International Disputes Digest

December 2025

Contents

Introduction

Welcome to the winter edition of the International Disputes Digest, where we bring together a selection of articles addressing the most pressing challenges and developments for international businesses in dispute resolution. As we approach the end of 2025, businesses and legal teams continue to navigate a landscape marked by digital transformation, regulatory change, and heightened cross-border risk.

This issue covers a broad spectrum of topics, from the evolving treatment of intangible assets – such as domain names – as seizable property, to the persistent complexities of supply chain disputes in the automotive sector. We examine how contract drafting, particularly the use of Incoterms "Ex Works" clauses, can directly influence jurisdictional outcomes in cross-border sales, and highlight the growing importance of arbitration in succession disputes under Swiss and French law.

Environmental and regulatory issues remain at the forefront, with landmark climate litigation in Italy expanding liability to private companies, boards, and shareholders, and global tax authorities intensifying enforcement through data-driven audits and AI. The Digest also explores the Dutch courts' approach to contract termination and collective privacy actions, the integration of AI in arbitration and courts in Türkiye and Ukraine, and the nuanced liability of boards for antitrust fines under EU law.

We hope you find these articles insightful and relevant to you. As always, we welcome your questions, comments, and perspectives on the evolving world of international disputes.

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Domain names as valuable assets

If a party cannot pay its debts, or simply refuses to pay, its creditors will look for assets that can be seized and sold to the highest bidder. The proceeds of the auction will be used to reimburse the debt.

One of the types of assets that the creditor may be interested in, are the domain names of the debtor. According to Wix.com, some domain names have sold for astonishing amounts, reflecting their brand power and market demand. Leading the list is Cars.com at USD 872m, followed by Business.com at USD 345m and LasVegas.com at USD 90m. Other high-value sales include CarInsurance.com (USD 49.7m), Insurance.com (USD 35.6m) and VacationRentals.com (USD 35m).

Jurisdiction

During the last two years, the Belgian courts have been the forum in which various proceedings concerning the seizure of domain names have been heard. The disputes regarded .eu domain names, which are managed by the registry of the .eu domain names, the Belgian company EURid. EURid is the not for profit organisation established in Belgium that manages the .eu top-level domain pursuant to Regulation (EU) 2019/517. Because EURid has its registered offices near Brussels, Belgium, the Belgian courts had jurisdiction to resolve disputes about the seizure of .eu domain names.

The factual background

The facts behind the pending cases are basically the same. The domain name holders are Maltese gambling companies, which were ordered by the Austrian courts to reimburse gambling losses to Austrian players. The Austrian courts ruled that the Maltese gambling companies had unlawfully offered their gambling services to the Austrian public and ordered them to reimburse the players' losses. Even though these decisions were confirmed by the highest courts in Austria, the Maltese gambling companies did not comply with the court orders and refused to make any payment to the players. The gambling companies were able to rely in part on the fact that assets held in Malta are well protected against the claims of frustrated players.

Therefore, the players looked for assets outside Malta, and they found the .eu domain names of the Maltese Gambling companies that are in Belgium, registered with the .eu registry EURid.

Issues for the Belgian courts

The first question submitted to the courts was whether a domain name is an asset that can be seized and sold to satisfy an outstanding debt. The Brussels Court of Appeal rendered two decisions, and it concluded that domain names are intangible assets that can be seized and sold to the highest bidder (decisions of 17 December 2024 and 18 February 2025). According to the Court of Appeal, domain names represent an economic value and can be transferred easily. The seizure of a domain name is not excluded by law and domain names are not registered on the basis of *intuitu personae* agreements. Domain names are comparable to intellectual property rights, such as trademarks and patents, which can also be seized and sold if their owner does not pay their debts.

The second question that arose was where and how a domain name should be seized. Since the domain names were seized in Brussels, Belgium, where the .eu registry is established, the jurisdiction of the Brussels courts to decide on the validity of seizure was not disputed.

How the domain names can be seized was heavily debated. In one case, the players seized the domain names directly from the .eu registry in Belgium and informed the domain name holders in Malta of the seizure. In another case, the players undertook a third-party seizure or a garnishment, whereby the creditors enforce their debt via a third-party who is indebted to the main debtor (much like a third party debt order). Rather than paying the debtor (in this case, the Maltese gambling companies), the third-party must pay the creditor (in this case, the players who made losses). Typically this would involve the debtor's bank blocking the funds seized and releasing the relevant amount to the creditor under the terms of the garnishment.

Court of Appeal decision

The Brussels Court of Appeal ruled that only a 'third-party seizure' or garnishment is allowed in Belgium to seize domain names. The Court of Appeal held that the domain name registry is a third-party who holds an asset of the debtor and if a creditor wants to seize that asset, he must do so by undertaking a third-party seizure or garnishment with the registry.

In the case where the players had seized the domain names directly from the registry, the seizure was declared invalid and was reversed (decision of 18 February 2025). In the case where the players had pursued a third-party seizure or garnishment, the seizure was declared valid (decision of 17 December 2024).

In the latter case, the gambling companies have filed an appeal with the Belgian Supreme Court *(Cour de Cassation / Hof van Cassatie).* They argue that their domain names are not assets that can be seized and that, even if domain names can be seized, the right way to do so is not by way of third-party seizure or garnishment, but rather a standard seizure in the hands of the gambling companies, such that it would need to be conducted in Malta, where the gambling companies may be better protected than in Belgium.

The Belgian Supreme Court's decision is expected in the second half of 2026.

Is a domain name an asset that can be seized by the creditors of the domain name holder? That question has been submitted recently to the Belgian Supreme Court.

Supply chain disputes in the automotive industry

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Supply chains in the automotive industry are under increasing pressure due to various factors including the COVID-19 pandemic, rising energy costs, semiconductor shortage, raw material constraints, the war in Ukraine, and tariffs. At the same time, the industry is undergoing structural changes driven by the shift from the combustion engine to e-mobility. To remain competitive, suppliers have no other choice than to adapt and innovate. Otherwise, they will fall behind.

In this challenging economic environment, lower-tier suppliers try to pass on costs to their customers, which may cause conflicts with existing long-term agreements. Customers bound by their own commitments cannot simply accept unilateral changes by their suppliers. As a result, disputes increasingly escalate into arbitration and litigation, undermining supply chain stability and burdening the industry as a whole.

Expiry of price agreements

In the automotive industry, supply relationships are generally regulated by framework agreements. These rather general long-term agreements are often further specified by project contracts. The applicable prices are often fixed for one or more years based on forecasted volumes and expected efficiency gains. On this basis, the customer is entitled to call off the volumes that it actually requires. The forecasted volumes are mostly not binding on the customer. Instead, where call-offs (significantly) deviate from the forecasted volumes, the supplier may be entitled to a renegotiation of prices.

In this regard, some contracts expressly provide for regular price reviews or contain other adjustment mechanisms.

These contractual setups increasingly lead to disputes between the parties. Time and again, suppliers take the position that they are no longer obliged to deliver after a pricing period ends and make continued supply dependent on (unilateral) price increases, occasionally threatening or suspending supply. In most cases, such behavior is equal to a violation of the supplier's contractual obligations: expired price agreements normally do not release suppliers from their delivery obligations, neither is a supplier usually entitled to unilaterally increase prices during the lifetime of a project. Rather, contracts typically stipulate that the last agreed price or a fallback price applies until a new agreement is reached, or prices are determined by a court or an arbitral tribunal. Even without an explicit provision, the obligation of the supplier to continue delivery may follow from the nature of the project-related contract or, in some instance, from competition law requirements.

Claims for price adjustments

Even where a valid price agreement is still in place, suppliers sometimes attempt to unilaterally impose price adjustments or demand one-off payments citing a change of circumstances (e.g., reduced orders or increased energy or raw material costs). Often, such demands are accompanied by threats to discontinue deliveries. Mostly, this approach amounts to a contractual breach.

Under German law, as in many other jurisdictions, unilateral contract adjustments follow strict requirements: they are typically only permissible if circumstances that formed the basis of the contract have significantly changed after its conclusion, and the parties would not have agreed – or would have agreed differently – had they foreseen these changes. Internal miscalculations or unilateral expectations about profitability do not justify adjustments. The supplier requesting an adjustment to the contract bears the burden of proof for the change in circumstances.

Even where the strict requirements for contract adjustment are met, this mostly does not lead to an automatic change of the contract. Under German law, the supplier only has a right to renegotiate. If negotiations fail or the customer refuses, prices may be determined by a competent court or arbitral tribunal, which can appoint an expert to assess whether an adjustment is justified. Regardless of any adjustment claim, suppliers are generally not entitled to suspend deliveries. Often contracts expressly exclude rights of retention, and even without such clauses, retention is subject to strict limits. In just-in-time or single-source setups, the suspension of deliveries causes tensions with the nature of the underlying agreements and the exercise of any right to withhold delivery is constrained by the principle of proportionality.

Options for the customer

When a customer is faced with a threat of a delivery stop or the actual suspension of deliveries, the key question is how to respond. In just-in-time supply chains, even short disruptions can cause severe financial damage, notably due to production line stoppages at the OEM, as well as reputational damage. If the customer decides not to give in to the supplier's unilateral demands, it must take action to ensure continued supply.

The customer may consider applying for interim relief by the competent court or arbitral tribunal. Where the contract includes an arbitration clause, interim relief can nevertheless be sought in state courts unless the parties have excluded their jurisdiction for such relief. Under several arbitration rules, including the ICC Rules,[1] interim measures can be requested from an emergency arbitrator before the arbitral tribunal is constituted.

To obtain interim relief, an applicant normally must show a *prima facie* right to delivery and urgency. While the standard to be met is generally strict, recent case law has become more permissive: other than in early decisions, the applicant's economic survival is not a requirement anymore. Instead, it is often considered sufficient that the applicant would suffer a significant loss without the injunction. When deciding, courts have also taken into account the specific characteristics of just-in-time production in the automotive sector. There are several precedents, in which German state courts have granted injunctions prohibiting the suspension of delivery s to prevent major financial losses.

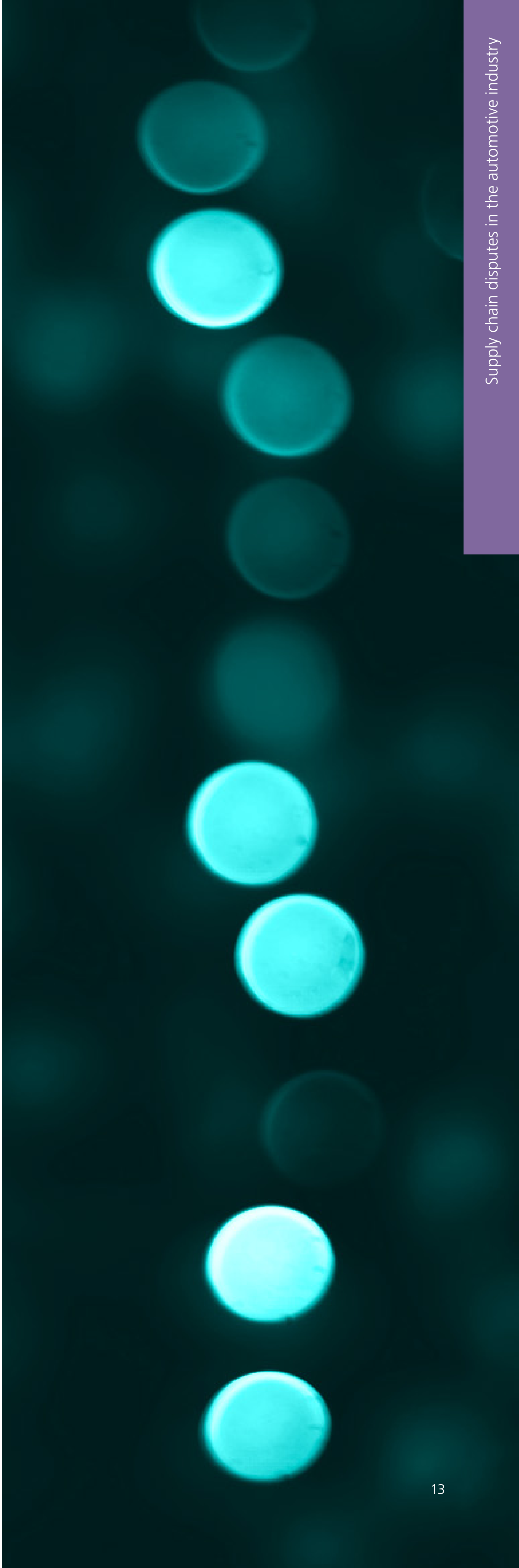
In view of the strict standard and limited available time, interim relief may not be sufficient to secure continued supply. Given the potential impact of an injunction, courts are generally reluctant to decide without holding a hearing before. To ensure continued supply in the short term, the customer may consider making payment under protest and subject to reclaim in court or arbitration. However, this approach carries significant risks: with the upfront payment the customer assumes the risk of the supplier's insolvency as well as the risk associated with litigation or arbitration.

If the supplier insists on unconditional payments, the customer may choose to pay and later declare the avoidance of the agreement once dependency on the supplier has ended. German courts have qualified the announcement of a suspension of deliveries as a threat in the legal sense. Such threat is illicit if the supplier lacks the right to withhold deliveries. Under German law, a contract can be rescinded based on an illicit threat within one year after the threat ceases. If successful, the contract – or the price adjustment – is deemed void from the outset, requiring reversal of all exchanged services: the supplier must refund payments, and the customer must return delivered parts or provide compensation.

