and the appointment of four arbitrators from African countries other than Egypt.

To date there are nearly 80 arbitral institutions within the African continent, with many states having more than one institution. In June 2018, the African Arbitration Association (AfAA) was established, bringing together African arbitral institutions and practitioners to promote, encourage, facilitate and advance the use of international arbitration within the African continent. Members include 10 arbitral institutions from across the continent, and 2019 saw the AfAA's inaugural conference hosted in Kigali, Rwanda, with the theme of "The Coming of Age of International Arbitration in Africa".

Home-grown African arbitration centres have emerged to enable Africa-related disputes to be heard domestically or within the continent, rather than exporting all disputes to London, Paris or Asia. The focus on seating Africa-related arbitrations in Africa has been a key theme of several recent African arbitration conferences. A key component has been the development of suitable facilities and capacity to cater for international disputes in centres across the continent, along with closer collaboration between centres, sharing expertise, pooling resources and working together at regional levels. The rules of arbitration governing some of these institutions are in line with modern arbitration rules, including provisions permitting expedited procedures which makes the choice of these institutions far more attractive to parties in dispute.

However, it is unlikely that all these regional centres will continue in the long term. A number have already developed at a quicker pace than others and become more successful. CRCICA is a case in point. It is now sharing its expertise and working closely with two other centres on the continent under memoranda of understanding. In 2018, CRCICA signed a memorandum of understanding with the KIAC, which was reported at the 2019 East Africa International Arbitration Conference (EAIAC) to be making "good progress". Following this success, and the strides that have been made in the growth of collaboration between the CRCICA and the Nairobi Centre for International Arbitration, these two centres signed a further memorandum of understanding at this year's EAIAC. These examples of closer collaboration recognise that African arbitration centres are stronger when they are united in order to compete internationally.

Trajectory and predictions for the future

Inaugural Africa Arbitration Awards

To celebrate the significant achievements in the development of arbitration in Africa, 2019 saw the inaugural Africa Arbitration Awards take place in Nairobi on 30 August.

Africa's GDP growth is set to increase from 3.5% in 2018 to 4.1% in 2019. The continent has a steadily rising workforce and holds a third of the planet's mineral resources. Cote d'Ivoire, Ethiopia, Ghana, and Rwanda are four of the world's fastest-growing economies. These factors in Africa's development, along with a continued influx of foreign investment, notably from China, will give rise to an increasing need for efficient and effective dispute resolution mechanisms, and leading individuals who can be appointed to resolve those disputes. With the launch in 2018 of the ICC's Belt and Road initiative, aimed at assisting in resolving disputes between China and other nations through cooperation, the number of arbitrations through this initiative is likely to grow.

A further impetus to the continued growth of arbitration across the continent is the need for support from, and expertise within, the judiciary. One encouraging example comes from Kenya. At the EAIAC in August 2019 in Nairobi, the Chief Justice and President of the Supreme Court of Kenya referred to the Kenyan Judiciary's "unlimited support for arbitration" based on the Kenyan Constitution together with his own *"unwavering support to resolution of disputes by arbitration"*. Implicit in this is an appreciation that arbitration cannot flourish within a nation without the support of the judiciary. Kenya is going further than this – the Presiding Judge of the Commercial Division of the High Court was recently directed to work with the Law Society of Kenya to discuss the fast-tracking of cases relating to arbitral proceedings.

However, not all recent developments in Africa have had a positive impact on the promotion of international arbitration. One example is Tanzania, which takes a less positive view of international arbitration, particularly concerning natural resources disputes and public private partnerships (PPP) disputes. Indeed, international arbitration outside Tanzania is prohibited for PPPs, by virtue of the Public-Private Partnership (Amendment) Act 2018. This contrasts with the approaches of neighbouring countries, notably Kenya, which remains an arbitration-friendly jurisdiction. It seems that over the next few years we may see a divergence in approaches across the continent, with the significant growth of African arbitration and an increase in African arbitrators in many nations, contrasted with some push-back in other countries.

Several excellent conferences now take place across the continent, organised by global organisations, universities, arbitration centres and other interest groups, all focused on equipping African practitioners. Over the coming years, this is likely to continue to grow, bringing together different perspectives, ideas and lessons learned to strengthen the practice of arbitration across Africa.

Third party funding is a further likely area of growth and development. Given the rise of third party funding in international arbitration and with the subject frequently appearing on the agenda of arbitration conferences across the continent, we expect to see more African nations grappling with the concept in conjunction with the common-law principles of maintenance and champerty. This may pave the way for third party funding to feature to a greater degree in arbitrations seated in Africa.

In conclusion, we see a commitment across significant pockets of the continent to the continued growth of arbitration in Africa. We expect to see steady growth not just in the number of African parties involved in arbitrations, but also in the number of arbitrations seated in Africa and in the number of African arbitrators appointed in domestic, regional and international arbitrations. Continued collaboration between practitioners, arbitrators, arbitral institutions and the judiciary will play a key role, and we anticipate an increased appetite for third party funding to play a role, at least in international arbitration in Africa.

