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International Disputes Digest

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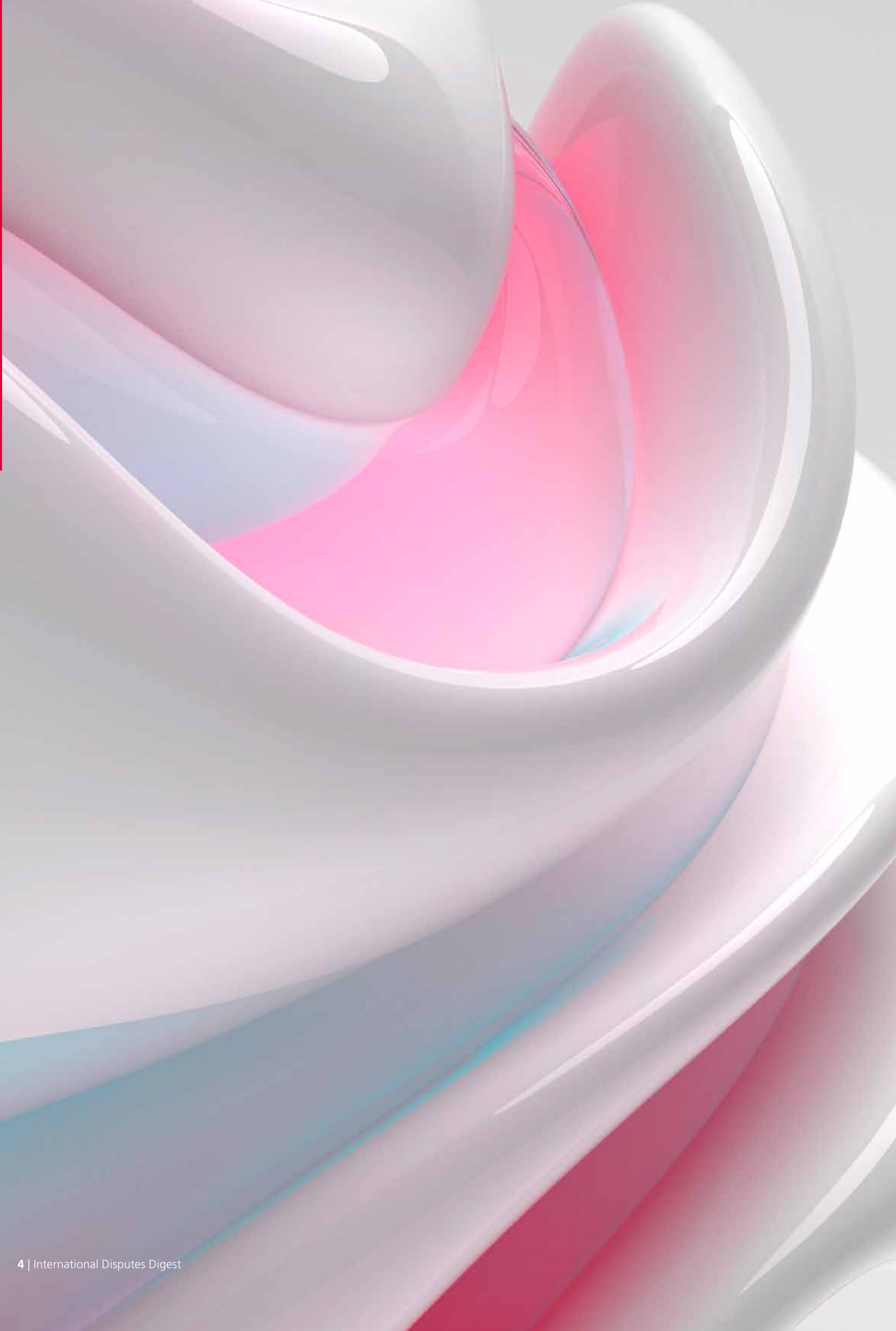

Introduction

Welcome to the summer edition of the International Disputes Digest, a bi-annual publication that highlights, explores and analyses the latest trends in the global dispute-resolution sector.

Although the worst of COVID-19 seems to be over, the world is both struggling with the pandemic's aftermath and preparing for the possible spread of new variants. At the same time, supply-chain deficiencies, global inflation, rising energy prices and the war in Ukraine represent yet more uncertainties the international business community must face in the immediate future. We hope this publication provides you with the resources, knowledge and confidence to overcome whatever difficulties the future may hold.