Finally, a supplier who is being sued by its customer may be interested in having the effects of the legal dispute extended to the next level (e.g. to its own customer). Supply chains, especially global ones, are complex systems. To fulfill their obligations, players at different levels depend on the performance of their contractual partners. Disputes in the supply chain are therefore not usually limited to the relationship between the claimant and the respondent. Rather, the outcome of one dispute often triggers follow-on disputes. To avoid losing the case twice, the supplier has an interest in extending the decision in the first case to the follow-on case, not only with regard to the dispositive part but also with regard to all relevant findings. In state court proceedings, this can be achieved by issuing a third-party notice. In arbitration, however, such an instrument is usually unavailable. The German Arbitration Institute (DIS) has recently introduced "Supplementary Rules for Third-Party Notices" which address this issue allowing, under certain conditions, that the recipient of a third-party notice is bound by the arbitral award in a follow-on dispute.[2]

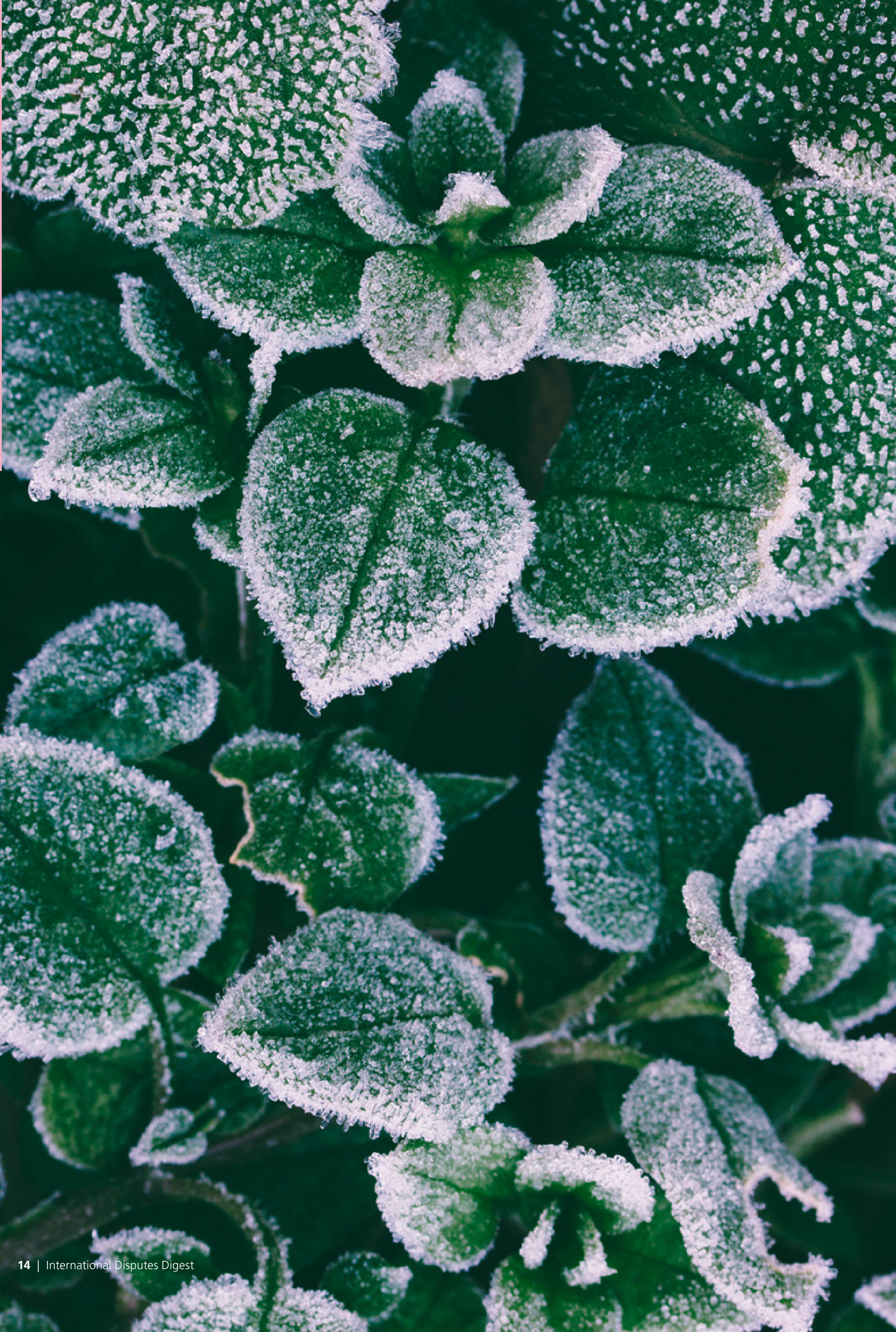
Outlook

Looking at the global landscape, one can expect that, in view of the prevailing instability, disputes in the supply will remain at a high level in the automotive sector. The situation may change, once the shift from the combustion engine to e-mobility has progressed and current challenges are mitigated, for example through resolution of trade conflicts and stabilization of energy markets.

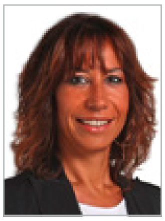


1 Article 29 of the ICC Rules of Arbitration of 2021 and Appendix V, available at http://www.iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/.

2 Available at https://www.disarb.org/fileadmin/user_upload/Werkzeuge_und_Tools/DIS_Supplementary_Rules_for_Third-Party_Notices_3-2024.pdf.



Climate Change Litigation in Italy



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Climate change litigation in Italy was recently marked by a historic ruling by the Joint Sections of the Italian Supreme Court, issued on 30 July 2025.

The case

In 2023, Greenpeace Italy, ReCommon and 12 citizens brought an action against ENI and its shareholders, the Ministry of Economy and Finance ("**MEF**") and Cassa Depositi e Prestiti S.p.A. ("**CDP**") in the Court of Rome. The plaintiffs sought to hold them responsible for damages to health, safety, and property, as well as for having endangered and continuing to endanger the same as a result of climate change.

More specifically, the plaintiffs asked the Court of Rome to:

— **Establish (Joint) Liability:** declare the defendants jointly and severally liable for damages related to health, property, quality of life, and climate change impacts suffered by the plaintiffs.
— **Mandate Emission Reduction:** issue an order compelling the defendants to reduce ENI's greenhouse gas emissions by 45% compared to 2020 levels, by 2030.
— **Equitable Payment:** if the emission reduction order is not granted, determine an equitable sum for damages.

ENI, CDP and MEF objected to *"the absolute lack of jurisdiction of the ordinary court",* contesting the possibility of proceeding with a climate lawsuit before an ordinary court.

The Court of Rome, upon request of the plaintiffs, referred the decision on jurisdiction to the Joint Sections of the Supreme Court. Therefore, the Italian Supreme Court was requested, for the first time, to rule on the possibility of bringing a climate lawsuit in our country.

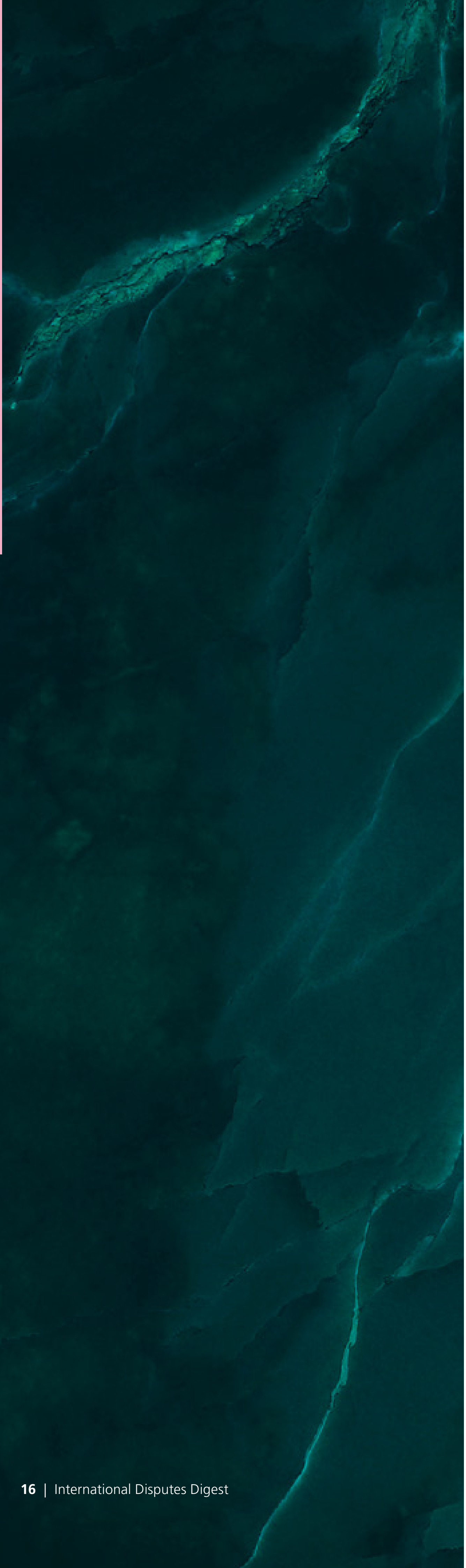
The Joint Sections of the Supreme Court is a special body of the Supreme Court that meets to resolve issues of particular importance, settle disputes between the decisions of individual sections of the Supreme Court, and ensure uniformity in the interpretation of law in Italy. The rulings of the Joint Sections are binding on the individual divisions of the Supreme Court, which cannot deviate from them without authorisation from the Joint Sections.

The Court of Rome therefore suspended the proceedings by waiting for a ruling by the Supreme Court, which focused on the following matters:

— **Jurisdiction of Ordinary Courts:** Whether civil courts have the competency to rule on complex climate matters, especially considering the principle of separation of powers.
— **Territorial Reach:** ENI, MEF, and CDP argued that Italian judges lack jurisdiction over ENI's emissions outside Italy.
— **Justiciability of Climate Claims:** Whether climate change claims, in general, are matters for judicial review or fall solely within the political sphere.

The peculiar aspect of this case and ruling is that, unlike the usual climate change lawsuits brought against states or public administrations, this case concerns a **private company.**

Previously, decisions on this matter had always involved state bodies, with the cases being requests for action to reduce emissions or to declare environmental laws unconstitutional due to them being insufficient to meet international targets.



The decision of the Joint Sections of the Supreme Court

Justiciability of the claim

The defendants argued that the case was inadmissible because it interfered with the freedom of economic initiative (Article 41 of the Italian Constitution). The Court clarified that, according to the law implementing the Paris Agreement (Law 204/2016), the obligations to combat climate change are binding not only on States but also on **private entities** that produce or trade in fossil fuels. Since this sector is responsible for a large part of global emissions, these companies have an **objective or presumed** responsibility (Articles 2050 and 2051 of the Italian Civil Code) and must take all necessary measures to prevent environmental damage.

Nature of the obligation to act

ENI also argued that the matter was a political one. However, the Court specified that the judgment concerns the **breach of legal obligations** and not environmental policy choices. It is therefore up to the ordinary court to verify whether international and constitutional sources impose a duty of intervention on companies and whether its violation gives rise to **civil liability.**

Jurisdiction of the Italian court

The damage complained of also occurred outside the national territory. However, according to EU Regulation No 1215/2012, jurisdiction may lie with the court of the place where the harmful event occurred or where the damage occurred. Since emissions have global and widespread effects, the Court ruled that jurisdiction may lie with either the court of the place where the emissions were produced or that of the **residence of the injured parties.** Given that the company's industrial strategy is decided in Italy, the Court recognised **Italian jurisdiction.**

The Court of Rome will now have to consider the damage that ENI has contributed to causing the plaintiffs.

Corporate liability

This is a significant evolution of **parent-company liability in civil law.** The Court acknowledges that climate harm stems from strategic and operational decisions taken at group level. Nonetheless, where the parent company dictates the overall transition trajectory, it may be **jointly liable** for the group's carbon footprint. Boards must therefore treat climate governance as an integral part of enterprise risk management, not a peripheral CSR issue.

Shareholders' liability

The Court innovatively extends potential liability to **institutional and sovereign investors,** marking a new frontier for "climate stewardship." Passive ownership no longer guarantees immunity: large shareholders must demonstrate active engagement to mitigate the company's climate impact. For state-controlled entities, this also intersects with constitutional obligations to protect the environment (Art. 9 Const.) and intergenerational equity.

The importance of the Supreme Court's decision and future implications

A new precedent for strategic climate litigation
This ruling marks a turning point in the Italian legal landscape. For the first time, the Supreme Court recognises that **private companies can be held civilly liable for damages related to climate change.**

The Supreme Court's ruling will also have an impact on other litigations, such as the so called "Giudizio Universale". This is an action brought by NGOs and private individuals against the Italian State, seeking stronger action on greenhouse gas emissions and an amendment to the National Integrated Energy and Climate Plan ("**PNIEC**"), a strategic document defining the national energy and climate policy regulated by EU Regulation 2018/1999.

The Court of Rome dismissed the claim as inadmissible, due to (i) the lack of absolute jurisdiction, with reference to the civil judge being unable to interfere with the Italian State's climate action, since it would have breached the principle of separation of powers; and (ii) the lack of relative jurisdiction, with reference to the civil judge being unable to review the "*adequacy, consistency and reasonableness*" of the PNIEC within the law. The Court held that the Claimants should have filed a lawsuit before the administrative court rather than the civil court.

The decision may also serve as a jumping off point for other European jurisdictions, as it demonstrates that civil law systems can use constitutional principles and tools already available in civil law to address climate liability.

Liability extended to investors and shareholders
Perhaps the most innovative aspect of the ruling is the extension of the scope of liability beyond the administrative and management bodies of companies, to include controlling shareholders and institutional investors. By recognizing that these individuals/entities may be held liable for failing to exercise their influence to steer the company towards the objectives of the Paris Agreement, the Supreme Court significantly extends the scope of climate liability.