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Tracing the effect of Achmea on Spanish investment treaty arbitration

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1. Introduction

The Court of Justice of the European Union **(CJEU)** decision in the case of *Slovak Republic v Achmea B.V.* (Case C-284/16) **(Achmea)** has had a significant impact on Investment Treaty Arbitration **(ITA)** within the European Union **(EU).**

It is the first major case in which the CJEU has had an opportunity to give its view on how ITAs interact with the European legal order. The CJEU's ruling that an arbitration clause in a Bilateral Investment Treaty **(BIT)** between two EU Member States (The Netherlands and the Slovak Republic) was incompatible with EU law has been seen as a landmark decision but has, perhaps, had less impact in Spain than the government would have liked – in view of the numerous ITAs which have been brought against the country. In this article we offer an overview of *Achmea's* aftermath and how the decision, which caused so much optimism in Spanish government circles, has impacted the Spanish government's litigation strategy since.

2. Background

The *Achmea* case has attracted a lot of commentary, and we do not intend to repeat what has been said before. It is, however, useful to set out a brief summary of the facts of *Achmea* by way of context.

In 2008, Achmea, a Dutch supplier of financial services, brought an arbitration against the Slovak Republic under a BIT signed by the Netherlands and Slovakia in 1991, prior to Slovakia becoming a member of the EU in 2004.

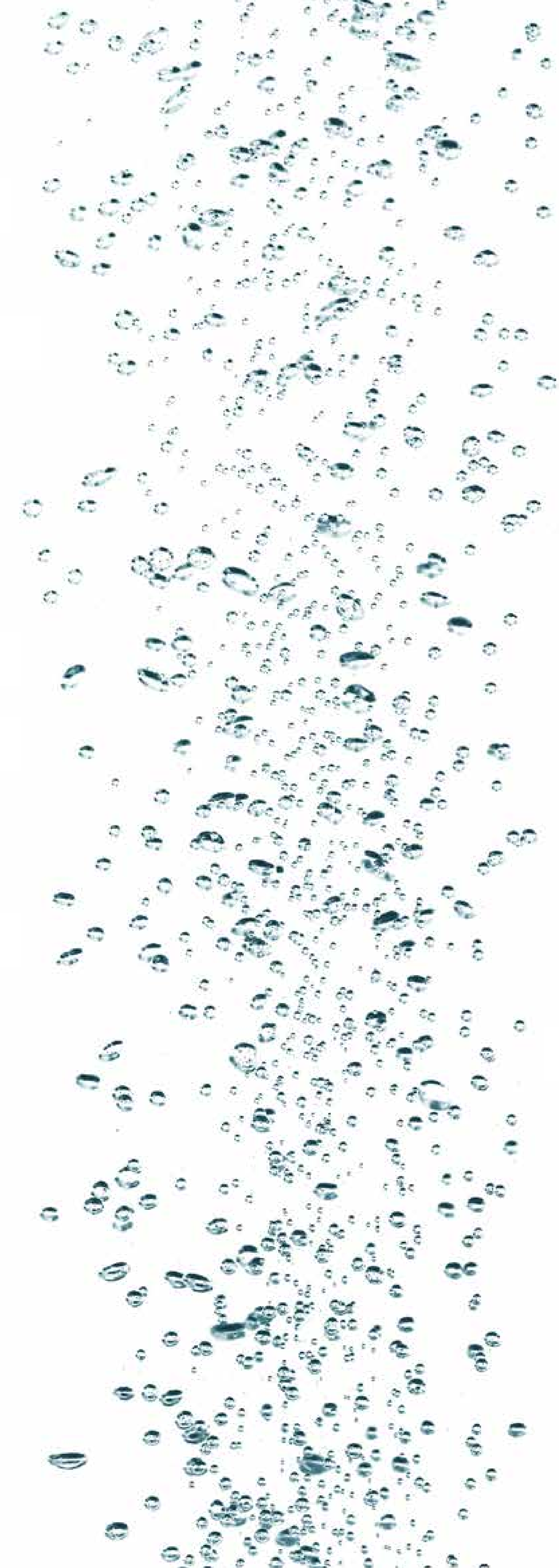
Achmea claimed that, in 2006, Slovakia had partly reversed the liberalisation of its health insurance market in violation of the BIT. In 2012, the arbitral tribunal issued an award of around EUR 22.1m in favour of Achmea.

Slovakia challenged the award before the German courts (where the arbitration was seated). It alleged the arbitral tribunal lacked jurisdiction because the BIT arbitration clause was incompatible with articles 18 (discrimination on the grounds of nationality), 267 (preliminary rulings before the CJEU) and 344 (disputes between Member States are subject only to the jurisdiction of the European Courts) of the Treaty of the Functioning of the European Union. The German court dismissed the challenge and Slovakia appealed to a higher German court.

The question of incompatibility was then referred to the CJEU, which ruled, in 2018, that the arbitration provision in the BIT was incompatible with and jeopardised the autonomy and uniformity of EU law.

The CJEU also noted that, because the arbitral tribunal was not part of the European judicial system, it had no capacity to refer to the CJEU for preliminary rulings and was not bound by the CJEU. This, it held, undermined the application and development of EU law.