In this edition, our colleagues consider how the pandemic has irrevocably impacted the world of dispute resolution. CMS expert Rob Wilson is interviewed about the current trend to make the international dispute resolution process more environmentally sustainable and how the legacy of COVID-19 was a catalyst for reform.

The EU's Representative Actions Directive and how it is set to reshape the consumer protection landscape across the union is the subject matter of an article authored by our Polish colleagues. CMS Ukraine also explore how sanctions and national courts are being used by Ukraine in its bid to seize Russian assets in the wake of the devastating Russian invasion.

In terms of global trends our experts examine legislative developments in the world of NFTs and crypto-currency; how attempts to implement windfall taxes on energy companies in response to a spike in energy prices has become a legal Pandora's Box across the EU; measures to minimise the risk of post-completion M&A disputes; and an overview on current issues surrounding third party litigation funding.

The Unified Patent Court system is the subject of another article, which examines the UPC now that it has entered its long-awaited implementation stage.

Our experts in Spain explore the key issues surrounding recognition and enforcement of arbitral awards in Spanish law when a foreign court hands down the award. In China, we provide updates on efforts to modernise the nation's arbitration law, which was first passed in 1994. In Peru, we analyse how "umbrella clauses" can be employed to ensure that the obligations assumed by a host state in an investment contract are protected by international law.

Lastly, our colleagues discuss how a major litigation case impacts reputation and what options litigation teams have to fight back.

We hope you find this digest to be an essential resource, and we encourage you to contact us directly if you have ideas or questions pertaining to any of the topics discussed in this edition.

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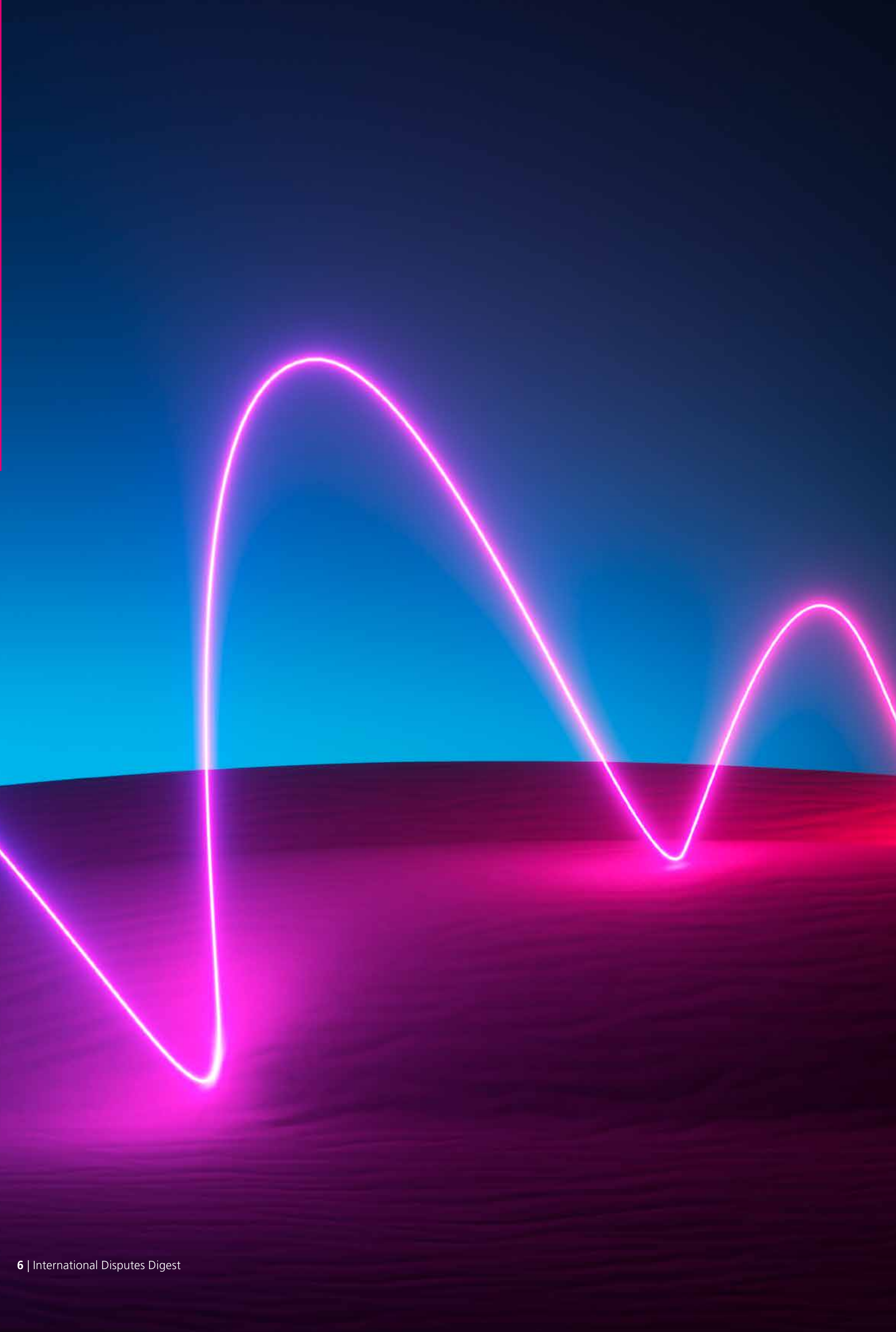

