

# International Disputes Digest



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# Introduction

Welcome to the winter edition of the *International Disputes Digest*, our bi-annual publication that considers and analyses current trends in global dispute-resolution and their wider impact.

With war raging in eastern Europe and no end to the conflict in sight, the world and the global economy continue to face complex challenges. In response to the invasion of Ukraine, Russian sanctions have impacted a world economy already suffering from supply-chain deficiencies and the aftermath of the COVID-19 pandemic.

Economic stresses have also been magnified by the decision of western countries to reduce reliance on Russian energy supplies, resulting in gasoline and natural gas shortages and widespread inflation in both the energy sector and the general economy. Although Ukraine's resilience on the battlefield raises the hope that the conflict will be resolved sooner rather than later, the international business community still faces a plethora of uncertainties.

In this edition, we feature a range of articles from around the world on topics as diverse as directors' duties for companies in financial distress, potential reform of the English Arbitration Act 1996, and risk management in the life sciences sector. We also consider how businesses in the UK can take steps to protect themselves in a "season of protest" and the obtaining of evidence abroad for use in international arbitration, amongst other matters.

We hope you enjoy reading this Digest. We wish you and your families a relaxing and peaceful festive break and all the best for 2023.

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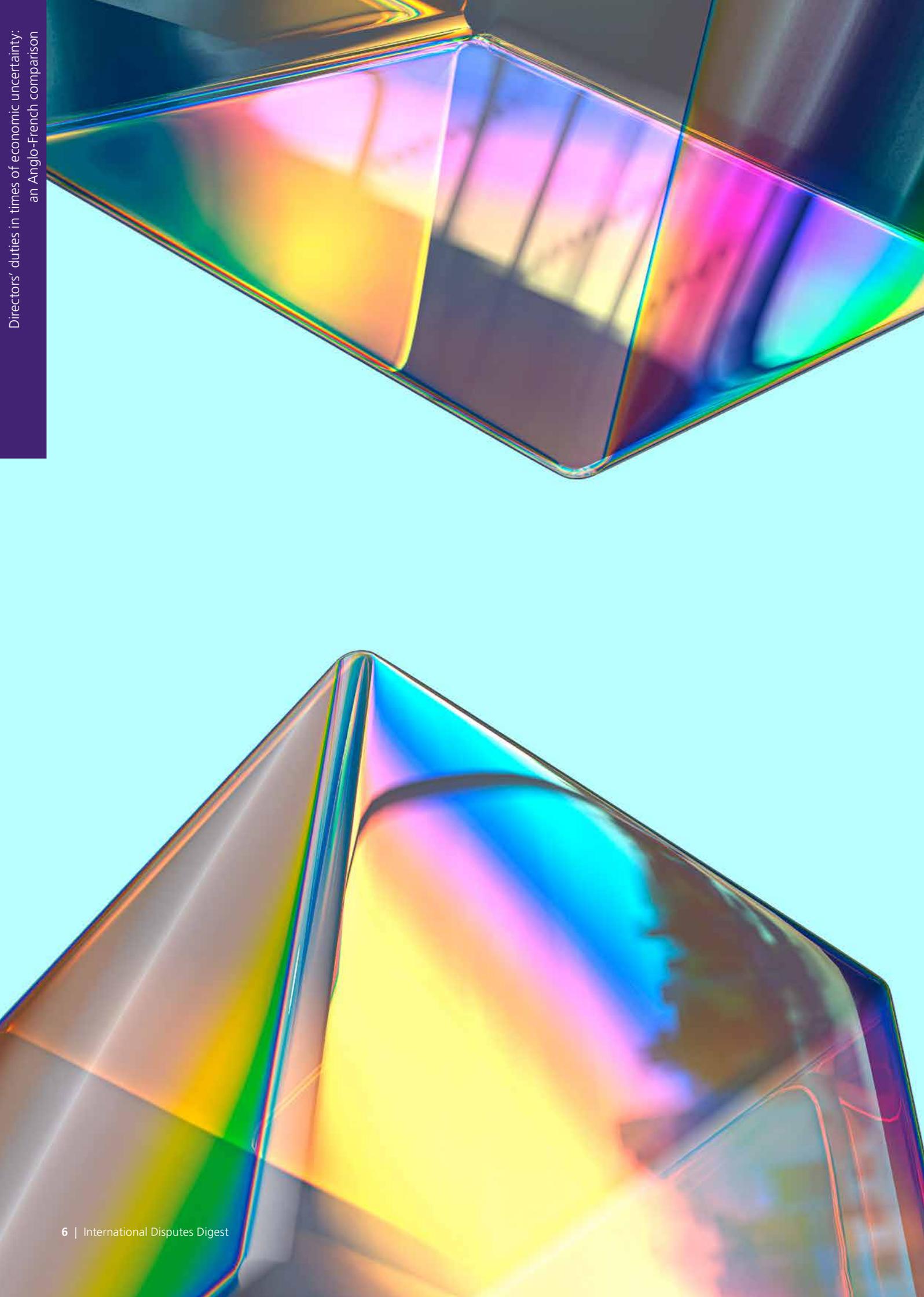
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# Directors' duties in times of economic uncertainty: an Anglo-French comparison



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For companies in financial difficulty, there is added scrutiny on how their businesses have been conducted and, the extent to which directors have complied with their duties. In a worst-case scenario, directors are potentially exposed to personal liability for their actions following an insolvency event. It is therefore critical that directors understand the scope of their duties, how to comply with them, and the various steps they can take to minimise the risk of claims being made against them.

On 5 October 2022, the UK Supreme Court handed down its judgment in the case of *BTI v Sequana*. This marked the first time that the Supreme Court had ruled on whether a "creditor duty" exists in English law. Described in the judgment as a momentous decision, the court confirmed that such a duty does exist. Delivered at a time of widespread global economic challenges, the judgment also serves as a timely reminder of the importance of considering directors' duties, their potential personal liability and at what point the need for directors to consider the various stakeholder interests shifts.

In those circumstances, we consider the position under English law and French law and the differences in directors' duties and liabilities in each jurisdiction.

### Whose interests should directors be concerned about?

In the normal course of running a company, **under English law**, the Companies Act 2006 is clear that directors must act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its shareholders. Due to this duty, it has widely been accepted that when discharging their duties, the interests of the shareholders should generally be the directors' primary consideration.

In *Sequana*, the Supreme Court held that this duty is modified in certain circumstances by the common law, so that the company's interests are taken to include the interests of its creditors. The Supreme Court stressed that this is not a new free-standing duty, but a modification to the existing duty directors owe to the company. That modification is not engaged until the directors know or ought to know that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable.

The Supreme Court suggested that once the creditor duty is engaged, it can be viewed in terms of a "sliding scale", meaning that the weight to be given to the interests of creditors will increase as the company's financial difficulties become increasingly serious, and only once an insolvent liquidation or administration is inevitable are creditors' interest's paramount. Nonetheless, the judgment was not clear on exactly how close to insolvency this duty is triggered and there was some disagreement on whether the directors' knowledge of the company's financial position should be a factor. As each matter is likely to be fact specific to the relevant company in financial distress, prudent directors will need to seek advice at the appropriate time on the scope of their duties, whose interests are to be preferred in the circumstances and how that balance may shift as the position improves or deteriorates.

**Under French law**, while directors must act in good faith, their most important duty is to act in the best interests of the company itself.

They are also bound by a duty of loyalty towards shareholders of the company. This duty requires directors to provide the shareholders with all necessary and adequate information on the conduct of the business of the company.

Directors should also consider the interests of third parties, even if ostensibly the directors are making decisions for the company and in its name only. If an interested third party suffers loss that arises from its interests being wrongly disregarded by the directors, the company may be liable to that third party.

The personal liability of the directors will only be engaged in specific circumstances.

### Can directors be personally liable when a company is in financial difficulties and on what grounds?

**Under English law**, limited companies exist as separate legal entities. A company, not its directors, is responsible for its own debts and liabilities. Should a director, however, be found to have breached any of their duties or responsibilities, the administrator or liquidator can bring a claim against the director in the name of the company. Such claims may be brought against registered directors and de facto directors (a person who assumes responsibility to act as a director, although never actually appointed as such).

*Sequana* concerned a situation where directors approved a distribution to shareholders without having regard to the interests of creditors. The Supreme Court found that at the relevant time, the creditor duty had not arisen, and so the distribution decision could not be impugned. If, however, the company had been insolvent or bordering on insolvency, or had an insolvent administration or liquidation been probable, at the time of the decision the directors should have had regard to creditors' interests, and hence it is likely that approving the distribution would have been a breach of duty. That breach would have given rise to claims by the liquidator against the directors personally.

There are also other grounds under which directors can be held personally liable under English law when a company is insolvent or approaching insolvency and these include, but are not limited to:

**Wrongful Trading** – If a director knows or ought to know that there is no reasonable prospect of the company avoiding an insolvent liquidation or administration, they continue to allow the company to trade after reaching that conclusion, and do not take

every step to minimise the loss to the creditors, the director can be held personally responsible for the company's debts.

**Fraudulent Trading** – If a director manages a company with the intention of defrauding creditors, and it can be shown that there was actual dishonesty on the part of the director, the director may be required to contribute to the company's assets available for distribution to creditors. The director may also face criminal charges as fraudulent trading is a criminal offence.

**Misfeasance** – If a director has misapplied, retained, or become accountable for company assets, or has wrongly exercised their authority, the English court may order the director to repay, restore or account for the money or property with interest or contribute such sum to the company's assets by way of compensation as the court thinks just.

**In France**, once the company becomes insolvent, the directors' liability can be sought to sanction them in the event of misconduct that contributed to the cessation of payments (the point when the company is not able to pay its debts with its available assets). The action will be brought by the judicial administrator or liquidator on behalf of the company against the legal directors or the *de facto* directors if it is demonstrated that the person has indeed had an influential and independent leadership role.

Under French law, as soon as the insolvency procedure is commenced, the creditors are all represented by the judicial representative who has sole power to pursue the directors' liability on behalf of the creditors or third parties.

However, an independent creditor can pursue a director for personal liability if they can demonstrate that (i) they have suffered from a loss that is distinct from the loss suffered by the community of creditors (i.e. a loss that is different from a simple debt recovery, or loss of value of company shares in relation to the insolvency procedure); and that (ii) the director committed misconduct detachable from their functions (i.e. misconduct outside the normal exercise of their functions as a director).

Upon insolvency, the liability of directors can be pursued on several grounds:

**Liability action for lack of assets** (as provided for in articles L. 651-2 to L. 651-4 of the Commerce code) – this action is an indemnity action, the purpose of which is to repair the damage suffered by the legal person, with the aim of punishing the director who led the company to default, by ordering them to cover fully or partially the company's debts. This claim can, however, only be brought in cases of liquidation.

In this context, the lack of assets is defined as the difference between liabilities and assets, by considering all liabilities with all assets, whether contingent or actual.

The fault committed by the director that led to the lack of assets may be any fault committed in the general management of the company (i.e., either an action or omission), but it must have been committed before the start of the insolvency proceedings.

For instance, the payment of dividends in the context of a takeover operation exposes the director to liability for lack of assets when the distributing company is subsequently placed into judicial liquidation because of the resulting reduction in reserves (Com., 9 September 2020, n°18-12.444).

