

International Disputes Digest



Contents

- 5 ■ New Class Action Act strengthens the class action climate in the Netherlands
- 8 ■ Identifying the governing law of arbitration agreements – choice prevails across jurisdictions
- 13 ■ Rights of Representation in International Arbitration
- 16 ■ Latest international developments in cryptoassets disputes: an update from England, Singapore and Switzerland
- 20 ■ South Africa: An emerging and credible international arbitration centre on the African continent
- 22 ■ Understanding Consequential Loss
- 26 ■ Recovery of the Bank of Russia's expenses for additional financing of a bank under rehabilitation
- 28 ■ EU to launch the Public Prosecutor's Office with a Romanian appointed Chief Prosecutor
- 32 ■ Constitutional Judges act as a counterweight to the new Energy Policy in Mexico
- 35 ■ How to safeguard the continuity of arbitration in light of the COVID-19 pandemic?
- 38 ■ Electronic auctions in Slovenia offer challenges and opportunities for investors
- 40 ■ Third-party funding of litigation and arbitration in CEE
- 42 ■ EU to enact the Representative Actions directive
- 46 ■ CMS around the globe
- 47 ■ Knowledge and Know How

Introduction

Welcome to the winter edition of the CMS International Disputes Digest, the biannual publication of CMS' Dispute Resolution practice featuring analysis and commentary on the major trends shaping the worldwide dispute-resolution market.

In these difficult times, global business in almost every sector faces uncertainty brought on by the pandemic and the economic hardships created by it. In light of these challenges, we bring you the latest news from the world of legal disputes on the most important issues, opportunities and questions involving international business.

Whether born from expediency in crisis or a vision for the future, progress is a central theme of this edition. To quote Heraclitus, the Greek philosopher, "there is nothing permanent except change" and 2020 has been no exception as we look ahead to trends for 2021 and beyond.

In this edition, our colleagues in Germany consider the European Parliament's recent approval of a new directive on consumer representative actions, which sets down the minimum standards for collective redress and injunctions for consumers.

Highlighting the growing complexity of international arbitration, our colleagues in the UK, France, Germany, Hong Kong, Switzerland and Singapore undertake a comparative analysis of the often challenging matter of determining the governing law of arbitration agreements in each jurisdiction.

We also report on how jurisdictions are adopting digital solutions. With court and insolvency registers already online, COVID-19 has compelled lawmakers in Slovenia to digitalise public auctions, an efficient approach that is likely to extend beyond the pandemic and provide additional transparency to the process.

The legacy of COVID-19 and its effect on justice in other parts of the world are also explored as our authors highlight how Chile was able to amend laws and procedures to safeguard the continuity of arbitration proceedings, due process and the right to a defence during the darkest moments of the pandemic.

This Digest also shines a spotlight on the Netherlands and the implementation of new class-action legislation, which has bolstered the Dutch class-action climate and is transforming the Dutch judiciary into a prominent international centre for dispute resolution. Our authors also explore South Africa's progress towards becoming an established arbitration centre on the African continent.

As the market develops, our experts in Poland consider how third-party funding of litigation and arbitration is on the rise in Central and Eastern Europe. In another nod towards innovation, our authors acknowledge the impact of cryptocurrencies on international finance by analysing the legal remedies in place in the UK, Singapore and Switzerland to protect cryptoassets in disputes.

Other articles include constitutional disputes over energy policy in Mexico; the new European Public Prosecutor's Office; consequential-loss clauses in the global energy sector; cross-border insolvency in Russia; and rights of representation in international arbitration in Singapore and Australia.

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



David Bridge
Partner, United Kingdom
T +44 20 7367 3021
E david.bridge@cms-cmno.com



Zsolt Okányi
Partner,
Global Head of CMS Disputes
T +36 1 483 4800
E zsolt.okanyi@cms-cmno.com



New Class Action Act strengthens the class action climate in the Netherlands



Leonard Böhmer
Partner, Netherlands
T +31 30 2121 710
E leonard.bohmer@cms-dsb.com



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

Over the last decade, the Netherlands has become a popular forum for international class actions against multinationals. Companies are increasingly being confronted with such claims, which are brought by foundations on behalf of groups of interested parties, such as consumers or investors. These claims can have a significant impact on the operations and reputations of the companies involved.

The Dutch system contains an opt-out mechanism for Dutch class members and an opt-in mechanism for foreign class members. The Dutch class action climate has also recently been further strengthened by the new Dutch Class Action Act, which came into force on 1 January 2020. A significant number of international class actions have since been filed in the Dutch class action register, including a EUR 5 billion claim against US company Oracle and its Dutch holding company for privacy infringements, as well as several diesel emissions class actions and claims involving human rights issues.

Netherlands: a liberal approach to class actions

A significant number of international companies have vested their principal European places of business or important holding companies in the Netherlands due to the country's favourable business, tax and legal conditions. One side effect of this is a significant amount of class-action activity. Indeed, this activity has prompted several US claimant firms to open branches

in the Netherlands in recent years. It is important that international companies based in the Netherlands are mindful of the risks of this class-action activity.

By comparison with other EU countries, the Netherlands is a relatively liberal jurisdiction in terms of allowing class actions against international companies where Dutch (holding) companies are co-defendants, such as in cases involving Steinhoff and Petrobras.

Additionally, the Netherlands offers, via the Dutch Act on the Collective Settlement of Mass Damage, a mechanism for settling class actions on a global scale. A settlement in the Netherlands can be declared universally binding for every interested party that a claims foundation purports to represent, unless a party has opted out. Such collective settlements have often been used for securities/misrepresentation cases involving international investors, and well-known examples include *Shell* (2009), *Converium* (2012) and recently *Fortis/Aegeas* (2018).

The Dutch class-action climate is built on a solid foundation. The Dutch judiciary is ranked among the most efficient, reliable and transparent worldwide (within the top three according to worldjusticeproject.org). The Netherlands is also an ideal forum for litigation involving defendants (or assets) located abroad, since Dutch court judgments are among the most widely enforceable judgments worldwide. As a result of instruments such as the Brussels Regulation, Lugano Convention and Hague Convention, Dutch court judgments are easily enforceable in over 30 other jurisdictions, including the EU, most US states, Canada, Singapore, Hong Kong, Australia and New Zealand.

Since 1 January 2019, the Netherlands has also had a specialised Commercial Court for international disputes, which handles cases in English and has been actively promoting itself as a forum for *ad hoc* class actions and collective settlements.

Recent years have also seen an increase in class actions on human rights (common interest) issues, such as climate change concerns. In the well-known landmark case of *Urgenda* in 2019, the Dutch Supreme Court upheld an earlier judgment finding that reducing emissions was necessary in order for the Dutch government to protect human rights. This is the first such tort case to be brought against a government in relation to climate change on a human rights basis, and is the first successful climate justice case. This demonstrates the liberal attitude of the Dutch courts to new concepts of class actions. In light of this *Urgenda* judgment, in November 2020, Greenpeace summoned the government before the court with a request that it implement more climate safeguards within the government's funding of Dutch Airline KLM.

On 1 January 2020, the Dutch Act on collective actions for damages (the "**Act**") came into effect, which introduced a more comprehensive and balanced system for dealing with class actions. It facilitates consumer/ investor claims while also providing safeguards for companies. This Act is already in line with the proposed EU Directive on representative actions for the protection of the collective interest of consumers, which is now in its final phase of implementation. This makes Netherlands a frontrunner in this respect. The new regime applies to class actions initiated on or after 1 January 2020 and that relate to events that took place on or after 15 November 2016.

Right to claim damages

The most important change in the Act is the new possibility to claim *damages* in a class action. The award of damages not only binds the defendant company,

but also the parties who suffered damage and whose interests were represented by the representative entity, but who did not opt out. This *ultimum remedium* is likely to create pressure for the settlement of class actions, and the Act should lead to greater empowerment of consumers and consumer organisations.

Safeguards for companies and their officers

It is important to note that the Act also shields companies and their officers from trivial claims and multiple class-action vehicles through certain safeguards:

- The Act has a register for claims foundations and interest groups.
- An exclusive representative will be appointed by the court (who litigates on behalf of all advocates).
- The Act sets strict requirements for a claims foundation or interest group in terms of governance, financing and representativeness. No profit may be made by the persons behind the organisation.

Stricter requirements also apply to the admissibility of a class action. An interest group must demonstrate that pursuing a class action is more efficient and effective than filing an individual action. This involves looking at similarities between claims, the group size and the potential aggregate claim value.

A further requirement is that there must be a close connection with the Dutch legal system (to prevent forum shopping). In general, such a connection exists if:

- (a) the majority of the individuals within the 'class' are domiciled in the Netherlands;
- (b) the defendant is domiciled in the Netherlands and additional circumstances indicate a sufficient relationship with the Netherlands; and/or
- (c) the events that resulted in the class action took place in the Netherlands. In general, the Dutch courts are quite liberal in accepting international claims.

Phases of Dutch class-action proceedings

Dutch class-action proceedings are divided into four phases:

1. Filing

A 'collective claimant' files its claim with the court (writ of summons) and publishes it in the 'collective actions register' in order to be appointed the 'exclusive representative'. Other collective claimants will have the opportunity to file a claim relating to the same event or subject matter within a period set by the court (at least three months).

2. Certification presentative

The court checks whether the collective claimant meets all admissibility requirements. Where there is more than one collective claimant, the court will select the most suitable collective claimant to conduct the litigation as the representative of the class and of the other collective claimants (the 'exclusive representative'). In order to facilitate the appointment of a lead claimant and to streamline the claim, all class actions relating to the same event or subject matter are consolidated before one court. At this stage, the court will also determine the criteria of the individuals who will form the class.

First Opt in/Opt out

After the appointment of the lead claimant, members of the class have the opportunity to opt out within a period set down by the court (at least one month). 'Foreign Victims' who have no domicile or residence in the Netherlands, but who suffered damage as a result of the same event, will have the opportunity to opt in, unless the court orders them to be part of the class, except if they opt out. After opting in, they will be part of the class.

3. Settlement

After the appointment of the lead claimant, the court will also provide the parties with an opportunity to try to reach a settlement. This is a mandatory phase. If the parties reach a settlement, it must be submitted to the court for approval. If the court approves the settlement, it becomes binding on the class.

Second Opt in/Opt out

Another opportunity to opt out.

4. Merits/judgment

The court will review the case on its merits. The court may order both parties to submit a proposal for the collective resolution of the damages. If the court rules that the claim and possibly the parties' proposals are upheld, the court will determine the compensation and the collective resolution of the damages and how the aggregate award of damages is to be distributed among the class. The entire class is bound by the judgment (except for those who opted out).

The Act in 2020

The first year of the Act has seen 15 cases being filed in the class action register to date. That is a significant number, particularly taking into account the fact that out-of-court settlements will often be reached before claimants reach the registration stage, as well as the impact of the COVID-19 crisis, which delayed the process. Those 15 cases are all currently in the first or second phase.

In the Dutch class-action regime, there is no limitation on the types of class actions that may be brought. This makes the Netherlands a very attractive jurisdiction for claimants.

The types of class actions registered this year underline the variety of the Dutch class-action climate:

- Common interest and human rights claims against the Dutch State (discrimination): four cases
- IP infringements: four cases
- Enforcing consumer rights (diesel emission claims with refund): three cases
- Privacy and GDPR infringements on behalf of consumers: two cases
- Collective labour claims: one case

There were no financial and securities (prospectus and misrepresentation) class actions filed this year. We anticipate that these types of class actions will increase in 2021 following COVID-19.

However, in the first year of the Act, we have seen several international class actions against multinationals with significant claims for damages, such as the privacy class action against Oracle and the diesel class actions against several international, mainly European, car producers.

The first judgment on the admissibility and the appointment of an exclusive representative also suggests that the courts will carefully scrutinise the admissibility of such claims. Ultimately, in that case, the court found the claim was admissible, indicating the court's willingness to facilitate class actions.

Conclusion: adequate risk and crisis management of defendant companies

In light of the existing Dutch infrastructure for class actions (branches of international case funders and US claimant firms), the liberal attitude of the Dutch courts (with the possibility to conduct proceedings in English) and the balanced new class-action regime (in combination with good enforceability of its judgments), the Netherlands has all the ingredients for an increase in class-action activity in the coming years. A "hard-Brexit" could accelerate this activity.