Representative Actions Directive – the European and Polish perspectives

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The Representative Actions Directive enacted by the EU in late 2020 is set to reshape the consumer protection landscape across all EU member states. By introducing brand-new legal mechanisms, this will soon open the path to cross-border litigation of mass claims – which will potentially involve thousands or more consumers. European businesses who regularly face this type of legal issue on their home ground should now keep an eye open for the fresh assortment of challenges and the widespread consequences that the new regulations may bring.

The Representative Actions Directive (Directive 2020/1828, the RA Directive) requires EU member states to introduce (by June 2023 at the latest) legislation that will facilitate bringing before their courts and administrative bodies representative actions (i.e. mass U.S. class-action style claims for protection of the rights of consumers). Consumer rights that will be covered using the recently designed instruments span a multitude of business sectors. The new mechanism will apply to both domestic and cross-border disputes and will enable consumers to seek a variety of different measures.

In what sectors will representative actions apply?

According to the RA Directive, the new mechanisms will apply to infringements of the collective interests of consumers that are protected under EU provisions listed in an annex to the RA Directive. These encompass over sixty EU acts that regulate and harmonise member states' laws in a variety of sectors, such as energy, health, travel, financial services, and telecommunications. The RA Directive is a supplementation, rather than a replacement of the existing tools of consumer protection.

Who can bring representative actions?

The RA Directive requires that representative actions on behalf of consumers will be brought by "qualified entities" designated by EU member states. Concerning cross-border representative actions, the RA Directive sets out several criteria that a qualified entity must meet: among others, a non-profit character and a statutory purpose demonstrating its legitimate interest in protecting consumer interests. Member states are also allowed to use the same criteria for the appointment of qualified entities to bring domestic representative actions, as well as designating public bodies as qualified entities. Members states will be required to inform the public about qualified entities for the purpose of domestic representative actions, and to provide information to the EU Commission about qualified entities and cross-border representative actions. The Commission will maintain and oversee a public list of such entities.

What types of claims can be pursued a representative actions?

Generally, two types of means of protection are envisaged in the RA Directive: injunctive and redress measures. However, EU member states might introduce further solutions within the framework of representative actions.

Injunctive measures are aimed at ceasing or prohibiting a practice, which constitutes an infringement of the consumer rights protected under the RA Directive. These can also be pursued as provisional measures and may establish that a practice in question constitutes infringement or obligates the publication of the decision on the measure or the issuance of a corrective statement. Moreover, failure or refusal to comply with an injunctive measure will be subject to penalties. Qualified entities pursuing injunctive measures will not need to obtain an expression of intent from individual consumers and will not be required to demonstrate a defendant's liability through intent, negligence, loss or damage to individual consumers.

Redress measures require entities who committed an infringement to provide remedies to consumers, encompassing reimbursement or reduction of price, compensation, contract termination, replacement, or repair. To be included in and bound by the outcome of representative action, consumers will need to express their wishes, explicitly or tacitly. In the latter case, as the consumers are not individually specified, the redress measure should at least describe the group of consumers entitled to benefit from the remedies granted. Regarding, cross-border representative actions, only an explicit expression of intent will be sufficient. Parties to the representative action will also be able to propose a settlement redress for the consumers concerned, which will be subject to approval by the court or the administrative body conducting the proceedings.