However, the director will not be liable if the act is merely simple negligence, or if a loss-making activity is continued while another activity of the company compensates for it.

This action cannot be sought in conjunction with a general civil liability action against the director, but it can be exercised in parallel with the individual action of the creditor for the individual damage suffered because of the personal fault of the director that is distinct from the normal exercise of their function.

**Personal insolvency bankruptcy** (as provided for in articles L. 653-4 and L. 653-5 of the Commerce code) is a personal sanction for the director, which entails a ban on directing, managing, administering, or controlling, directly or indirectly, any commercial enterprise. Such a sanction can be applied when a director (i) has entered into, on behalf of others, without compensation, commitments that are too substantial at the time of their conclusion, given the situation of the company; or (ii) has paid a creditor, after the cessation of payments and with full knowledge of the facts, to the prejudice of the other creditors; or (iii) has abstained from cooperating with the elements of the procedure, which has obstructed its smooth running.

**"Banqueroute" or bankruptcy** (as provided for in articles L. 654-2 to L. 654-6 of the Commerce code) is a criminal offence that requires the existence of an insolvency or liquidation procedure. A person will be found guilty of bankruptcy if they have either embezzled or concealed all or part of the debtor's assets, fraudulently increased the debtor's liabilities, kept fictitious accounts, or caused accounting documents to disappear, or kept manifestly incomplete or irregular accounts. The prosecution is carried out by the public prosecutor's office before the criminal court.

## Do all creditors need to be treated equally?

**Under English law**, during the insolvency process, the insolvency practitioner has a set priority order that must be followed when distributing the assets of the company. There are a certain number of classes to which payments must be distributed (i.e., secured creditors, floating charge creditors, unsecured creditors), ensuring that equal payments are made to each creditor in any given class.

Prior to any insolvency, the directors have a similar duty to ensure that they do not pay any creditor in preference to any other, to safeguard the principle that all creditors in a specific class have a right to be treated equally.

Under the *Insolvency Act 1986*, a company is said to have given a preference if the company does anything which has the effect of putting a creditor into a position, which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done, and thus, becomes a detriment to the other creditors who have equal rights. Payments within two years of the date of insolvency could be preferential if made to a connected party. Otherwise, the time limit is six months. The English courts will consider both the timing and the value of the action, which could include releasing a guarantee, repaying a debt that is guaranteed by the director and repaying a loan to a person connected to the company.

The preference might be given to the timing of the payment as well as to the value.

Upon insolvency, the insolvency practitioner can apply to the court for any preferential payments to be set aside, resulting in the director becoming personally liable for those debts.

**Under French law**, there is a difference between creditors whose claim appeared before or after the commencement of the insolvency procedure.

Creditors whose claims are posterior to the commencement of the proceedings are undertaking services that make it possible for the company to

continue operating. They are therefore paid with preference; on the date the claim is due. For instance, there is a "super-privilege" for employees who are to be paid first and justice fees also benefit from a privilege, so that they are paid with priority.

Creditors with a claim that arose before the start of the insolvency procedure should declare their claim within two months of the commencement of the procedure, so that the validity of their claim can be verified. Once the admissibility of the claims has been confirmed by the judge, there is a specific order in which assets must be distributed, as provided by article L. 643-8 of the Commerce code. Employees, the tax administration, and creditors who already benefit from a guarantee or a security attachment are considered priority creditors.

With regards to the directors' duties specifically, certain similarities can be drawn between the English duty against preferential payments and the article L. 653-5 of the Commerce code. This article similarly prohibits directors from paying creditors in a manner that prejudices other the creditors when the company is in financial difficulties.

## Conclusion

Where a company is in financial difficulties and the directors are concerned about the position of the company, they should seek advice as soon as possible to avoid any potential personal liability and to identify the options available for the company. As acknowledged in the *Sequana* judgment, this is "an area of law which is in the course of development, and many aspects of which remain controversial ..." and the specific actions to be taken by directors will depend on the facts and circumstances of each case and company.

As a rule, whether under French or English law, directors should always keep the best interests of the company at the forefront of their minds (with creditors' interests becoming relevant and increasingly more important as the financial situation deteriorates, under English law), but they should also be aware that their decisions may expose them to personal liability if they are made in breach of their duties. Those duties and decisions are likely to come under increased scrutiny for certain companies facing challenging economic headwinds.

# General principles of law in judgments of the Court of Justice of the European Union



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The general principles of EU law, together with the Treaties, make up the primary law of the European Union. The general principles have been developed in the case-law of the Court of Justice of the European Union (“**CJEU**”) based on national legal systems, international agreements made by the Member States and on EU law. Some of those general principles have also been acknowledged and codified in the Charter of Fundamental Rights of the European Union.

The general principles are of key importance for the correct interpretation and application of EU law. They establish the boundaries within which those vested with rights may exercise them and the CJEU refers directly to those principles in its numerous judgments.

Below we discuss some of the general principles which are particularly important from the perspective of the matters we have been handling recently.

## The principle of legal certainty

The principle of legal certainty has recently been cited by the CJEU, among others, in the cases where the CJEU decided on the rules applicable to limitation period calculation. In case C-267/20 (*Volvo AB, DAF Trucks NV vs RM*), the CJEU indicated that: “in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as

applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them.”

In case C-308/19 (*Consiliul Concurenței vs Whiteland Import Export SRL*), the CJEU acknowledged the primacy of the principle of legal certainty over the principle that a national court is required to interpret the provisions of national law in conformity with EU law. In this case, the CJEU noted that the principle whereby national law must be interpreted in conformity with EU law is limited by general principles of law, including the principle of legal certainty, and cannot serve as the basis for an interpretation of national law *contra legem*.

However, in 5 judgments delivered in 2022 the CJEU held that the principle of *res judicata*, being the procedural manifestation of the principle of legal certainty, must in some circumstances give way to the principle of effectiveness of EU law (case C-600/19, joined cases C-693/19 and C-831/19, case C-725/19 and case C-869/19). All of these cases concerned the primacy of effective consumer protection under Directive 93/13 over the principle of *res judicata*. The fact that these cases concerned consumer protection seems to be of key importance to the acknowledgement of the primacy of the principle of the effectiveness of protection arising from Directive 93/13. In contrast, in an earlier case, C-126/97 (*Eco Swiss China Time Ltd vs*

*Benetton International NV*), concerning relationships between business entities, the CJEU held that the principle of *res judicata* prevails even over the Treaty rules regarding competition protection.

### The principle of proportionality and the related prohibition of abuse of rights

The CJEU frequently refers to the principle of proportionality as a general principle of EU law in the context of penalties for infringement of EU law (e.g. in case C-452/20 (*PJ vs Ufficio dei monopoli per la Toscana*)). In one of its recent judgments, issued on 13 October 2022 in case C-431/21 (*X GmbH & Co. KG vs Finanzamt Bremen*), the CJEU noted that the nature and amount of the penalty imposed should in each individual case be proportionate to the gravity of the infringement, which it is designed to penalise.

The principle of proportionality of penalties also applies to consumer protection cases. The CJEU addressed this issue directly in case C-42/15 (*Home Credit Slovakia*), stating that: “while the choice of penalties remains within the discretion of the Member States, such penalties must be effective, proportionate and dissuasive”.

The principle of proportionality is not only important for the evaluation of whether or not specific penalties are adequate. It may also be a useful tool for finding a balance between the interest of an individual and the general interest of the European Union and its citizens. The CJEU cited the principle of proportionality for that purpose in case C-44/79 (*Liselotte Hauer*).

In this context, the CJEU may address the principle of proportionality in cases C-520/21 and C-140/22, which concern finding a balance between consumer protection and the general interest of the stability of the banking and financial system. The fact that protection of the stability of the banking and financial system is in the general interest of the European Union has been acknowledged in the case-law of the CJEU (in its judgment of 1 June 2022 in case T-481/17, and earlier in cases C-526/14, C-8/15 P to C-10/15 P and C-41/15). In cases C-520/21 and C-140/22, the CJEU may clarify whether consumer protection measures, which disregard the general interest of the European Union, are proportionate and may be applied.

The principle that prohibits the abuse of rights is directly linked to the principle of proportionality. The prohibition of abuse of rights is well established in the case-law of the CJEU (cases C-373/97, C-255/02, C-196/04, C-321/05, and recently in cases C-251/16 and C-273/18). Crucially, it follows from the above-mentioned judgments that the prohibition of abuse of rights applies regardless of whether such rights have been set out in Treaties, resolutions or directives.

### The principle of equality

The principle of equality is arguably the principle that the CJEU refers to most frequently (recently in cases C 598/19 and C-336/19). The principle requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified.

Whether or not a difference in treatment is objectively justified should be evaluated in an objective and reasonable manner. In its judgment issued in case C-127/0 (*Société Arcelor Atlantique et Lorraine and Others*), the CJEU linked the principle of equality to the principle of proportionality by stating that a difference in treatment is justified if it is proportionate to the aim pursued by the treatment.

The principle of equality has also been acknowledged directly in Article 20 of the Charter of Fundamental Rights.

### Prohibition of unjust enrichment

In light of the consistent case-law of the CJEU, the prohibition of unjust enrichment also constitutes a general principle of EU law (cases T-166/98, C-47/07, C-259/87 and C-76/17). In its judgment issued in joined cases C-295/04 to C-298/04 (*Manfredi*), the CJEU stated directly that: “Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.”

The prohibition of unjust enrichment should be linked to the right to property acknowledged in Article 17 of the Charter of Fundamental Rights of the European Union.