Companies should be mindful of this class-action climate and put in place adequate international risk assessments and crisis-management processes in order to tackle potential class actions at an early stage.

Identifying the governing law of arbitration agreements – choice prevails across jurisdictions



Kushal Gandhi

Partner, United Kingdom

T +44 20 7367 2664

E kushal.gandhi@cms-cmno.com



Jessica Foley

Senior Associate, United Kingdom

T +44 20 7367 2512

E jessica.foley@cms-cmno.com

When commercial parties are negotiating their contracts, finessing the terms of their arbitration agreements is understandably not always a priority. However, in the event that a dispute arises, parties who have expressly chosen a governing law for their arbitration agreement will be able to avoid the uncertainty, time and cost of satellite disputes on that issue.

Due to the “separability” principle, arbitration agreements are considered separately from the contracts in which they are contained. The rationale is to insulate the arbitration agreement in the event the enforceability of the main contract is questioned. One consequence of this principle is that arbitration agreements may be governed by a different law from that governing the main contract. Where questions are raised about the interpretation or validity of an arbitration agreement, the tribunal (and potentially a supervising court) will refer to the rules as set out in the law governing the arbitration agreement. Since different national laws treat such issues differently, the validity of an arbitration agreement may therefore depend on which law governs that agreement. Hence, the identification of the correct governing law can be of crucial importance.

If the parties do not expressly choose a law, identifying the governing law is not always straightforward.

There are three potential candidates: (1) the law governing the main contract; (2) the law of the arbitral seat; or (3) the law with which the agreement has its closest connection. Courts have not been consistent in their approach to determining the governing law (both across and within jurisdictions), creating uncertainty for parties and even conflicting judgments regarding the validity of arbitration agreements and the enforceability of awards made pursuant to them.

However, in October 2020, a landmark UK Supreme Court case clarified the position under English law, which has provided much needed certainty. In this article, we examine the position under English law and the Supreme Court’s reasoning and consider how certain other jurisdictions approach the identification of the governing law of arbitration agreements, namely France, Germany, Hong Kong, Singapore and Switzerland. We then conclude by highlighting some common themes.



The English law position

The English courts have traditionally preferred to adopt the governing law of the main contract as the law governing the arbitration agreement in the absence of an express choice of law (e.g. *Channel Tunnel Group Ltd v Balfour Beatty Ltd* [1993] AC 334 and *Kabab-Ji S.A.L v Kout Food Group* [2020] EWCA Civ 6). However, the courts have also held that the governing law is more likely to be the law of the seat of the arbitration (e.g. *C v D* [2007] EWCA Civ 1282 and *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638).

The UK Supreme Court has now (by a majority decision) done away with simplistic default rules that prefer the law of the seat or the main contract, in favour of a methodical application of English law rules on determining the governing law of contracts, as follows.

- 1) The starting point is English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation because article 1(2)(e) of Rome I excludes arbitration agreements.
 - 2) In the absence of a choice of law of the arbitration agreement, it will be the law with which the arbitration agreement is most closely connected.
 - 3) In order to determine whether the parties have made a choice, the arbitration agreement and main contract are to be construed, as a whole, applying the rules of contractual interpretation of English law (being the forum of the dispute).
 - 4) If there is a choice of governing law for the main contract, that will generally apply to the arbitration agreement as well. The court recognised that, despite the separability principle, commercial parties reasonably expect their choice of law to apply to the whole of the contract.
 - 5) The fact that the seat of the arbitration is different from the choice of law of the main contract is not, on its own, enough to negate an inference that the governing law of the main contract applies to the arbitration agreement as well. The Supreme Court noted that there is no strong presumption that the parties have, by implication, chosen the law of the seat of the arbitration to govern their arbitration agreement.
 - 6) However, factors that can indicate a different governing law for the arbitration agreement are:
 - (a) a provision of the law of the seat indicating that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law (e.g. Section 6 of the Arbitration (Scotland) Act 2010); or
 - (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. This is in keeping with the "validation principle" of English law that "*the contract should be interpreted so that it is valid rather than ineffective*". The Supreme Court majority recognised that this will require having regard to the words used in the contract, the surrounding circumstances and the extent of the risk that the arbitration agreement would be undermined if its validity and scope were governed by the relevant system of law. The Supreme Court majority reiterated the formulation of Moore-Bick LJ in *Sulamérica*, that commercial parties are generally unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is "at least a serious risk" that a choice of that law would "*significantly undermine*" that agreement.
- Each of the above two factors may be further reinforced if it can be shown that the seat was deliberately chosen as a neutral forum for the arbitration.
- 7) If there is no express choice of law to govern the main contract, it does not automatically follow that the contract (or the arbitration agreement) is intended to be governed by the law of the seat.
 - 8) If, following the above, there is no express or implied choice of law that can be determined, then one is required to determine the law with which the arbitration agreement is most closely connected. It is only then that it may be said the arbitration agreement is most closely connected with the law of the seat chosen by the parties. The majority held that despite the reasonable assumption, as a starting point, that the parties have intended for all terms of their contract to be governed by the same system of law, there is authority (including *Sulamérica*) for a "*general rule*" that the arbitration agreement is most closely connected with the law of the seat of the arbitration, even if that law differs from the law applicable to the parties' substantive obligations. The majority noted that the seat is where the *arbitration* is to be performed (legally speaking, if not physically), whereas the place of performance of the substantive obligations of the contract may not have a "*significant connection*" for the purpose of determining the law of the arbitration agreement.
 - 9) Dispute resolution clauses that include provisions for good-faith negotiation, mediation or any other procedure before a dispute can be referred to arbitration will not generally provide a reason to displace the law of the seat as the law applicable to the arbitration agreement when (8) above applies.

Other common law jurisdictions – Hong Kong and Singapore

In Hong Kong, the courts will first consider whether the parties have expressly chosen a governing law of the arbitration agreement, such as provided for in the Hong Kong International Arbitration Centre model arbitration clause. If not, they will consider whether there is an implied choice. In the absence of a choice, the courts will look to the system of law with which the arbitration agreement has the closest and the most real connection.

In Singapore, where the parties have not expressly chosen the law governing their arbitration, the courts have traditionally held that the implied choice should presumptively be the law of the main contract. In such a case, the Singapore courts have held that there is no reason to consider the system of law with which the arbitration agreement has the closest and most real connection. The presumption will not be displaced by the seat of arbitration providing for a different governing law.

As common law legal systems, the Singapore and Hong Kong courts typically take into account not only the case law of their own courts, but also that of other common-law jurisdictions, and are therefore likely to follow the approach of the UK Supreme Court.

Germany

Like their English counterparts, the approach of the German courts has not always been consistent. In principle, two approaches exist:

- 1) On the basis that arbitration agreements are purely procedural, in the absence of a choice of law to govern the arbitration agreement, the law of the seat governs the agreement. Strictly speaking, the governing law clause for the main contract will not suffice as an express choice. However, in practice the courts have extended such clauses to cover arbitration agreements.
- 2) Applying principles of international law, arbitration agreements are governed by the law chosen by the parties to govern the main contract, in the absence of which they are governed by the law of the country with which they are most closely connected.

In practice, the courts often apply the law governing the main contract to the arbitration agreement, whether based on an implied choice of law or the “close connection” test.

Switzerland

Swiss law provides for a conflict of laws rule in *favorem validitatis* (the law favours the validity of the arbitration agreement). In order to be valid, an arbitration agreement must comply with the requirements of the most favourable of (1) the law chosen by the parties to govern the arbitration agreement; (2) the law governing the dispute; or (3) Swiss law. There is no hierarchy between these systems. In practice, unless the parties have made an express choice of governing law for their arbitration agreement, the courts will assess the validity of an arbitration agreement in regard to Swiss law.

France

The French courts have consistently held that the existence and validity of an arbitration agreement must be considered solely in the light of the requirements of international public policy, irrespective of any national law, even a law governing the form or substance of the main contract. The French courts instead apply substantive rules of international arbitration, including the separability principle. In a recent case (*Kout Food Group v Kabab-jl SAL*, 23 June 2020, N° RG 17/22943), the Paris Court of Appeal applied these principles in holding that, in the absence of an express choice of law, the law of the seat applied to the arbitration agreement.

Conclusion

Despite some differences between jurisdictions, the common theme is that the courts recognise that an arbitration agreement may be governed by a different law from the main contract, applying the separability principle. They also take a pro-arbitration approach, seeking to give legal effect to parties’ arbitration agreements wherever possible.

The key takeaway is that “choice” will always prevail. Therefore parties should consider and agree in their contracts upon all three systems of law that will be relevant to a dispute: (1) the law applicable to the main contract; (2) the law governing the arbitration agreement; and (3) the seat of the arbitration.

The authors would like to thank Edouard Vieille and Jean-Fabrice Brun (CMS France), Tilman Niedermaier (CMS Germany), Nicolas Wiegand (CMS Hong Kong), Jodok Wicki (CMS Switzerland) and Dami Cha and Lakshanthi Fernando (CMS Singapore) for their contributions to this article.



Rights of Representation in International Arbitration – the Singapore perspective



Lakshanthi Fernando

Partner, Singapore

T +65 9648 9008

E lakshanthi.fernando@
cms-holbornasia.com



Jeremie Witt

Partner, Australia

T +61 7 3184 9111

E jeremie.witt@cms-cmno.com



Dami Cha

Associate, Singapore

T +65 6422 2837

E dami.cha@cms-holbornasia.com

To what extent can a right to be heard form a sufficient basis for challenging an arbitral award? A recent Singapore High Court decision provides important guidance on the qualified nature of a party's right to be heard, whilst re-emphasising the 'light touch' approach taken by the Singapore courts in relation to reviewing arbitral awards.

In the Singapore High Court decision of *CGS v CGT* [2020] SGHC 183, the court dismissed the applicant's argument that the Tribunal had improperly excluded its General Manager from acting as co-counsel and declined to set aside a Singapore International Arbitration Centre ("**SIAC**") award.

The applicant commenced an expedited SIAC arbitration in June 2018. In August 2018 it dismissed its initial legal counsel and was represented by its General Manager ("**GM**").

Paragraph 6 of the first Procedural Order ("**PO1**") provided that, "[w]here a Party was represented by Counsel, communications with the Tribunal shall be with Counsel instead of the Party's representatives."

Subsequently, the applicant appointed new legal counsel ("**Legal Counsel**") for the substantive hearing, during which, its Legal Counsel clarified that the GM intended to participate but would "solely" address the Tribunal for its Opening Statement.

Due to PO1, the GM was omitted from certain email communications with the Tribunal leading up to the hearing. At the hearing, the GM was "interrupted" during the applicant's Opening Statement when the Tribunal requested a better explanation of an aspect of the claim and was prevented from asking a question of a factual witness by the Tribunal.



The applicant subsequently applied to set aside the award on the basis that:

- (i) the arbitral procedure was not in accordance with the agreement of the parties;
- (ii) the applicant was unable to present its case; and
- (iii) a breach of the rules of natural justice had occurred, and the applicant's rights were prejudiced.

Any infringement on the right to be heard must be raised in a timely manner

The Honourable Judicial Commissioner Andre Maniam held that if the applicant considered its rights to have been infringed, it should have raised its objection or applied to vary PO1 immediately, instead of raising the issue in a set-aside action. In circumstances where the applicant considered there to have been a fatal failure in the process, it ought to have complained and not simply pressed on with the hearing.

Fairness of the procedure vs. parties' contemporaneous communication

Further, the Judicial Commissioner held that there was no protocol for communications agreed between the parties, and that PO1 was not the parties' "agreed procedure" for the purposes of setting aside an application under the Model Law. The Judicial Commissioner also held that PO1 did not infringe the parties' right to representation, and the Tribunal could reasonably direct that there be only one line of communication between each party and the Tribunal.

The Court also noted that fairness of the procedure must be judged against what the parties contemporaneously communicated to the Tribunal. In the present case, the Legal Counsel had, in fact, acknowledged the Tribunal's request to follow paragraph 6 of PO1 by email. Therefore, the Judicial Commissioner was of the view that there was no reason for the Tribunal to think that paragraph 6 of PO1 was objectionable.