In their transposition of the RA Directive, member states may also make it possible to seek both injunctive and redress measures in a single representative action.

In addition, the court or administrative body conducting the proceedings will be able to obligate the unsuccessful party to inform the consumers about the result of a particular representative action.

How will the procedure look?

The RA Directive does not include any particular procedure applicable to representative actions. However, it provides for several specific rules that will have to be taken into consideration by member states. Notably, member states are required to implement rules of disclosure of evidence. Also, it will be possible for member states to rely on final decisions issued in representative actions as evidence in other proceedings against the same trader for the same practice. Furthermore, pending representative actions, proceedings will suspend or interrupt limitation periods of claims that the involved consumers might have.

On the other hand, the RA Directive does not set precise standards of certification, which is usually one of the fundamental aspects of any class-action type proceedings in many jurisdictions. In this respect, the RA Directive provides that a qualified entity bringing a representative action will be required to provide the court or administrative body with sufficient information about the consumers concerned and that the court or administrative body conducting the proceedings should have the possibility to dismiss manifestly unfounded cases at the earliest possible stage.

How will representative actions be financed?

The matter of the costs of the proceedings is largely left out of the scope of harmonization. Consequently, the RA Directive provides that the unsuccessful party should bear the costs as per applicable domestic rules and that individual consumers should not pay the costs, except under exceptional circumstances where costs were incurred as a result of the individual consumer's intentional or negligent conduct.

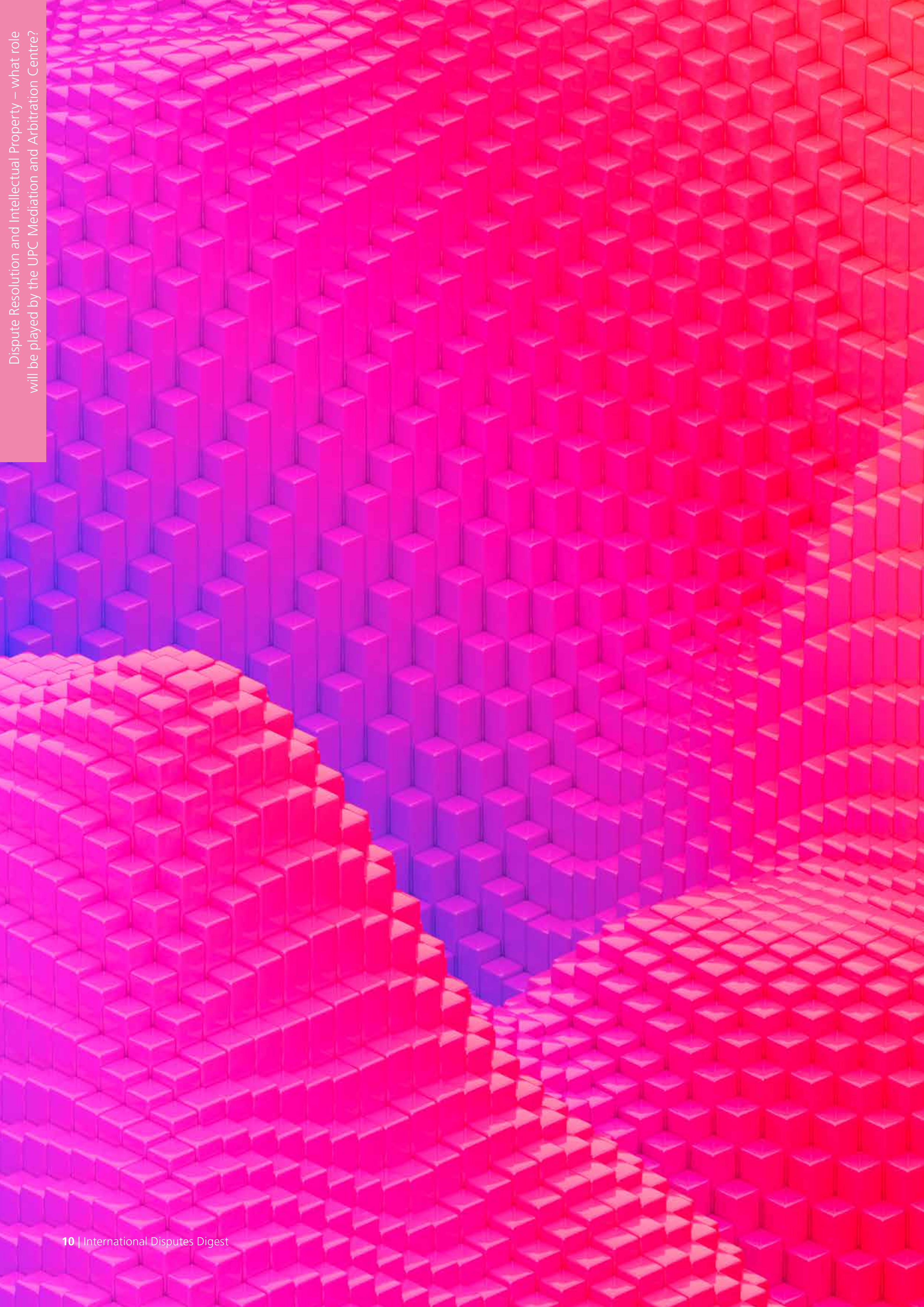
Interestingly, the RA Directive sets out specific rules for third-party funding of representative actions for redress measures. Namely, third-party funding will be subject to scrutiny to avoid a possible conflict of interest or adverse effects of third-party funding on the collective interest of consumers. The inclusion of the abovementioned rules makes the RA Directive the first piece of legislation on the EU level addressing third-party funding, indicating its growing importance for dispute resolution, particularly as a tool enabling access to justice.