### Obligation to show reasonable diligence in limiting the extent of a loss or damage

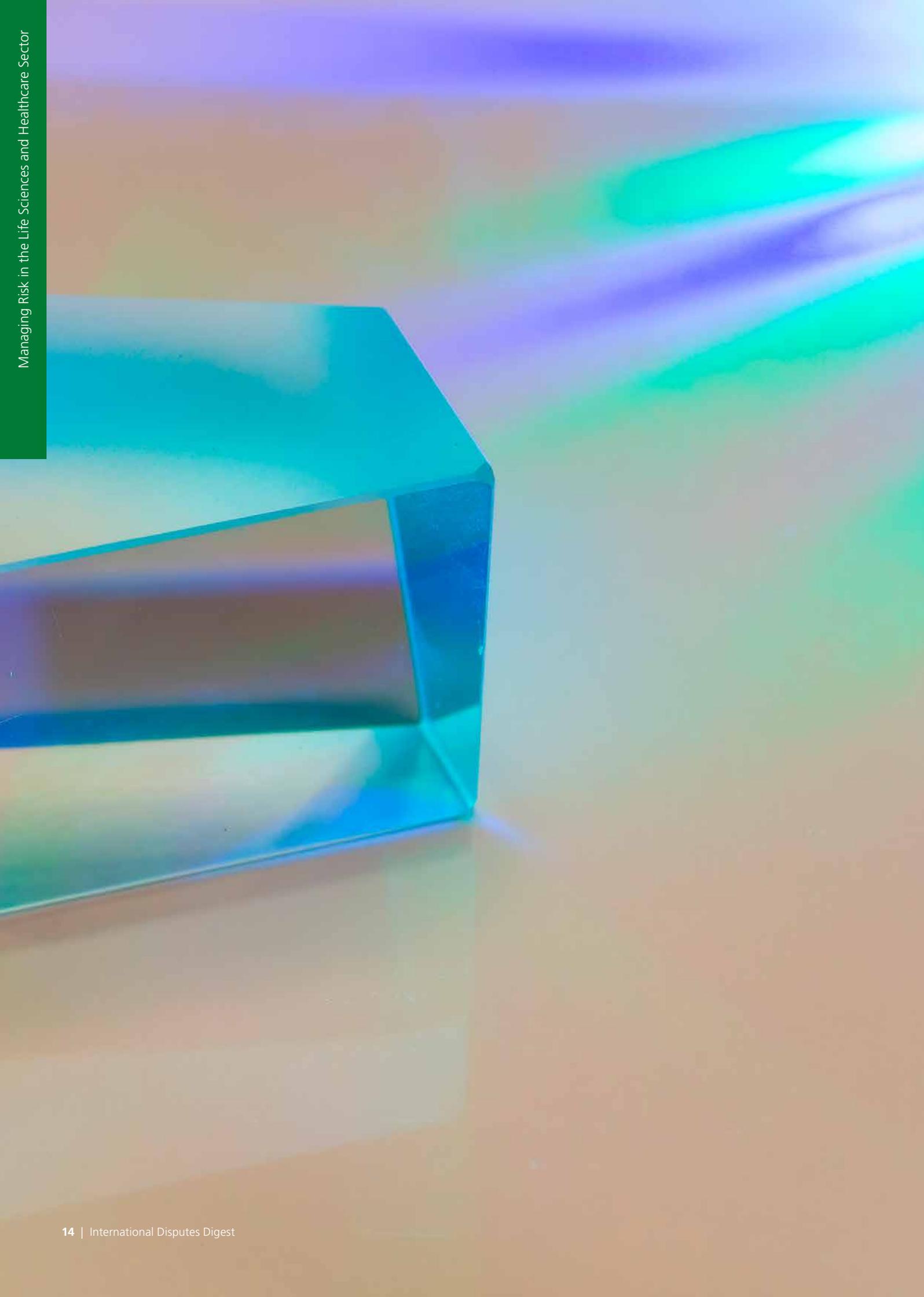
Finally, we would like to draw attention to a principle which is of special importance for redress-of-damage cases. The CJEU has acknowledged that a principle that is common to the legal systems of the Member States and a general principle of EU law is that an injured party must show reasonable diligence in limiting the extent of their loss or damage (joined cases C-104/89 and C-37/90 (*Mulder*)).

The CJEU has repeated the same principle in its judgment issued in joined cases C-46/93 and C-48/93 (*Brasserie du Pêcheur SA*), indicating that in order to determine the loss or damage for which reparation may be granted, a national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, they availed themselves in time of all the legal remedies available to them.

## The *Audiolux* case, or what is not a general principle of law

It should also be noted that the CJEU sometimes issues judgments where it concludes that a general principle of EU law cited by a party to the proceedings does not exist. This is true for case C-101/08 (*Audiolux SA and Others*) where the CJEU held that Community law does not include any general principle of law under which minority shareholders are protected by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy their shares under the same conditions as those agreed upon when an acquired shareholding conferred or strengthened the control of the dominant shareholder.

It follows from the above that when hearing the cases brought to it, the CJEU is right to have recourse to the general principles of law. When preparing a party's position in proceedings before the CJEU, one should not disregard an analysis of the case from the perspective of the general principles of EU law.



# Managing Risk in the Life Sciences and Healthcare Sector



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In this article, we consider the emerging and evolving risks in the life sciences and healthcare sector, and how those risks can be effectively managed and mitigated.

## Risk management

Through the decades of work, we have performed for our life-sciences and healthcare clients, we have gained an in-depth understanding of how companies seek to manage risk and how their lawyers can help them. Successful companies see the potential opportunities and rewards that accompany the risks they face. Likewise, legal advisers should help companies navigate the increasingly complex risk landscape by helping to maximise positive outcomes, as well as mitigating any negative consequences.

In addition to the usual regulatory and compliance risks that come with being one of the most regulated sectors in the world, life sciences and healthcare companies also need to grapple with and manage new risks that are emerging and evolving at an accelerating pace. Scientific and technological advances in the sector are somewhat expected, but life sciences and healthcare companies also need to account for changing customer

expectations and shifts in the focus of lawmakers towards environmental, social and governance or 'ESG' issues. For this reason, companies must regularly consider their changing risk environment to manage it effectively.

## Environmental, social and governance

There has been a cultural shift in recent years with the ESG narrative becoming more important. If they are not managed effectively, these issues bring the potential for regulatory enforcement, civil claims, and criminal sanctions as well as reputational harm. Customers are taking a greater interest in the environmental impact and sustainability of the products they purchase. For example, in the UK, the National Health Service (NHS) has set out its Net Zero Supplier Roadmap and from 2027 will only purchase products from companies who are aligned with its trajectory towards net zero carbon. Shareholders too are

becoming focused on ESG issues and shareholder activism is increasingly influencing corporate agendas. Successes of shareholder activists in the oil industry are one of many signs of mounting and effective pressure from investors on companies to enhance their performance and disclosures on ESG criteria.

### 'Green' claims

If the global life sciences sector were a country, it would be the fifth largest emitter in the world, due in part to manufacturing and production processes, as well as the resulting waste.<sup>1</sup> In responding to the increased scrutiny on life sciences companies and their environmental impact, there is the increased risk of misleading sustainability or 'green' claims.

'Green' claims can include any communication relating to the environmental attributes of a particular product or organisation. The life sciences and healthcare sector are starting to use them more frequently in relation to claims relating to carbon reduction and neutrality, reduction of water usage, and reduction of hazardous and non-hazardous waste.

Any 'green' claim will need to be substantiated and cannot be vague. Otherwise, it may be deemed misleading. For example, it is unlikely to be acceptable simply to state that a company is "green" or "sustainable" or make excessive green promises or unspecific statements. Instead, any 'green' claim must be clear, specific, and balanced and may need to be accompanied with clarifying information and/or a disclaimer, so that the full, and not partial, picture is made clear to the audience.

In anticipation of an increase in claims against companies for 'greenwashing' marketing campaigns or misleading environmental impact claims, we are increasingly advising clients in advance on how best to mitigate the associated risks and manage any reputational impact if issues arise. It is best practice to obtain and keep a record of objective evidence to support the substantiation of any 'green' claims before making them, as well as using standards that are widely recognised in the industry to substantiate any claims.

### Supply-chain risks

Companies in the life sciences and healthcare sector will also need to examine their own environmental footprint as part of any ESG strategy. "Greening your supply chain" sounds attractive, but in reality, can be a costly and time-consuming exercise that may result in a dispute, unless sufficient pre-contract due diligence and post-contract management is performed.

Risks associated with supply chains currently extend beyond ESG to more immediate concerns around security of supply, transportation, and storage, and to the amplified time and price pressures that the market is facing. Leveraging your contractual rights to achieve a resolution may not be enough to give you the assurance you need. As a last resort, terminating your existing agreements in order to negotiate improved arrangements, potentially with alternative suppliers, needs to be implemented carefully and with legal input to minimise disruption to your business.

### Technology transformation

Another area of risk is emerging and transformative technologies. New technologies have the potential to advance almost every aspect of this sector, but they also bring with them new risks, which need to be properly managed, such as data protection, cyber security, and product liability.

Taking artificial intelligence (AI) as an example, this is widely used in transformative medicine, improved diagnostics, and analytics. There is, however, increasing sensitivity and concern regarding the legal and other risks, which are still being understood and evaluated.

### Telemedicine and digital health

The COVID-19 pandemic brought the use of remote healthcare and the corresponding need for governance in this area into sharp focus. The need and desire of consumers for remote healthcare is expected to remain due to the ease and convenience it brings. Software in the form of a digital health app may be considered a "medical device" if it is intended to be used for the diagnosis, treatment, and monitoring of a disease, injury, or disability. If the app is considered a "medical device", it will need to meet various regulatory surveillance and reporting obligations, overseen in the UK by the Medicines and Healthcare products Regulatory Agency. Medical device regulatory obligations are enforced via the criminal law in the UK. Civil liability may also arise under the common law tort of negligence and/or by way of breach of contract or for a breach of medical device regulatory provisions.

### Dispute resolution

New and emerging risks are usually accompanied by increased disputes risk. Taking technology as an example, disputes may be driven by issues arising from IP and trade secrets, the use of AI, smart contracts, cryptocurrencies, and cloud services.

<sup>1</sup>This was highlighted by Ian Milimo, project manager for the United Nations Development Programme, in his keynote speech at the Global Life Sciences & Healthcare Forum 2022: The legal sector has a key role to play in global sustainability says United Nations ([cms-lawnow.com](https://www.cms-lawnow.com))

As these risks are sometimes difficult to manage, life sciences and healthcare companies may look to international arbitration as a form of alternative dispute resolution to resolve them. This is particularly the case for licensing and joint-venture disputes.

The advantages for using arbitration to resolve disputes in this sector include:

- It can provide a useful mechanism for parties to resolve multi-jurisdictional disputes under one forum (particularly if faced with different legal regimes).
- It provides parties with more control, including the ability to select specialised arbitrators with life-sciences expertise; and
- it can be an effective way to resolve disputes confidentially, allowing commercially sensitive information to remain protected.

We are starting to see a slow increase in the use of arbitration for these types of disputes. According to the London Court of International Arbitration (LCIA) Report for 2021, the sector accounted for 3% of the LCIA's caseload in 2021.<sup>2</sup> This was up from 2% for the years 2017-2022. Parties may therefore consider including dispute resolution clauses in relevant agreements, which require them to submit to a fixed arbitration regime in the event of a dispute.

## Conclusion

In the life sciences and healthcare sector, companies are accustomed to operating in a fast-paced and ever-changing environment that brings risk as well as opportunity. We touch on some risks in this article, but there are many more, such as the growth of class actions and collective redress. To keep ahead of the competition, companies and their legal advisors should look ahead to manage proactively their risk environment and exposure, both in terms of current risks and emerging risks that arise.

<sup>2</sup> Reports (lci.org)



# The taking of evidence abroad – recent developments in criminal procedure and international arbitration from a practitioners' perspective



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Often the outcome of a case depends on whether the party bearing the burden of proof can establish the factual basis for the requested relief. To do so, the party must prove the elements of the legal basis that the relief is relying on. The taking of evidence therefore plays a crucial role in international procedural law. Where evidence is not freely accessible (e.g., a witness refuses to appear before court or a document is withheld), the assistance by courts and other governmental bodies becomes important. The process is straightforward when the evidence is in the country in which the proceedings take place. However, complex issues may arise when the evidence is located abroad. This is because the taking of evidence involves the exercise of sovereign rights and powers and this is limited to the territory of the respective court or governmental body. Effective taking of evidence therefore requires cooperation between states on an international level. This is the case for both civil and criminal proceedings.

The taking of evidence abroad is regularly discussed in the context of civil litigation. In this article, we will look

at recent developments in two other fields. We will give an overview on recent changes in the field of criminal procedure and will comment on a landmark decision of the US Supreme Court in which the Court decided on whether US federal courts are competent to provide their assistance in the taking of evidence for arbitrations with seats outside the United States.