The principle that respondent States have extrapolated from the CJEU's ruling is that arbitration provisions in BITs between Member States are not compatible with EU law and so are not enforceable. Spain, faced with over 50 arbitrations (most under the Energy Charter Treaty **(ECT)),** has led the way in trying to rely on the *Achmea* decision to avoid the enforcement of claims under ITAs.



3. Attempts to apply Achmea by Spain

More than 40 ITAs, totalling over EUR 7bn, have been brought against Spain as a result of legislative changes between 2010 and 2014, which made retrospective changes to feed-in tariffs for photovoltaic plants. These proceedings have generally (though not exclusively) been brought under the ECT. Spain has also faced five separate BIT claims, the most recent of these in relation to the winding up and sale of Banco Popular.

Spain has not won a single case in an ITA since 2017. This is in contrast with litigation in the Spanish Supreme Court where domestic investors have been blocked from bringing claims against the country. The Spanish Supreme Court has ruled that legislative changes comply with the Spanish Constitution and do not undermine the principle of legal security. Unsurprisingly, therefore, the Spanish government has sought to divert claims to the Spanish courts.

Spain, which had almost no experience of ITAs, is now the Member State with the largest number of pending ITAs. Faced with this increasing number of claims, its strategy has varied over time.

In the first ITA against it under the ECT, Spain was advised by external counsel. However, this attracted criticism from the press and the wider legal profession due to a perception that external counsel was an unnecessary expense and that government lawyers should represent Spain.

As the flow of ITAs increased, Spain decided to form a dedicated team within the State Attorney's office *(Abogacía General del Estado)* to handle them. *Abogacía General del Estado* was initially effective and fended off the first two cases against the State, which concerned an earlier set of legislative amendments in the renewable energy sector. However, as mentioned above, Spain has since lost all ITAs against it in relation to the later, more intrusive overhaul of the legislative framework in the renewable energy sector.

Despite the decision in *Achmea,* the arbitral tribunals have decided against Spain in all recent cases. In reaction to this, Spain has taken the battle to the post-award stage, seeking to annul the awards before the relevant Member State and non-Member State courts.

Some of the reasoning given by tribunals, in deciding not to apply *Achmea,* can broadly be summarised as follows:

— *Achmea* does not extend to parties arbitrating under the ICSID Convention, as was held in a case under the International Centre for Settlement of Investment Disputes **(ICSID)** rules, *UP and C.D Holding Internationale v Hungary.*

— Although EU law is part of international law, it also contains rules that only operate within the EU and, arguably, do not form part of international law. Consequently, the EU legal framework cannot create principles generally applicable to the parties. This was the approach taken in *Vattenfall v Germany,* another ICSID case, where the tribunal stated that the ECT was to be construed independently, and cases relating to this Treaty should not be affected by the *Achmea* decision pursuant to Article 16 of the ECT.

What is clear from these decisions is that arbitral tribunals have not declined jurisdiction on the basis of *Achmea.* Similarly, in *Landesbank Baden-Württemberg and others v Spain,* a case brought before an ICSID tribunal in 2015, Spain, seeking to rely on *Achmea,* unsuccessfully challenged the arbitral tribunal and tried to unseat all three members, on the grounds that the arbitrators had prejudged the case and treated the parties unequally. In September 2018, Spain filed a request for the disqualification of the tribunal on the grounds that, following *Achmea,* it did not have jurisdiction. It claimed that intra-EU ITAs under the ECT were precluded by EU law. However, in February 2019 the arbitral tribunal issued an interim award dismissing Spain's objection on the basis that it had been made out of time. In October 2019, the World Bank confirmed the interim award.

Notwithstanding the above decisions, there appears to be consensus across EU institutions as to the application of *Achmea.* In its 19 July 2018 Communication, the European Commission clarified that "[t]*he Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations".* In a move that appears to confirm this approach, in late October 2019, the majority of the Member States agreed in principle to enter into a new international treaty terminating intra-EU BITs. The final text is expected to be published shortly.

Despite the apparent political consensus, one Member State court has distinguished the CJEU's *Achmea* decision. In *PL Holdings S.à.r.l. v. Republic of Poland, SCC Case No. V 2014/163,* the Swedish Court of Appeal refused to set aside the two arbitral awards. It held that the arbitration agreement between the parties was valid and not contrary to Swedish public policy or EU law. The Court distinguished *Achmea,* stating that, even though the case had similarities, Poland had not opposed the arbitration from the beginning – as Slovakia did – but only did so as a last resort before the Court and did not initially raise any objection on jurisdictional grounds, instead participating in all arbitration proceedings.

Courts from non-Member States have also not always followed the CJEU's reasoning. The US District Court for the District of Columbia ruled in *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20 (2013)* that the arbitral award against Romania was valid and that *"Romania has failed to carry its burden of showing that Achmea forecloses this court's* [US District Court for the District of Columbia] *jurisdiction".*

4. Cases to watch

Spain is currently attempting to resist the enforcement of other awards by US courts, relying on *Achmea,* however decisions have not yet been made. Nonetheless, in the ongoing case before the Swedish Court of Appeal, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 2015/063* ***(Novenergia),*** the Court decided not to refer the question about the validity of the arbitration provision on the ECT to the CJEU. Notably, a judge in *Novenergia* in the District of Columbia allowed the European Commission as an *amicus curiae* (intervening "friend of the court") to support Spain's efforts to prevent enforcement of the relevant award.