The Court also held that there was no merit in the applicant's allegation that the omission of the GM from certain correspondence led to a document being served out of time, and so no prejudice was suffered by the applicant.

Tribunal's Conduct of the Hearing

The respondent argued that rule 23.1 of the SIAC Rules ("any party may be represented by legal practitioners or any other authorised representatives") required the parties to choose between either being represented by legal practitioners, or by other authorised party representatives (such as the GM). While rejecting the respondent's argument and holding that rule 23.1 of the SIAC Rules does allow for representation by both legal counsel and non-legally qualified representatives, the Court nevertheless dismissed the applicant's complaint that it was unable to "present its case as intended".

The applicant's complaint was based on the grounds that the GM was interrupted in the Opening Submissions and was also prevented from asking a question of a witness.

After reviewing the transcripts of the hearing, the Judicial Commissioner held that the alleged interruption was in fact "entirely innocuous" and that "it would be a sad day if such a complaint sufficed to set aside an arbitral award". It was also determined that the GM had only been granted permission to assist in the Opening Statement, and not with the questioning of witnesses.

Therefore, the Judicial Commissioner held that the Tribunal had been reasonable and fair in holding the applicant to what it had represented as being the GM's role in the hearing. It was, in the Court's view, "fanciful and entirely speculative" for the applicant to argue that if the GM had participated more extensively as co-counsel – had she been allowed to question witnesses and had she been allowed to continue to explain an exhibit – that it could reasonably have made a difference to the outcome.

Conclusion

This case is an important reminder that the Singapore courts will not set aside an award lightly. Parties who choose to arbitrate in Singapore agree to give the Tribunal wide and flexible discretion to determine its own procedures and processes.

This case also reinforces that a party's rights to be heard and to present its case are not absolute. While a party must be given a fair and reasonable opportunity to be heard, what is fair and reasonable will depend on the particular circumstances of each case. The Judicial Commissioner held that the Tribunal is entitled to make procedural decisions to give the parties a reasonable right to present their case, after weighing the competing considerations.

Finally, the decision emphasises how critical it is for parties to raise their objections on procedural unfairness (or anything else which may lead to an award being impugned) in a timely manner with the Tribunal. Where a party fails to do so, it cannot expect a sympathetic reception from the courts by belatedly trying to set aside the award based on objections which should have been raised earlier.

Latest international developments in cryptoassets disputes: an update from England, Singapore and Switzerland



Kushal Gandhi

Partner, United Kingdom

T +44 20 7367 2664

E kushal.gandhi@cms-cmno.com



Wei Ming Tan

Senior Associate, Singapore

T +65 9636 0156

E weiming.tan@
cms-holbornasia.com



Alex Bardin

Associate, Switzerland

T +41 44 285 11 11

E alex.bardin@cms-vep.com

The year 2020 is proving to be fruitful for all things crypto. There is growing judicial support for legal remedies available to protect cryptoassets and investors in crypto currencies. Internationally, there are now various reported judgments confirming the status of cryptoassets as property and we are also seeing decisions on how cryptoassets are to be distributed in the context of insolvency of a crypto exchange.

In this update we provide a synopsis of some of the most recent cases and developments in England, Singapore and Switzerland relating to cryptoassets.

England

In a recent judgment, the English court refused to continue an interim injunction that restrained the defendant from dealing with bitcoin held in a coin-depot account, over which the claimants had asserted a proprietary right.

Factual Background

In *Toma v Murray* [2020] EWHC 2295 (Ch), the claimants sold bitcoin to an account controlled by the defendant. The payment received for the bitcoin was reversed and the claimants were left without the bitcoin and money.

Although the defendant did not go so far as to admit that fraud took place, he was content for the purpose of the application hearing for the court to proceed on the basis that fraud of some sort was carried out.

The claimants sought to continue a previously granted without-notice interim injunction against the defendant, pending the final determination of their claim.

The relevant test

In determining the application, the court referred to the test set down in *AA v Persons Unknown & Ors* [2019] EWHC 3556 (Comm) at [62]:

"First, there must be a serious issue to be tried, secondly, if there is a serious issue to be tried, the court must consider whether the balance of convenience lies in granting the relief sought. The balance of convenience involves consideration of the efficacy of damages as an adequate remedy, the adequacy of the cross-undertakings to damages, and the overall balance of convenience including the merits of the proposed claim".

No arguments were made that bitcoin was not property capable of being subject to an injunction. This now appears to be an accepted principle in English law following the judgment in *AA*.

Is there a serious issue to be tried?

It was held that a serious issue was to be tried and a full hearing would need to be conducted to determine whether there was any fraud on the part of the defendant.

What is the balance of convenience?

In assessing the balance of convenience, the claimants' position was that as there is a proprietary claim to bitcoin this should reduce the significance of the question as to whether or not damages are an adequate remedy. In support of this, the claimants relied on the judgment in *AA* involving an injunction against persons unknown for 96 bitcoins, where it was determined that damages would not be an adequate remedy.

In this case, the English court was not persuaded that the balance of convenience lay with the claimants. The court considered that this was essentially a claim for the value of the bitcoin, which is capable of being satisfied in monetary terms rather than relying on the proprietary remedy.

It was also stated that, due to the volatile nature of cryptoassets, an injunction preventing the defendant from being able to dispose of the bitcoin at the appropriate time would increase his risk of loss. The claimants (by their own admission) would also experienced difficulty in satisfying any cross undertakings in damages if the defendant were to suffer this loss.

Conclusion

The judgment in this case highlights the factors that the court will take into account when considering matters relating to injunctive relief for cryptoassets.

This judgment also reiterates the need to establish that damages are not an adequate remedy when seeking injunctive relief, irrespective of whether the underlying claim is a proprietary/tracing claim.

Singapore

In February 2020, Singapore's apex court, the Court of Appeal, rendered judgment on the first crypto-dispute to be litigated on the nation's shores – *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20.

Factual Background

Quoine was the operator of a cryptocurrency-exchange platform, which also functioned as a market-maker by placing buy and sell orders through its "Quoter Programme".

B2C2 traded on the platform using algorithmic trading software designed to function with minimal human intervention. Built into the algorithm was a fail-safe "deep price" of 10 Bitcoin ("BTC") to 1 Ethereum ("ETH"), which would be invoked should input data from the platform be unavailable.

Quoine's oversights in making certain changes to the platform's critical operating systems led to the Quoter Programme's failure to generate new orders. This triggered the deep price in B2C2's trading software, matching B2C2's sell orders with the buy orders of two other traders ("Counterparties"). This resulted in 13 trades between B2C2 and the Counterparties made at a rate of 10 BTC for 1 ETH – approximately 250 times the then going rate of 0.04 BTC for 1 ETH.

The next day, Quoine unilaterally cancelled the trades as they were concluded at highly abnormal rates. B2C2 commenced proceedings against Quoine alleging a breach of contract and/or trust.

The Court's judgment

The court held that the contracts underlying the disputed trades were formed directly between B2C2 and the Counterparties, and not with Quoine, which was merely a service provider. As such, Quoine could not rely on the user agreement to cancel the transactions that took place at an aberrant value.

Furthermore, the user agreement contained an express term that once an order was fulfilled, such an action was irreversible. The automated contracts entered into by B2C2 and the Counterparties were therefore valid and enforceable.

Applying the Doctrine of Mistake

Quoine contended that the disputed trades were void for unilateral mistake.

The court found that where deterministic algorithms are concerned, it is the programmer's state of knowledge that is relevant. The inquiry is whether, when programming the algorithm, the programmer had actual or constructive knowledge that the relevant offer would only ever be accepted by a party operating under a mistake and whether the programmer was taking advantage of such a mistake.

The court concluded that B2C2's programmer could not have such knowledge nor could have programmed B2C2's trading software to take advantage of such a mistake. Furthermore, the Counterparties' mistaken belief that they were buying ETH for BTC at market prices was not a mistake as much as it was a fundamental term of the contracts.

The trades were also not void for common mistake. The parties did not enter into the disputed trades under a shared mistaken assumption that they were transacting at or around the going market rate for ETH. B2C2 was not labouring under such an assumption since it had intentionally pre-programmed the "deep price" of 10 BTC to 1 ETH.

Breach of Trust

While commending the Commonwealth cases and literature for accepting cryptocurrency as property, the court reserved the issue of whether cryptocurrencies are a species of property that can be subject of a trust. In any event, the court found no breach of trust since there was no certainty of intention on B2C2's part to create one.

Conclusion

This judgment is the first non-UK Commonwealth judicial decision to address how the doctrine of mistake should be applied to automated contracts made by computerised trading systems. It also adds to the debate over whether cryptoassets should be regarded as property, and if so, property of what precise nature.

Switzerland

New set of laws on blockchain and distributed ledger technology

Switzerland remains an attractive venue for blockchain and crypto businesses with its legal infrastructure being in constant development. The Swiss parliament approved the new set of Swiss laws on blockchain and distributed ledger technology ("**Blockchain/DLT Laws**") on 25 September 2020. Subject to a referendum, which is unlikely, the Blockchain/DLT Laws are likely to enter into force in early 2021.

The new Blockchain/DLT Laws address, among other matters, bankruptcy proceedings involving third-party crypto custodians. In particular, they create a clear legal framework for segregating crypto-based assets from third-party custodians in bankruptcy proceedings. The new Blockchain/DLT Laws also create a statutory claim to access and obtain data in the custody of a bankruptcy estate (i.e. after the bankruptcy of a company in possession of the data, such as a cloud provider). The legal community has generally welcomed this new framework as it provides greater procedural certainty in bankruptcy disputes that involve cryptocurrencies and other crypto assets.

Arbitration as a suitable dispute resolution mechanism for crypto disputes

Given that a large number of crypto businesses are located in Switzerland, a variety of possible disputes may arise from, for example, transaction executions, software licensing agreements, and the validity of contracts involving those businesses. Since transactions in the cryptocurrencies sector are characterised by, among other matters, high-frequency momentum, it makes sense to ensure that there is an effective and efficient dispute-resolution mechanism in relation to them. As a non-governmental dispute resolution process that nevertheless leads to an enforceable and binding award, arbitration perfectly suits the needs of crypto businesses. Arbitration proceedings are generally single instance and give parties an opportunity to tailor most of the aspects of their dispute-resolution process.

An arbitration clause can be agreed upon in the contract or after the dispute arises. The latter scenario is less common since it requires the parties to be able to agree on referring their dispute to arbitration in the heat of a conflict. It is therefore advisable to agree and incorporate a valid arbitration clause at the time of contracting. However, even after a dispute arises, the parties may still have at least one interest in common, namely, that their dispute not be resolved through a governmental institution such as a state court. The parties may therefore wish to consider referring their dispute to arbitration in Switzerland, such as under the Swiss Rules of International Arbitration (or any other internationally recognised arbitral rules in a different jurisdiction, should they prefer to do so).

Switzerland as a suitable arbitration venue for crypto disputes

Switzerland's arbitration-friendly approach makes it a popular venue for both local and international disputes. With the recent revision of the Swiss Private International Law Act and the Swiss Federal Tribunal Act, parties will be able to file applications in English to set aside an arbitral award to the Swiss Federal Tribunal. Given the international nature of the cryptocurrency business, this presents a significant advantage for the parties to arbitration by saving time, translation costs, and through the increased efficiency of the proceedings. These provisions are likely to enter into force in early 2021, making Switzerland even more suitable for crypto-related disputes.

Conclusion

The world of crypto continues to get more sophisticated and with it the legal remedies available to protect cryptoassets are starting to mature. As in any other area of commercial relationships, the parties should be aware of potential disputes and have a reliable and efficient dispute-resolution mechanism in place. A key factor in ensuring legal protection of cryptoassets will be the speed with which parties seek legal recourse. Cryptocurrency platforms will also do well to ensure that their user contracts are properly drafted to deal with systemic errors and technical glitches, which are inevitable in the world of technology.



South Africa: An emerging and credible international arbitration centre on the African continent



Siphokazi Kayana

Head of Dispute Resolution,
South Africa

T +27 87 210 0711

E siphokazi.kayana@cms-rm.com



Zaakir Mohamed

Head of Corporate Investigations
& Forensics, South Africa

T +27 87 210 0711

E zaakir.mohamed@cms-rm.com

Historically, South Africa was not regarded as a safe seat for international commercial arbitration. However, the situation is beginning to change due to recent developments, including legislation passed by the South African government to ensure that an effective legal framework is in place to regulate international arbitrations and the enforceability of arbitration awards.