## Increasing international cooperation in criminal proceedings

Cross-border crime, understood as those activities that affect persons or take place in the territory of more than one state, has long been a concern and preoccupation of the international community. This has been exacerbated with the spread of new technologies and their implications in terms of globalisation. This reality calls for new instruments of cooperation in criminal matters, aimed at stopping criminals who seek to benefit from the

territoriality of criminal law and from the monopoly of each state's *ius puniendi* (right to punish). The collection of evidence in other states for its use in criminal proceedings is key in dealing with this type of crime. Examples include the temporary transfer of detainees for investigative purposes; the gathering of personal evidence consisting of the testimony by videoconference of an investigated person, witness, or expert; controlled deliveries; the creation of joint investigation teams; and undercover investigations.

Within the EU, the principle of mutual recognition of judicial decisions has been the cornerstone of judicial cooperation in criminal matters since the Tampere Council in 1999. Subsequently, Article 82 of the Treaty on the Functioning of the European Union was based on this principle. Precisely one year later, in July 2000, the Convention on Mutual Assistance in Criminal Matters was approved to speed up coordination between member states based on mutual trust. This model of cooperation updated the Convention on Mutual Assistance in Criminal Matters signed in Strasbourg in 1959 within the Council of Europe. The 1959 Convention designed a system whose main instrument was the so-called "rogatory commission", establishing specific grounds for the refusal of a request for judicial assistance and specific requirements to condition its practice in some cases. However, except for reasons of urgency, rogatory commissions were channeled through the central authorities and this remains the case today.

The 2000 Convention opted for a more efficient system. It replaced communication between central authorities with direct communication between judicial authorities, removing the principle of dual criminality for a list of offences and establishing a list of specific grounds for refusal. The principle of dual criminality previously requested that the facts under investigation should be considered a crime in both countries. With the same spirit of facilitating cooperation between member states, forms or certificates were introduced as way to promote mutual assistance. In this regard, Directive 2014/41/EU of the European Parliament and of the Council which regulates the European Investigation Order in Criminal Matters (EIO) was adopted and is currently considered as the only instrument for obtaining cross-border criminal evidence in the EU. The EIO includes all types of investigative measures (except for the creation of a joint-investigation team and the collection of evidence for such a team), including measures involving the collection of evidence in real time, on a continuous basis or for a certain period. There is also Regulation (EU) 2018/1805 of the European Parliament and of the

Council on the mutual recognition of seizure and confiscation orders which is relevant in the context of obtaining cross-border evidence. This regulation allows the enforcement of a seizure or confiscation order without verification of the dual criminality of the facts for a list of crimes under the terms set forth in its article 3.

In Spain, Directive 2014/41/EU was embodied into Law 3/2018, which modifies Law 23/2014, on the mutual recognition of criminal decisions in the European Union. Law 23/2014 is the exponent of the new model of judicial cooperation within the framework of the area of freedom, security, and justice of the EU. It regulates the different instruments of mutual recognition including the European arrest warrant and surrender, which is the order of preventive seizure of assets or of confiscation, and the EIO. Note that in relation to the EIO, the Spanish legislator, as in many other European countries, gives a leading role to the Public Prosecutor's Office. It considers the office the competent authority for issuing the EIO, provided that the measure does not limit fundamental rights, together with the judges or courts hearing the criminal proceedings. When the measures do restrict fundamental rights, it also gives the competent authority exclusive consideration whether to receive the EIOs issued by the competent authorities of other member states, whose enforcement will be carried out by judges and courts.

Within the European Union there is a legal framework prepared to deal with cross-border crime, with mutual recognition instruments that allow legal practitioners to obtain evidence from other states. In non-EU countries, mutual recognition will depend on the international treaties that may exist on a case-by-case basis.

### A backlash in arbitration?

International cooperation has also been steadily increasing in civil procedure. The Brussels Convention of 1968, the Lugano Conventions of 1988 and 2007 and the Brussels Regulations of 2001 and 2012<sup>1</sup> are testaments to this development on the European level. Beyond Europe, the Hague Convention on Private International Law has played an important role in fostering the cooperation of states in civil matters, notably in the taking of evidence.<sup>2</sup>

While there is a trend for international cooperation in civil matters, the trend in arbitration has been to limit judicial activity for the sake of party autonomy. Nevertheless, most arbitration laws provide that the arbitral tribunal and/or the parties may apply for

<sup>1</sup> Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Regulation (EU) No 1215/2012 of the European Parliament and of the Council 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>2</sup> Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

assistance by national state courts in the collection of evidence. The reason for such provisions is that arbitral tribunals derive their authority from a contract between the parties and thus lack authority vis-à-vis third parties and cannot enforce their orders. For instance, Article 27 of the UNCITRAL Model Law provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may request assistance in taking evidence from a competent court of the state in which the arbitration is seated. The court may execute the request within its competence and according to its own rules on taking evidence.

However, court assistance need not necessarily stop at the boundaries of the country where the arbitration is seated. In the US, for example, several Courts of Appeal took the view that 28 U.S.C. § 1782 (“§ 1782”) allowed parties in arbitrations seated outside the US to apply for assistance by federal courts in the taking of evidence. By contrast, other Courts of Appeal objected to this view, holding this provision inapplicable to arbitral tribunals. In view of this circuit split, the US Supreme Court granted *certiorari* to two cases raising the question whether federal courts were competent to provide judicial assistance to arbitrations seated abroad. One case concerned a post M&A dispute to be decided by an arbitral tribunal in Germany. The other arose out of an investor-state arbitration under UNCITRAL Arbitration Rules based on the Latvia-Russia bilateral investment treaty (“BIT”).

In its judgment in *ZF Automotive, Inc. et al. v. Luxshare, LTD*<sup>3</sup>, the US Supreme Court decided that parties in an

arbitration seated outside the US are not entitled to assistance in the taking of evidence under § 1782 as they do not qualify as “international tribunals” within the meaning of the statute. The Court based its unanimous decision on a verbal, historic and systematic interpretation of the statute. While the Court admitted that the wording of the statute is ambiguous, it stressed that arbitral tribunals lack governmental authority. The Court further held that Congress adopted § 1782 in support of international comity and to strengthen the cooperation between the US and other states. In the Court’s view, this excludes arbitral tribunals who derive their powers from a contract, including tribunals in investor-state arbitration under the UNCITRAL Rules based on a BIT. From a policy perspective, the Court observed that applying § 1782 to arbitrations would undermine the parties’ implied agreement on limited access to discovery proceedings.

The decision of the US Supreme Court is of practical importance since § 1782 applications had become a tool frequently used in arbitrations with connections to the US. It is a matter of perspective whether the decision by the US Supreme Court is seen as a strengthening of arbitration as an autonomous dispute resolution mechanism or as a backlash in the cooperation between states in international procedural law.

In any event, as the above developments show, the taking of evidence in an international context requires a holistic view and in-depth knowledge of the applicable rules in the relevant jurisdictions, not only the place of the proceedings.

<sup>3</sup>*ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401.



# Time for Change: Reform of the English Arbitration Act



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On 22 September 2022, the Law Commission of England and Wales published a consultation paper laying out proposed reforms to the Arbitration Act 1996 and posing 38 consultation questions across a broad range of topics arising from the review. An important objective of the review is to explore the potential for updating the Act in a timely manner with the intention of strengthening England's position as a world leader in international dispute resolution.

## Introduction

The Arbitration Act 1996 (the Act), described as a 'striking innovation' that 'create[d] an accessible and almost complete code of conduct, embodying a consistent vision of the arbitral process...'<sup>1</sup> has been in force for 25 years. Unlike arbitration laws in many other jurisdictions based entirely on the UNCITRAL Model Law,<sup>2</sup> the Act also drew from a long and well-developed history of arbitration in England and Wales.

Over the years, the Act has played a central role in building the reputation of London as one of the most popular seats for arbitration in the world. In order to ensure it is fit for the purpose and continues to promote England and Wales as a leading destination for commercial arbitration,<sup>3</sup> the Law Commission initiated a consultation in September 2022 to review the Act. Given many views provided to the Law Commission in its pre-consultation that the Act works well, the Law Commission does not propose root and branch reform, but has nonetheless been thorough in its review.

Set out below is a summary of some of the key areas for the proposed reform.

## 1. Summary disposal

The Act confers wide ranging powers on arbitrators to decide upon procedures to avoid unnecessary delay or expense, and decide

<sup>1</sup> Mustill and Stewart C. Boyd, *Commercial Arbitration* (2nd edn, LexisNexis 2001).

<sup>2</sup> UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration)

<sup>3</sup> Law Commission Terms of Reference.

procedural and evidential matters.<sup>4</sup> However, there is no express power for a tribunal to apply summary procedures to dispose of claims (or counterclaims) that are obviously without merit. It has been suggested to the Law Commission that the absence of express powers in the Act leads to “due process paranoia”, where arbitrators avoid summary procedures over concerns of the award being challenged.

The Law Commission has proposed language expressly to recognise that it is open to tribunals to adopt summary procedures. If accepted, this proposed reform would permit a tribunal to adopt summary procedures on the application of a party (rather than on a tribunal’s own initiative). It is also proposed to be a non-mandatory provision, allowing parties to agree to disapply the provision or agree on an alternative mechanism (e.g. the summary procedures included in institutional arbitral rules that may be selected). It also proposes a specific threshold to avoid the need for a tribunal to have to determine the test which it would then have to apply in deciding on a summary disposal application. The test proposed is to permit disposal of a claim on a summary basis where it has no real prospect of success, and when there is no other compelling reason for it to continue to a full hearing. Given the popularity of London as a centre for the determination of banking, finance and construction disputes, the adoption of an appropriate summary procedure is likely to prove popular, and follows a recent trend of adoption of such procedures by leading arbitral institutions around the world.

## 2. Courts’ powers

Courts of England and Wales have powers under the Act to support the arbitral process by making orders: (a) on the taking of witness evidence; (b) on the preservation of evidence; and (c) relating to property and others. However, some cases have cast doubt on whether courts can make such orders against third parties, which can sometimes be necessary, in particular, to preserve property or to obtain documentary evidence or witness evidence. The Law Commission proposes amending the provisions to confirm that orders against third parties can be made. The Law Commission does, however, recognise that it may not be appropriate for a third party to be subject to the same limitations on appeals before the court as would apply to parties to arbitration. Therefore, the Law Commission rightly proposes that third parties involved in such applications would have full rights of appeal.

The Law Commission also considers how the Act might deal with the relatively recent innovation of emergency

arbitration: a concept that did not exist when the Act was drafted. It is proposed not to apply generally the provisions of the Act to emergency arbitrators (recognising that they are largely a creature of institutional arbitration rules). Leaving such mechanisms to arbitral institutions, the Law Commission also proposes that the Act should not include its own provisions for the court to administer a scheme of emergency arbitration (meaning that emergency arbitration would not be available unless the parties agreed on a separate mechanism for it).

However, to give effect to orders made by emergency arbitrators, the Law Commission proposes giving the court the power to order compliance with a peremptory order of an emergency arbitrator (which would offer a partial solution to the question of the enforceability of emergency arbitrator awards). An alternative option under consideration is to allow a party to apply to the court for an interim order with the permission of an emergency arbitrator.