Antin Infrastructure Services Luxembour S.a.r.l. v Spain (ICSID) 2018 represents the latest twist in this story. Although the case was stayed, an ICSID annulment committee lifted the stay at the end of October 2019, stating that Spain's arguments on conflicting international laws – including the effect of *Achmea* – were *"a legal quagmire"* produced by the state. This conclusion suggests that Spain's strategy has not found favour, and given that US and Australian courts, where the investors have tried to enforce the award, were waiting for the ICSID committee to express its views, this may well have important knock-on effects.

5. Conclusion

As can be seen from the above, Spain initially looked on the decision in *Achmea* favourably. However, despite initial successes, ITA tribunals have broadly decided against the country. Arguments based on *Achmea* have not provided a definitive answer to intra-EU ITAs and Spain has been forced to fight a rear-guard action resisting enforcement of these awards while it looks for another strategy to stem the tide of claims. Instead of being the panacea it seemed for the host States looking to defend intra-EU investment claims, *Achema* has so far simply created greater uncertainty around the enforcement of arbitral awards.

Reform of directors' liability in Belgium

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The reform of Belgian insolvency law and the introduction of the New Code on Companies and Associations introduced several new rules and concepts that reshape the corporate landscape for directors and their potential liability.

Reform of insolvency law

One of the main pillars of the reform of Belgian insolvency law that entered into force on 1 May 2018 was the abolition of the concept of the "merchant" *(handelaar / commerçant)* and the introduction of the concept of the "enterprise". This means that Belgian insolvency law now covers a broad range of legal entities that previously did not fall under it (e.g. law firms, hospitals, non-profit associations, foundations, etc). In addition, the rules on liability of directors after bankruptcy were transferred from company law to insolvency law, and liability for wrongful trading was established on a separate legal basis. As a result, the range of directors who may be held liable for a bankruptcy suddenly increased significantly.

The legislation also envisaged a new remuneration system for trustees and gave them an additional financial incentive to actively pursue the liability of directors. Although this new system missed the mark on some points – for example, it does not resolve the issue of how to finance such proceedings when there are insufficient assets in the bankruptcy estate – the clear intention of the legislation was to reduce the number of cases in which directors go unpunished because the trustee does not want to go through lengthy and costly proceedings.

For the same reasons, the individual right of a creditor to initiate a claim against directors in the event of manifest gross negligence that contributed to the bankruptcy is also regulated in more detail in the new insolvency law. If the trustee refuses or does not take a position on pursuing the liability of a director, the individual creditor can take matters into their own hands and start proceedings on behalf of the bankruptcy estate. The proceeds of a successful action will be used to indemnify the creditor for the costs that they have incurred. The remaining proceeds will then be divided between the creditors in accordance with the general rules of priority between the creditors. If the trustee decides to intervene at any stage of the proceedings, all costs that have already been incurred by the individual creditor will be reimbursed by the bankruptcy estate. This gives the individual creditors more certainty in respect of the recovery of their costs and reduces their overall risk.

Reform of company law

Whereas the reform of Belgian insolvency law was mainly a codification of existing separate acts, the New Code On Companies and Associations (NCCA) drastically changed the Belgian corporate landscape by abolishing most of the existing company forms and introducing many new concepts, such as new types of corporate bodies and a private limited liability company *(BV/SRL)* without any share capital.

The NCCA entered into effect on 1 May 2019 for new companies. Existing companies can opt in at any time and the new rules will automatically apply to them from 1 January 2024. The provisions of mandatory law will enter into effect for all companies and associations on 1 January 2020. This includes the general rules on the liability of directors.

General principles of directors' liability under the NCCA

The general principles of directors' and officers' liability mostly remain unchanged.

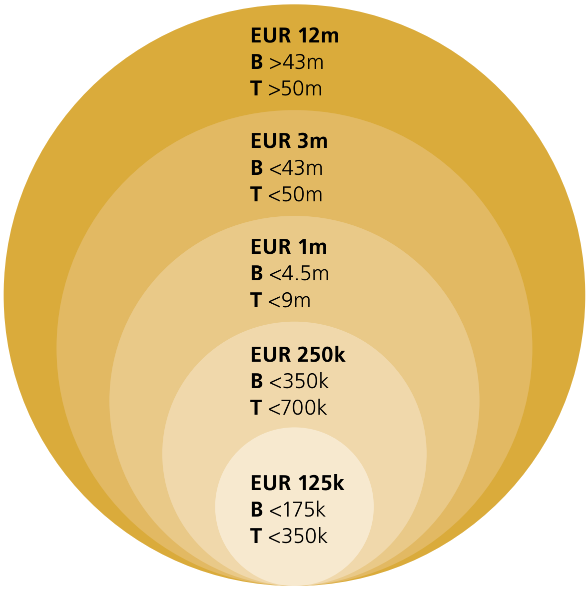
The NCCA establishes the joint liability of directors, day-to-day managers, members of the supervisory or management board and *de facto* managers to the company in case of a breach of a standard duty of care or a violation of the articles of association or specific provisions of the NCCA during the performance of their mandates. They can also be held liable towards third parties insofar as such a breach qualifies as an extra-contractual breach. What is new is that an individual director can be exempted from this joint liability for violations of the articles of association and specific provisions of the NCCA if he or she did not take part in the wrongful action and notified the other members of the board thereof. The provisions about bankruptcy liability remain part of insolvency law and have not been amended.