Nevertheless, those developments have not yet had the result of attracting disputes which could be determined on the African continent (for whatever legitimate reason) by competent African judicial bodies. As a result, we still see disputes being run out of forums outside of Africa that could easily have been heard and determined on the continent.

For arbitrations that involve African parties, there is no longer a good reason not to consider running those cases from arbitration centers on the African continent, including South Africa, which has updated its legislation to be fully internationally compliant with the infrastructure and has the professional skill and know-how to ensure effective resolution of international commercial disputes. This is particularly the case in the current environment created by the COVID-19 pandemic, which limits international travel.

New legislation

At least 30 African countries have passed modern arbitration legislation, which can be broadly divided into two groups: the Organisation for the Harmonisation of Corporate Law in Africa ("**OHADA**") and the UN Commission on International Trade Laws Model Law ("**UNCITRAL Model Law**").

Until recently, international companies had legitimate concerns about having disputes heard and determined in South Africa due to South Africa's Arbitration Act 42 of 1965, which failed to regulate the procedural rules applicable to international arbitrations seated in South Africa and created the risk of arbitration awards being set aside by foreign courts.

South Africa's replacement legislation, the International Arbitration Act 15 of 2017 (the **"IAA"**), aligns itself with the UNCITRAL Model Law. This eliminates any uncertainty about how international arbitration proceedings would be regulated if seated in South Africa.

The IAA facilitates arbitration as a method of resolving international commercial disputes: it adopts the UNCITRAL Model Law for use in international commercial disputes; facilitates the recognition and enforcement of certain arbitration agreements and arbitral awards; and recognises South Africa's obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

The biennial 2020 Arbitration in Africa Survey Report identifies the major cities on the African continent that host arbitration cases, whether ad hoc or institutional. Johannesburg, Lagos, Cairo, Cape Town, and Durban are ranked as the top five, with three arbitration courts located in South Africa.

Advantages of an arbitration seated in South Africa

By aligning itself with modern arbitration legislation, South Africa has given foreign parties the appropriate assurance that the country's international arbitration laws meet recognised international standards and benchmarks. As South Africa transitions into the international arbitration scene, the UNCITRAL Model Law harmonises arbitration law and accommodates differing views on specific issues, especially in cases where the parties hail from vastly different legal backgrounds.

A key element of establishing a safe seat for arbitration is an independent legal profession with expertise in international arbitration, and an independent judiciary that respects a party's choice to arbitrate. South Africa satisfies both these elements, possessing highly skilled legal practitioners and arbitrators with the Arbitration Foundation of Southern Africa (**"AFSA"**) along with a judiciary that is strongly independent and politically autonomous.

Against the backdrop of COVID-19, South African dispute-resolution forums have adopted virtual platforms, which makes the dispute-resolution processes accessible, efficient and increasingly safe for international arbitration. Attending an arbitration by video conference makes access to arbitration easier and reduces costs, which for South African arbitrations are already very competitive.

The benefits of using local litigation and arbitration investigation support

Given the benefits of running arbitrations that involve African parties in Africa and specifically South Africa, there are also significant benefits in using local investigation teams to provide arbitration or litigation support. Those investigators often work closely with the legal teams to run cost-effective and efficient arbitrations, offering a range of services including the following.

- Investigations are conducted by professionals with local knowledge of the relevant legislative and regulatory prescripts. This ensures that all avenues are pursued effectively and evidence, information, interviews, documentation, and connections are thoroughly gathered to aid an attorney's efforts;
- These teams assist in the collection of evidence through the use of background checks, witness interviews and computer forensics, including locating individuals relevant to a case in question;
- Investigators can also conduct local asset-ownership searches (i.e. property and vehicle ownership searches) to assist assessing recovery in the case of civil-recovery disputes;
- Local forensic accounting and financial investigations are conducted by professionals who understand local tax and commercial laws. These procedures can help quantify losses and make recoveries in cases where claims are based on fraudulent activities;
- Computer and data analysis are conducted by parties on the ground, who also assist in identifying and gathering relevant information and evidence in accordance with local requirements to support a case; or alternatively, these investigators can identify weaknesses in a case;
- Based on information and evidence gathered during the course of the local investigation, clients can gain an informed view on the likely benefits or potential success of the case. They can also gain further insights in order to decide an appropriate litigation or arbitration strategy.

Understanding Consequential Loss



Phillip Ashley

Partner, United Kingdom

T +44 20 7367 3728

E phillip.ashley@cms-cmno.com



David Rutherford

Senior Associate, United Kingdom

T +44 20 7367 2494

E david.rutherford@cms-cmno.com



Madalena Houlihan

Associate, United Kingdom

T +44 20 7367 2398

E madalena.houlihan@cms-cmno.com

‘Consequential loss’ exclusion clauses are widely used in energy industry contracting. They are also widely used in other industries, such as the construction industry. However, the negotiation and drafting of such clauses does not always attain the level of scrutiny that is afforded to other contractual provisions.

CMS Guide to Consequential Loss Clauses in the Energy Sector

CMS has carried out a survey of consequential loss exclusion provisions across 38 jurisdictions with a specific focus on their use in the energy industry (the **“Consequential Loss Guide”**). It is available at: <https://cms.law/en/int/expert-guides/cms-guide-to-consequential-loss-clauses-in-the-energy-sector>

It is apparent from the Consequential Loss Guide that in every country surveyed there are doubts about the scope of the meaning of the words ‘consequential loss’ when used in such clauses.

Drafting of substantive exclusion clauses

Examples of these widely used clauses include:

- 1) The BP Oil International Limited General Terms & Conditions for Sales and Purchases of Crude Oil, used in global oil sales, state “...in no event, ... shall either party be liable to the other... in respect of any indirect or consequential losses or expenses ...”.
- 2) The FIDIC Silver Book provides: “Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under...”

- 3) The Shipbuilders' Association of Japan standard form shipbuilding contract states: *"The BUILDER shall have no responsibility or liability for any other defects whatsoever in the VESSEL than the defects specified in Paragraph 1 of this Article. Nor the BUILDER shall in any circumstances be responsible or liable for any consequential or special losses, damages or expenses including, but not limited to, loss of time, loss of profit or earning or demurrage directly or indirectly occasioned to the BUYER by reason of the defects specified in Paragraph 1 of this Article or due to repairs or other works done to the VESSEL to remedy such defects"*.

Arbitration clause 'double lock' exclusions

In addition, some of the international model form agreements also have 'consequential loss' exclusions in the arbitration clause. The AIPN Model Dispute Resolution Agreement (2017) states that:

"The Parties waive their rights to claim or recover, and the [Arbitral Tribunal] [Arbitrator] shall not award, any consequential, punitive, multiple, exemplary, or moral damages..."

The implications of such drafting might not be immediately apparent to non-aficionados of international arbitration. However, two key issues arise:

- First, if an arbitration clause requires an arbitrator *"shall not"* (or similar wording) award damages for consequential loss, the issue arises as to whether the arbitrator lacks jurisdiction to do so. If an arbitrator lacks jurisdiction to award 'consequential loss', damages awards that are not subject to appeal on error of law might otherwise be appealable on jurisdictional grounds.
- Second, as the arbitration agreement is severable, a different law may govern it than in the main body of the contract. If the main body of the contract and an arbitration clause each contain consequential loss exclusions, it is possible that different laws governing interpretation of those words apply.

Traditional Common Law Approach

England

Sir Kim Lewison sets out, in his seminal text *The Interpretation of Contracts*, "[w]here a contract excepts one party for liability for consequential loss, it will normally be interpreted as excepting him from such loss as is recoverable under the second limb of *Hadley v Baxendale*".

Hadley v Baxendale (1854) 9 Exch. 341 decided that, as a matter of law, an innocent party may recover for breach of contract:

- First, losses that may fairly and reasonably be considered to arise "naturally", i.e. according to the usual course of things from the breach of contract (the 'first limb' of *Hadley v Baxendale*); and
- Second, such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it (the 'second limb' of *Hadley v Baxendale*).

It is not entirely clear at what point the second limb of *Hadley v Baxendale* became commonly referred to as 'consequential loss', or the context in which this arose. However, a series of English Court of Appeal decisions confirmed the approach that 'consequential loss' in a contractual exclusion clause would be considered, by English law, to mean the second limb of *Hadley v Baxendale*.

United States

As far back as 1894, the United States Supreme Court accepted *Hadley v Baxendale* as "a leading case on both sides of the Atlantic" concerning the recoverability of losses.

The commentary to the Restatement (Second) of the Law of Contracts explains that: *"The damages recoverable for loss that results other than in the ordinary course of events are sometimes called 'special' or 'consequential' damages. These terms are often misleading, however, and it is not necessary to distinguish between 'general' and 'special' or 'consequential' damages for the purpose of the rule stated in this Section."* It is evident from the Restatement (Second) of the Law of Contracts that in the law of most United States jurisdictions the second limb of recoverable damages is also "sometimes called" consequential loss. There is a series of cases in the United States that follow the traditional English approach of applying this interpretation to exclusion clauses using the words 'consequential loss'.

Other common law jurisdictions

Until recently, the foregoing traditional approach appeared to be settled law in most common law jurisdictions. In addition to being the law in England and most United States jurisdictions, the traditional approach appears to have been adopted at some point in most other common law jurisdictions. For example:

- 1) Singapore still follows the traditional English law approach.
- 2) India still follows the traditional English law approach.
- 3) Scotland's law has largely evolved in concert with that of England.
- 4) Hong Kong generally follows the traditional English law approach.
- 5) Australia used to follow the traditional English law approach until recently.

Common law: Challenging the traditional approach

The foregoing traditional approach to equating 'consequential loss' in an exclusion clause to the second limb of *Hadley v Baxendale* was questioned, but not resolved, by Lord Hoffmann in *Caledonia North Sea Ltd v British Telecommunications* [2002] UKHL 4 where he reserved his position on the question as to whether "the construction adopted by the Court of Appeal was correct".

The traditional approach was overturned by the Victorian Supreme Court (Court of Appeal) in *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26. In *Regional Power Corporation v Pacific Hydro Group Two Pty Ltd* [2013] WASC 356 the Western Australian Supreme Court went on to state that the "natural and ordinary meaning of the words [consequential loss] begins with these words themselves, assessed in their place within the context of the [contract] as a whole".

The English courts have not yet followed Australia. There is *obiter dicta* to suggest at least some judges are sympathetic to the Australian approach. Two recent cases that questioned the traditional approach in England are *Transocean Drilling UK Ltd v Providence Resources plc* [2016] EWCA Civ 372 and *the Star Polaris* [2016] EWHC 2941 (Comm). However, in *2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd* [2020] EWHC 972, the High Court subsequently applied the traditional approach in the context of a 'consequential loss' exclusion clause.

Civil law approach

As a general rule, the analysis above in relation to the approach of common law jurisdictions to 'consequential loss' in exclusion clauses does not readily transpose to civil law jurisdictions.

France

According to Article 1231-4 of the French Civil Code, damages for contractual breach are limited to damages that are the immediate and direct consequence of the breach. Under French contract law, establishing whether the loss is direct or indirect is a matter of causal link.

Notwithstanding the above, 'consequential loss' clauses are used in contracts governed by French law. For example, the FIDIC contract wording literally translates 'indirect or consequential loss or damage' as "*la perte ou le dommage indirect ou consequent*".

French law doctrine has tried to propose definitions of consequential damage in order to conceptualise and clarify its various uses under French law. Two main meanings have been identified:

- First, a purely legal definition of consequential damage refers to 'second degree' damage, i.e. which is directly even though not immediately connected to the causal event, as opposed to indirect (or remote) damage. As such 'consequential loss' would be loss that is recoverable according to Article 1231-4 of the French Civil Code that the parties may elect to exclude.
- Second, the concept of consequential loss refers to economic losses. As such, consequential loss is a specific kind of intangible damage (including, for instance, *the lucrum cessans* under Article 1231-2 of the French Civil Code). In these circumstances, whether causation is direct or indirect is irrelevant.