## 3. Challenges to jurisdiction

Under the Act, parties have a number of avenues to challenge the jurisdiction of a tribunal. The starting point (often seen as a core principle of arbitration) is that a tribunal is itself competent to rule on its own jurisdiction. It can, therefore, determine a challenge to jurisdiction itself. Under the Act, a party can also apply to the court to determine the tribunal’s jurisdiction. Furthermore, a party can also challenge an award of a tribunal based on its lack of jurisdiction. Where the court is to review a decision of the tribunal on its own jurisdiction, should that be a review of the decision (i.e. an appeal) or a complete rehearing of the question of jurisdiction?

The Law Commission proposes that where a party has participated in the arbitration, while objecting to the jurisdiction of the arbitral tribunal, and the tribunal has ruled on its jurisdiction in an award, any subsequent challenge to the court should be by way of appeal only and not rehearing. The view of the Law Commission is that the alternative approach is giving the party ‘two bites of the cherry’ by allowing it to challenge jurisdiction, fully, twice. This is potentially one of the most controversial aspects of the proposals. While it is correct that a party would potentially get two attempts to challenge jurisdiction, the alternative is for a tribunal, that may not actually have jurisdiction, to make a decision, which is then only reviewed by a court. The proposal also creates a potentially negative effect, in that it may dissuade parties from

<sup>4</sup> Arbitration Act 1996, S.33 and 34.

<sup>5</sup> Arbitration Act 1996, S.30.

<sup>6</sup> Arbitration Act 1996, S.32.

<sup>7</sup> Arbitration Act 1996, S.67.

participating in the arbitration at all, in order to preserve the right to challenge the jurisdiction of the tribunal fully before the court.

#### 4. Discrimination

The Law Commission supports the proposition that arbitration benefits when it is free from prejudice. Where it sees that prejudice may arise is in the appointment of arbitrators. An area of previous controversy has been where specific characteristics of an arbitrator are required as part of the arbitration agreement. Is it permissible for those characteristics to include protected characteristics (e.g. ethnicity, religion or gender)? The idea of such requirements seems contrary to principles of diversity, inclusion and equality, and indeed, there has been a recent push in many parts of the world to achieve more gender diversity among arbitrators. Yet there are certain specific uses of arbitration, where all parties may be of a particular faith or ethnicity. In such circumstances, is a requirement that the arbitrator be of the same ethnicity or religion as the parties a problem? Conversely, many international arbitral institutions adopt mechanisms to avoid appointing arbitrators of the same nationality as a party. In order to strike the right balance, the Law Commission proposes that the appointment of an arbitrator should not be susceptible to challenge on the basis of a protected characteristic (i.e. an arbitrator cannot be challenged due to a protected characteristic that they may or may not have) and that an agreement between the parties relating to an arbitrator's protected characteristics should be unenforceable, unless having that protected characteristic is a proportionate means of achieving a legitimate aim.

That seems to strike the right balance between avoiding prejudice, while at the same time, permitting arbitrations to proceed with an arbitrator with protected characteristics if all parties have agreed.

#### 5. Arbitrator immunity

Arbitrators have broad immunity from liability while discharging their functions.<sup>8</sup> However, an arbitrator may incur liability in the event of resignation and, in light of some recent court decisions,<sup>9</sup> an arbitrator may incur personal liability for costs where a party makes an application to court to remove that arbitrator.

The Law Commission has indicated that it does not consider those cases to reflect the intentions of the Act. Therefore, the Law Commission proposes that the immunity of arbitrators be extended to include

immunity from costs liability arising out of arbitration-related court proceedings.

Although the Law Commission does not make a specific proposal in relation to the liability of arbitrators if they resign, it seeks comments on whether liability should only be imposed if the resignation was unreasonable.

#### 6. Confidentiality

One of the most valued characteristics of international arbitration for many parties is confidentiality. The Act in its present form says nothing about confidentiality. Case-law establishes that confidentiality of the arbitration is an implied term, subject to a number of exceptions to the general rule.

Many users have called for the Act to be amended to codify the current common (case-) law on confidentiality since it would offer more clarity and certainty. For international commercial arbitration, confidentiality is undoubtedly seen as a benefit. However, there are other types of arbitrations (including investor/state arbitration) where there is more likely to be a presumption that arbitration proceedings are not confidential. To codify in statute a law of confidentiality would therefore require either a classification of different arbitrations in order to identify what might or might not be confidential, or to include confidentiality provisions on either an opt-in or opt-out basis. Having considered the options, the Law Commission does not propose to make any addition to the Act in relation to confidentiality, since it believes a single rule does not accommodate the range of arbitrations operating under the Act. To some, this is the most controversial omission from the recommendations.

#### 7. Technology

The Act says little about technology, but some commentators consider that this is a missed opportunity to modernise the Act. The Law Commission does acknowledge that arbitral institutions and other bodies<sup>10</sup> have devised rules for remote hearings and electronic documentation, which are compatible with the Act in its current form. Any updates to address developing technology would run the risk of becoming quickly out of date, and would in all likelihood increase the time needed for consultation and drafting. However, that may result in amendments being needed sooner, such as where technological advances make the potential for arbitration conducted with the assistance of artificial intelligence more realistic. Given the 25 years that passed since the Act was last reviewed, it should be assumed that any round of revisions may have to last

<sup>8</sup> Arbitration Act 1996, S.29.

<sup>9</sup> *Wicketts v Brine Builders* (2002) 2 Arbitration Law Monthly 31; *Cofely Ltd v Bingham* [2016] EWHC 240. (Comm), [2016] All ER (Comm) 129; *Halliburton Co v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48.

<sup>10</sup> UNCITRAL Arbitration Rules 2021; Lawtech UK, 'Digital Dispute Resolution Rules Version 1.0 2021 (UK)' 2021.

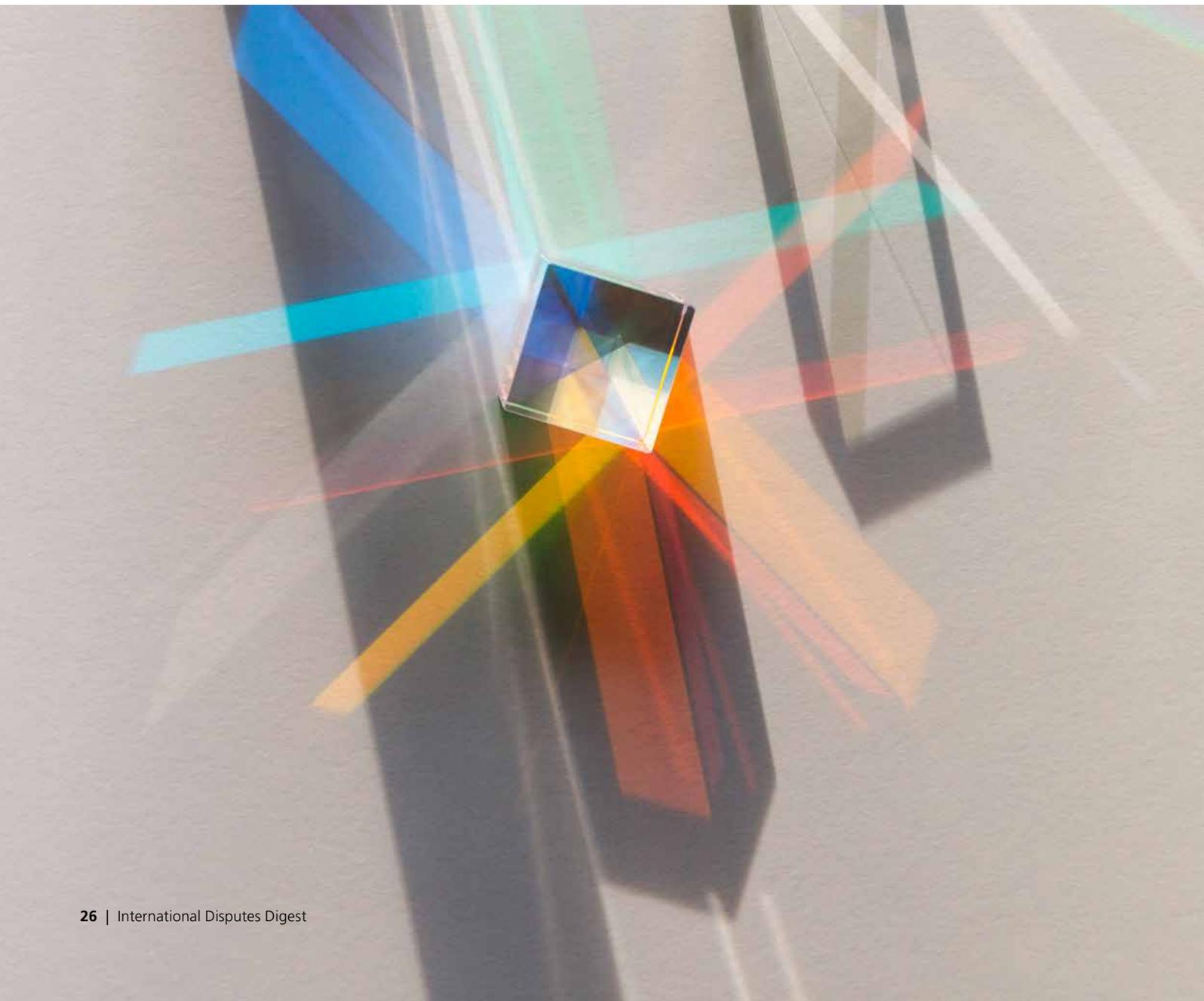
another 25 years, which might run the risk of the Act becoming out-dated. Indeed, some jurisdictions openly promote their ability to update their arbitration laws quickly. The Law Commission faces a dilemma – attempt to make the Act more ‘technology ready’ for future unspecified developments, or leave this for a later review and run the risk that the Act might become out of date.

### Concluding remarks

Overall, while each proposal would be a minor amendment, the cumulative effect of the above

proposals would represent some significant changes to practice that, if applied, would require parties and counsel to carefully consider the implications for arbitration, and how it is incorporated into parties’ agreements.

The Law Commission has invited responses to its consultation paper by 15 December 2022. After the consultation has completed, the Law Commission will then analyse the responses and ensure further stakeholder engagement as appropriate. We will report on future developments in subsequent editions of the Disputes Digest!



# Taking on the Copycats – Tips on Protection and Enforcement



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## Current economic and supply chain challenges are creating the perfect storm for copycat products. What can brand owners do to protect themselves?

A 'lookalike' or 'copycat' product is one that mimics well-known household brands by copying some or all of its packaging, name or design in a deliberate manner. Recently, a stream of lookalike disputes has played out in the public eye. While traditionally a tale of branded manufacturer against the retailer, the two recent IP infringement claims by Marks & Spencer (**M&S**) against Aldi regarding its caterpillar cake demonstrate that the issue is just as current for retailers.

The intention of a copycat product is clear – to profit from the goodwill and reputation of the established product, but to fall short of creating deception or confusion. Against this backdrop, one might assume there is a clear path for established brands taking legal action to prevent the copycats. However, the way in which the copycat retailer sells their product and the protection that the established brand has in place are crucial.