Some changes also have an indirect impact on the liability of directors. For instance, due to the abolition of the concept of "share capital" in the private limited liability company *(BV/SRL),* the ratio between net assets and share capital can no longer be used as an objective criteria to determine whether the financial position of the company is healthy enough to distribute dividends. Instead, the law now requires that each time the company intends to distribute a dividend, the directors will need to draft a special report in which they declare that the distribution will not have any effect on the company's ability to pay its debts during the next 12 months. The directors can be held liable towards the company and third parties if it can be demonstrated that they knew or should have known that the company clearly would not be able to pay its debts as a result of the distribution.

Cap on liability

The NCCA also introduces a cap on the maximum amount for which directors can be held liable. The maximum amount ranges between EUR 125,000 and EUR 12m, depending on the average balance sheet total and turnover over the last three financial years.

Maximum liability amounts



B = Average balance sheet total, T = Turnover

The limitation on liability is applicable both towards the company and third parties irrespective of the contractual or non-contractual basis of the liability claim. The maximum amounts apply to all directors and officers together and to each fact or set of facts that may give rise to liability, regardless of the number of claimants or claims.

This limitation on liability has been very controversial and has been hotly debated. According to the legislation, the liability risk for directors of large companies has increased considerably over the years and directors – who by law are required to be self-employed – do not benefit from the statutory limitation on liability enjoyed by employees and certain other professions (such as auditors). With the introduction of these caps, the intention of the legislation was to create a more attractive climate for directors of Belgian companies and to make it easier for directors to obtain insurance.

The introduction of this limitation on liability is somewhat surprising. On the one hand the legislation reformed the insolvency legislation and made it easier for individuals to actively pursue the liability of directors in case of bankruptcy. It also gave incentives to trustees to effectively pursue the liability of directors. On the other hand, it now limits the amounts that creditors can potentially recover. Most of the underlying reasons are also not convincing. The tasks of directors differ significantly from those of regular employees or auditors. Moreover, the size of a company does not necessarily relate to the amounts that could potentially be claimed from the directors in case of breaches. It is also standard practice to establish caps on the amounts that are covered under directors' & officers' (D&O) liability policies, so limiting the liability by law will have no impact on insurability or on the calculation of the premiums of D&O insurance policies.

After some strong criticisms, legislators eventually approved an amended version of the mechanism for limitation on liability with a set of exceptions. The final article establishes the following exceptions to which the limitation does not apply:

- In case of frequent minor misconduct, gross misconduct, fraudulent intent or intent to harm.
- In case of violation of certain legal obligations set forth in the NCCA (including valid registration of shares, full payment of capital).
- In case of shortcomings in tax payments and social security contributions.

In essence, this means that a director will only benefit from this protection in cases of accidental minor breaches, which in practice hardly ever result in the liability of a director. The limitation on liability will thus only apply to a marginal number of D&O liability claims.

D&O insurance

D&O insurance policies have become a commonly used instrument to protect directors from personal liability claims and will remain so in the future. We expect that the caps on liability will in practice have hardly any effect because in cases where a director is held liable, their breach will probably fall under one of the exceptions. These caps also do not protect directors from defence costs which can often accumulate quickly.

As an alternative to D&O insurance, Belgian companies are often exonerated and their directors held harmless for liability by signing a hold-harmless agreement. The NCCA now explicitly prohibits a company, its subsidiaries or the entities controlled by it to provide such guarantees to its directors. This prohibition does not apply to holding companies with regard to the directors of its subsidiaries.

Conclusion

It is still too early to assess what impact the reforms of Belgian insolvency and corporate law will have on the D&O liability landscape in Belgium. We do expect to see an increase in proceedings against former directors of bankrupt companies due to the new incentives given to trustees and individual creditors. Directors in certain company forms, such as the private limited liability company (*BV/SRL),* will also need to be more careful when a company intends to distribute dividends or when they need to assess whether or not the continuity of the company might be at risk. We also expect an increase in the number of D&O policies. Time will tell how successful these reforms are in achieving their objectives.

State liability for banking supervision: EU law and a Bulgarian banking saga

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Can a competent national authority be held liable for the insufficient exercise of its statutory powers of supervision by the depositors of commercial banks? At least at EU law level, the issue should have been settled by the seminal judgment in *Peter Paul, Cornelia Sonnen-Lütte, Christel Mörkens v. Germany (C-222/01) (Paul).* However, as the latest developments in Bulgaria demonstrate, *Paul* was not the last word on the matter.

EU Court of Justice in *Paul:* no independent EU regulation

The *Paul* case of the Court of Justice of the European Union (CJEU) set the guidelines for the liability of central banks for a depositor's failure to obtain a refund from the bank with which they had contracted.