This approach strengthens the role of **activists, civic organisations and minority shareholders,** who will now be able to cite fiduciary and due diligence duties to demand concrete decarbonization strategies and corporate governance aligned with international climate objectives.

Convergence with the European Union's sustainability agenda
The Court's reasoning fits consistently within the framework of European sustainability policy, in particular with the Corporate Sustainability Due Diligence Directive (**CS3D**) and the reform of the EU ETS system.

Through judicial review, the decision adds a new dimension to the process of implementing European climate policies. Alongside legislative and market mechanisms, it also affirms the role of the judiciary as the guarantor of consistency between legal obligations and corporate practices. In this sense, the judiciary becomes a complementary actor in strengthening the effectiveness of the European Green Deal.

Increased responsibilities for directors and managers
In terms of corporate governance, the ruling significantly raises the standard of diligence required of directors. It clarifies that commitments to climate neutrality or energy transition cannot remain mere declarations of intent, but must be translated into concrete, verifiable action plans based on climate science.

Executives and board members are therefore required to demonstrate effective management of climate risks. This is likely to result in **increased internal controls, independent audits and more rigorous reporting** for companies exposed to climate litigation risk.

Future implications
As jurisdiction has been recognised, the Civil Court of Rome will now have to decide on the merits of the claim. The outcome could introduce unprecedented remedies, such as the judicial imposition of limits on the operational emissions of a private company, or an obligation on public shareholders to guide climate strategies.

Even before the decision on the merits is reached, the Supreme Court's ruling has nonetheless already redefined the context of climate litigation in Italy. Defences based on lack of jurisdiction or the "*political nature*" of the issue are no longer viable. Companies, investors and financial institutions will have to prepare for judicial scrutiny based on fundamental rights in relation to climate conduct.

Italy could thus emerge as a key jurisdiction for climate liability in Europe, where environmental law, human rights protection and corporate governance are becoming increasingly intertwined. Significant growth is expected in strategic climate litigation, involving not only large emitters, but also shareholders, banks and financial intermediaries, driven by a context of growing social expectations and a progressive alignment between European regulatory reforms and domestic judicial review.

Global tax disputes hot topics

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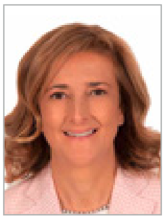

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The global tax disputes landscape is experiencing a period of intensified enforcement, expanding data-driven audits, and challenges over procedure and taxpayer rights. This environment is driven by a combination of cash-strapped governments seeking revenue, artificial intelligence ("**AI**") enhancing the capabilities of tax authorities, and geographically mobile individuals and businesses.

Authorities are deploying additional resources and advanced technology to close perceived tax loopholes, with initiatives targeted specific sectors, cross border transactions, and perceived abusive practices. Three recurring themes emerge across jurisdictions:

- **Enforcement** – jurisdictions are seeing higher audit volumes and increased use of penalty regimes, often accompanied by parallel criminal proceedings in cases considered egregious.
- **Procedural focus** – as authorities expand powers to obtain information from taxpayers and third parties, "cooperative compliance", including where taxpayers receive "nudge" letters to encourage action and focused interventions on areas where there is perceived non-compliance.
- **Planning is essential** – taxpayers are advised to maintain detailed documentation, engage early with strategy and procedure, and consider how to mitigate penalties.

Although these trends appear across multiple jurisdictions, there remain differences between tax authorities in how they affect taxpayers. In the sections that follow, we examine four jurisdictions, each illustrating hot topics and areas of focus for the relevant tax authority.

United Kingdom

His Majesty's Revenue and Customs ("**HMRC**") has entered a period of heightened enforcement supported by government funding earmarked for tax compliance. This is expected to result in additional investigations and compliance activity by HMRC, more sophisticated oversight and data interrogation powered by technology and AI. These developments are driving increased scrutiny of fraud and avoidance-related matters. The "nudge" letter has become a mainstream compliance tool: a communication prompting taxpayers to self review areas such as compliance for loan relationships, crypto asset reporting, and online sales disclosures. Although the nudge letter is not a formal allegation, failure to respond may prompt escalation. Taxpayers in such scenarios should undertake an early assessment of their factual and legal position to determine next steps. This may include responding substantively, making a disclosure, or defending their position, recognising that timing and the procedural approach may drive penalty mitigation and influence any future litigation.

Against this backdrop, procedural and evidential discipline are crucial. Retaining accurate records for relevant periods and engaging promptly with information requests from a litigation standard approach can be key. Where tax errors are identified in later periods, consideration of appropriate disclosures can mitigate penalties.

In an environment defined by a significant increase in data, tax complexity and the need to increase the government's tax revenue, early decisions on strategy, litigation approach and disclosure can determine the course of the dispute and protect a taxpayer's position.

Italy

Italy's tax disputes landscape is currently shaped by an expanded ecosystem of tax credits, incentives and the steady sophistication of audit practices assessing entitlement to those benefits. Authorities have intensified the verification of credits, increasingly testing both legal and technical eligibility criteria as well as the evidentiary underpinnings of the tax benefits.

For multinational groups, scrutiny also extends to transfer pricing as well as the other typical intercompany transactions (i.e. dividend distributions and interest payments).

The adoption of cooperative compliance and risk-prevention systems, such as the Tax Control Framework, is being promoted for the benefit of a broader range of taxpayers to mitigate dispute. This regime has shifted, due to recent regulatory reforms, from an open, company-driven model to a certified and standardized system.

Procedurally, Italy offers multiple options before litigation. Taxpayers frequently undertake voluntary corrections, negotiate settlements, and reach judicial conciliation to reduce further costs (as interest and penalties). Indeed, the taxpayer often achieves the best outcome by pursuing disciplined administrative procedures that facilitate the use of different settlement mechanisms to contain risk. If such mechanisms are not applied, the Italian dispute system is highly structured, with specialist tax courts and a three-tier appeals structure but the proceedings can be lengthy, increasing costs and risk.

In short, the system is designed to encourage administrative resolution and prevent dispute; if that fails, a multi tiered judicial process is aimed to assert rights, taxpayers should therefore build early and complete defence strategy for both settlement and dispute proceedings from day one.

Sweden

Sweden exemplifies a lean, rules driven model with wide investigative powers and limited room for negotiated outcomes. The Swedish Tax Agency (STA) can reconsider tax decisions up to the sixth year following the financial year. However, after the second year, the STA typically needs to show that the taxpayer provided information of importance that was also incorrect, in order to issue an adverse decision. Investigations commonly involve re-examinations of filed returns or focused sector interventions, where venture capital activity has been a recent focus area, underscoring a data rich approach rather than randomised auditing. The STA has broad powers to investigate. A taxpayer must provide the STA – upon request – with all information, books and documents that may be relevant. The STA also has the option of ordering third parties, e.g. banks, suppliers and customers who have been in contact with the taxpayer, to submit documents and other information to the STA. While settlements over tax assessments are not available, taxpayers benefit from meaningful procedural protections, including the right to access information filed by others, to comment on intended decisions, and to representation.

The penalty system is formulaic: surcharges of 40% for income tax and 20% for most other taxes, with potential criminal referral where incorrectly withheld tax is significant. Appeals proceed through the administrative courts in three instances, typically taking around one year per stage; payment deferral may be obtained where the STA's position appears doubtful, and deferral of surcharges is mandatory upon application when surcharges are imposed. The practical guidance is clear: engage expert counsel early, manage the flow of information carefully, and prepare for litigation rather than negotiated compromise. With alternative dispute resolution mechanisms absent and settlements off the table, factual development, privilege strategy, and meticulous rebuttal of the STA's audit findings carry outsized weight.

Brazil

Brazilian tax disputes have recently made international headlines following Netflix’s disclosure that a dispute with the Brazilian tax authorities had materially affected its Q3 2025 results (taxation of cross-border royalty remittances). The case highlights the complexity and potential high stakes of the Brazilian tax environment.

Tax audits are commonly triggered by inconsistencies in filings, abrupt changes in tax practices, or the use of structures perceived as aggressive – such as questionable tax credit deductions or the use of controversial tax incentives. Authorities have broad investigative powers, including access to third-party records, lifting bank secrecy under certain conditions, and conducting raids against taxpayers suspected of fraud or serious non-compliance subject to judicial authorisation.

The Brazilian system offers both administrative and judicial routes for dispute resolution. Taxpayers may challenge assessments through a structured administrative process, followed by judicial review through three levels of courts. Standard penalties range from 20–100% of the tax due (up to 225% in fraud cases), and interest accrues at Brazil’s SELIC rate (the benchmark interest rate set by the Central Bank). Interim relief is available through guarantees such as judicial deposits or surety bonds, or by obtaining an injunction to suspend collection.

Recent areas of focus include the taxation of cross-border payments and royalty remittances, the early revocation of sector-specific tax incentives, and ongoing legal debates over the scope of *res judicata* in tax matters. In this environment, early engagement with tax authorities, strong evidentiary records, and close monitoring of case law are essential to managing risk and securing favourable outcomes.

CMS Expert Guide

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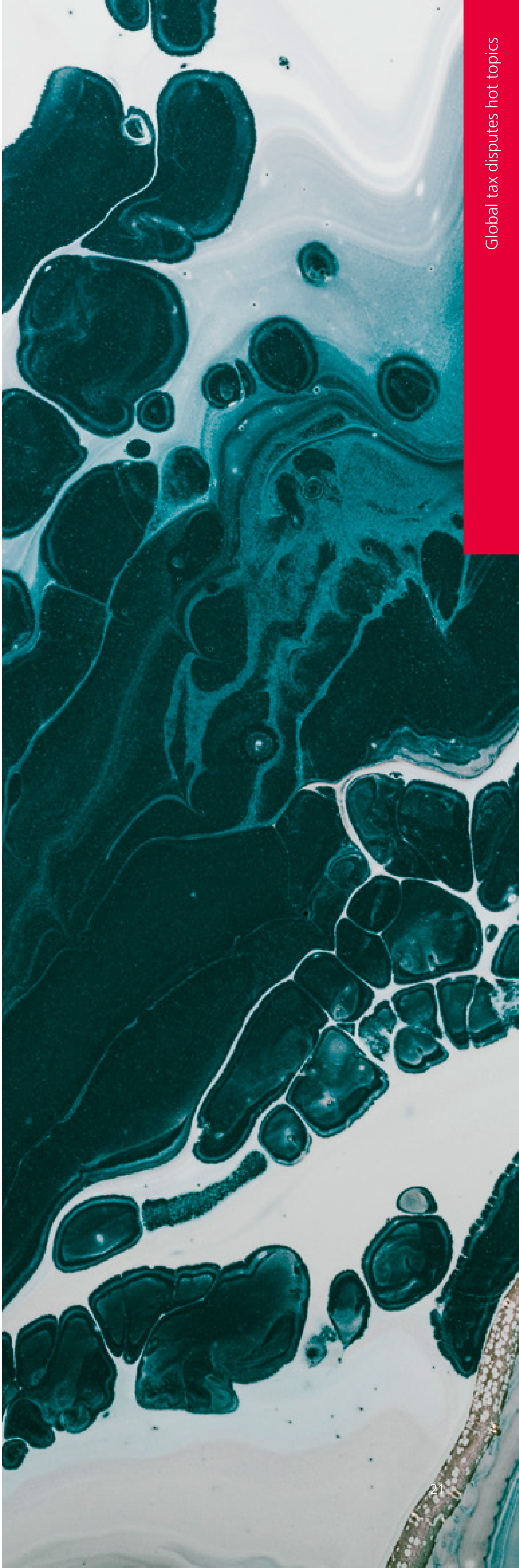

Incoterms clause "Ex Works" in international sales contracts and the impact on jurisdiction

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Introduction

The Incoterms drafted and periodically updated by the International Chamber of Commerce (ICC) are of great importance in the regulation of international sales contracts.

Incoterms are a series of model commercial terms developed for the interpretation of the most used commercial terms in contracts for the sale of goods and to determine exactly the scope of obligations, the allocation of costs and risks between the seller and the buyer. In other words, by subjecting the contract to one of the Incoterms outlined by the ICC, the parties agree to share the costs and risks of the transaction according to the formula relevant to the chosen Incoterms.

Application of Incoterms

Their application therefore derives from the express reference in the contract. For example, if the parties to the contract expressly indicate that the sale is governed by Ex Works ("**EXW**") clause, thereby defining the place of delivery of the goods, the seller is released from the obligation of delivery, costs, and risks when they make the goods available to the buyer at the location indicated. This generally corresponds to the seller's premises, without any obligation to load or clear customs.

Risk Transfer – Seller to Buyer

Furthermore, the inclusion of an EXW clause does not only mean transferring costs and risks to the buyer from the moment the seller delivers the goods by handing them over to the carrier at the agreed location, but also establishes that this is where the delivery obligation must be fulfilled and, consequently, it is also relevant – insofar as it is of interest here - in terms of jurisdiction, identifying which court will decide any dispute between two parties belonging to different countries and relating to any obligation arising from the contract, including that of paying the price of the goods.

Jurisdiction

In international contracts between the parties based in the European Union (the "**EU**"), jurisdiction is governed by EU Regulation No. 1215/2012, known as Brussels I bis, which, in addition to the fundamental principle that jurisdiction must be exercised by the EU country in which the defendant is domiciled (Article 4 of the Regulation), provides for a number of special rules on jurisdiction. For example, in cases of the sale of movable goods, jurisdiction lies with the court of the place where "*the goods were or should have been delivered under the contract*" (Article 7(1)(b) of the Regulation).