Registered trade marks are usually the best weaponry. Lookalikes typically rely on visual clues, drawing on the consumer's sub-conscious positive feelings towards the

original brand. This provides the starting point for knowing what to register – the stand-out attractive elements that give the product its look and feel – and create familiarity with the consumer. These elements may include colour, layout, graphics or shape of packaging.

Often the owner of a registered trade mark will seek to argue that the lookalike product is similar enough to an earlier registered trade mark that it will likely cause confusion to consumers, who mistakenly believe that the products originate from the same business or that there is a commercial arrangement between the producers (Section 10(2), the Trade Marks Act 1994). The difficulty, however, is that confusion does not typically arise in copycat cases. The UK courts have ruled that consumers know they are buying a cheaper store version rather than the original branded product. For this reason, the tort of passing off has also fallen short of protecting against copycats in court, since there is a pre-requisite of confusion/deception.

In August 2022, the Swiss Federal Court<sup>1</sup> ordered Lidl to destroy its own 'Favorina' branded chocolate bunnies as they were found to be confusingly similar to Lindt's well-known gold-wrapped bunny,

<sup>1</sup> Chocoladefabriken Lindt & Sprüngli AG v (First) Lidl Schweiz AG; and (Second) Lidl Schweiz DL AG 4A\_587/2021.

which is registered as a 3D trade mark. The Court noted that consumers will typically choose products that are familiar to them and will not necessarily consult labelling.

A similar decision was made by the Court of Session in Scotland, when William Grant & Sons succeeded in its claim for interim relief against Lidl.<sup>2</sup> William Grant has a registered trade mark for the shape of its Hendrick’s gin bottle. When Lidl re-designed the bottle and label of its “Hampstead” gin to a dark round bottle with a diamond-label shape, William Grant relied on its shape trade mark to argue infringement, on the basis of Section 10(3) of the Trade Marks Act 1994. Relying on this provision means that a UK brand holder must only show that it has a sufficient reputation in its trade mark, which the lookalike takes unfair advantage of or dilutes, by creating a link in the mind of the consumer. Crucially, it is not necessary to provide evidence of customer confusion. Therefore, registering similar shape trade marks can be the difference in allowing brands to take on the copycats successfully.

Having an IP filing strategy is an important step in protecting the time and money invested in product development, but it is equally important to have an IP enforcement strategy.

When looking to enforce their IP, UK brands generally take action in the High Court in England or the Intellectual Property Enterprise Court (IPEC). Scotland is an often-overlooked jurisdiction for the purposes of IP enforcement but there are some tactical advantages

to pursuing actions in the Court of Session (Scotland’s highest civil court), including the potential element of surprise, timing and costs.

Where an infringer has physical stores in Scotland (as with the Lidl case<sup>3</sup>) or where there is an online infringer selling throughout the UK, brands will often have the option of bringing an action for an interim interdict (the Scottish equivalent of a preliminary injunction) in Scotland. In certain circumstances, the Court of Session will grant a UK-wide interim interdict order on a “without notice” basis, which means the first an infringer may learn about the court order is when process servers turn up at their offices or stores to serve the order. Often, the element of surprise works to the brand owner’s advantage, the infringement ceases in short order and matters are resolved relatively quickly.

Of course, any enforcement strategy must also take into account PR aspects and the potential for ‘trial by social media’. In the M&S IP infringement claims, Aldi was quick to bring the caterpillar cake wars to the court of public opinion via Twitter, when M&S accused it of copying. We are seeing this tactic being used more frequently to assert pressure on brand owners to back down and it must therefore be considered when deciding what action to take against infringers.

Commencing successful enforcement action against copycats is not always straightforward but as we have demonstrated in this article, there are steps brand holders can take to put themselves in a stronger position when it comes to taking on copycats.

<sup>2</sup> William Grant & Sons Irish Brands Limited v (First) Lidl Stiftung & Co Kg; (Second) Lidl UK GmbH and (Third) Lidl Great Britain Limited [2021] CSOH 55.

<sup>3</sup> William Grant & Sons Irish Brands Limited v (First) Lidl Stiftung & Co Kg; (Second) Lidl UK GmbH and (Third) Lidl Great Britain Limited [2021] CSIH 38.

# Season of Protest



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Civil societies around the world are being subject to unprecedented levels of stress. After the disorienting effects of the pandemic and lockdowns, people everywhere are faced with cost-of-living and energy crises and a likely biting recession. This at a time when respect for the traditional political process is at an all-time low and single-issue political movements predominate.

As a result, we are seeing ever-greater levels of public protests. There are protests on the streets and protests online. We are even seeing litigation being brought as a form of protest. These protests can often be disruptive and sometimes violent. And it is not uncommon for protests to be directed at specific businesses. For that reason, more and more clients are asking what can be done legally in response.

Typically, a business is likely to be reluctant to involve itself in legal action against protesters. Far better to avoid the issue entirely or reach an amicable outcome. There is now a plethora of environment, social and governance (ESG) material for businesses to take into account and specialist advisers to provide counsel on a range of matters from green issues to supply-chains issues. Businesses may be able to best avoid being the target of activist movements with the proactive adoption of the above approach together with deft communications.

But not always. Sometimes the nature of the business means that it is necessarily controversial. Or maybe there is a fundamental misunderstanding on the part of protestors about the business, which cannot be assuaged. Or sometimes both situations apply. Either way, even the most well-meaning company can find itself at the centre of a disruptive and commercially damaging protest movement.

When a business is targeted in this way, it will want to weigh its response carefully. If the protest is largely a peaceful attempt on the part of the protestors to vent and draw attention to a public-interest issue, any proactive response by the business may be unwise. But if the protest is violent or disruptive and involves breaches of the law (both criminal and civil), a firmer approach may be appropriate.

Protests can take many forms. Perhaps the most typical is a physical protest where activists mass outside business premises, block access and otherwise cause disruption. One avenue the business may wish to explore is criminal law. In the UK, new laws are being proposed that would not only extend the range of offences, which may be committed at protests (e.g. “locking on” or chaining oneself up as part of a disruptive protest), but also to grant significant new powers to the police to stop and search potential protestors.

Here the relationship with the police is likely to be key and any business that may be vulnerable to a physical protest is well advised to embark on a long-term engagement strategy with the local police. In this way, they are best prepared should the worst happen. In such circumstances, businesses may also wish to ensure that their own staff, in particular their security personnel, are fully aware of the position in criminal law so that there is no risk of any transgression, which from a communications perspective could be disastrous.

Another route is a civil injunction against protestors to seek to prevent them committing unlawful activity. In the UK, this is a productive but sophisticated area. Often the business will not know the names of those protesting, but in these circumstances the courts are prepared to grant injunctions against what are known as “Persons Unknown being the person(s) responsible for the activity”. Crafting the form of the order and determining the best means of services is a complex area, and the courts have proven to be unforgiving with businesses if there is any slip.

Another option regarding civil claims could be a damages action. Sometimes protestors move quickly when causing damage (e.g. protestors in the UK who enter supermarkets and spill milk on sale). An injunction in such a case is unlikely to be granted until the protest is long over. But the protestors could be held accountable for the damage they have caused. The central point of course would not be reimbursement but deterrent. Many protestors may have insufficient means for this to be a realistic option. Increasingly, however, activists undertaking these activities are well heeled and may have something to lose. A business would no doubt wish to calibrate the PR consequences of such an approach carefully, but the public mood appears to be hardening against disruptive protestors. Such damages claims may be an effective weapon.

A campaign against a business may be advanced online, either together with or separately from physical protests. This may be on a bespoke website (known colloquially as a “sucks” site) or on social media. Protestors on social media often proceed on the basis that they can do so anonymously with entirely free rein. But there are many legal techniques, which can be used to track down posters on the internet and identify them, including obtaining

information from internet service providers. Victims of online abuse can even get orders from the court requiring those responsible to come forward and identify themselves. Often, once someone on the Internet knows they have been identified, that alone can substantially change their behaviour for the better going forward.

Another form of protest is when a legal claim is brought as part of a campaign of protest. One example we have seen is a judicial review brought by an activist group against the environment agency alleging unduly emollient actions against a client’s site. Also, numerous private law claims in nuisance were brought against the client. The judicial review failed but was then reconstituted. The private law claims continue.

Another example is protestors seeking to use the derivative action procedure to stand in the shoes of the company and sue the directors for alleged breach of their duties. The claimants need permission from the court to bring the claim, but if they get it, they may be able to force the company to fund the claim, which would be disastrous for the business financially, reputationally and practically.

The derivative action procedure is well established in the UK. In respect of shareholders, it is on a statutory footing with one approach being for protestors to buy a token share in the target business and use that as the basis for the action. But applying the procedure to protestor actions is novel. We are taking the leading case in this area to the Court of Appeal, which is due to be heard in the course of 2023.

The final concern in this area is employees. Currently, there appears to be a much higher propensity for employees to judge their employers and hold them strictly to account. This can lead employees to take vocal public action against their employers as part of protest campaigns, which can give rise to a range of legal issues. For example, employees have employment and whistleblowing rights, which need to be safeguarded. Also, employees may have access to sensitive confidential information, which may need to be protected. And sometimes it can be hard to distinguish between an employee who is a bona fide protestor and one with an unwarranted grievance who is using the protest issue as an excuse.

We have highlighted some of the legal complexities facing businesses when they are targeted by a protest. In every area, it is important to pay close attention to the disclosure of information and ensure that the theme of any litigation is consistent with the public messaging of the client. Taken together, what is optimal is a clear, coherent and coordinated strategy combining legal, communications and operations that is sensitive to developing events. Such a strategy is most likely to produce a successful outcome for the business.

# Poland makes important changes to Holding Companies Law



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Poland has recently introduced important changes concerning holdings through an amendment to the Polish Commercial Companies Code that came into force in October 2022 and introduced detailed provisions on binding instructions from parent companies, with implications for the liability of parent and subsidiary companies, as well as their board members. The amendments also introduced new provisions that enhance the role of the supervisory boards of parent companies.

Giving instructions, at least informal ones, was common practice in groups of companies in Poland. However, until October 2022, Polish law was silent on whether such instructions were allowed as well as on other relevant aspects of such instructions.

### What are the new prerequisites for a parent company's instruction to be binding on its subsidiary in Poland?

The most important prerequisite is that both the Polish subsidiary (or subsidiaries) and the parent company must declare that they are a group of companies. The fact of establishing and/or joining a group should also be revealed in the official Polish register of companies. (If the parent company is located abroad, notification in the register of the Polish subsidiary's participation in a group of companies is sufficient). This should also

be preceded by a resolution of the subsidiary's shareholders on joining the group of companies. This resolution should be adopted by a three-quarter majority vote and should also indicate the dominant parent company.

There are further requirements concerning the parent company's instructions. The parent company's instruction should be issued in written form (i.e. on paper or electronically). Otherwise, the instruction is invalid. Additionally, the written instruction should specify the action required from the subsidiary and the interest of the group of companies related to the instruction, as well as expected gains or losses. The instruction should also specify the way and the date that damage resulting from the execution of the binding instruction will be compensated to the subsidiary. The management board of the subsidiary must also adopt a resolution mirroring the instruction from the parent company.

### Can the management board of the subsidiary refuse to obey the instruction from the parent company under the new provisions?