As such, a case-by-case analysis is necessary, applying the above rules of interpretation, to establish the proper meaning of 'consequential loss' when used in a French law contract. Therefore, the use of the words in the context of a French law contract remain problematic.

Germany

German law does not explicitly recognise the terms 'consequential loss', 'direct loss' or 'indirect loss'. Notwithstanding the above, contractual exclusions of liability clauses using German law regularly seek to exclude 'consequential loss' without defining what is meant. Court decisions on the interpretation of the meaning of consequential losses are very limited in number and not always coherent.

The federal supreme court (*Bundesgerichtshof*) and a higher regional court (*Oberlandesgericht*) ruled in the 1990s that, in a contract which is subject to German law but written in English, terms such as 'consequential loss', which have a specific meaning in English law, will generally be construed according to English law principles.

Whether the above rulings of the German courts would still apply today is unclear, as the underlying assumptions have been criticised by prominent scholars. An alternative approach would be to equate 'consequential loss' with the concept of *Folgeschäden* (literal translation "consequential damage") or *mittelbare Schäden* that has developed in German law. It is generally agreed that costs to repair (or replace) damaged property or to heal an injured person are direct losses and not *Folgeschäden* or *mittelbare Schäden* and therefore not excluded as consequential loss.

Lusophone jurisdictions

Portugal, Brazil and Angola do not have the concept of 'consequential loss' embedded within their legal framework. However, the concept remains widely used in exclusion clauses.

Under Articles 562 and 564 of the Portuguese Civil Code ("**PCC**"), a party causing loss or damage to another has the obligation to compensate the injured party for damage suffered (*danos emergentes*) and loss of profits (*lucros cessantes*) that the non-defaulting party probably would not have suffered if the breach of contract had not occurred. The position is substantially the same in Articles 562, 563 and 564 of the Angolan Civil Code ("**ACC**") and Article 402 of the Brazilian Civil Code ("**BCC**").

The terms 'indirect' and 'consequential' are generally used interchangeably. This, perhaps, is a result of a common law drafting tradition. Although indirect loss is not defined by the PCC, ACC or BCC, it is widely understood to mean loss that is indirectly caused by the breach as a matter of causation. As there is only an obligation to pay damages for 'direct loss', it is arguable whether such an exclusion adds nothing to the position at law. Although many in the industry associate the term with *lucro cessante* (loss of profit), there is no obvious jurisprudence to support this approach.

Latin America (excluding Brazil)

The words 'consequential loss' have no given or recognised meaning in Peruvian, Colombian, Chilean or Mexican law. Article 1558 of the Chilean Civil Code; Article 2110 of the Mexican Federal Civil Code, Article 1321 of the Peruvian Civil Code and Article 1613 and 1616 of the Colombian Civil Code state that only 'direct damages' resulting from a breach of contract may be claimed.

As a consequence, there is uncertainty as to how an exclusion of 'consequential loss' should be treated in meaning or effect. In the Colombian energy sector 'consequential loss' is often associated with *lucro cesante* (loss of profit). However, it should not be assumed that it will be given that meaning as there is no clear jurisprudence on the issue. In Chile and Peru, it seems likely that 'consequential loss' will most likely be associated with 'indirect damage', which is not recoverable in law in any event. However, again, there is no clear jurisprudence on the issue.

Asia Pacific Civil Law

On the basis of the above analysis, it might be assumed that civil law jurisdictions in the Asia Pacific region follow civil code jurisdictions elsewhere. However, the issue is more complex.

Article 416 of the Japanese Civil Code allows a party to seek "*damages which arise from any special circumstances if the party should have foreseen such circumstances*". This wording has its origin in the second limb of *Hadley v Baxendale*. It is not clear from jurisprudence whether 'consequential loss' in an exclusion clause that would be equated to such special circumstances (or damages).

In turn, the South Korean Civil Act is modelled on the Japanese Civil Code. As such, the conceptual approach of *Hadley v Baxendale* has also made its way into South Korean law through the concept of 'special loss'. Absent clear jurisprudence, Korean law will be faced with the same conundrum as Japanese law as to whether 'consequential loss' should mean the second limb of *Hadley v Baxendale* or something else.

China takes an entirely different approach. As with many other civil law jurisdictions, the words 'consequential loss' in China have no attributed legal meaning. While its use should be avoided, it is possible that it would be given a wide interpretation to include loss of profits in all material types.

Conclusion

In addition to the above, the Consequential Loss Guide also covers a variety of associated issues such as the relationship between the words 'consequential loss' and the scope of other types of loss also excluded by the clause. The Consequential Loss Guide is available [here](#).

The Consequential Loss Guide demonstrates that the governing law will have an important impact on the construction and interpretation of a consequential loss exclusion clause. As a result, careful thought should be given to using model form clauses in jurisdictions where the concept does not readily translate.

The authors would like to thank the numerous lawyers at CMS that contributed to the Consequential Loss Guide.

Recovery of the Bank of Russia's expenses for additional financing of a bank under rehabilitation – the first application of this new legal provision



Igor Sokolov

Senior Associate, Russia

T +7 495 786 4074

E igor.sokolov@cmslegal.ru



Sergey Yuryev

Head of Dispute Resolution, Russia

T +7 495 786 3081

E sergey.yuryev@cmslegal.ru

In Russia, there have long been rules that allow creditors to hold a company's former owners and executives liable in the event of insolvency (referred to as subsidiary liability in insolvency). In this case, the amount that the individuals are liable for is based on the funds that remain outstanding to the creditors following the insolvency. Similarly, liability may arise without insolvency: upon the change of an entity's owner, it is not uncommon for claims to be brought to recover losses from the company's former management where the company has incurred losses as a result of the management's wilful acts or omission.

Experience shows that the largest losses are recovered from former executives and beneficiaries of banks, which is logical given the financial size of the banking sector. In September 2020, a Russian court of first instance made headlines by ordering the recovery of RUB 198bn (EUR 2.2bn) in losses from the former managers of the Moscow Industrial Bank ("**MInBank**").

The amount recovered was extremely high for the Russian judicial system. However, of more interest is the legal basis for the claim. The lawsuit was based on a previously dormant provision (paragraph 2 of Article 189.23(5) of the Law on Insolvency/Bankruptcy), which came into force in June 2018. This provision allows for the recovery of a new type of loss: the Bank of Russia's expenses for contributing funds to the capital of a credit institution subjected to insolvency prevention measures (i.e. rehabilitation). These expenses are calculated using a simple formula (i.e. the amount of funds spent by the Bank of Russia multiplied by 20 years and by the key refinancing rate). In fact, this formula determines the Bank of Russia's loss of profit rather than its direct losses. The Bank of Russia is required to use funds to prevent the insolvency of a bank under rehabilitation. The new provision provides compensation for the loss of income that could have been generated had these funds been applied in the usual manner (e.g. lending to banks).

Crucially, the Law on Insolvency/Bankruptcy specifies the following procedure for recapitalising a bank when rehabilitated by the Bank of Russia:

- In the first stage, after identifying critical financial and regulatory problems in a credit institution, the Bank of Russia reduces its charter capital to the amount of its equity, or, in the worst-case scenario, to one rouble.
- In the second stage, the troubled bank issues additional shares that the Bank of Russia acquires.

In this way, the bank under rehabilitation jettisons its former inefficient owners and managers. As the new owner of the bank, the Bank of Russia can sue the bank's former management.

The Law on Insolvency/Bankruptcy contains a rule that individuals controlling a credit institution (i.e. its former management and beneficiaries) are liable to the bank for any losses caused by wilful acts or omissions to act in the run-up to rehabilitation. This rule has often been applied in practice to allow compensation for a bank's losses due to a former manager's wrongdoings. A general standard of proof exists in such cases: the plaintiff must prove that the defendant committed a wrongful act or omission (i.e. a tort) that has a direct causal relationship with the adverse financial effect on the bank (i.e. the loss). In such cases, the courts examine in detail all the circumstances of the dispute in order to establish whether the defendant's actions amount to an abuse, or whether the losses resulted from the standard commercial risk inherent in any business activities.

The court's decision in the MInBank case illustrates the practical application of the new provision of the Law on Insolvency/Bankruptcy regarding the Bank of Russia's expenses. In the MInBank case, the court verified the procedure used by the Bank of Russia to calculate its expenses and found that it fully conformed with the formula prescribed by the statute. Losses in the amount of RUB 198bn were recovered jointly and severally from the 18 former members of the bank's Management Board.

As stated by the court, in this case, there was no need to scrutinise the work of the bank's former senior managers (e.g. to determine what loans they approved in order to extract assets from the bank). To hold them liable for these multi-billion rouble losses, the court only needed to establish that the defendants had not taken measures to ensure the proper functioning of the bank's internal controls. In other words, the mere fact that the Bank of Russia provided rehabilitation and additional financing is sufficient for the court to order the recovery of enormous amounts from the bank's former management. Importantly, both rehabilitation and additional financing are steps that are unilaterally taken by the regulator and require no approval from the court.

All 18 former members of the MInBank Management Board were held jointly and severally liable, despite their clearly different roles in the Management Board and the fact that they held their positions at different times. Moreover, the court held liable several members of the Management Board who had resigned in 2016 – two years before the new provision came into force. In its decision, the court explained that the *"exercise by the Bank of Russia of this power cannot be considered in the context of the retroactive effect of the material law"*. Thus, the court recognised that it was acceptable to deviate from the fundamental rule that a legal provision establishing liability in law cannot have retroactive effect.

Therefore, this first-time application of the new provision of the Law on Insolvency/Bankruptcy to allow the recovery of expenses incurred by the Bank of Russia in the rehabilitation of troubled banks has resulted in a judgment with serious grounds for concern. It reveals that the general standards of proof typically used in all loss recovery cases do not apply to this provision. The amount of loss is determined using the formula set down in the statute. Furthermore, it is known in advance that the recoverable amount will be immense. The finding of the defendants' liability was made without taking into account their respective responsibilities as members of the Management Board. Furthermore, the court allowed retroactive application of the rule on liability in relation to several defendants, which is extremely unusual for this type of case.

If the higher courts uphold the above approach, the risks will significantly increase for beneficiaries and senior management (i.e. members of management bodies) of Russian banks. In the event of the rehabilitation and additional financing of any Russian bank, it is almost inevitable that enormous amounts will be recovered from the bank's beneficiaries and management. Any possible arguments in defence are likely to be unsuccessful.

EU to launch the Public Prosecutor's Office with a Romanian appointed Chief Prosecutor



Mihai Jiganie-Serban
Senior Counsel, Romania
T +40 21 407 3821
E mihai.jiganie-serban@
cms-cmno.com

The European Public Prosecutor's Office ("**EPPO**") is a new EU body responsible for investigating, prosecuting and bringing to judgment offences affecting the financial interests of the EU. The EPPO is set to become operational soon and its central office will be based in Luxembourg. Laura Codruta Kövesi was appointed as the first European Chief prosecutor for a seven-year mandate. Prior to becoming the European Chief Prosecutor, Kövesi was the General Prosecutor of Romania and the Chief Prosecutor of the National Anticorruption Directorate, which is Romania's prosecution unit specialising in investigating crimes of corruption and crimes against the financial interests of the EU.

What is the EPPO?

The EPPO began as an initiative of 16 EU member states¹ to fight the defrauding of the EU budget. By the end of 2017, a regulation on establishing the EPPO was issued and the number of member states supporting the initiative increased to 20². At this stage, another two states³ have given their support for the creation of the EPPO, which was designed as an instrument for combating crimes such as fraud, corruption and cross-border VAT fraud. Support for the EPPO stemmed from the fact that existing authorities (i.e. the European Anti-Fraud Office, the European Agency for criminal justice cooperation, the European Police Office) appeared not to be able to conduct criminal investigations or prosecute fraud cases.

The structure of the EPPO is built on two levels: strategic and operational. The strategic level is composed of: the European Chief Prosecutor responsible for managing the EPPO and organising its work; and a college of prosecutors responsible for decision-making on strategic matters. A European Prosecutor from each member state will be appointed to the college. The operational level will feature: European delegated prosecutors responsible for conducting criminal investigations, prosecutions and bringing to judgment cases falling within the EPPO's competence; and a permanent chambers, which will monitor and direct the investigations and prosecutions, and take operational decisions.