The German law in question does not provide for any such liability. However, the claimant in the national proceedings claimed that EU law was relevant. In essence, the claimant's position was that Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (the Deposit Guarantee Schemes Directive) requires certain positive actions by the national regulatory body which, if not taken, may trigger the liability of the national competent authority for a breach of EU law.

The CJEU found that, in several member states, the national authorities responsible for super-vising credit institutions could not be held liable in the event of defective supervision. Those rules are based on considerations relating to the complexity of banking supervision, in the context of which authorities are under an obligation to protect a plurality of interests, including the stability of the financial system.

The CJEU reasoned that, based on a number of EU directives, including Directive 89/64 and Directive 2000/12, it is clear that the approach adopted by the EU legislature in the field of credit institutions is to achieve only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisations and the prudential supervision of systems. This enables the granting of a single licence that is recognised throughout the EU and the application of the principle of home member state prudential supervision. In adopting the Deposit Guarantee Schemes Directive, the legislature introduced minimal protection of depositors in the event that their deposits are unavailable, which is also guaranteed where the unavailability of deposits might be the result of defective supervision on the part of the competent authorities.

It follows that EU directives relating to credit institutions and banking supervision cannot be construed as conferring rights on depositors whose deposits are unavailable as a result of defective supervision on the part of the competent national authorities.

The CJEU therefore stated that the EU does not override national law precluding individuals from claiming compensation for damage resulting from defective supervision on the part of their national authority. In other words, if the national law does not regulate the matter, neither does EU law.

Depositors' liability claims: a perspective from Bulgaria

In 2014, the fourth-largest Bulgarian bank, Corporate Commercial Bank (CCB), collapsed. Until then, a decade had passed in which CBB had not suffered any major banking issues. CCB had in fact attracted significant media attention due to being local and independent (i.e. not part of an international corporate group) and pursuing a lucrative and aggressive policy of attracting deposits from clients. As a result, CCB's bankruptcy sparked a significant business and media scandal, which also had major political consequences.

The Bulgarian National Bank (BNB) – the national banking supervision authority – acted in June 2014 to impose restrictions on the operations of CCB, as a large number of depositors were queueing to withdraw deposits. In November 2014, the BNB revoked CCB's licence.

CCB's insolvency triggered a myriad of legal proceedings. First, the revocation of the bank's licence by the BNB was subject to appeals. Second, the courtled insolvency procedure of CCB commenced. Third, a significant number of proceedings were brought by the receivers of the bank to trace and recover CCB's former assets. Finally, as early as 2016 some of CCB's depositors started filing legal claims for compensation due to the bank's insolvency.

Some depositors alleged that Bulgaria had not fully implemented the Deposit Guarantee Schemes Directive, which had led to the fact that, as contended, the BNB should have revoked CCB's licence earlier to trigger the payment of the guaranteed amounts of deposits. Instead, CCB closed its operations in June and remained dysfunctional until November 2014 when BNB took its licence. In December 2014, the guaranteed amounts of deposits were paid to CCB clients. There have been dozens of claims in which former depositors have alleged that they should be compensated for this delay by the application of a statutory set amount of delay interest rate. These claims spawned two references for a preliminary ruling to the CJEU regarding the Deposit Guarantee Schemes Directive.

A second type of claim has also been lodged with various Bulgarian courts. A significant number of depositors filed compensation claims, alleging that had BNB exercised proper supervision of CCB, the bank would not have collapsed into bankruptcy. However, those depositors are listed as creditors of CCB. Deposits they hold which exceed the EUR 100,000 threshold are expected to be paid by CCB receivers once the bank attains sufficient liquidity. At the same time, there is no certainty as to when and to what extent the deposits will be paid, as the CCB receivers are still tracing and filing claims for various assets and non-performing debts of CCB. Nonetheless, receivers started making partial payments in May 2019 out of sums recovered from CCB debtors.

These claims have been staunchly opposed in the courts. A number of defences have been raised, including: that the Deposit Guarantee Schemes Directive does not designate BNB as the competent body for establishing the unavailability of deposits; that depositors are not allowed to claim compensation from the supervisory authority for lack of effective banking supervision; and that depositors have not lost their deposits. At the time of writing, the highest Bulgarian court with jurisdiction over the disputes – the Supreme Administrative Court – has not yet issued a final court judgment. The issues therefore remain unsettled.

As for claims brought by CCB depositors, the CJEU handed down its judgment in the *Kantarev* case (C-571/16) in 2018. In that case, the CJEU went further in analysing the Deposit Guarantee Schemes Directive, confirming what was stated previously in *Paul,* i.e. that, where national law has established a deposit-guarantee scheme, the Directive does not preclude national legislation limiting the ability of individuals to: (i) claim damages for harm sustained as a result of insufficient or deficient supervision by the national authority supervising credit institutions; or (ii) pursue state liability under EU law on the ground that those responsibilities of supervision are fulfilled in the general interest. The Deposit Guarantee Schemes Directive, as the CJEU elaborated in *Kantarev,* has direct effect and so confers rights on individuals, allowing depositors to bring an action for damages for the harm sustained by late repayment of deposits. Under this ruling, the CJEU provided one more aspect to pursuing state liability under EU law – a competent national authority under the Deposit Guarantee Schemes Directive may face claims for damages by depositors alleging the unavailability of deposits in a bank.