As a rule, the instruction is binding. However, there are exceptions. The subsidiary's board should

refuse to follow the parent company's instruction if its execution will result in the subsidiary becoming insolvent or create the threat of insolvency. The management board of a non-wholly owned subsidiary should also refuse to obey the instruction if it finds that the instruction is contrary to the interests of the entire group and that there is also a risk that the damage, which might result would not be compensated within two years (from the occurrence of the act or omission causing this damage). As a corollary of this obligation to follow parent instructions, the board members of the subsidiary are released from liability for damage resulting from its execution.

### The other side of the coin: liability

The dominant (i.e. parent) company could be liable under certain conditions towards a non-wholly owned subsidiary for damage caused by carrying out the instruction. If the parent is the sole shareholder, this company would be liable towards the subsidiary for such damage only if the latter company became bankrupt as a result of performing the instruction. The parent company could also be liable under certain conditions towards the subsidiary's shareholders for a decrease in the value of the shares of the subsidiary resulting from executing the binding instruction.

Forming a group of companies can have further implications for the dominant parent company. The parent company issuing the instruction may also be liable towards creditors of the subsidiary if enforcement of a claim against the subsidiary is ineffective, unless the parent is not guilty or the damage was not caused by the parent's binding instruction. This is an exception to the general principle according to which the parent company and subsidiary company are separate legal entities and are not liable for the debts of the other.

### Holding Companies Law in Poland: a useful tool or a headache?

Time will tell whether the amendments are a good solution for businesses in Poland. To establish

(and register) the formal group in Poland is a question that does not have a simple answer for every corporation. However, it is certain that groups that have or plan to have subsidiaries in Poland will face additional challenges.

In particular, for groups opting in by forming the group, relatively complex and formal requirements concerning parent instructions might slow down decision-making processes. Therefore, some may doubt whether this is an attractive proposition to businesses, especially in today's dramatically fast-changing and unpredictable economic environment. In this context, the new rules could be particularly challenging for those corporations, which prefer more involvement from the top in the management of operations below. These newly enacted provisions could also create a conflict between the board members of the parent and subsidiary companies or even their respective legal, compliance and financial teams.

One can also imagine practical problems. One issue is how specific the instruction (and the mirror resolution of the subsidiary's board) should be when it comes to its required reasoning. Another issue is how to assess the risk of damage, which may or may not result from a given instruction and document this assessment, such as in the case of a loan or bond issuance by the parent company, for which the subsidiary's assets would be needed as security.

One may even wonder if the amendment, in its current formulation, was necessary. Even well before this recent amendment there had been cases where Polish courts exempted the liability of board members who acted in the interest of the entire group of companies and/or followed instructions from the parent company. Some might argue that leaving these issues to the courts to be decided on a case-by-case basis would provide more flexibility and would prove to be a better approach.

Whatever the assessment of the new rules on groups of companies, this legislative change cannot be ignored and parent companies will have to develop an appropriate and tailored approach.

# Sanctions and arbitration: procedural management, force majeure, hardship clauses and enforcement of awards in wartime



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International contractual relationships may be significantly affected by extraneous events. The recent global pandemic, armed conflict, and international sanctions such as export blocks, transport restrictions and in general all measures affecting the supply of goods and services (e.g. financial measures) can render the performance by a party more onerous or even impossible. A recent example is the eighth sanctions package issued by the EU against Russia, which extends the existing ban on the provision of services to Russia to include architecture, engineering, IT consultancy and legal advisory services.

When unexpected, unforeseeable, and unavoidable circumstances arise, parties must consider whether their contractual performance remains feasible. If not, there are various options to redress the contractual imbalance, which may range from suspending performance until the circumstances change to terminating or renegotiating the contract.

### Defining *force majeure* and hardship

In this context, *force majeure* and hardship clauses often come into focus in international disputes. The drafting of these clauses is of crucial importance, given that disputes typically arise from their interpretation. It is for this reason that in recent years, important international institutions, such as Unidroit and the ICC, have updated their principles and model clauses.

The Unidroit Principles of International Commercial Contracts 2016 (the “**Unidroit Principles**”) incorporate the features of *force majeure* developed by arbitral jurisprudence. *Force majeure* is described as an impediment resulting from circumstances beyond the control of the affected party that were not foreseeable at the time of the conclusion of the contract and are impossible to avoid or overcome.

In 2020, Unidroit also published the guide “Note of the Unidroit Secretariat on the Unidroit Principles of International Commercial Contracts and the COVID-19 health crisis” on how the Unidroit Principles can help parties deal with contractual disruptions caused by the pandemic.

In 2020, the ICC published a model *force majeure* clause, accompanied by a list of situations that qualify as presumed *force majeure* events. If a presumed *force majeure* event occurs, the burden of proof falls not on the affected party but on the other party to show that the event does not fall within the definition. War, hostilities, invasion, acts of foreign enemies, extensive military mobilisation, currency and trade restrictions, embargos and sanctions are all presumed *force majeure* events in the standard formulation proposed by the ICC, which the parties may decide to keep or modify.

In terms of hardship, although domestic law usually governs the presence of factors hindering performance, the Unidroit Principles may be a valuable guide. Hardship is defined in the Unidroit Principles as the occurrence of events, which substantially alter the balance of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished. Such events, which are beyond the control and risk assumed by the affected party, must occur or become

known after the conclusion of the contract. The hardship event must also be one that the affected party could not reasonably have taken into account at the time the contract was entered into. In the event of hardship, the Unidroit Principles offer several solutions: (i) renegotiation between the parties; or (ii) termination or modification by a court or arbitrator.

The ICC has also published a standard form hardship clause referring to cases where performance becomes more onerous due to events that are unforeseeable, which a party could not reasonably have taken into account at the time of the conclusion of the contract, and in which the event or its consequences cannot be avoided or overcome. In terms of remedies, the ICC clause provides that if the parties have not been able to renegotiate the contract, the party invoking the hardship clause may terminate the contract. Alternatively, the parties may choose from wording that empowers a judge or arbitrator to adapt the contract with a view to restoring equilibrium or to terminate the contract.

### International sanctions and arbitration

International sanctions can raise important questions for arbitrators when deciding on issues concerning the substance of the dispute. Arbitrators may, for example, have to consider whether cost increases for companies only indirectly caused by sanctions against certain countries can be considered unforeseeable events at the time the contract was concluded. The dispute may concern the affected party seeking to invoke *force majeure* due to non-performance by a third party (e.g. a supplier), as well as whether the affected party could have or should have considered alternative means to perform its obligations despite the constraints. Note that the ICC model *force majeure* clause (discussed above) addresses this issue by precluding the non-performance by a third party from being considered a *force majeure* event, unless the affected party proves that the *force majeure* situation also exists for the third party.

International sanctions may impact not only the substance, but also the administration of the arbitration proceedings, directly or indirectly. For instance, measures prohibiting services from being rendered to sanctioned entities may prevent arbitrators and arbitration institutions from receiving payment, which, among other things, are also affected by measures involving banks in the sanctioned country.<sup>1</sup> Other challenges may concern the manner and possibility of notification or practical situations such as witness examination of individuals who are unable to travel due to sanctions.

Generally, arbitration is a valuable dispute resolution mechanism due to the ease of enforcing arbitral awards

<sup>1</sup> Council Regulation (EU) No 833/2014 concerning restrictive measures against Russia expressly excludes from its scope transactions strictly necessary for access to judicial or administrative proceedings or arbitration in a Member State.

in most countries under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958). Nonetheless, enforcement may be a challenge for the award creditor if it is sought in a country placed under a special legal regime.

### Enforcement of arbitral awards in Ukraine

One such example is Ukraine, which has been placed under martial law. This does not impact the recognition and enforcement of awards under the New York Convention. Martial law also does not affect the functioning of the courts in Ukraine, including for the purpose of the recognition and enforcement of foreign arbitral awards against Ukrainian debtors. Depending on the location of a particular court, the proceedings may be slower due to interruptions related to war hostilities/infrastructure disruptions. However, the courts having jurisdiction over recognition and enforcement proceedings (i.e. Kyiv Court of Appeal and Supreme Court) are both located in Kyiv, which is relatively safe.

Still, the war in Ukraine has impacted the enforcement of the awards in two main ways:

- (i) the physical accessibility to the award debtor and, potentially, the assets available for enforcement (i.e. if the debtor is located in the temporarily occupied territories, or if the debtor's assets have been destroyed as a result of hostilities, etc.); and
- (ii) depending on who the award creditor is, compliance with enforcement of the award may impinge on public policy considerations.

#### (i) Physical limitations

If the award debtor is located in temporarily occupied/uncontrolled territory, it (or its legal counsel) may not be able to participate in the court proceedings to present its objections to the enforcement. The court may be unable to notify the debtor of the process to ensure the parties to the proceedings have a fair trial.

As a matter of practice, the Ukrainian courts tend to pay attention to parties' claims concerning their limitations in exercising their procedural rights and are

likely to grant a *prima facie* substantiated request to adjourn the proceedings or extend a deadline to allow parties to properly participate in hearings.

#### (ii) Public Policy Considerations

Public policy considerations play a key role in the enforceability of an arbitral award. Where armed conflict, as is often the case, leads to the imposition of international sanctions, difficulties may arise in the enforcement of an award in which *force majeure* or hardship is accepted because of applicable sanctions on a party, as possibly conflicting with public policy.

The Ukraine Supreme Court has expressed the view in the context of sanctions and national security considerations that the enforcement of an arbitral award in favour of a sanctioned Russian creditor against a Ukrainian enterprise belonging to the defence sector would violate Ukraine's public policy. Consequently, the court denied enforcement of the award.<sup>2</sup> The Ukraine government has since introduced a special regulation, which expressly prohibits any money transfers (as well as any other transactions) in favour of entities with ties to Russia or in favour of Russia.

There has since been an emerging trend in which parties have objected to the enforcement of arbitral awards that would require making payment to Russia or Russia-related entities. Procedurally, it is being alleged in these cases that the making of payment and the courts' granting of requests for payment would constitute a breach of Ukraine's public policy.

In summary, the procedures for recognition and enforcement of foreign arbitral awards in Ukraine during wartime have not been substantially impacted. Arbitral awards with no connection to Russia or to any sanctions regime more generally are being recognised by Ukrainian courts normally. The key change we expect to see is in relation to awards in favour of Russia or Russia-related entities with reference to an alleged breach of Ukraine's public policy (in the war context). Given this context, and also in view of the increasing number of sanctions imposed on Russia and Russia-related entities, we anticipate that denying recognition and enforcement of arbitral awards in favour of Russia is highly likely to become the new approach of Ukrainian courts.

<sup>2</sup> Case No. 761/46285/16-Ц available at: <https://verdictum.ligazakon.net/document/94803432>; Case No. 824/100/19; available at: <https://verdictum.ligazakon.net/document/87760125>; case No. 824/101/2019; available at: <https://verdictum.ligazakon.net/document/90306230>; case No. 824/174/19 available at: <https://verdictum.ligazakon.net/document/90143722>.



# Recognition and enforcement of investment arbitral awards under the New York 1958 Convention and jurisdictional immunity



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Recognition and enforcement of investment arbitral awards remains a key issue for international investment disputes, in all jurisdictions that fall under the scope of the New York Convention of 1958 (the “**NY Convention**”). To preserve the confidence granted by the international community in arbitration as a neutral and effective method to solve investment disputes, states and particularly their judiciaries should remain cautious in applying jurisdictional and execution immunities in recognition and enforcement scenarios.