One of the key features of the EPPO is represented by the ability to conduct an investigation in a coordinated manner based on a common European investigation-and-prosecution strategy, decreasing the time frame for proceedings while optimising results. Although the EPPO will not be able to perform the entire proceedings for a criminal case, its aim is to present a full picture for each criminal investigation while pooling expertise in areas such as criminal analysis, taxation, accounting and IT while operating as a single office without procedural or language barriers.

If the EPPO takes up an investigation, national authorities will step back from initiating their own investigation into that crime. These authorities are also obliged to report any relevant criminal conduct to the EPPO.

The European Delegated Prosecutor ("**EDP**") will carry out activities hand in hand with national police and law enforcement agencies, and will be able to undertake investigatory measures or instruct the competent authorities in his member state on how to proceed. There are a series of investigatory measures that member states must ensure during an investigation, including issuing search warrants, production of any relevant object or document, intercepting electronic communication, the tracking and tracing of objects by technical means, freezing instrumentalities or the proceeds of a crime, and obtaining data. On the other hand, certain aspects of an investigation remain the jurisdiction of national authorities since the EPPO must request that national authorities conduct arrests in accordance with their applicable national laws since the EPPO does not have the competence or relevant bodies for implementing measures such as arrests. In certain cases, if an individual is not present in the member state where the EDP is located, an European Arrest warrant can be issued through the competent authority.

A snapshot of the new prosecutor's track record

The reasons behind the appointment of Laura Condruța Kovesi as European Chief Prosecutor include her experience and results during her mandate as the Chief Prosecutor of the Romanian National Anticorruption Directorate ("**DNA**").

Kovesi was appointed as Chief Prosecutor of the DNA in 2013 for a three-year mandate, and was reappointed in 2016. During her time as the Head of the DNA, her office brought judgments against 68 high officials with 37 convictions and the percentage of acquittals in connection to these cases remaining below the European threshold of 10%.

Despite Kovesi's results while Head of the DNA, her tenure there corresponded with several constitutional challenges over the collaboration between the DNA and the Romanian Intelligence Service ("**SRI**") in criminal files, including secret protocols concluded between the two that raised questions about how the DNA carried out its activities. Ultimately, the Romanian Constitutional Court sanctioned the active involvement of SRI in criminal files and its collaboration with prosecutors' offices, including the DNA.

¹ Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Germany, Greece, Spain, Finland, France, Lithuania, Luxembourg, Portugal, Romania, Slovenia and Slovakia.

² The following countries decided to join: Estonia, Latvia, Italy and Austria.

³ The Netherlands and Malta.

EU funds fraud: EPPO vs. DNA and OLAF

At the national level, EU funds frauds are investigated by the DNA, the Romanian specialised prosecution office that probes corruption offences (e.g. bribery, influence peddling, abuse of office) and all types of crimes committed against the financial interests of the EU.

The European Anti-Fraud Office (OLAF), on the other hand, conducts administrative investigations, but does not have powers of law enforcement and is not in charge of prosecutions at the national level. Following an investigation, OLAF issues reports that include financial, judicial, disciplinary or administrative recommendations for the competent authorities.

In light of this, the EPPO is expected to have a big impact since it will have the authority to investigate, prosecute and bring to judgment offences committed against the budget of the EU, as opposed to OLAF, which can only perform an administrative investigation of these offences.

According to public statements, the EPPO and OLAF will avoid duplication of their work and will establish close cooperation aimed at ensuring that their mandates complement each other. OLAF will not open any administrative investigations parallel to an investigation conducted by EPPO on the same facts, and the latter may request the former to support its activities.

At the national level, the EPPO will act as a "hierarchically superior prosecution office" for the DNA and can exercise the right to take over a given investigation. In this circumstance, the DNA must transfer the investigation file to the EPPO and refrain from carrying out further activities in respect to the same offence.

Conclusion

A major reason for creating the EPPO is the enormous VAT losses from national budgets across the EU through cross-border fraud. This matter is highly important to the EU since in 2020 a series of improvements to the VAT system were implemented to improve tax collection (i.e. "VAT quick fixes"). In 2018, Romania recorded the highest national VAT Gap of 33.8%, which underscores the need for better instruments to manage such losses.

Given the large amount of European Funds going to many EU countries, including emerging members like Romania, as aid to combat COVID-19, the EPPO will have the authority to investigate acquisitions made during the pandemic.

Once functional, the EPPO will have the ability to conduct investigations in a coordinated manner based on a common European investigation and prosecution strategy, which will decrease the time frame of proceedings while optimising results. The EPPO, however, will not be able to perform the entire proceedings of a criminal case; certain investigation activities will remain in the competence of national authorities.

Considering that a series of investigatory measures, such as arrests, search warrants and intercepting electronic communications, remain in the competence of the national authorities of each member state according to their criminal procedures, the premise of respecting the fundamental rights and freedoms of persons will be maintained, eliminating all fears on the part of the public vis-à-vis any past controversies surrounding the DNA in Romania.

Only the future will tell if the EPPO, under the management of Ms. Kövesi, will fall under the same intense spotlight as the Romanian DNA and if it will be able to replicate the Romanian DNA's record conviction rate of over 90%.



Constitutional Judges act as a counterweight to the new Energy Policy in Mexico



Manuel Ferrara

Associate, Mexico

T +52 55 2623 0552

E manuel.ferrara@cms-wll.com

The current federal administration in Mexico has threatened the stability and growth of national and foreign companies dedicated to generating electricity from clean sources.

The state, through the Ministry of Energy and the Energy Regulatory Commission, has issued a series of regulatory acts to limit the participation and status of private companies that generate electricity from clean sources ("**Regulatory Acts**"). These acts are apparently based on the current government's vision of private initiative, but above all appears to be an effort to strengthen the state-owned Federal Electricity Commission ("**CFE**").

As a result, the affected private companies issued court proceedings claiming those Regulatory Acts were unconstitutional. The role of the Constitution and the Constitutional Judges has served as a genuine counterweight against the Regulatory Acts issued by the state.

How does this counterweight work?

This article explores the reasons and grounds by which the Constitutional Judges have protected the electricity industry against the Regulatory Acts of the current administration.

It is essential to bear in mind that in 2013, Mexico experienced a change in the electricity industry based on energy reform to the Constitution ("Constitutional Reform of 2013").

Before the Constitutional Energy Reform

According to the Constitution, it was the exclusive right of the federal government, through the state-owned the CFE, to generate, transmit, distribute, and supply energy as a public service. Therefore, the CFE was the sole provider of generation, transmission, distribution, and retail services.

Under the law before reform, private companies had permission to do certain activities concerning generation, conduction and the supply of energy, but only if it was to provide energy for their own use (i.e. self-supply) or to sell energy to the CFE. Private companies were not to provide energy as a public service.

The self-supply scheme turned out to be highly successful. Through this scheme, it was possible to attract billions of pesos of investment from private companies to generate more energy. The legal limitations did not slow the economic and social activity of the country over this supply, and the law did not consider this supply to be part of the public service. However, the activities in the energy sector were effectively no longer being done by the state through the CFE.

After the Constitutional Energy Reform

The energy reform was based on two principles:

- i) To have greater participation of economic agents in order to achieve an efficient and competitive developed market. In a market where the cost of generating electricity is recovered, prices are lower, supply conditions are better, and the quality of service constantly improves.
- ii) To comply with international treaties regarding the reduction of gas emissions through the use of clean technologies to generate power through private companies.

Under these principles, the Constitution stated that the national electricity system's planning and control – as well as the public service of transmission, distribution and supply of electricity – were exclusive activities of the federal government. Private companies were allowed to participate in other activities, such as the generation and commercialisation of electricity, in a market of free agreement and competition for the benefit of users.

Likewise, the foundations of Energy Reform were established to protect and care for the environment in all processes relating to the electricity industry. Thus, the legislation highlighted several obligations for participants, in terms of clean energy and reduction of polluting emissions, as a strategic transition to promote the use of clean fuels and technologies.

In order to avoid undue impact on the permissions acquired before the energy reform of 2013, a series of regulations were established to ensure that the permits and authorisations previously granted were respected in their terms and overseen under the provisions that were enacted.

The current administration has carried out a series of Regulatory Acts that, on the one hand, discourages the generation of electricity through the use of clean sources by private parties and, on the other, aims to reinforce the CFE. For instance, in the case of the power plants developed before the 2013 energy reform, these acts were carried out, ignoring the rules under which they were established.

The acts impose barriers on a regime of free enterprise and open competition in the wholesale electricity market in opposition to the regulatory framework established after the Constitutional Reform of 2013. Without justification, the Regulatory Acts favour the CFE, and private-sector participation is limited. Also, consumers are deprived of the benefits of an open market in the energy sector.

The Regulatory Acts are also opposed to the promotion of clean technologies and fuels by limiting the generation of electricity from clean sources. The acts favour conventional sources, which in turn produces greenhouse gases to the detriment of the environment.

Finally, the acquired rights of power plants constructed before the energy reform of 2013 are adversely affected by the Regulatory Acts since both the Constitution and the applicable laws foresaw that those rights would be respected.

Based on these arguments, and because the major principles of energy reform were reflected in the Constitution, the Constitutional Judges acted as a true counterweight by restraining the Regulatory Acts.

In some cases, they granted temporary stay-of-execution resolutions to restrain the effects of the Regulatory Acts. In other cases, these arguments were used to issue a first-instance ruling in favour of private companies.

Due to their importance, it is likely that the Supreme Court will ultimately resolve these constitutional disputes and will follow the same line of judgment held in the first instance since these Regulatory Acts violate the purpose of energy reform as it was established at the Constitutional and legal levels.



How to safeguard the continuity of arbitration in light of the COVID-19 pandemic?

////////////////////////////////////



Rodrigo Campero

Partner, Chile

T +56 22 4852 015

E rodrigo.campero@cms-ca.com



Stephan Luhrmann

Senior Consultant, Chile

T +56 22 4852 015

E stephan.luhrmann@cms-ca.com



Hugo Ojeda

Associate, Chile

T +56 22 4852 032

E hugo.ojeda@cms-ca.com

Law No. 21.226 – Origin and consequences

On 2 April 2020, Law No. 21.226 (**"the Law"**) came into force, establishing exceptions for judicial proceedings and hearings, deadlines and bringing actions in response to the impact of the COVID-19 pandemic in Chile.

In particular, Article 6 states: *"The evidentiary periods in all judicial proceedings pending before ordinary and specialised courts and arbitral tribunals in Chile, that began at the entry into force of this law, or that began during the state of emergency declared in response to the coronavirus crisis by the Ministry of the Interior and Public Security on 18 March 2020 through Supreme Decree No. 104, will be suspended until ten business days after the state of emergency, and its extensions, if necessary, have been lifted."*

As a result, from 2 April 2020 until ten business days after the ongoing state of emergency has been lifted, all evidentiary periods that started since that date or were in progress on 2 April 2020 are suspended.¹

¹ Article No. 6, Law No. 21.226.



To date, the state of emergency has been extended twice, which caused the suspension of all evidentiary periods from 2 April 2020 to the present. In other words, the evidentiary periods for trials in general, and for arbitrations in particular, have been at a standstill for more than seven months.

Given that there is no mechanism or public policy that guarantees control of the COVID-19 pandemic, it is unclear whether this state of emergency will be extended again.

Faced with this uncertainty and the indefinite standstill of judicial proceedings in the evidentiary period, the question arises as to whether arbitration can be continued despite this legal suspension, and under what circumstances an award can be issued within a reasonable period of time. As the famous Roman philosopher Seneca points out: *"nothing resembles injustice so much as late justice."*

Circumstances must be taken into consideration in order to continue with arbitration, despite the suspension provided by law

Unlike ordinary court proceedings, arbitration is a special dispute resolution mechanism. It is different as it arises from a contract and from the powers conferred by the parties upon the tribunal convened to issue an award. In addition, the tribunal is constituted and specially appointed by the parties or a third party to resolve specific legal conflicts.²

The parties have a greater degree of commitment and participation in arbitration, since they frequently establish by mutual agreement the rules of procedure that will apply to the arbitration, altering the general legal rules that ordinarily apply to judicial proceedings. This allows the arbitration to face the extraordinary incidents and circumstances that occur during the procedure with greater flexibility.