How representative actions might work in Poland?

In Poland, the RA Directive will have to fit into the existing system of protection of the collective rights of consumers, which can be divided into three main categories. Firstly, the protection of consumers in general falls under the competence of the President of the Office of Competition and Consumer Protection, an administrative body that conducts ex officio investigations that may result in issuing declaratory decisions, as well as imposing significant financial penalties that can later be appealed to a specialized court. Secondly, the Financial Ombudsman has the power to initiate proceedings against financial institutions on behalf of their clients, concerning unfair commercial practices (as defined in Polish provisions implementing the Directive 2005/29/EC). Finally, mass claims concerning consumer protection can be pursued within the Polish group-action litigation system, which is based on an opt-in structure, must involve at least ten individual claimants, and provides for an elaborate process of certification.

Poland should adopt and publish the provisions implementing the RA Directive by 25 December 2022 and apply them on 25 June 2023. However, to date, no draft bills or other official documents concerning the transposition of the RA Directive have been published.

If you are interested in the subject, please have a look at our new CMS European Class Actions Report 2022.



Dispute Resolution and Intellectual Property – what role will be played by the UPC Mediation and Arbitration Centre?

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With the ratification of the Unified Patent Court Agreement (UPCA) by Austria on 18 January 2022, the Unified Patent Court (UPC) system entered the implementation phase after a long period of delay, which was mainly due to Brexit and a constitutional complaint in Germany. In line with a general ADR-friendly trend at an EU level, the UPC system, in addition to a Court of First Instance, a Court of Appeal and a Registry provide for the installation of a Patent Mediation and Arbitration Centre with seats in Lisbon and Ljubljana. Also, outside the UPC system, ADR in IP-related matters are on the rise.

Use of Arbitration in IP-related matters

Arbitration clauses have always been used in IP-related contracts such as license agreements, non-disclosure agreements (NDAs), research and development agreements (R&D Agreements) as well as transactional contracts with an IP connection. The reasons for choosing arbitration differ from case to case. For instance, arbitration is used to protect trade secrets or to ensure the expertise of the decision makers. Irrespective of the reasons for opting for arbitration, parties have the possibility to shape the proceedings in arbitration to a far larger extent than is the case in court proceedings. This crucial role of private autonomy is precisely the reason why arbitration has so far played a comparatively minor role in disputes concerning the validity of IP rights. Pursuant to a still widely adopted view, private arbitral tribunals lack the power to decide on the status of IP rights granted by public authorities. It has been argued that this power is reserved for the exclusive jurisdiction of the competent state courts.