Recognition and enforcement of awards constitutes a core value and critical element of an efficient international investment disputes system, as they represent the genuine materialisation of justice among its participants. In short, a significant part of the reliability of the international investment protection system rests upon the effectiveness of the tools for

recognition and enforcement of arbitral awards against host states in a wide array of jurisdictions.

In the case of investment awards rendered in accordance with the UNCITRAL Arbitration Rules, the framework of the NY Convention provides such a tool. Articles I, III, IV and V, impose an international obligation to provide

full recognition and enforcement to foreign awards, as defined per Article (1 and 2). Any contracting state to the NY Convention (“**Contracting State**”), including their judicial system, is therefore obliged to recognise and enforce foreign arbitral awards under the rules of the NY Convention. This includes denying such recognition exclusively under the limited grounds of Article V.

Notably, recognition courts should not raise *ex officio* issues of immunity of jurisdiction and execution as grounds to deny recognition and enforcement. Such means of defence are exclusive to the host state and should be raised only when these immunities have not been waived in accordance with international law.

Nonetheless, as it often occurs with the application of the NY Convention by local courts, some approaches tend to deviate from this logic. Such is the case with a recent decision by the Colombian Supreme Court, currently pending appeal, where jurisdictional immunity was raised *ex officio* to decline the Court’s own jurisdiction to serve as recognition authority under the NY Convention. The case concerns an investor seeking recognition and enforcement in Colombia of an investment award rendered against an EU State.

The decision appears daunting because it is a reminder of a time where the NY Convention and the whole international arbitration system was not available to foreign investors and host states to resolve investment disputes.

There are more than a few historical references to cases in which the states turn to “diplomacy by force” and military power to settle disputes. This occurred in the absence of a neutral dispute settlement forum for their nationals who are foreign investors *vis-à-vis* other states.

For example, in Colombia in 1821 officials of the *Gran Colombia*, exercising the nascent state’s sovereignty, did not honour the debt of sovereign bonds held by an English national, James Mackintosh. In the absence of a diplomatic solution, Mackintosh turned to the UK for assistance. A military intervention was set in motion as means for the collection of the debt.

A similar situation occurred in Venezuela during 1902, the well-known *Incidente de las Cañoneras*. For several years, British, German and Italian fleets besieged and attacked the Venezuelan coasts as a mechanism to intercede in the collection of debts that the state had not honoured with nationals of these nations.

The Don Pacifico incident is another important precedent of international law on the application of “diplomacy by force”. Greece did not grant compensation to the English diplomat Don Pacifico, who saw his house destroyed during riots in Athens during 1850. Faced with the refusal to be compensated by the Greek State, Pacifico resorted

to the British navy, which *de facto* executed a blockade on the Greek port of Piraeus as a mechanism for the collection of compensation. This, in turn, unleashed a diplomatic and military crisis between the UK and the Russian Empire, protector of the Greek State against Ottoman expansion, which caused damage to thousands of inhabitants of the territories involved.

The contemporary framework of bilateral and multilateral treaties for the protection of foreign investment, along with arbitration as the most appropriate forum to solve investment disputes, have been established to leave such incidents in the past. It is this framework that allows the free flow of capital through foreign investment, a pillar of our contemporary globalised economy. In Colombia alone, foreign investment accounted for an estimated USD 5,899m for the first half of 2022 alone.

The NY Convention constitutes a vital mechanism of such an international framework. A system that both provides protection to the legitimate interests of investors and host states by way of a peaceful and serious dispute resolution alternative and an effective means to execute decisions, even against sovereign states.

The effectiveness and stability of the system lies in the fulfilment of the obligations by Contracting States. It is essential that states recognise the binding nature of awards issued by international arbitral tribunals. This is even more important whenever recognition and enforcement are sought in another Contracting State’s jurisdiction, different from that of the host state, where assets are located.

The recognition of a foreign arbitral award against states cannot rely on their good will. Furthermore, jurisdiction and execution immunities should only be raised by the state opposing recognition, not *ex officio* by the courts of the Contracting State where recognition is sought.

Such a situation undermines investment arbitration, since it represents a rejection of the application of the NY Convention. Even under article V(2), refusal of recognition should not constitute an immunity that the affected state does not raise, since it implies replacing the state’s consent and denying previous waivers to the said immunity.

On the contrary, jurisdictional immunity cannot be regarded as an absolute rule depriving other Contracting States of jurisdiction to enforce and recognise awards against the host state under the NY Convention. In such cases, the recognition and enforcement would be limited to the jurisdiction of the host state, which once more implies that compliance with the award relies only on the decision of this state’s authorities and nothing more.

One clear example of this situation has arisen in recent years in Europe, regarding several investment treaties (e.g. Energy Charter Treaty 1994) where compensation for damages was granted against states that refused to comply with awards. Plaintiff states have argued both a lack of jurisdiction with the investment tribunals and, once the dispute has been settled with a final decision, jurisdictional immunity *vis-à-vis* recognition courts in other jurisdictions.

However, this breaches the treaty under which the arbitration award was rendered and denies the international obligations of Contracting States under the NY Convention.

Several courts have stated opposite positions. They have made it clear that states, by means of the arbitration agreement in their investment treaties or commercial contracts, waived their immunity from jurisdiction not only before the arbitral tribunal but also before the courts of other states when recognition and enforcement of the award is sought.

Thus, for example, in *Creighton v. Qatar*<sup>1</sup>, the French Court of Cassation upheld that when the sovereign State of Qatar consented to arbitration under the ICC Rules, it had thereby further waived its immunity from jurisdiction for the purposes of recognition and enforcement of the award, which in that case was rendered in France, not in Qatar.

A similar stance was held in Germany, where the Federal Court of Justice recognised and enforced an investment arbitration award that ordered the Kingdom of Thailand to pay damages in favour of a German investor.<sup>2</sup> Specifically, the court held that the waiver of jurisdictional immunity enshrined in

the arbitration agreement included in the bilateral investment treaty had to be extended to the recognition and enforcement of the award.

In Colombia, once a decision has been recognised the Constitutional Court determines that even state immunity from execution is subject to limitations. For example, in judgment SU-443 of 2016 the Court set out the following criteria:

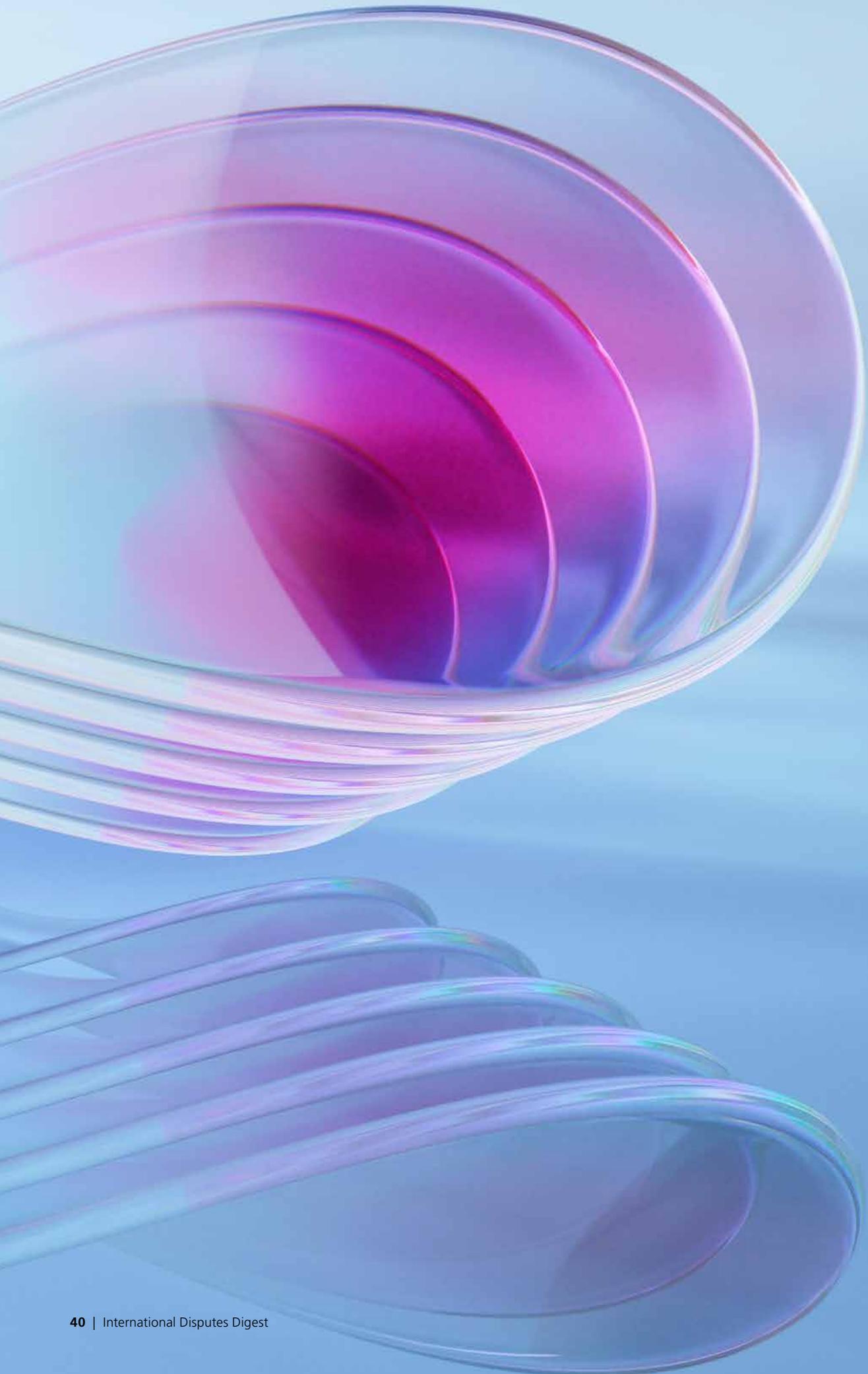
*In accordance with customary international law, an asset belonging to a State is subject to immunity from execution, unless one of the following conditions is met: (1), that the property is not used for activities that do not pursue non-commercial public service purposes, (2) that the State has expressed its consent to the attachment or coercive measure on its property, or (3) which has earmarked the property for payment of the respective judicial claim.*

Therefore, whenever a sovereign state agrees to arbitration, it waives jurisdictional immunity and that waiver extends to the recognition and enforcement of the award. The waiver should be reinforced by the fact that both the host state and the state where recognition and enforcement is sought are Contracting States to the NY Convention.

The system would not offer material protection to the investor if recognition courts apply jurisdictional immunity *ex officio* to deny the substantive application of the NY Convention. In such a scenario, investors must resort to diplomacy or de facto ways to collect an award that is not spontaneously recognised by the condemned state, which is precisely the scenario that the international framework for investment protection aims to leave in the past.

<sup>1</sup> *Creighton Limited (Cayman Islands) v Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of Qatar* (2000), XXV Ybk Comm. Arb. 458, Arrêt de la Cour de Cassation française du 6 juillet 2000

<sup>2</sup> BGH, 30.01.2013, No. III ZB 40/12, Bundesgerichtshof – BGH, decision of January 30, 2013



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