In order to establish the place of delivery of the goods and, consequently, the jurisdiction, it is necessary to consider the EXW clause that may be included in a contract. As established by the Court of Justice of the European Union ("**CJEU**") and by the Italian Supreme Court of Cassation ("**CSdC**"), once the EXW clause is included in a contract of sale, it identifies the place of delivery of the goods and, consequently, the jurisdiction.

On this point, EU case law ruled more than ten years ago in the well-known "Electrosteel" judgment of June 9, 2011, handed down by the CJEU (Case C-87/10, Electrosteel Europe SA v. Edil Centro S.p.a), according to which, in determining whether the place of delivery of the goods is determined *"on the basis of the contract,"* the court seized *'must take into account all the relevant terms and clauses of that contract which are capable of clearly identifying that place, including the terms and clauses generally recognized and established by international trade practice'*, such as Incoterms, provided that they are *'capable of clearly identifying that place'*. Only in the absence of such an agreement, i.e., on a residual basis, does the rule apply that delivery is deemed to have been completed, for the purposes of jurisdiction, at the destination of the goods.

Previously, the CSdC considered that the EXW clause was not sufficient to express the parties' intention to indicate the place of delivery for the purposes of jurisdiction. Only recently has the Supreme Court changed its position to align itself with that of the CJEU and, therefore, affirmed that the EXW clause included in a sales contract is not limited to governing the transfer of risk but also the place of delivery of the goods and, consequently, jurisdiction.

More specifically, in its recent ruling no. 22032 of July 31, 2025, the Italian CSdC, called upon to rule on a dispute between an Italian seller and a Romanian buyer, stated that *"in the case of international distance sales of movable goods, disputes concerning the payment of goods shall be referred, pursuant to Article 7(1)(b) letter b) of EU Regulation No. 1215 of 2012, to the jurisdiction of the judicial authority of the place of physical delivery of the goods, for this purpose considering the Incoterms Ex Works (EXW) clause, if referred to in the contract, as suitable for governing not only the transfer of risk but also the place of delivery of the goods (identified by Incoterms at the supplier's premises) and, consequently, jurisdiction, unless the contract itself contains different and additional elements that lead to the conclusion that the parties intended a different place of delivery."*

With ruling No. 4716 of February 22, 2025, the Italian CSdC, called upon to rule on a dispute between an Italian seller and an Austrian buyer, stated that *"when an Incoterm EXW clause is included in a sales contract, the place of delivery of the goods must be considered, for all purposes, to be the seller's factory or registered office,"* since the presence of such a clause is irrelevant for the purposes of determining the place of delivery only if *"the existence of a clear intention of the parties to derogate from it is demonstrated."*

The same opinion was expressed in ruling No. 11346 of May 2, 2023, in which the Italian CSdC, called upon to rule on a dispute between an Italian seller and a French buyer, held that in the context of an international contract for the sale of goods, unless proven otherwise, the inclusion of the Ex Works clause in the contract documents as agreed by the parties (correspondence to this effect between orders sent by the buyer and invoices issued by the seller being sufficient) is sufficient to determine the place of delivery of the goods and, consequently, in application of the common European rules (Brussels I bis Regulation), the jurisdiction of the Italian court applies, unless the contract contains other elements that lead to the conclusion that the parties intended a different place of delivery.

Conclusion

In conclusion, given the suitability of the Incoterms Ex Works clause to identify the place of delivery for the purposes of jurisdiction, it is useful to adopt different drafting and management approaches in the negotiation and drafting of sales contracts between EU parties, depending on the interests of the parties to the contract and the contractual scenarios.

AI in arbitration and the courts: Focus on Türkiye & Ukraine

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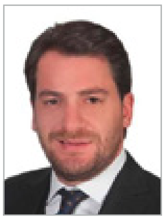

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Artificial intelligence (**AI**) is rapidly transforming the landscape of dispute resolution worldwide, prompting courts and arbitral institutions to reconsider traditional workflows and ethical boundaries. Both Türkiye and Ukraine stand at the forefront of this evolution, each navigating the integration of AI into their judicial and arbitration systems against distinct legal, social, and technological backdrops. While Türkiye emphasises pragmatic adoption within established legal safeguards and policy frameworks, Ukraine's judiciary has responded to extraordinary challenges – such as the pandemic and ongoing conflict with Russia – by accelerating digital transformation and setting clear ethical boundaries for AI use. This article explores how both jurisdictions are harnessing AI's potential to enhance efficiency, accessibility, and fairness in dispute resolution, while remaining vigilant about the risks and ensuring that human judgment remains central to the administration of justice.

Türkiye: Promise, Pragmatism, and the Path Ahead

The use of AI is moving rapidly from experimentation to workflow in dispute resolution. In Türkiye, both in litigation and arbitration, parties, arbitral tribunals and the courts are exploring how AI can streamline routine tasks, sharpen analysis, and improve access to justice – while remaining alert to well known risks around accuracy, confidentiality, and fairness. There is no debate that integration of AI into dispute resolution mechanisms is inevitable, but its conscious use is the key: AI will be a tool, not a decision maker.

Legal touchpoints

Turkish law does not yet have specific rules for resolving disputes involving AI. Nevertheless, the existing general framework provides meaningful safeguards. Turkish legislation ensures procedural fairness, while arbitration is subject to the duties of independence and impartiality. Attorneys have professional and ethical obligations, and the law on protection of personal data also plays a role. These factors collectively regulate how the technology may be used in practice. In cross-border disputes seated in Türkiye, parties are increasingly looking to international soft law for guidance. Recent guidance from overseas institutions emphasises that, while AI can be used for administrative and analytical support, core adjudicative functions must remain human, outputs must be verified, and confidentiality must be preserved. These themes align with Turkish procedural values and public policy.

Current landscape

Türkiye's 2025 Presidential Programme includes the following statements: *"Decision support systems in the judiciary will be strengthened by artificial intelligence, and recommendation systems supporting judicial activities will be developed."* It should be noted that the Presidential Programme is crucial for Türkiye because it provides a strategic roadmap for sustainable economic growth, green and digital transformation, and long-term national development goals. In line with the National Artificial Intelligence Strategy for 2024–2025, the Scientific and Technological Research Council of Türkiye (**TÜBİTAK**) Artificial Intelligence Institute is developing projects in a range of areas, including justice. The Ministry of Justice is also currently undertaking various projects in this area.

Practical uses in arbitration

AI delivers near term value in document intensive workflows, especially in alternative dispute resolution (**ADR**) methods. While these applications are also relevant to litigation, they are particularly impactful in ADR due to its cross-border nature, multi-lingual proceedings, and reliance on virtual hearings, where efficiency and flexibility are critical. AI enabled tools can assist with facilitating the management of scheduling and enhancing the efficiency of remote proceedings in virtual hearings, document review, chronologies, issue spotting, and drafting. In international cases, machine translation and transcription can accelerate multi lingual proceedings, and summarisation tools can help arbitrators and tribunals. However, these tools should be treated as support for decision-making, not as a substitute for legal judgement. Human judgement remains essential to guard against hallucinations by AI. Tribunals and counsels may use AI to accelerate process, but they must validate their sources, keep records of review, and preserve confidentiality.

In summary, the near-term value of AI in Türkiye lies in its ability to deliver speed, organisation and accessibility, rather than in replacing legal or adjudicative judgement. By adopting targeted measures alongside clear safeguards, both arbitration users and courts can boost efficiency while safeguarding the integrity and fairness that inspire confidence in the system.

Ukraine: cautious approach

Facing the challenges brought by the pandemic and the war, the Ukrainian judiciary within recent years has undergone significant development with regard to the implementation of modern digital technologies. In particular, the Electronic Court system was introduced, allowing parties to submit documents to the court in electronic form and familiarise themselves with the case materials remotely, as well as allowing courts to issue their documents in electronic form, making the proceedings paperless. Additionally, the relevant regulations were put in place and technology developed for the participation in hearings via videoconference, so it is now common for a party to connect to a hearing remotely.

With the development of AI, it is clear that state and arbitration tribunals have to address its use and implement it in their day-to-day work.

AI in state courts

In September 2024 the Congress of Judges adopted the Code of Judicial Ethics (**Code**), which sets clear boundaries for how judges can use AI. According to the Code, AI is allowed only if it does not affect a judge's independence and fairness, and if it is not involved in assessing evidence or the decision-making process. AI can help with information retrieval and analysis or procedural tasks, but it is crucial that the use of AI complies with all relevant laws.

In addition to the Code, to frame the use of AI by judges and their assistants, the High Anti-Corruption Court (**HACC**) issued an order approving the principles of using AI in court. The HACC takes a practical and cautious approach, similar to that in the Code, stating that the use of AI may support but not replace judicial decision-making. Its rules make clear that AI must never interfere with justice. Sensitive court documents must not be uploaded to AI tools to protect confidentiality. Court staff are expected to use AI responsibly, following ethical standards such as professionalism, integrity, and respect for the law. Importantly, AI shall be used only for administrative tasks and never in actual court proceedings, ensuring that judicial independence and fairness remain untouched.

AI is increasingly being used also by attorneys, although there are currently no clear regulations governing its use. Nevertheless, when using AI, attorneys shall adhere to the general requirements for providing legal services as outlined in relevant legislation and the rules of professional ethics – particularly regarding client confidentiality and the quality of service. Sensitive information shall not be shared with AI tools without the client's express consent, and any output generated by AI should be carefully reviewed, as inaccuracies or hallucinations are not uncommon.

Another aspect of AI use arises when parties use AI to substantiate their position within court proceedings. In one case, a party asked the Supreme Court to review its interpretation of the term "voluntary commitment" based on the opinion produced by ChatGPT. In response, the Supreme Court stated that using AI-generated content to challenge a court's decision is not only inappropriate but also an abuse of legal process. Such actions show disrespect to a judge and violate an attorney's duty to act with care and honesty. Attorneys must ensure their submissions are based on solid legal reasoning and ethical standards, regardless of whether AI tools were used to help prepare them. The court criticised the AI-generated opinion as "clearly unfounded and knowingly baseless", pointing to a lack of proper legal analysis.

In another case, a party challenged the Court's decision on the grounds that the Court of Appeal had failed to consider opinions generated by ChatGPT and GROK when interpreting provisions of a land lease agreement. The Supreme Court upheld the lower court's decision and emphasised that AI should be used to support and strengthen the rule of law. In this instance, however, the party used AI not to promote the proper administration of justice, but to question and appeal conclusions already reached by the Court.

In both cases, the Court emphasised that AI is just a support tool. It cannot replace judges or serve as a source of law. Legal decisions must be based on legislation and court practice, but not machine-generated suggestions, and attempting to use AI to challenge a court's authority undermines the justice system and public trust.

Thus, the approach of the Ukrainian state courts to the use of AI is unanimous and clear – AI cannot be used as a source of evidence, challenge the decision of the court or replace a human in the decision-making process. However, it can be used as an auxiliary tool, with proper checks of results provided by AI, to help attorneys and judges in their work.

Use of AI in arbitration

The use of AI in arbitration proceedings held by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (**ICAC**) is not currently regulated. Both the ICAC Rules and the Law of Ukraine "On International Commercial Arbitration" do not address the issue of AI usage. However, these documents allow parties to agree on the procedure of arbitral proceedings at their own discretion, which gives the parties room to agree on AI usage if it does not contradict the ICAC Rules and effective legislation. In this regard, it shall also be mentioned that the use of AI and challenges related to it are being actively discussed within the arbitration community.

Considering the guidelines and practices already developed by state courts, along with the ongoing discussions within the arbitration community regarding the use of AI, the ICAC may eventually address this issue in its regulations.

Conclusion

The experiences of Türkiye and Ukraine illustrate both the promise and the complexity of integrating AI into judicial and arbitral processes. In both countries, AI is recognised as a powerful tool – capable of streamlining administrative tasks, improving document management, and facilitating remote proceedings – but not as a substitute for human decision-making. Legal and ethical frameworks in each jurisdiction emphasise the importance of judicial independence, procedural fairness, and the protection of confidential information. The courts in Ukraine have rejected attempts to use AI-generated content as a basis for legal argument and evidence, reinforcing the principle that technology must serve, not supplant, the rule of law. Meanwhile, Türkiye's evolving policy landscape and ongoing projects signal a commitment to responsible innovation. As both jurisdictions continue to refine their approaches, their experiences offer valuable lessons for the global legal community: AI's greatest value lies in augmenting, not replacing, the human elements of justice, and its adoption must be guided by clear safeguards, transparency, and respect for fundamental legal principles.

Amsterdam Court of Appeal confirms the Netherlands as a key jurisdiction for collective privacy actions

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On 7 October 2025, the Amsterdam Court of Appeal issued a significant interim decision in the collective action against TikTok, further opening the door to collective privacy claims against tech companies in the Netherlands. In its decision, the Court of Appeal addressed several issues, including the jurisdiction of Dutch courts, the admissibility of the claim organisations, the possibility of claiming compensation for immaterial damages in a collective context, and specific aspects of the Dutch Class Action Mass Claims Settlement Act *(Wet afwikkeling massaschade in collectieve actie;* the "**Wamca**").

The Wamca: from declaratory relief to damages

The Wamca, which entered into force on 1 January 2020, updated the Dutch collective action regime by allowing representative organisations to seek monetary damages in collective opt out proceedings. Under the prior regime, organisations were largely limited to declaratory relief. The Wamca has not only led to greater incentives to litigate but also to fund such actions. In light thereof, the Netherlands has rapidly become a preferred forum for collective actions, with a notable portion of those actions being for alleged privacy and data protection infringements targeting major technology platforms and companies. Claim organisations have started collective actions against, for example, Meta, X, Amazon, Oracle, Salesforce and, as we can see in this verdict, against TikTok. Despite the number of filings, however, none of the privacy and data protection matters reached the merits phase. This was in part due to the defendants having mounted robust defences on issues including jurisdiction, admissibility of the claim organisations and their claims, and group definition. It is worth noting that the appeal proceedings in TikTok were initiated before the merits phase and as such, also in the TikTok case, the merits phase has not yet commenced.