The restrictive position that disputes concerning the validity of patents would be categorically excluded from arbitration is increasingly criticised and on the retreat. For instance, the District Court Munich recently expressed strong skepticism in this regard (judgment of 5 May 2021, docket number 21 O 8717/20). In an *obiter dictum,* the court took the view that such exclusion is justified only where a decision with an *erga omnes* effect on the validity of a patent is at stake, since such a decision would conflict with the privity of arbitration. By contrast, the court saw no reason why an arbitral tribunal should be prevented from deciding on such a matter with *inter partes* effect (e.g. by ordering a party to apply for the deletion of a patent).

Implementation of the Patent Mediation and Arbitration Centre

The forthcoming establishment of the Patent Mediation and Arbitration Centre provides opportunities to discuss the arbitrability of IP-related matters, since it raises the question of what disputes may be referred to the Centre.

The Mediation and Arbitration Centre will have to adopt Mediation and Arbitration Rules. While the mediation rules are publicly available in the fifth draft version of 2015, little is known about the design of the arbitration rules. However, some key features can already be derived from the UPCA.

Pursuant to Article 35(2) UPCA, the Mediation and Arbitration Centre will provide facilities for mediation and arbitration of patent disputes falling within the scope of the UPCA. The scope of the UPCA is regulated by Article 3 and applies to any European patent with unitary effect. In addition, Article 32 vests the UPC with exclusive competence in respect of a comprehensive list of matters related to unitary patents, including actions for revocation of patents and for the declaration of the invalidity of supplementary protection certificates. At the same time, Article 35 (2) UPCA provides that a patent may not be revoked or limited in mediation or arbitration proceedings. The competence of the Mediation and Arbitration Centre will therefore to a large extent depend on the interpretation of this exception.

Good arguments exist to read the exception narrowly and limit it to the revocation or limitation of a patent with erga omnes effect. This would allow arbitral tribunals to decide on unitary patents comprehensively with inter partes effect, such as by prohibiting a party from appealing against it or obliging the party to withdraw it. This view is also supported by Clause 11(2) of the draft Rules of Procedure, which is applicable irrespective of whether the arbitration or mediation proceedings are administered by the Mediation and Arbitration Centre:

> Pursuant to Rule 365 the Court shall, if requested by the parties, by decision confirm the terms of any settlement or arbitral award by consent (irrespective of whether it was reached using the facilities of the Centre or otherwise), including a term which obliges the patent owner to limit, surrender or agree to the revocation of a patent or not to assert it against the other party and/or third parties.

However, if arbitral awards by consent are recognised, this argues in favour of granting arbitral tribunals a corresponding decision-making power as a whole, since an arbitral award rendered on the basis of adversarial proceedings like a settlement agreement has legal effect only between the parties.[1]

Regarding enforcement, Article 35 (2) UPCA provides that the rules applicable to the enforcement of orders and decision by the Court "apply mutatis mutandis to any settlement reached through the use of the facilities of the Centre, including through mediation." Whereas the term "settlement" could be understood in a narrow sense and thus only apply to awards by consent, the more general term *"règlement d'un différend"* used in the French version of the UPCA would also allow a broader interpretation including regular awards.

Finally, insofar as patent-related disputes raise issues beyond unitary patent law, the question arises to what extent such issues can be disposed of in proceedings administered by the Mediation and Arbitration Centre. A too rigid approach would lead to a fragmentation of the proceedings, reducing the attractiveness of the Centre. Conversely, it cannot be assumed that the Contracting States of the UPCA, by making limited resources available in patent matters, intended to provide services for the settlement of disputes entirely unrelated to unitary patents. Against this background, it will be interesting to see where the boundaries will be drawn.

[1] The situation is different where arbitral awards have erga omnes by law, as it is the case in Belgium pursuant to Art. 51 (1) of the Patent Act of 28 March 1984 (*« Lorsqu'un brevet est annulé, en totalité ou en partie, par un jugement ou un arrêt ou par une sentence arbitrale, la décision d'annulation a contre tous l'autorité de la chose jugée sous réserve de la tierce opposition. »)*

The future role of arbitration outside the UPC system

The design and scope of competence of the Mediation and Arbitration Centre will also have an impact on ADR beyond the UPC system. The UPCA assumes as a matter of course that mediation and arbitration proceedings in connection with unified patents can be conducted outside the UPC system. It is even expressly provided that settlements reached in such proceedings may be confirmed by the UPC.