In view of this, the question arises whether the parties can modify the legal suspension arising from Article 6 of the Law and agree to continue with arbitration?

In our opinion, such an agreement is possible and binding for at least two reasons.

Firstly, the purpose of the regulation imposed by Article 6 is to respect the parties' rights of defence; that is, to prevent the impairment of their rights to present and dispute evidence during the evidentiary period while the state of emergency exists.

This was expressly indicated in the parliamentary debate of the Law, during which it was noted that *"the main objective of this legal initiative is for the courts of justice to continue to function; that when they do so they do not impair the right to defence of the people; that they follow all that is due process, in a situation that is extraordinarily complex."*³

Secondly, in the event that Article 6 is considered a rule of public order and cannot be altered by the parties, neither party will be entitled to claim the invalidity of the arbitration or to motion for the reconsideration of the legal suspension, as this would mean asserting something contrary to what was implied by a previous action or statement of that party, which is prohibited by law.

In effect, when the parties express their free, prior and informed consent, and in good faith continue the arbitration despite the suspension decreed by the Law, they will be unable to subsequently claim that the arbitration violates the law, because they would be asserting something contrary to their own actions or statements.

The Supreme Court has recognised the legal regulation arising from Article 6, stating that *"loyal and honest conduct must be maintained in law and, of course, no one can take advantage of the law to benefit from their own negligence or misconduct."*⁴

In view of this, and the lack of a judicial ruling regarding the legal nature of Article 6, in our opinion the only way to continue the arbitration is through the express agreement of the parties involved.

The option for the arbitrator to continue the arbitration by virtue of his position is not advisable because there is a high probability that the parties will claim an impairment to their right to defence, and will try to annul the arbitral award for violating the aforementioned legal suspension.

Conclusions

The spread of COVID-19 has seriously impacted legal proceedings and greatly extended their duration. In Chile, a law has been enacted that suspends the evidentiary period, preventing the continuation of judicial proceedings and undermining the right to trial within a reasonable time and the guarantee of achieving legal certainty in conflicts.

However, we conclude that the suspension of arbitration can be circumvented to the extent that the parties agree to continue the procedure by expressly modifying the regulation provided in Article 6 of Law No. 21.226. It is advisable that any such agreement be made expressly and in writing in order to avoid a claim of invalidity of the arbitration or the annulment of the arbitral award.

² Aylwin A. Patricio. "El Juicio Arbitral". ("Arbitral Proceedings" in English.) Published by Editorial Jurídica de Chile, 2009, Santiago, p. 20-21.

³ History and background of Law No. 21.226. p. 62, available at https://www.bcn.cl/historiadelaley/fileadmin/file_ley/7739/HLD_7739_37a6259cc0c1dae299a7866489dffb0bd.pdf

⁴ Supreme Court, ruling dated 30 November 2015. Docket No. 10.666-2015. Supreme Court, ruling dated 16 January 2013. Docket No. 6465-2012. Supreme Court, ruling dated 19 October 2010. Docket No. 2236-2009.

Electronic auctions in Slovenia offer challenges and opportunities for investors



Maja Šipek

Associate, Slovenia

T +386 1 62052 10

E maja.sipek@cms-rrh.com

Slovenia is slowly but surely implementing digital solutions into its justice system. Certain registries, including the court and insolvency registries, have already been digitalised and electronic filing in Slovenian court proceedings is now available. The next step in the digitalisation of the Slovenian court system will be electronic auctions.

In March 2018, an amendment to the Enforcement Act (*Zakon o izvršbi in zavarovanju*; or ZIZ) introduced a legal framework for online public auctions in enforcement proceedings, which envisaged a unified search platform for property to be auctioned, as well as the possibility for online bidding. The newly envisaged regime will not apply to sales in bankruptcy proceedings where the choice of the sale method is left to the discretion of the bankruptcy administrators.

Despite the amendment, the auction system is not quite there yet. In order to create the new online auction structure, the Act requires the Ministry of Justice in Slovenia to publish its rules of procedure and set up an online platform. Only upon that being achieved will the provisions regulating electronic public auctions enter into force.

The exact timeline for this to happen is still unclear. In August 2020, the public had its first glimpse of the progress of this work when the Ministry of Justice published its draft rulebook. The creation of this rulebook is a clear indicator that the digitalisation

process is moving forward and that the online system could be introduced in early 2021. Given this, investors should now put some thought into the opportunities, and possibly also into challenges, that the new electronic auction system will bring.

Transparency and better access to property auctioned

Currently, public auctions in enforcement proceedings are conducted in-person in court buildings. The public has limited information regarding movable and immovable property on sale since there is no unified court-run platform where one can perform searches based on types of property.

Following the amended ZIZ, the rulebook introduces an online platform for e-auctions (*e-dražbe*) where the public will be able to search the properties available at auctions. Every enforcement officer will be obliged to post the required information on the platform regardless of whether movable or immovable property is on sale.

For real estate, the rulebook envisages presentation of detailed information, including i) location, ii) floor, iii) area, iv) number of rooms, v) construction year, vi) initial price, etc. Users will also be able to perform searches based on any of these criteria. Further, users will be able easily to obtain the court appraisal report and information required to view the real estate in person online.

Under the new regime, electronic placing of offers will generally be required for the sale of real estate, which is administered by the court. However, the conduct of electronic auctions will not always be required for the sale of movable property. The decision on how the auction will be conducted, electronically or in person, will remain at the discretion of the enforcement administrator.

Impact on the market

The primary aim of digitalisation of public auctions was prevention of fraud, threats and cooperation between bidders at in-person auctions. It is hoped that the new process will significantly reduce the risk of auctions being tainted in this way and build confidence amongst participants, creditors and the public generally that a more transparent process will produce outcomes where assets are released at their market value. Indeed, the most logical economic impact of the new rules will be an increase in prices reached at public auctions. This means that creditors can expect a higher repayment of the claims that are being enforced.

We anticipate that this will likely be due to the fact that all auctions will be gathered on one platform where all interested parties will be able to keep track of ongoing sales quickly and easily. Therefore, the possibility of benefitting from information asymmetry will be significantly reduced.

Furthermore, electronic public auctions will make the participation of foreign investors much easier since they will no longer need to engage local proxies or travel to Slovenia to place an offer. This means that their costs of participation will be reduced. As such, the competition between potential buyers might be expected to become more intense which could deliver better returns for creditors.

The future

For the reasons set out above, it is expected that the introduction of online public auctions will limit possibilities to acquire real estate at an undervalue.

Online public auctions may also open an opportunity for creditors, to get repayment from the assets which are generally less attractive for investors such as co-ownership shares. While lack of interest in the purchase of co-ownership shares is, to a certain extent, understandable since they do not grant exclusive possession over a part of real estate, the rights deriving from such ownership structure are often underestimated. Increased competition might cause such benefits to be seen by investors who are seeking more aggressive opportunities to participate at public auctions, which in turn, means that creditors will be able to benefit from the sale of such assets.

The introduction of electronic public auctions in Slovenia represents a major change for enforcement proceedings in Slovenia and will also likely have an important impact on the market. With increased competition, creditors should also hopefully benefit from increased repayment of claims, as well as a more efficient and transparent sale process.



Third-party funding of litigation and arbitration in CEE



Aleksander Wozniak
Senior Associate, Poland
T +48 22 520 8455
E aleksander.wozniak@cms-cmno.com



Mateusz Gerlach
Associate, Poland
T +48 22 520 8450
E mateusz.gerlach@cms-cmno.com

To date, third-party funding in CEE has not been as popular as in the rest of Europe. However, along with the increasing number of disputes and rising costs, this has begun to change. The issues expected in relation to the COVID-19 pandemic – that can both result in more disputes and limit parties' abilities to finance them – is likely to speed up the growth of third-party funding across the region and add to its popularity.

The growing involvement of third-party funding firms in the CEE region was discussed during webinars organised by CMS Warsaw in October and November 2020. In this virtual setting, lawyers from CMS Warsaw: Małgorzata Surdek, Partner, Aleksander Woźniak, Senior Associate and Mateusz Gerlach, Associate, together with guests from Delta Capital Partners Management and Nivalion, examined the general framework, as well as practical aspects of this method of financing disputes and its advantages to potential litigants.

What is third-party funding?

The concept and framework of third-party funding has been succinctly outlined in the 2019 Winter Edition of our International Disputes Digest. In a nutshell, third-party funding is an external, non-recourse financing of claimants' or defendants' costs in arbitration or litigation by an entity not involved in the dispute itself. This is in exchange for a fee expressed as a percentage of sums recovered following a favourable award or judgment, and its enforcement.

What types of disputes can be funded?

Funders offer financing to parties acting either in court litigation or arbitration, as both claimants and defendants (in the latter, even where no counterclaim is pursued). Particularly in the case of defence funding, the financing agreement should clearly define what is considered a 'success' and thus, in what circumstances the funder should receive its remuneration. In any case, for a claim to receive the funding, its value has to reach a certain threshold to make it worthwhile for the funder. At present, this threshold is usually considered to be ca. USD 8–10m; however, there might be exceptions from these approximate amounts.

The good news for prospective litigants is that nearly every kind of dispute with monetary value may be eligible to receive financing. This includes, in particular, corporate and post-M&A disputes, antitrust private enforcement, IP, energy and infrastructure, as well as commercial and insolvency disputes.

A funder may also be interested in financing a whole portfolio of cases. Portfolio funding means that selected claims of a corporate client are pooled together in order to receive funding. There are no strict rules that apply to pooling the cases in a portfolio. The main advantage for a funder is the risk diversification, and for a party seeking the financing, the reduced cost of such funding. An added advantage for litigants is that certain claims of a lower value or a higher risk can be included in a portfolio, even where they are unlikely to be eligible for standalone financing.

As the practice shows, a wide variety of claims may receive third-party funding, making it extremely flexible as a financing tool. Whether or not to grant an application for financing is ultimately a business decision to be taken by the funder. The exact financing structure can be delineated by the litigant and the funder to result in a financing agreement that best suits the specific situation.

Who should look for third-party funding and when?

Third-party funding is potentially available to all types of litigants – most funders do not have any closed list of jurisdictions or types of entities eligible for financing. Both private corporations, as well as publicly owned entities, can apply for and receive funding. A recent example of the latter from the CEE region is a deal agreed earlier this year by a Lithuanian publicly owned heat provider company to finance its arbitration claim before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). In the private sector, third-party funding may be particularly useful for SPV companies that might not be sufficiently equipped to conduct complex and lengthy disputes and effectively pursue their claims on their own.

There can be plentiful reasons to rely on third-party funding when conducting a dispute. While it can simply be a source of financing for entities that cannot afford to enter into costly disputes, third-party funding can also be understood as a tool to control costs (as the funder manages the budget and its fee usually depends on the outcome) or as a risk-hedging device (usually, if a claim fails, the funder is not entitled to recover the invested amount). Third-party funding may also come with ancillary services, such as asset-tracing or public-relations support, that can also be advantageous to a funded litigant. In some disputes, third-party funding may leverage a party's position in negotiations and help to reach an amicable settlement – by demonstrating a funded entity's preparedness for a dispute.

What does the financing process look like?

In practical terms, the process of third-party funding starts with an application from a party seeking the financing. The case is then pre-assessed and the funder decides whether to proceed. If the funder is interested in financing the dispute, it will subsequently conduct a full-fledged due diligence of the dispute using its internal or external legal team. Based on the outcome of the due diligence, the funder either grants or rejects the application. A successful application leads to parties concluding a financing agreement which outlines the exact fee proposals and regulates other issues, such as the budget, the parties' obligations in case of reaching a settlement or discontinuation of proceedings, etc. The financing itself can be structured in various ways, including transferring funds to a claimant, or purchasing a claim or even a claimant itself.

Parties enjoy a wide discretion in shaping their agreement, as third-party funding in CEE remains largely unregulated by statutory law. Particular local regulations on contracts or litigation costs may impact the applicability or usefulness of this type of financing; however, to date there are no provisions of law specifically addressing third-party funding.

What happens when the dispute is over?