Taking stock: liability for insufficient supervision under EU law

At first glance, it seems that the CJEU interpreted the issue in the *Paul* case as leaving no room for further consideration. The CJEU's conclusion was that EU law does not confer a right on depositors to sue the national competent authority for compensation if there is a breach of the applicable rules governing banking and credit institutions. That ruling seems to have closed the door for potential claims for damages. However, in *Kantarev* the CJEU re-confirmed *Paul* but also stretched the concept of state liability further. It seems that *Kantarev* did make a distinction between the situation of pure claims for inefficient banking supervision on the one hand, and claims for damages due to failure to comply with the Deposit Guarantee Schemes Directive, on the other. More importantly, *Kantarev* appears to suggest that the gates for such depositors' claims are open, thereby limiting the application of *Paul:* although generally depositors cannot seek state liability because of defective supervision, they can nevertheless seek damages if the deposit scheme rules are breached. However, the application of these rulings of the CJEU is yet to be seen in Bulgaria.

So, now, where do we stand? The CJEU is expected to make a new ruling under a reference by a Bulgarian court in connection with a claim of former CCB depositors. The scope of state liability for regulation of banking activities with therefore be subject to the scrutiny of the EU's highest court once again.

Russian Ministry of Labour invites organisations to implement new anti-corruption recommendations

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The Ministry of Labour and Social Protection has developed new recommendations on combating corruption in organisations, including Measures to prevent corruption in organisations[1], Recommendations on the procedure for assessing corruption risks[2] and a Memo on the corruption-prevention duties of employees, liability and incentives for employees[3].

The recommendations are expected to help companies properly fulfil their corruption-prevention obligations in accordance with article 13.3 of Federal Law No. 273-FZ "On Combating Corruption" dated 24 December 2008[4].

The recommendations include measures aimed at minimising corruption risks for companies, including those related to:

- the development of anti-corruption policies and standards.
- the settlement of conflicts of interest.
- interactions with employees.
- the building of an effective system for obtaining information on corruption offences.
- interactions with law enforcement agencies.

The Ministry of Labour paid special attention to an algorithm for assessing corruption risks, which uses a company's risk profile to arrive at the specific measures that organisations need to put in place.

In addition, the Ministry of Labour recommends enshrining the obligations that employees should follow in order to combat corruption in their employment contracts. It also emphasises the importance of creating a system of employee incentives and sanctions within organisations. This system should be aimed at supporting anti-corruption standards and discouraging all forms of corruption.

1 https://rosmintrud.ru/uploads/magic/ru-RU/Ministry-0-106-src-1568817692.8748.pdf
2 https://rosmintrud.ru/uploads/magic/ru-RU/Ministry-0-106-src-1568817604.7941.pdf
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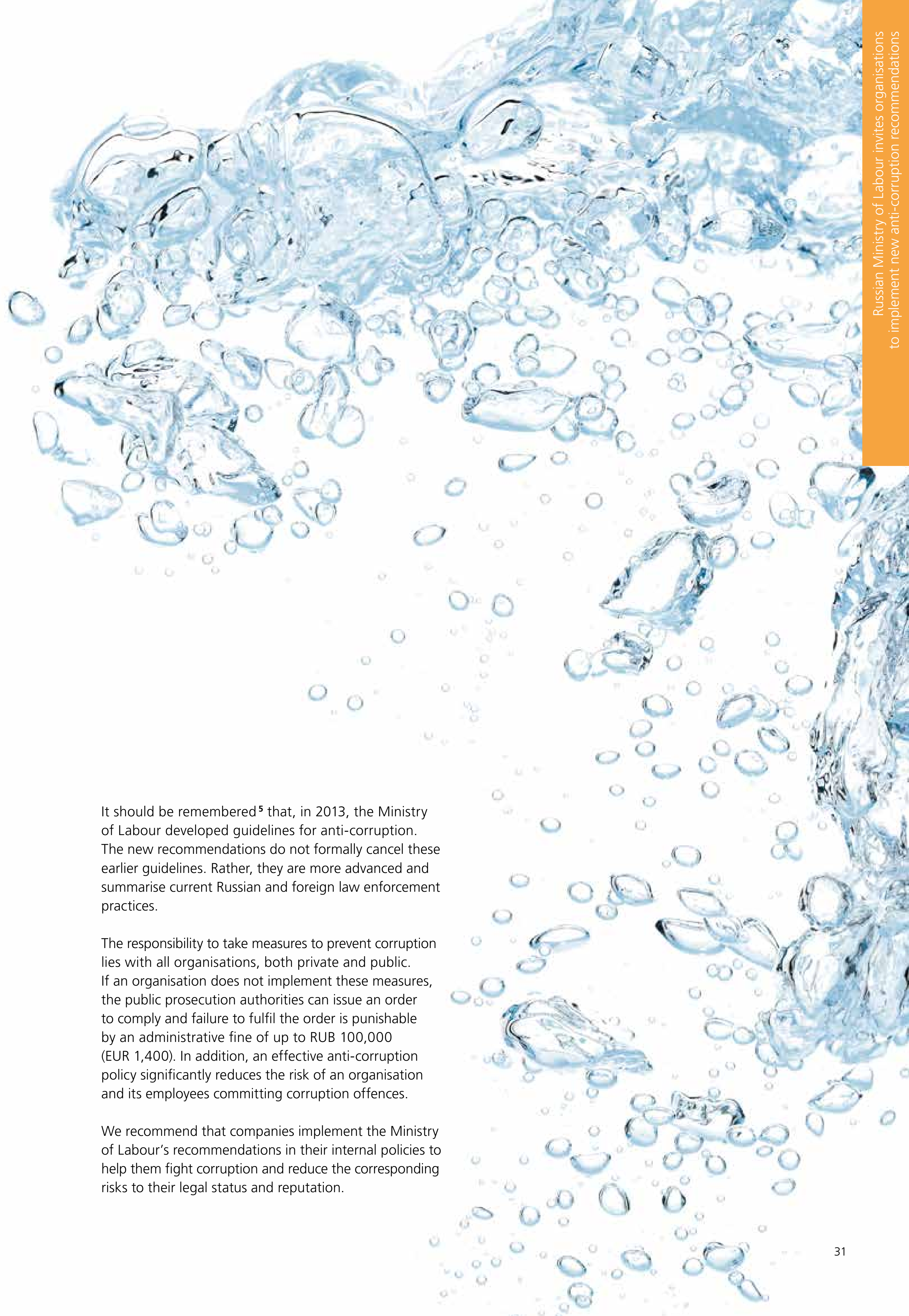