The TikTok proceedings in first instance

The TikTok litigation commenced in 2021 with a writ of summons issued by claim organisation, SOMI, against TikTok Ireland. After registration in the Dutch collective actions public register, two further foundations (TBYP and SMC) initiated similar claims against multiple TikTok entities. All organisations sought, among other relief, compensation for material and immaterial damages arising from alleged GDPR violations.

At first instance, the Amsterdam District Court held that it had jurisdiction and found the organisations admissible under the Wamca. On similarity, the District Court distinguished between material and immaterial damages. It considered material damages sufficiently similar (at least at this early stage) to proceed on a collective basis. By contrast, it deemed immaterial damages too individualised in the privacy context, pointing to divergent user experiences on TikTok and emotional impacts across a broad user base. The District Court also imposed a temporal cut off for the narrowly defined group on 9 November 2022 (the date it accepted jurisdiction), excluding persons who downloaded TikTok thereafter. These constraints substantially limited potential exposure and recovery, leading the claim organisations to appeal. TikTok cross appealed on matters including jurisdiction, admissibility, and group delimitation.

The Court of Appeal's decisions on jurisdiction, admissibility and scope of the group

For the purposes of this note we address the Court of Appeal's ruling around three central themes.

First, on jurisdiction for non GDPR claims, the Court of Appeal affirmed the competence of the Dutch courts based on the place where the harmful event occurs or may occur. It rejected in that sense, the notion that the Amsterdam District Court is only competent for damage that occurred within the Amsterdam district, noting that such a position would force duplicative filings across Dutch districts only for referral back to Amsterdam. The Court of Appeal deems this an unnecessary detour that would only lead to further delay. While this defence may be technically correct - particularly in light of currently pending questions before the CJEU on this topic in a matter against Apple - the Court of Appeal takes a pragmatic approach to avoid unnecessary hold-up.

For GDPR-based claims, the Court of Appeal stayed its assessment pending answers to preliminary questions concerning Articles 80 and 82 GDPR referred to the CJEU by the Rotterdam District Court in a similar collective action against Amazon. A key question in that referral is whether Article 80 permits opt-out collective actions, or instead requires an opt-in mandate or specific authorisation by data subjects. Importantly, the Court of Appeal allowed the TikTok proceedings to continue with respect to the non-GDPR grounds and declined to a full standstill, distinguishing the approach taken in other, similar matters.

Second, on admissibility and similarity, the Court of Appeal upheld the admissibility of the claim organisations. The Court confirmed that the admissibility assessment is *ex nunc* consistent with its approach in the collective action against Oracle/Salesforce. It further noted that SOMI and TBYP's presence on the list of qualified entities of the Representative Actions Directive supports compliance with relevant Wamca requirements. Critically, where the District Court had found immaterial damage claims too individualised to be assessed in the context of a collective action, the Court of Appeal did not agree with that view. It recognised that immaterial privacy harm can, in principle, be advanced in a collective action, emphasising that the route of a collective action is more efficient and effective than individual proceedings, also considering the size of the narrowly defined group and the uniform nature of the alleged misconduct and the legal grounds. If necessary, the group can be further broken into different sub-groups, which approach we have seen in other cases.

Third, on the scope of the narrowly defined group, the Court of Appeal declined to impose the District Court's temporal cut-off of 9 November 2022. The Court of Appeal considered that the alleged unlawful conduct may be ongoing and that a hard end date would undermine procedural economy by encouraging successive Wamca actions to capture persons subscribing to TikTok after such end date. In practical terms, individuals who create accounts during the proceedings can fall within the narrowly defined group.

Lastly, the Wamca does not provide for specific appeal procedural law. Therefore, the "regular" appeal procedural law applies, with the caveat that deviations are permitted if the purpose and system of the Wamca gives cause to do so. In light thereof the below considerations where the Court of Appeal clarifies certain appellate Wamca particularities are interesting. The Court of Appeal:

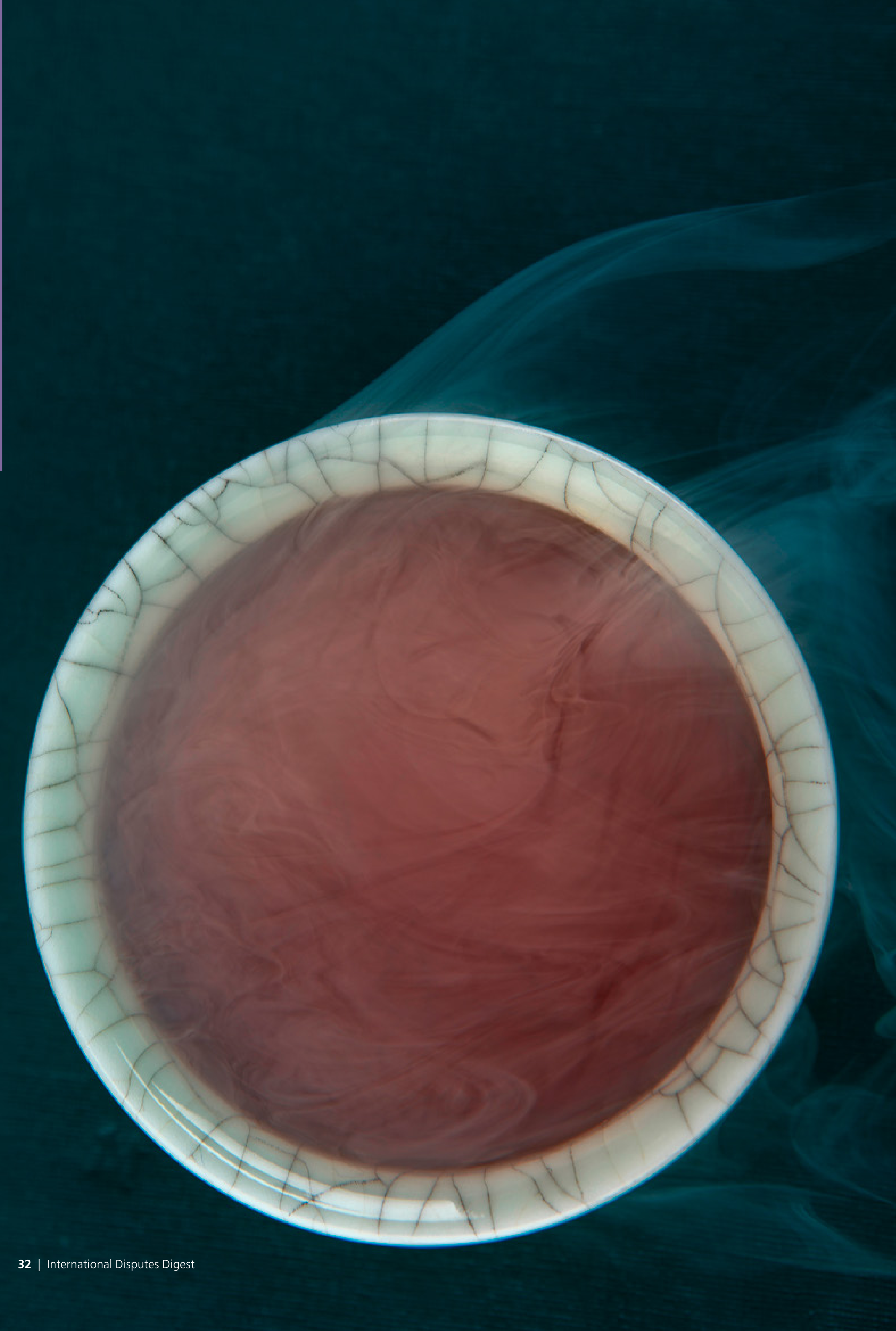
- confirmed that a party that was not designated as an exclusive representative may also appeal;
- held that appeals cannot be extended against parties not summoned at first instance, thereby confirming that joint handling for efficiency does not erase the separate identity of each case;
- reiterated that the designation of the exclusive representative is not open to appeal and maintained SMC and STBYP as exclusive representatives; and
- allowed amendments to claims given the early procedural stage, testing such amendments against the requirements of proper procedure in light of the collective context.

Practical implications for class action privacy litigation in the Netherlands

Following this decision defendants in privacy class actions in the Netherlands can expect a steeper trajectory toward the proceedings on the merits as admissibility challenges, particularly against immaterial harm claims, face a higher bar. For claim organisations and funders, the confirmation that immaterial privacy damages are not unsuitable for collective adjudication, combined with a flexible approach to group scope, enhances the viability of large scale privacy class actions. The evolving framework also intersects with related regulatory developments, including the Digital Services Act and Digital Markets Acts, which may further shape the class action litigation landscape in the Netherlands.

Conclusion

This ruling strengthens the role of the Netherlands as an important jurisdiction for collective privacy litigation and refines the Dutch collective actions' playbook. By affirming jurisdiction for non GDPR claims, recognising that immaterial privacy harm can be assessed in the context of collective actions, and allowing a narrowly defined group that is not limited in time, the Court of Appeal prioritises procedural efficiency and access to collective redress. We now eagerly await the CJEU's guidance on Articles 80 and 82 GDPR that will further impact the future of privacy class action litigation in the Netherlands.



Challenging calls under on-demand securities: varying common law approaches to the fraud exception

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English law allows only very limited grounds on which to challenge calls under on-demand securities issued by banks or other financial institutions (referred to generally in this article as "sureties"). Where a valid demand has been made and there are no conditions in the underlying contract preventing a demand, a clear case of fraud will need to be shown if the procuring party is to prevent payment.

A merely arguable case of fraud is not sufficient. Rather, it must be *"clearly established … that the only realistic inference is … that the beneficiary could not honestly have believed in the validity of its demands"* (*Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31). The surety must also have had knowledge of the fraud at the time of the demand and the balance of convenience must favour an injunction preventing the surety from making payment.

Given the strictness of the fraud exception under English law, it is no surprise that examples of its successful invocation are seldom seen. In this article, we consider two recent cases on the fraud exception in other common law jurisdictions, both of which were successful.

Prior statements of the beneficiary

Those rare cases where the fraud exception has been upheld under English law often involve statements by the beneficiary directly undermining its ability to make a call under the instrument in question. In *HLC Engenharia E Gestao de Projectos SA v ABN Amro Bank NV* [2005] EWHC 2074, the fraud exception was satisfied where a performance bond assignee had called the bond notwithstanding that the original beneficiary had written stating that it did not consider the contractor to be in default and that a call under the bond was not justified. Similarly, in *Tetronics (International) Ltd v HSBC Bank Plc* [2018] EWHC 201 (TCC) a renewed on-demand guarantee was issued on the faith of beneficiary assurances that it was not aware of any circumstances which would give rise to a demand under the guarantee. A demand for the full amount of the guarantee made less than two months later was found to be fraudulent in the face of such assurances.

In *Thales QFZ LLC v Aljaber Engineering WLL* [2024] QIC(F) 55, Thales QFZ LLC (**Thales**) was sub-contracted by Aljaber Engineering WLL (**Aljaber**) to install security systems for the New Hamad Port Project, which Aljaber was carrying out for the State of Qatar. Pursuant to the terms of the sub-contract, Thales procured an on-demand Performance Guarantee (the **Guarantee**) from BNP Paribas in favour of Aljaber.

Thales suspended work for non-payment and eventually purported to terminate the sub-contract on 20 February 2023. It subsequently commenced proceedings before the Qatar International Court (**QIC**), arguing that the sub-contract had been validly terminated and claiming payment of monies owed upon termination. Aljaber filed a Defence and Counterclaim in the proceedings on 3 November 2024, denying any entitlement to payment and disputing that the sub-contract had been validly terminated.

Four days prior to filing its Defence and Counterclaim, on 29 October 2024, Aljaber demanded payment of the full Guarantee amount from BNP Paribas. Its demand asserted that Thales was *"in breach of its obligations under the underlying relationship as it has failed to perform the works under the contract. As a result, the contract has been terminated".*

Thales successfully obtained an interim injunction from the QIC, relying on Aljaber's Defence and Counterclaim to show that its demand was fraudulent. The court relied on the fact that the Defence and Counterclaim asserted the sub-contract *had not* been terminated, whereas the basis of the demand issued four days earlier was that the sub-contract *had been* terminated. The court also relied on the long delay between Thales' purported termination and the demand. That a demand was only made after Thales had commenced proceedings indicated, in the court's view, a tactical motivation.

One point not considered by the court was the materiality of Aljaber's statement in the demand that the sub-contract had been terminated. The terms of the Guarantee did not appear to require Aljaber to allege termination in its demand. Aljaber could be expected to have a large claim against Thales regardless of whether the contract had been terminated (given that Thales had left site). As noted by the English Court of Appeal in *NIDCO v Santander* [2017] EWCA Civ 27, *"It cannot be fraudulent to make a demand one is entitled to make."*

Aljaber might therefore have sought to argue that the alleged fraud only pertained to its statement about the termination of the sub-contract, which was not something which could affect its entitlement to make a demand under the Guarantee.

More generally, this case shows that challenges to calls under on-demand securities on grounds of fraud are most likely to succeed where a party is able to evidence statements made by the beneficiary inconsistent with its demand. Such evidence can provide a platform for a without notice application to be brought, putting the beneficiary on the back foot and effectively forcing it to explain its demand.

Is recklessness sufficient?

A recent Singaporean Court of Appeal decision has considered whether the fraud exception should include recklessness. Singaporean law also follows the English law approach to the fraud exception, whilst allowing other grounds of challenge such as unconscionability.

In Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd [2024] SGCA 31, a Singaporean company in the business of oil trading, bunkering and supply chain services (**Winson**) entered into a circular trade arrangement for the sale of gasoil. Two shipments of gasoil were to be sold by Hin Leong Trading (**Pte**) Ltd (**Hin Leong**) to Trafigura Pte Ltd (**Trafigura**), Trafigura to Winson, and back from Winson to Hin Leong (**Winson-Hin Leong Sale**). In respect of the Winson-Hin Leong Sale, Hin Leong made applications to two banks (**SCB and OCBC**) for letters of credits to be issued in favour of Winson to finance Hin Leong's purchase of each of the two shipments of gas oil from Winson. SCB and OCBC issued separate letters of credit to Winson. Winson made its first presentation to OCBC under a Letter of Indemnity (**LOI**) for a cargo shipment on the "Ocean Voyager" and its first presentation to SCB under an LOI for a cargo shipment on the "Ocean Taipan".

Hin Leong had encountered financial difficulties and shortly after Winson's first presentation, OCBC received information on an all-lenders telephone conference that Hin Leong's inventory did not include cargo on either the Ocean Voyager or the Ocean Taipan. OCBC proceeded to reject Winson's first presentation on the basis that no physical cargo was shipped on the Ocean Voyager. The next day, Winson made its second presentation to OCBC for the Ocean Taipan instead, and explained that the second presentation for a different vessel was due to an internal mix-up. On that same day, Winson made its second presentation to SCB, this time for the Ocean Voyager. Both OCBC and SCB refused to pay under the letters of credit, contending that no cargo of gasoil pursuant to the LOIs were shipped in respect of the Winson-Hin Leong Sale.

The case against Winson was not one of direct fraud, but that the demand was made recklessly. The sureties relied on the third category of fraud in the well-known test for common law fraud set out in *Derry v Peek* (1889) LR 14 App Cas 337 i.e. that *"fraud is proved when it is shewn that a false representation has been made (a) knowingly, or (b) without belief in its truth, or (c) recklessly, careless whether it be true or false."*

Winson accepted that its presentations contained several false representations but denied recklessness and claimed it had an honest belief in its demands, principally by reference to the fact that it had already paid Trafigura for the shipments. Winson also relied on a previous decision of the Singapore International Commercial Court (**SICC**) where the recklessness had been held not to be sufficient to challenge demands under letters of credit.

OCBC and SCB's fraud challenge was upheld at first instance and again on appeal to the Singapore Court of Appeal. Both courts found that various irregularities in the underlying transactions raised "red flags" which Winson took no steps to investigate or clarify. Winson's *"abject indifference"* to the truth of its presentation meant that was reckless and did not honestly believe in the truth of its representations.

The Court of Appeal confirmed that recklessness is sufficient for the purpose of challenging a demand under a letter of credit or on-demand guarantee and disagreed with the SICC decision relied upon by Winson. In the court's judgment, that decision had confused the distinction between objective recklessness and subjective recklessness: objective recklessness is akin to negligence and does not apply under on-demand securities because a beneficiary owes no duty of care to the surety. Subjective recklessness refers to indifference to a risk of which the beneficiary is actually aware of. Accordingly, where direct evidence as to the beneficiary's state of mind is not available, circumstantial evidence of "red flags" which were ignored by a beneficiary provides an alternative means of establishing fraud.

One point not addressed by the court is the requirement for the sureties to have had notice of the fraud at the time the demands were made. This does not pose a problem where the sureties are relying on prior statements or communications by the beneficiary itself as in the *Thales* case discussed above. However, the position is more complex in a case based on recklessness. For example, the judgments in this case go into great detail as to the circumstances of the transactions and various communications and statements made by the parties during the relevant periods. The sureties would have been aware of very little of this at the point the presentations were made. Their knowledge at that point appears to have been limited to the discovery that Hin Leong's inventory did not include cargo on either the Ocean Voyager or the Ocean Taipan. However, this in itself would not have been enough to establish recklessness.

English courts will permit evidence of fraud arising after the demand to be relied upon in disputes between the beneficiary and the surety, but only on the basis of a counterclaim by the surety for fraudulent misrepresentation which can be set off against the bond claim. However, in order not to dilute the effectiveness of on-demand bonds, the fraud on which such a counterclaim is based needs to be clearly evidenced at the time of the relevant hearing. Although this poses no issue where a full trial is held, claims by beneficiaries are usually heard on a summary judgment basis, meaning that sureties can come under significant pressure to provide sufficiently cogent evidence of fraud ahead of a summary judgment hearing. The difficulties of doing so are likely to be increased if recklessness is relied on due to the much more complex factual issues which such a case gives rise to.

Conclusion

The above cases show the difficulties which can be arise in cases where calls under on-demand securities are suspected to have been made fraudulently. The approach to such challenges required by English law is complex and may not always be applied perfectly in any given case. Accurate and strategic legal advice taken at an early stage is crucial in such scenarios.

It remains to be seen whether the English courts will follow the Singaporean Court of Appeal's inclusion of recklessness within the categories of fraud permitted for challenges to such a claim. Whilst the success of a recklessness defence is likely to meet both factual and procedural challenges, it may be the only effective means of challenge in some cases for sureties who are faced with insolvent clients and strong suspicions as to the legitimacy of the underlying transactions and/or the demands made against them.

Corporate Crises Management

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Introduction

In the contemporary corporate environment, characterised by global interconnectivity and increasing reliance on technology, corporate crises have become increasingly frequent. Companies across diverse sectors are constantly exposed to threats such as increasingly sophisticated cyberattacks, adverse climate impacts and fraud, among others. The result is a pressing need for proactive and integrated crisis management.

Effective crisis management should not be viewed merely as a reactive response to adverse events, but rather as a continuous strategic activity with a preventative approach. Companies must anticipate potential risks and crises, develop detailed response plans, and ensure their internal structures are prepared to handle adversities. Corporate survival today depends not only on the ability to react but also on readiness to mitigate crises before they cause irreparable damage.

This article, therefore, explores how companies can effectively prepare by understanding the different types of crises, their legal implications, and how resilience can be strengthened through governance, regulatory compliance, and the strategic use of technology.

Definition of a Crisis

A crisis may be defined as any event that severely disrupts the normal operations of an organisation, potentially damaging its reputation, finances, and functionality. Such events may arise from either internal or external factors. Internally, crises may result from poor management, employee misconduct, or compliance failures. Externally, they may be triggered by natural disasters, illegal acts by third parties, or cyberattacks.

From a legal standpoint, a crisis can generate significant risks of litigation, regulatory sanctions, and reputational harm, which can severely impact the financial health of the organisation. One of the most useful classifications distinguishes between sudden crises – those that occur without prior notice – and emerging crises, which develop gradually, with warning signs that can be detected in advance.[1]

Understanding this distinction is crucial for planning appropriate responses to each situation. Preparation involves not only operational crisis management but also legal planning to address potential legal and regulatory risks. Well-prepared companies maintain continuous compliance with regulations and adopt clear legal policies to mitigate the consequences of crises.

Types of Corporate Crises

Corporate crises can take various forms, each requiring specific responses. The following are four main categories of corporate crises.[2]

Sudden Crises
Sudden crises arise unexpectedly and without warning, necessitating prompt and decisive responses from the organisation. Classic examples include natural disasters such as earthquakes and hurricanes, industrial accidents,

[1] Annual Crisis Report, Institute for Crisis Management (ICM).
[2] Outlined in the Annual Crisis Report published by the Institute for Crisis Management (ICM)

explosions, fires, and increasingly frequent cyberattacks. Cyberattacks represent a growing risk. Data breaches compromise confidential corporate and client information and can result in heavy fines, regulatory sanctions, and litigation. Organisations must immediately activate crisis response plans to contain operational and legal damage. Rapid and transparent communication with clients, regulators, and other stakeholders is crucial for managing reputational harm and minimising legal exposure.

Emerging Crises

Unlike sudden crises, emerging crises develop slowly, showing warning signs before fully materialising. They are often associated with internal failures such as fraud, governance issues, regulatory non-compliance, or unsustainable business models.

A typical example is the failure to comply with environmental standards, regulatory guidelines, or data protection requirements, which can result in severe fines, lawsuits, and reputational damage. Organisations that ignore these early signals risk allowing minor operational issues to escalate into full-scale crises. Continuous monitoring of internal practices and the prompt implementation of corrective measures are therefore essential.

Perception Crises

Perception crises occur when a company's public image is harmed, often disproportionately to the underlying facts. These crises can stem from rumours, fake news, or misinformation that spreads rapidly, particularly through social media.

In many instances, the reputational damage exceeds the impact of the original event, as the loss of client and shareholder confidence can result in a reduction of market value and even boycotts. To mitigate these effects, companies must adopt a clear, rapid, and transparent communication strategy aimed at regaining control of the public narrative.

Exceptional Crises

Exceptional crises are rare and highly unpredictable, not conforming to traditional patterns of crisis. The COVID-19 pandemic is the most recent and striking example of this type, which had a global impact and forced companies across all sectors to rethink their crisis management and operational strategies.

Such crises are particularly challenging because they cannot be accurately predicted and demand creative, unconventional responses. To address exceptional crises, companies must have detailed contingency plans combined with flexibility to adapt quickly to new realities.

Legal Challenges in Crisis Management

Legal challenges are a crucial component of effective crisis management. When a crisis occurs, companies may face a range of legal risks, including lawsuits from clients, suppliers, and other third parties affected by the crisis, as well as administrative and judicial proceedings involving civil, environmental, or regulatory liability resulting from non-compliance with applicable laws.

The legal team plays a fundamental role in organizing and coordinating actions during crises. It is also critical for establishing structured communication flows with stakeholders, public authorities, and the press.

Corporate crises may also lead to collective litigation, particularly when employee or consumer rights are at stake. To address these challenges, companies must maintain robust compliance policies, strict corporate governance, and a legal team capable of responding swiftly to legal threats.

Main Triggers of Crises

Numerous factors may trigger corporate crises, depending on the industry and operational context. The following list compiles examples and their relative impact in the past year:[3]

— Extreme Weather Events – 26.10%
— Class Actions – 11.37%
— Fraud and Corruption Crimes – 10.80%
— Workplace Violence – 9.39%
— Mismanagement – 8.53%
— Cybercrime – 7.24%
— Discrimination – 7.19%
— Labour Conflicts – 4.65%
— Sexual Harassment – 3.09%
— Hostile Takeovers – 3.71%
— Environmental Damage – 0.47%
— Accidents with Victims – 0.28%
— Product Issues (Defects and Recalls) – 1.67%
— Activism/Consumerism – 0.94%

Notably, the factors with the most significant increase in occurrence in the past year were:

— **Class Actions:** Increased from 7.70% to 11.37%, driven by large-scale litigation.
— **Fraud and Corruption Crimes:** Rose from 1.80% to 10.80%, exemplified by massive frauds such as the FTX case.
— **Workplace Violence:** Increased from 1.39% to 9.39%, reflecting more frequent incidents among colleagues.

[3] List contained in the Annual Crisis Report ("Report"), published by the Institute for Crisis Management (ICM)

- **Cybercrime:** Grew from 3.21% to 7.24%, due to malware, ransomware, data breaches, and AI-enabled attacks.
- **Discrimination:** Rose from 3.44% to 7.19%, with emphasis on age, gender, and other bias-related actions.

The Role of Technology in Crisis Management

Technology plays an increasingly significant role in corporate crisis management by providing tools that enhance efficiency and coordination. Virtual crisis rooms, management dashboards, and digital communication platforms facilitate decision-making and ensure stakeholder alignment.

Moreover, Artificial Intelligence (AI) is increasingly adopted to forecast potential crises by identifying emerging patterns in historical data. This allows organisations to act proactively. However, excessive reliance on technology may be risky, especially if systems fail during a crisis. Therefore, a balance between technology and human judgment is essential.