The consequences of the outcome of the dispute should be specified in the financing agreement; however, the common practice is quite consistent. Usually, the funder receives a share of the recovered (not only awarded) amount. On the other hand, if the financed party is unsuccessful, under a standard financing agreement it will have no obligation to return the financing, nor will it have to pay any fee to the funder, since no sum of money has been recovered. This highlights one of the key features and advantages of third-party funding: in view of the sunk litigation costs, there is virtually no downside for the claimant if the claim fails. The risk of the costs of the proceedings is shifted to the funder, and only a successful conclusion of the dispute brings material financial obligations to a funded entity.

How might the COVID-19 pandemic impact third-party funding?

There is hardly any doubt that the COVID-19 pandemic will have an impact on dispute resolution and consequently on third-party funding. As businesses face multiple challenges, the market can anticipate a greater demand for litigation and arbitration financing. These include insolvency of business partners, cash flow disruptions and potentially prolonged court proceedings. The number of contentious proceedings may rise, leading to more funds being tied up for extensive periods of time. This is likely to lead to further expansion of third-party funding in all jurisdictions across the CEE market.

EU to enact the Representative Actions Directive



Thomas Lennarz

Head of Dispute Resolution, Germany

T +49 711 9764 171

E thomas.lennarz@cms-hs.com



Peter Wende

Partner, Germany

T +49 711 9764 139

E peter.wende@cms-hs.com



Kenny Henderson

Partner, United Kingdom

T +44 20 7367 3622

E kenny.henderson@cms-cmno.com

On 4 December 2020, the European Union approved a new directive to facilitate consumer class actions, with the Directive on Representative Actions ("**RA Directive**") published in the Official Journal of the European Union (text of the RA Directive available [here](#)).

The RA Directive will set out minimum standards for procedural rules in member states ("**MSs**") for collective redress and injunctions for consumers. The claims will be brought by qualified entities ("**QEs**") on behalf of consumers. The RA Directive distinguishes between claims brought in a MS where the QE is designated (a "**domestic representative action**") and those brought by a QE in a MS where it is not domiciled (a "**cross-border representative action**"). QEs must meet additional criteria to bring the latter type of claims. However, as is explained below, the effectiveness of those safeguards is questionable.

Two other important features of the RA Directive are as follows. Firstly, it applies only to claims brought on behalf of consumers; it does not facilitate claims on behalf of legal persons. Secondly, the procedural mechanisms set out in the directive are only available for claims brought for breaches of instruments appended to the directive (i.e. the procedures are

not available for all types of claims). The instruments appended to the directive cover a wide range of harmonised areas, including data protection, financial services, travel and tourism, telecommunications and environment.

As the RA Directive sets out minimum standards, it is open to each MS to have collective proceedings and class-action mechanisms, which go beyond those specified in the RA Directive.

The remainder of this update summarises some of the key features of the proposed RA Directive.

Opt-in vs opt-out

Whether a collective redress mechanism operates on an opt-in or an opt-out basis is arguably the most significant feature of its risk profile to potential

defendants. Opt-in systems require persons to elect to participate in the class. In contrast, opt-out systems automatically include persons within the specified class, unless they choose otherwise. Opt-out mechanisms are therefore effective in aggregating claims where individual losses are low, but where the overall claim value may be significant.

The proposed RA Directive grants each MS the discretion to introduce an opt-in or an opt-out system, but they must implement an opt-in procedure at the minimum. This can be contrasted with the Commission's original draft of the directive, which required each MS to introduce an opt-out mechanism in certain circumstances. Potential defendants will be relieved to see that this text has not survived. Further positive news for defendants is that where a MS chooses to introduce an opt-out system, only consumers habitually resident in that state can be automatically included in the class. Persons who reside elsewhere must proactively opt-in.¹ The position for injunctive relief is different in that a QE may seek an injunction without the mandate or participation of consumers.²

Adverse costs rules

Adverse costs rules are helpful in deterring unmeritorious claims. These rules are the norm in Eu-rope, albeit some countries operate statutory caps on the recoverable-cost quantum. According to the proposed text of the RA Directive, the principle of cost shifting will be retained per local law, which is reassuring for prospective defendants.

Certification stage

Many collective redress mechanisms have a "certification stage" whereby a court will dismiss claims that fall short of the requisite certification standard.

Unfortunately, the proposed RA Directive has little to say on this topic. The operative provisions simply state that the courts will assess the admissibility requirements of a representative action in accordance with national law and the provisions laid down by the RA Directive.³ Thus, it is up to the individual MSs to set and apply their own conditions.

While not strictly a certification process, the directive states that MSs may dismiss "*manifestly unfounded*" cases at the earliest possible stage.⁴ An early opportunity for summary disposal is welcome, although "*manifestly unfounded*" is a high threshold.

¹ Draft RA Directive, article 5b, paragraph 3.

² Draft RA Directive, article 5a, paragraph 2.

³ Draft RA Directive, article 5, paragraph 1c.

⁴ Draft RA Directive, article 5, paragraph 6.



Destination of unclaimed sums

The destination of unclaimed sums is an important issue for defendants, particularly in opt-out mechanisms. In principle, all opt-out systems ultimately become opt-in in that members of the class must engage with the distribution process following trial or settlement in order to receive their share of the damages. Many factors influence the rate of participation: there are reports of low participation rates in consumer claims, sometimes as low as 1 per cent.

The destination of unclaimed funds should be less of an issue for opt-in mechanisms. By their nature, the affected consumers have identified themselves, making meaningful distribution far easier than for an opt-out claim. Once again, the proposal gives MSs full discretion in this.

Punitive or exemplary damages

The recitals to the draft RA Directive state that, to prevent the misuse of representative actions, punitive damages should be avoided: *"This Directive should not enable punitive damages being imposed on the infringing trader, in accordance with national law."*⁵ This is a welcome provision and is in keeping with European traditions of awarding damages on a compensatory basis.

Standing

As noted in the introduction, claims are brought by QEs on behalf of consumers.

The requirements for a QE bringing "domestic representative proceedings" are vague. The RA Directive merely requires that MSs ensure that the criteria for QEs *"are consistent with the objectives"* of the Directive.

To be approved as a qualified entity for cross-border proceedings, organisations must, among other things, prove at least 12 months of actual public activity in the protection of consumer interests, demonstrate their non-profit status and ensure the independence of those persons, other than consumers, who have an economic interest in the class action. Once admitted by a MS, QEs will enjoy mutual recognition, allowing them to operate throughout the EU.

MSs have discretion to extend these stringent qualifying criteria to QEs bringing domestic representative actions, but these criteria should not preclude the *"effective and efficient functioning"* of claims.

⁵ Draft RA Directive, recital 15a.

Where MSs do not introduce more specific requirements for QEs bringing domestic representative actions, this arguably creates a lacuna for cross-border domestic representative actions. A special purpose QE can be set up in the MS where the claim will be filed, therefore making the claim a domestic representative action and avoiding the more onerous requirements for cross-border representative actions.

Role of litigation funders

The RA Directive provides that insofar as domestic law permits litigation funding, conflicts of interest should be prevented and that funders should *“not divert the action from the protection of the collective interests of consumers.”*⁶ Thus, the Directive imposes restrictions on the degree of control a funder wields over the conduct of a dispute even if there was no pre-existing restriction in domestic law.

Impact of final decisions

A final decision on the existence of an infringement can be used as evidence by both parties in the context of any other actions filed to seek redress *“against the same trader for the same infringement”*.⁷

Comment

The introduction of the RA Directive is a significant step in the development of collective proceedings in Europe and is part of a broader trend, as illustrated by other recent developments:

- The introduction of an opt-out class action mechanism in the UK for competition claims in 2015 (see Law Now articles [here](#) and [here](#));
- Germany’s enactment of a “model declaratory action” (Musterfeststellungsklage) in 2018;
- The English Court of Appeal ruling in October 2019, which permitted an opt-out data protection class action to proceed against Google (see Law Now article [here](#)); and
- The introduction of an opt-out class action mechanism in the Netherlands in January 2020.

As explained, the RA Directive provides minimum standards that each MS must meet. As a result, the greatest impact will likely be felt in MSs that presently do not have workable mechanisms for collective proceedings. There are two other important points that should be noted. Firstly, there is nothing to stop MSs from introducing procedural rules that go beyond the minimum requirements set out in the RA Directive and make collective proceedings even easier to implement. Since the majority of MSs will be required to examine their procedural laws over the next 24 months, pro-claimant interests may lobby for dramatic changes. Secondly, as noted above, adverse-cost rules serve an important check on unmeritorious claims. Many civil-law countries cap the amounts payable in adverse costs, often at low figures. Those caps function for low-value claims, but claims facilitated by the RA Directive will often be high value. For those claims, it is questionable whether the caps on adverse costs are effective, and relevant MSs are advised to re-evaluate those rules.

Clearly, large corporates must prepare to meet the trend towards more class actions in Europe.

⁶ Draft RA Directive, article 7, paragraph 1.

⁷ Draft RA Directive, article 10.

CMS around the globe

The Americas

Bogotá
Lima
Mexico City
Rio de Janeiro
Santiago de Chile

Europe

Aberdeen	Edinburgh	Lyon	Sarajevo
Amsterdam	Frankfurt	Madrid	Seville
Antwerp	Funchal	Manchester	Sheffield
Barcelona	Geneva	Milan	Skopje
Belgrade	Glasgow	Monaco	Sofia
Berlin	Hamburg	Moscow	Strasbourg
Bratislava	Istanbul	Munich	Stuttgart
Bristol	Kyiv	Paris	Tirana
Brussels	Leipzig	Podgorica	Utrecht
Bucharest	Lisbon	Poznan	Vienna
Budapest	Ljubljana	Prague	Warsaw
Cologne	London	Reading	Zagreb
Duesseldorf	Luxembourg	Rome	Zurich

Algiers
Casablanca
Johannesburg
Luanda
Mombasa
Nairobi

Africa

Abu Dhabi
Dubai
Muscat
Riyadh

Middle East

Beijing
Hong Kong
Shanghai
Singapore

Asia-Pacific

Knowledge and Know How

You can access our guides and publications at cms.law. Recent examples include:



CMS Expert Guide to International Arbitration: The Guide provides a detailed overview of the law and practice of arbitration in a number of jurisdictions. The first volumes of this edition focus on 29 jurisdictions in Western Europe, Central and Eastern Europe, Middle East and North Africa. Further volumes will cover South Asia, South East Asia, the Pacific and the Americas.



CMS Disputes Talk podcast: In these uncertain times, global businesses in almost every sector are facing challenges brought about by an unprecedented operational climate. In order to help you navigate, we launched an interactive online event series – covering international dispute resolution hot topics – the CMS Disputes Talk. Have a look at our first four sessions which you can re-watch or listen as a podcast. You can also access our podcasts on our CMS Disputes Talk Spotify channel.



The CMS Expert Guide to consequential loss in the energy sector: The Guide provides a summary of the approach to consequential loss in over 30 jurisdictions.



CMS Expert Guide to Recognition and Enforcement of Judgments: The question of where and how to enforce a judicial decision in a foreign jurisdiction is crucial in cross-border disputes. Whereas in an ideal world “right should know no boundaries and justice no frontiers”, the practical reality is often quite different. Our Guide provides an overview of the conditions for the enforcement both of court judgments and arbitral awards in 10 jurisdictions.



CMS Expert Guide to COVID-19 Corporate Crime & Regulatory Issues: This Guide covers more than 20 jurisdictions, highlighting potential criminal and regulatory risks (and possible follow-on claims down the line) associated with operating or re-opening businesses during or after lockdown, while risk of exposure to the virus remains for employees and the general public.



CMS Guide to Anti-Bribery and Corruption Laws The current edition of the Guide covers more countries than ever before, assessing the laws in 42 countries. We include full coverage of the BRIC nations, as well as increased coverage in Asia (China, Singapore, Thailand, Malaysia and Indonesia), the Middle East (the UAE, Saudi Arabia and Oman) and South America (Brazil, Mexico, Chile and Colombia).

Law-Now™

Law-Now™ Subscribe for free access to disputes-related news and commentary directly to your inbox. Choose to receive timely updates on areas of interest that relate to you and your field of interest. Register at cms-lawnow.com.



LinkedIn Follow the CMS Dispute Resolution Group on LinkedIn to be part of the conversation as we post articles, event information and industry commentary.



Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.
cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Riyadh, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law