It should be remembered[5] that, in 2013, the Ministry of Labour developed guidelines for anti-corruption. The new recommendations do not formally cancel these earlier guidelines. Rather, they are more advanced and summarise current Russian and foreign law enforcement practices.

The responsibility to take measures to prevent corruption lies with all organisations, both private and public. If an organisation does not implement these measures, the public prosecution authorities can issue an order to comply and failure to fulfil the order is punishable by an administrative fine of up to RUB 100,000 (EUR 1,400). In addition, an effective anti-corruption policy significantly reduces the risk of an organisation and its employees committing corruption offences.

We recommend that companies implement the Ministry of Labour's recommendations in their internal policies to help them fight corruption and reduce the corresponding risks to their legal status and reputation.

A bilateral exchange on German and Turkish arbitration

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Despite experiencing both political and economic difficulties in recent years, Turkey remains an important regional player that is active in bilateral relations and across key international platforms such as the G20. The Turkish economy is the 17th largest globally and is powered by a dominant construction industry and smaller sectors such as tourism, textiles, agriculture and manufacturing. The legal framework for construction disputes is complex and comprises numerous pieces of legislation adapted to keep pace with this dynamic sector. Arbitration remains the preferred method of dispute resolution for both domestic and international contractors.

Against this backdrop, CMS partner Dr Dorothee Ruckteschler, together with ICC Germany and ICC Turkey, organised the first bilateral exchange between German and Turkish arbitration specialists. A group of renowned German and Turkish lawyers and professors met in the offices of CMS in Frankfurt on 1 October 2019 to discuss recent arbitration developments in both countries. Key themes considered at the event included case management techniques and cooperation with state courts.

The format chosen for this workshop, in which just 20 personally invited delegates took part, allowed for an interactive and intensive exchange on the current state of international arbitration in Germany and in Turkey.

Turkish Law No. 805 prompted much discussion. It requires the use of the Turkish language in any type of contract where at least one party is Turkish, and the contract is concluded or enforced in Turkey. The Turkish courts have explicitly extended this law to arbitration clauses and it is therefore necessary to comply with this requirement, particularly in any contract with Turkish parties. Furthermore, if the contract is in English, the Turkish translation of the arbitration clause needs to be done by an officially authorised Turkish translator.

Whereas in both countries disputes among shareholders are arbitrable, disputes between a shareholder and the company – in particular regarding the validity of shareholders' resolutions – are not arbitrable under Turkish law. This is a highly controversial issue and Turkish delegates were keen to learn about recent developments in German law accepting the arbitrability of such disputes, provided that the arbitration clause fulfils certain specific requirements. The Supplementary Rules for Corporate Disputes in Annex 5 of the 2018 DIS Arbitration Rules were also a major talking point in this regard.

The delegates also analysed the extent to which cooperation with state courts is advisable in international arbitration proceedings. Regarding applications for interim measures, a majority of both Turkish and German counsel in the group said they would still advise clients to apply for these measures with state courts rather than arbitral tribunals in order to save time in the enforcement of these orders.

All delegates concluded that this bilateral discussion was extremely useful and voted for the continuation of the exchange in the future. It was evident that there is huge potential for bilateral German-Turkish cooperation, particularly in respect of international arbitration.

The group looked forward to continuing the discussion at the 23rd Annual IBA Arbitration Day Innovation 360 event on 12 – 13 March 2020 in Istanbul, Turkey.

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