Best Practices for Crisis Mitigation

Effective crisis mitigation requires ongoing preparation and robust strategic frameworks. Key best practices include:

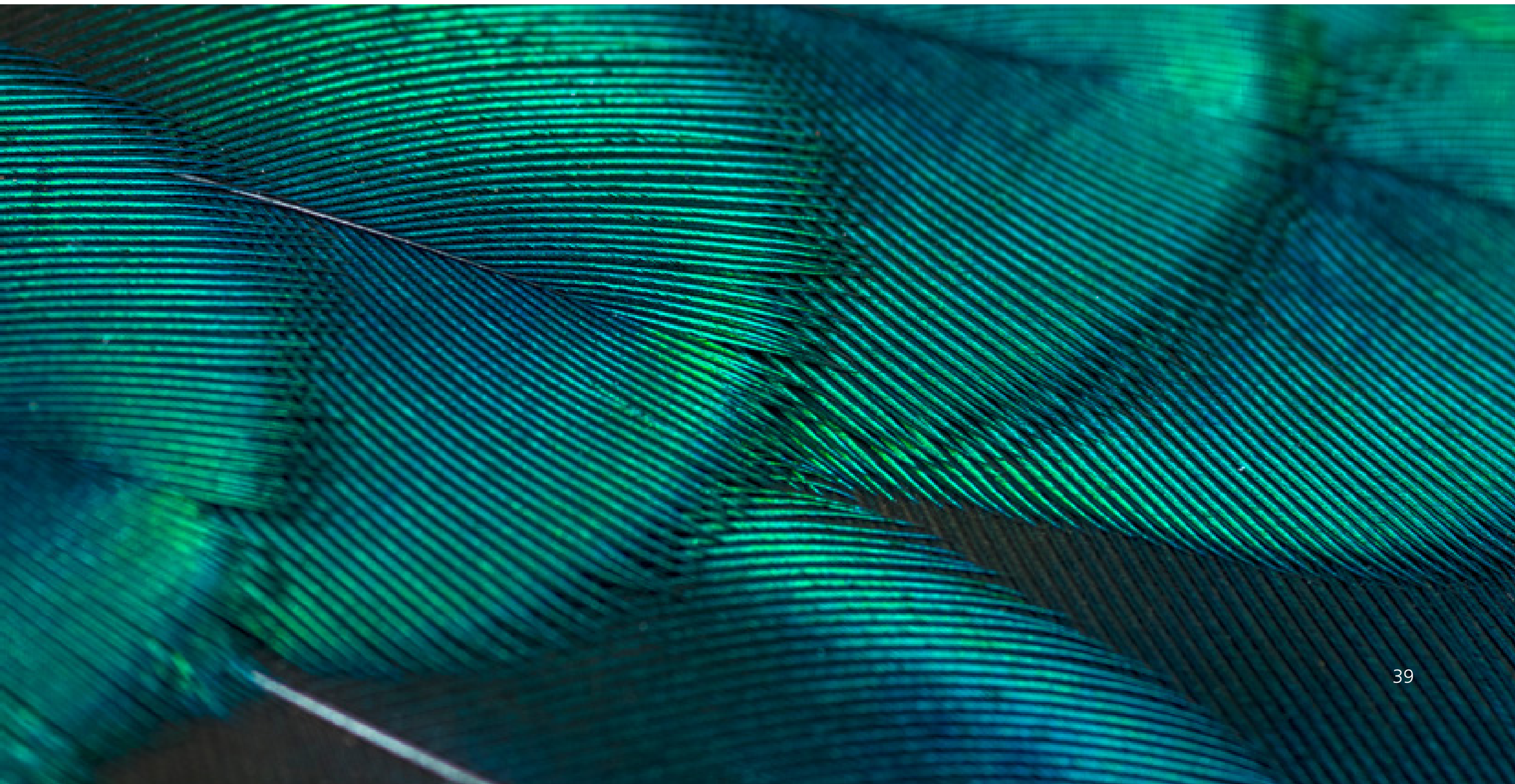
- Regularly training crisis management teams to ensure readiness. Crisis simulations are valuable tools for testing response plans and identifying weaknesses before real events occur.
- Conducting post-crisis reviews to evaluate successes and areas for improvement. These assessments enable organisations to refine their strategies and strengthen future responses.
- Managing communication effectively during crises. Messages must be clear, timely, and consistent across internal and external audiences. Poor communication can aggravate a crisis, while effective communication preserves stakeholder trust and minimises damage.

Conclusion

Corporate crisis management is vital to the survival and success of companies in the modern business landscape. As threats grow more complex and unpredictable, organisations must adopt a proactive and strategic approach to mitigate crises and safeguard their reputation.

By combining advanced technology, continuous training, and strong governance, companies can effectively respond to diverse crises. Regulatory compliance and the ongoing review of crisis management practices are key to organisational resilience.

Proper preparation enables companies not only to mitigate the effects of crises but also to emerge stronger, with a solid foundation of trust and resilience to face future challenges.



Cutting the cord, keeping it fair: the Dutch Supreme Court recalibrates termination of duration agreements

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Recent decisions of the Dutch Supreme Court have reset the practical playbook for terminating (long-term) duration agreements. Two rulings form the new axis: the "Retailer case" (2024) and, crucially for 2025, the "Logistics case" (2025). Together they reaffirm a contract first approach, while clarifying the narrow channels through which reasonableness and fairness operate. The upshot is clear: agreed termination clauses will generally stand, and any softening of hard exits will occur mainly through compensation (rather than judicial rewriting of agreed notice periods).

The Dutch legal framework in outline

— **What is a duration agreement?** A duration agreement is a legal relationship with continuous or recurrent performance over time. Dutch law recognises both named contracts with statutory regimes and unnamed commercial collaborations governed by general contract law (e.g., distribution).

— **Fixed term versus indefinite term.** For fixed term agreements, mid term termination for convenience is, in principle, unavailable unless the contract or statute provides for it; deviation may be sought only via unforeseen circumstances. For agreements of indefinite duration, termination is theoretically possible, even if the contract and the law are silent, but open norms may attach conditions.

— **When the contract is silent (indefinite term).** If neither contract nor statute sets a regime, the supplementary effect of reasonableness and fairness can require: (a) a sufficiently weighty reason in exceptional settings; (b) a reasonable notice period; and/or (c) an offer of compensation. These elements are calibrated to dependency, duration, investments, and transition needs. In rare cases, parties may have intended true non terminability and any challenge to that will rest on considerations of reasonableness and fairness or unforeseen circumstances.

— **When a termination clause exists**. Where a contract contains an express termination mechanism, that mechanism governs. Courts may supplement only where there is a genuine gap (for example, implying an obligation to offer compensation), but may not rewrite clear terms – such as an agreed notice period – via supplementation. Setting aside a clear clause requires the higher threshold of reasonableness, fairness or unforeseen circumstances to be met.

— **Compensation versus damages.** If the termination is valid, but fairness requires monetary mitigation, compensation is not simply lost profits as calculated by reference to the counterfactual. It targets transition costs, unrecouped investments tied to the relationship, and other justified outlays beyond ordinary entrepreneurial risk that the afforded notice did not absorb. By contrast, if a termination clause or its use is set aside and the

termination therefore lacks legal effect, exposure can approach the positive contractual interest as in wrongful termination.
— **Proof and allocation of burdens.** The terminating party needs only to show termination in line with the contract or baseline principles. The party resisting termination or seeking compensation must plead and prove the specific circumstances calling for conditions (reason, time, money) and quantify any compensation sought. A voluntarily granted longer notice period can be relevant to quantum, but will not be decisive.
— **Regulatory overlays and consumer carve outs.** Mandatory statutory regimes (e.g., agency, franchise) may impose their own rules, and consumer protection introduces additional constraints. The present discussion focuses on business to business settings.
— **Reasonableness and fairness (art. 6:248 DCC).** Dutch law channels equity through two effects. The supplementary effect in paragraph (1) fills gaps and may imply ancillary duties (reasonable notice, weighty reason in exceptional dependency settings, suitable compensation) but does not override clear terms. The limiting effect in paragraph (2) is a safety valve: a clear term – or its invocation – may be disapplied if its operation would be unacceptable. This is exceptional and fact sensitive. If the valve is opened and a clause falls away, supplementation then fills the resulting gap in a second step.

What has changed – and what has not

At headline level, little has changed: Dutch law still privileges *pacta sunt servanda* ("agreements must be held") in commercial relationships. Where a duration agreement contains a termination clause, termination in accordance with that clause is in principle valid. The refinements concern how and when open norms intervene, and with what consequences.

The Retailer case resolved a recurring issue: if circumstances require that termination for convenience be accompanied by "suitable" compensation, the absence of such an offer does not as a rule invalidate the termination. The termination stands if contractual and statutory conditions are met. Two caveats follow. First, the supplementary effect can oblige the terminating party to pay compensation after the fact. Second, in exceptional cases, the absence of a suitable offer for compensation – together with other factors – may render the termination itself unacceptable, with loss of legal effect and wrongful termination exposure.

The Logistics case then tightened the doctrinal screws. Faced with a one month contractual notice period, the Court of Appeal had used supplementation to "extend" the period. The Supreme Court rejected that route: a court cannot neutralise or rewrite a clear contractual term via supplementation. If a clause is to be set aside, the portal is the limiting effect (or unforeseen circumstances), a higher threshold. Supplementation can still support an obligation to pay compensation; and a party's decision to grant a longer notice period in practice may inform the amount of any compensation. The line is redrawn: agreed notice periods stand; fairness speaks mainly through money, not judicially re engineered time.

Three communicating variables: reason, time, money

The framework calibrates three interdependent variables: the reason to terminate, the notice afforded, and whether (and to what extent) compensation is owed. A strong justification for exit tolerates more abrupt timelines; a short notice period (especially amid dependency) more readily pulls compensation into view; a generous notice period can mitigate the need or quantum of compensation. The decisive inquiry is whether the terminated party had a fair runway to adapt and manage sunk or transitional costs beyond ordinary entrepreneurial risk.

Two clarifications matter:

— Compensation is not always a proxy for the positive contractual interest. The measure is what fairness demands.
— A longer than contractual notice granted in practice can influence, but does not dictate, compensation. It is one factor in a holistic assessment.

The architecture of judicial control after the Logistics case

The decisions refine the roles of supplementation and limitation.

— Supplementation (art. 6:248(1) DCC) fills gaps; it does not rewrite clear terms. In termination contexts, it can impose ancillary conditions – most notably an obligation to offer compensation – where the contract is silent on that point, and can inform the amount.
— Limitation (art. 6:248(2) DCC) is a sparingly used safety valve for clear terms that would operate unacceptably. Where successful, the contractual provision is set aside; a gap then appears and, in that second step, supplementation can shape the replacement regime. Because setting aside a clause raises the spectre of wrongful termination if termination nevertheless proceeded, damages exposure can escalate toward the positive contractual interest. The threshold is high and the evidential burden on the contesting party is real.

This insistence on procedural channels disciplines judicial reasoning and curbs a drift toward general proportionality review that dilutes contractual certainty. Courts will not casually extend bargained for notice periods; they will, however, attach monetary conditions where fairness requires.

Practical implications for commercial parties

For drafters, the guidance is both sobering and enabling. Vague termination language invites applications for supplementation and disputes about compensation. If predictability is the aim, draft it.

1. First, calibrate termination beyond bare power and period. Specify whether reasons are required and of what weight. Clarify whether any compensation is payable on termination and, if so, constrain it through a method or cap tailored to the relationship. Provisions aimed at this do not foreclose fairness review, but they constrain supplementation and raise the threshold for deviation.
2. Second, align time and money *ex ante.* If the commercial logic is that longer notice substitutes for compensation, say so and define what “longer” means. Conversely, if agility and short notice are desired, consider this in the drafting.
3. Third, maintain discipline as relationships evolve. Where collaborations scale beyond the original design, revisit termination architecture. The Logistics case arose from a court’s impulse to keep a clause “fit for purpose” via supplementation. The Supreme Court’s response makes contract maintenance a necessity: adjust the clause by agreement; do not expect a court to do it later via supplementation.
4. Fourth, plan litigation posture. A terminating party should have a litigation plan in place with adequate risk mitigation measures. The terminated party bears the burden to show dependency, investments, adaptation timelines, and why such costs exceed ordinary business risk. The terminating side can define the record by granting pragmatic notice and setting out a reasoned position on compensation’s inapplicability or modest scope. Attempts to invalidate termination via limitation require a compelling, well evidenced narrative of unacceptability, with acceptance of the attendant risk profile if that threshold is crossed.

Where the open questions remain

The move from time to money leaves two uncertainties. First, what counts as “suitable” compensation will remain context specific. The taxonomy – dependency, duration, unrecouped investments, adaptation costs – is clearer, but its weighting varies by sector and may be influenced by regulatory overlays. Second, the effect of a voluntarily extended notice on compensation is not formulaic and parties should expect argument on diminishing marginal relief.

These uncertainties do not unsettle the fundamental principles: courts will not lengthen an agreed notice period through supplementation; fairness operates mainly through compensation; and setting aside a clause remains exceptional.

Conclusion: contract first, fairness second, discipline throughout

The Retailer case and the Logistics case do not upend Dutch termination law; they refine it in a commercially intelligible direction. The economics of exit are managed through calibrated time and money rather than judicial redrafting. The task for the drafter is plain: put the exit architecture in the contract, including financial guardrails; keep it under review; and, when the time comes to part, manage the landing (by time, by money, or a prudent mix), so that cutting the cord remains firm and fair.

Arbitration of succession disputes under Swiss and French law

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Introduction

A multi trillion intergenerational transfer of wealth is reshaping private client practice and amplifying the number and complexity of cross border estates. State court litigation – often slow, formalistic, and public – struggles to provide coherent and timely outcomes, particularly where parallel proceedings across jurisdictions create duplication and inconsistency. Against this backdrop, arbitration offers a private, flexible forum with access to specialist adjudicators. Where legally feasible, it can consolidate dispersed issues, accelerate resolution, and preserve confidentiality. Drawing on recent developments, this article compares Swiss and French approaches to the arbitrability of succession disputes, focusing on procedural feasibility, enforceability, and practice.

Succession Arbitration under Swiss Law

Since 2021, Swiss law expressly permits arbitration clauses in unilateral instruments and in corporate or foundation statutes, provided the seat of arbitration is in Switzerland. This legislative clarification coincides with an institutional innovation: the Swiss Arbitration Centre's Supplemental Swiss Rules for Trust, Estate and Foundation Disputes (the "TEF Rules"), effective 1 July 2025. Together, these developments render arbitration an operational and attractive option for international wealth planning.

At the normative level, both the Swiss Civil Procedure Code and the Swiss Private International Law Act allow arbitration clauses to be embedded in a will, an inheritance agreement, a trust deed, or the statutes of a foundation, if the arbitral seat is in Switzerland. In practice, a testator may therefore direct that disputes among heirs, legatees, or executors be referred to arbitration; likewise, internal disputes involving foundations and trusts may be resolved by arbitral tribunals rather than state courts.

Advantages
The advantages are concrete:

— Confidentiality protects personal and financial information.
— Party autonomy enables the appointment of arbitrators experienced in succession matters, along with tailored choices of language and seat.
— Procedure can be calibrated to the needs of the case, often yielding a final award more quickly than court litigation.

- Critically, international recognition and enforcement under the New York Convention enhances the effectiveness of arbitral awards.

Limitations
Limits nonetheless persist:

- Certain courts retain exclusive jurisdiction (for example, over rights in rem in immovable property).
- Mandatory rules, notably forced heirship protections, must be respected.

These constraints informed the design of the TEF Rules, and should be anticipated at the clause drafting stage.

The TEF Rules
The TEF Rules complement the Swiss Rules of International Arbitration with mechanisms adapted to the realities of trust, estate, and foundation disputes. They cover clauses contained in unilateral instruments, such as wills or foundation statutes, and can be opted into via contract, including inheritance agreements.

They also account for "entitled persons" who, while not formal parties, may be impacted by the outcome – such as minors or unborn heirs. The framework requires their identification and notification and provides for appropriate representation to safeguard fairness and the enforceability of awards. Confidentiality extends to these persons and their representatives.

As to applicable law, the TEF Rules adjust the usual Swiss approach to avoid diluting mandatory succession norms: absent a valid choice of law, the tribunal determines the applicable substantive law by reference to the conflict of laws rules governing succession at the deceased's last domicile. The Swiss Arbitration Centre also publishes model clauses tailored to wills, inheritance agreements, trust deeds, and foundation statutes.

For international families, the result is a coherent, pragmatic framework. Arbitration delivers discretion, expertise, and cross border enforceability, and it promotes consolidation of issues before a neutral and efficient forum.

Succession Arbitration under French Law

In France, the arbitrability of inheritance disputes has long been acknowledged in case law, albeit without a dedicated statutory regime. Articles 2059 and 2060 of the Civil Code govern the field, permitting arbitration over rights freely disposable by the parties and excluding matters of personal status and capacity. On this basis, practice and scholarship accept the arbitrability of disputes concerning division or liquidation of the estate, inventory and valuation of assets, tax liabilities, and the validity and interpretation of testamentary dispositions, including assessment of the testator's intent and consent. The question of whether a party qualifies as an heir may also be arbitrated, provided resolution does not entail determining personal status – such as establishing filiation.

Despite these advantages, arbitration in succession matters remains underused in practice. Recent initiatives by practitioners and specialized centres for family disputes indicate growing interest, with inheritance cases forming a substantial share of arbitrable family disputes.

Potential Developments
Structural reform is now underway. A draft Arbitration Code presented by a committee of practitioners in March 2025 includes a chapter dedicated to succession and proposes the following principle: *"Questions relating to successions may be submitted to arbitration as soon as the succession is opened." If adopted, this would enshrine in statute the possibility of arbitrating inheritance disputes.*

However, unlike Switzerland, France does not appear to be taking an equivalent step forward. The reform still limits the use of arbitration in succession matters to situations in which the estate has already been opened. As a consequence, parties may initiate arbitration only by signing an arbitration agreement after the death of the de cujus, once their succession rights have become available. This continues to preclude the inclusion of arbitration clauses in wills and thus prevents any anticipatory recourse to arbitration.

Yet anticipation is a key driver of certainty and efficiency in this area. The traditional obstacle lies in the contractual nature of arbitration and the unilateral character of wills, which do not bind heirs before the estate opens. Nonetheless, safeguards could be envisaged to secure heirs' consent at the appropriate time – whether through conditional mechanisms, structured post-opening agreements, or adequate representation. Such measures would accommodate the expected increase in inheritance litigation and reinforce the place of arbitration in domestic practice.

Conclusion

Switzerland now offers a clear and specialised framework for the arbitration of succession disputes, as well as disputes involving trusts and foundations, which is further strengthened by the entry into force of the TEF Rules on 1 July 2025. It enables genuine anticipatory planning through the inclusion of arbitration clauses in wills, inheritance agreements, trust instruments or foundation statutes, though it is subject to mandatory limitations (e.g. forced heirship, rights in rem over immovable property). It is also supported by dedicated mechanisms, such as the identification and notification of affected persons and their appropriate representation.

In France, the ongoing reform is moving toward an explicit statutory recognition of arbitration in succession matters, but still confines its use to proceedings based on arbitration agreements concluded after the opening of the estate, thereby excluding any anticipatory resort through a unilateral clause.

In both systems, arbitration meets the growing demand for confidentiality, expertise and procedural efficiency, while enhancing the international enforceability of the solutions adopted.

Board liability for antitrust fines?

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Whether companies may seek recourse against responsible board members for antitrust fines has long been a controversial issue discussed in case law and academic literature. The German Federal Court of Justice (**BGH**) has now indicated that national law does not preclude such recourse. At the same time, it referred the decisive question of whether EU law mandatorily prohibits such recourse to the European Court of Justice (**ECJ**).

Price cartel in the stainless steel sector

In the underlying decision, the defendant was on the management board of the holding company of a stainless steel group (a German stock corporation) and a director of an operating subsidiary (a German limited liability company). Due to the subsidiary's involvement in a price cartel, the German Federal Cartel Office (**Bundeskartellamt**) imposed fines on both the subsidiary and the defendant personally, pursuant to Section 81(1) no. 1 of the Act against Restraints of Competition (**GWB**) in conjunction with Article 101(1) of the Treaty on the Functioning of the European Union (**TFEU**).

The subsidiary and the holding company each sought compensation from the defendant under board liability for the fine and reimbursement of the investigation and legal defence costs incurred by the holding company in defending against the fine. In addition, the group companies sought a declaratory judgment establishing the defendant's liability for all further damages arising from the cartel violation.

The lower courts denied internal recourse for the fine as well as for the investigation and legal defence costs. However, the applications for declaratory judgment regarding liability for future damages were granted in both instances. On appeal, the group companies pursued their claims for payment.

Are antitrust fines compensable damages?

Under Section 93(2) of the German Stock Corporation Act (**AktG**) and Section 43(2) of the German Limited Liability Companies Act (**GmbHG**), members of the board who breach their duties are jointly and severally liable for any damage resulting from their actions. In the present case, it was undisputed that the defendant had participated in a price cartel and had thereby breached his duties. The BGH noted that the breach of duty is not precluded by the fact that the company gained an economic advantage from the breach.

The sole issue in the appeal proceedings was whether the antitrust fine imposed on the company constituted compensable damage within the meaning of board liability. In theory, the fine leads to a reduction in the company's assets that can be causally attributed to the defendant's breach of duty in establishing the cartel. This would therefore constitute a causal loss. However, this would mean that the sanctioned company could seek recourse from the responsible members of the governing body for its own fine and thus ultimately be compensated by shifting the penalty to the individuals involved, even though the company committed an attributable antitrust violation. Against this background, academic literature and case law are divided on whether recourse against board members for cartel fines must be excluded by a teleological reduction of Section 43(2) GmbHG and Section 93(2) AktG. Two levels must be distinguished: first, whether national law provides indications for a teleological reduction; and second, whether EU law requires a restriction of national board liability in the context of antitrust fines.

Teleological reduction of national board liability law controversial to date

According to the prevailing opinion in academic literature and case law, the grounds for board liability under national law must be reduced teleologically; otherwise, the purpose of sanctioning of the fine would be undermined. The purpose of the sanction is to skim off financial gains obtained from the violation and to impose a financial disadvantage on the company. This sanctioning rationale would be counteracted if the company could pass the fine on to the board member and thereby indemnify itself. Moreover, board members might rely on D&O insurance taken out by the company – at least for defence costs or certain liabilities – so that the economic impact of the fine could be mitigated. Such "insured internal recourse" would lead to inconsistencies in the assessment of sanctions and significantly weaken the deterrent effect intended by the penalty.

Prominent legal voices, by contrast, reject restricting recourse against board members in cases involving cartel fines. They argue that neither Section 43(2) GmbHG nor Section 93(2) AktG provides for such a restriction, nor is a teleological reduction necessary in view of the purpose of the fine as a sanction. The sanction's purpose is already fully achieved by imposing a fine on the company. The admissibility of internal recourse is governed solely by the relevant civil and company law provisions and is not superseded by sanction purposes. Allowing recourse preserves an important control mechanism over the behavior of board members by holding responsible executives accountable for their conduct. Even under this view, only the punitive component of the fine would be recoverable; any disgorgement (skimming) component reflecting illicit gains would not be recoverable via recourse, and financial advantages for the company must be netted when assessing damage.

BGH: Requirements for teleological reduction under national law are questionable

For the first time, the BGH has ruled on the recoverability of antitrust fines and expressed considerable doubt as to whether the conditions for a teleological reduction are met when considering national law alone.

At the outset, the BGH clarified that neither the wording of the provisions on board liability nor the legislative materials contain any indications of a restrictive application in the case of recourse to imposed cartel fines. Nor does the meaning and purpose of the provisions require such a restriction, since claims for board liability serve precisely to compensate for damage resulting from breaches of duty. Rather, the threat of recourse against board members creates incentives for lawful corporate management and thus contributes to the prevention of antitrust violations.

So far there are no general civil or criminal law prohibitions in the highest court rulings preventing a third party from paying sanction on an individual. The BGH saw no sufficiently distinct obligations that could justify deviating from these general principles of sanction law. It also pointed out that the legislature has never opposed this line of Supreme Court case law and, despite numerous reforms in antitrust fine law, has not standardised any clarification or restriction of civil law recourse options. It therefore remains doubtful whether there is an unintended regulatory gap that could justify a teleological restriction of board liability, even if there are reasons to believe that a recourse option could impair the sanctioning purposes pursued by the fine. In the BGH's view, national law alone is therefore unlikely to decisively rule out the possibility of internal recourse.

Interpretation of European antitrust law is decisive

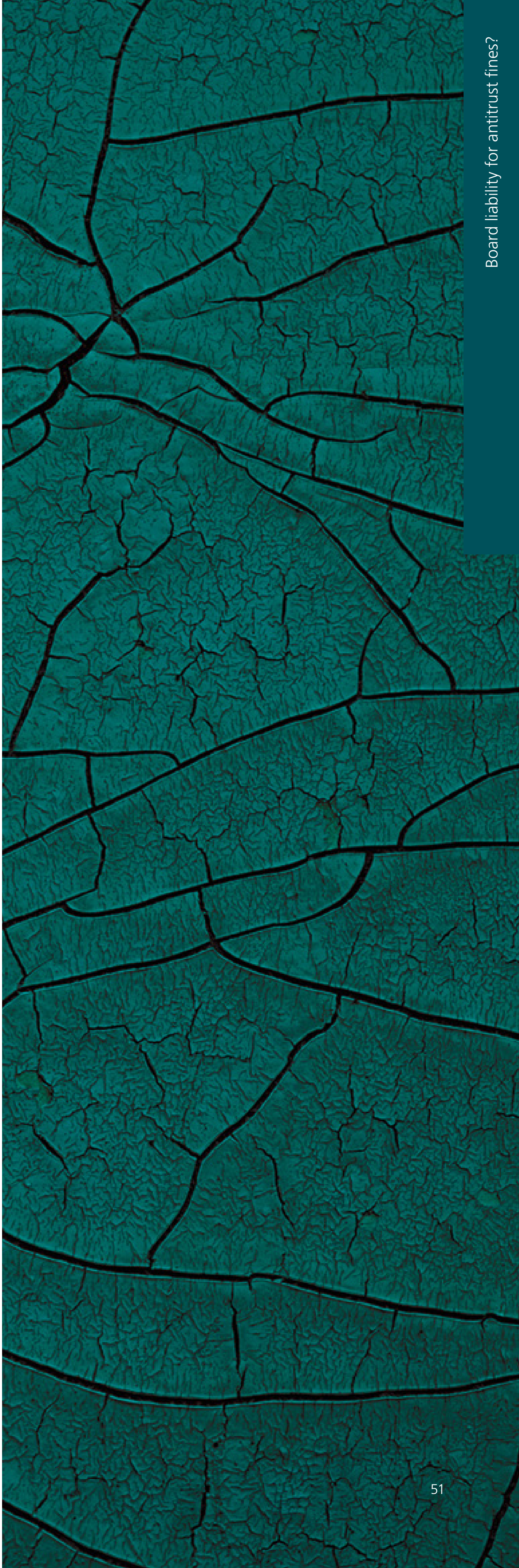
The BGH ultimately concluded that the exclusion of recourse against board members in the case of antitrust fines could also result from the primacy of European competition law and the resulting interpretation of national law. Therefore, the Senate did not have to make a final decision on whether national law already requires a teleological reduction. In the BGH's view, EU law does not expressly regulate the (in)admissibility of recourse against board members for antitrust fines. However, the ECJ has emphasised in its case law that fines imposed by a national competition authority must be effective, proportionate, and dissuasive, and has clarified in this context that the effectiveness of an antitrust fine would be significantly reduced if it were tax-deductible. Regarding this ECJ case law, the BGH stated that internal recourse – potentially covered by existing D&O insurance – could impair the effectiveness of a cartel fine required under EU law in a similar way to tax deductibility. The BGH therefore referred the question to the ECJ as to whether the possibility of internal recourse under board liability law undermines the required effectiveness, proportionality, and deterrent effect of antitrust fines in a manner contrary to EU law.

Investigation and legal defense costs as well as consequential damages

In the BGH's view, investigation and legal defence costs are recoverable – irrespective of European antitrust law – because recourse for these costs does not impair the effectiveness of the fine. For the same reason, consequential damages resulting from claims by aggrieved customers are also recoverable. The punitive purpose of the fine is not affected with regard to these damages.

Consequences for practice

The BGH makes it clear that it considers recourse against board members to be permissible under national law in the case of antitrust fines. However, this position has no immediate practical significance for the time being. The BGH emphasised that there should be no split interpretation between national and EU antitrust fines. Recourse, even in a purely national context, is therefore only possible if it is also permissible under EU law. The decision on the scope of recourse against board members thus lies with the ECJ. It remains to be seen whether the ECJ will extend its strict case law on the prohibition of tax deductibility of antitrust fines and exclude internal recourse against board members.



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