Unlike the UPCA in respect of the Mediation and Arbitration Centre, institutional arbitration rules such as the ones of the ICC or the WIPO do not contain any limitations on the type of disputes. Instead, those rules apply if the parties agree on their applicability, subject to overriding mandatory law. Considering the number of open questions in connection with the competence of the Mediation and Arbitration Centre, this certainty constitutes a significant advantage.

Conclusion

Many questions are still open in connection with the Mediation and Arbitration Centre under the UPCA. Many of these questions will be clarified on the basis of practical cases. It will be decisive how the Mediation and Arbitration Centre will position itself in relation to other institutions in the field of arbitration and ADR. Will the focus be narrow on pure unitary patent cases or will the offer be broader for (unitary) patent-related disputes in general? Irrespective of this, it is to be expected that mediation and arbitration will gain in importance in IP matters in view of the advancing digitalisation of business life.

This article was co-authored with Philipp Vollrath.

Ukraine's quest to seize Russian assets:
the role of sanctions and national courts

Ukraine’s quest to seize Russian assets: the role of sanctions and national courts

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Economic sanctions have become one of the central elements of a modern state’s policies. They can be traced back to antiquity when Athens imposed a trade ban on merchants in the Greek city of Megara. But after centuries of enforcement, sanctions still often face the fate of the Megarian Decree, falling short of fulfilling their peacebuilding objectives.

The full-scale and unprovoked Russian invasion of Ukraine prompted a number of nations to apply severe and sweeping sanctions against the Putin regime. Thus far, these sanctions have been unable to immediately tame the aggressor state or to stop the war. However, it would be premature to underestimate the role of sanctions in this conflict. Economic restrictions still cripple the aggressor state’s economy. They may also be deployed to compensate for the sustained losses endured by the affected parties at the expense of the invading state.

In seeking feasible legal remedies to make Russia pay for its aggression against Ukraine, in May 2022 the Ukrainian parliament amended its sanctions law, which provided the state with the interim power to confiscate Russian assets and use the seized proceeds to cover rebuilding costs.

Seizing Russian assets in Ukraine: three conditions

Ukraine first imposed sanctions against Russian legal entities and individuals in 2014, when Russia annexed Crimea and launched attacks in the east of Ukraine.

As of June 2022, the National Security and Defence Council of Ukraine (the **“NSDC”**) blocked assets and imposed other restrictions on over 1,400 companies and 3,000 individuals linked to Russia. However, the stringent property safeguards and evidentiary-demanding procedures hindered Ukraine’s ability to confiscate the blocked assets of the sanctioned persons even during martial law.

The toll of war damage has forced Ukraine to revise its domestic legislation. Adopted on 12 May 2022 and effective since 24 May 2022, the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine to Increase the Effectiveness of Sanctions Related to the Assets of Certain Individuals" amends the sanctions framework in Ukraine. It allows the state to seize the blocked assets of sanctioned persons for state revenue under a rapid and agile procedure (the **"Sanction"**).

According to the law, the Sanction can be implemented in Ukraine under the following three conditions:

— if the targets are designated legal entities and individuals;

— if the objects are the blocked assets of the sanctioned entities and individuals;

— if the enforcement timing occurs during martial law.

Below we briefly outline the key features of each of these conditions.

Targets
The law stipulates three broad categories of legal entities and individuals whom the Sanction can target:

— First group: persons whose actions caused a significant threat to the national security, sovereignty, or territorial integrity of Ukraine (i.e. the individuals involved in the decision-making process on the armed aggression against Ukraine and related activities);

— Second group: persons who significantly contributed to the illicit actions of the first group (i.e. individuals who provided material-technical, financial, or informational support, etc.);

— Third group: Russian residents (i.e. Russian citizens, legal entities owned/controlled by the Russian state, and other legal entities recognised as Russian residents by the NSDC or court).

Under the new legal regime in Ukraine, foreign businesses operating in Russia risk falling into one of these groups targeted by the Sanctions if they invest in Russian sovereign bonds over EUR 95,000 per year, pay taxes to the Russian state budget over EUR 1.3m per year, or have been conducting commercial activity in Russia during martial law in Ukraine.

Objects
As mentioned above, Ukraine has already sanctioned thousands of companies and individuals linked to the Russian regime, whose identified assets and funds in Ukraine have been blocked. The new sanctions regime allows Ukraine to seize frozen assets and other assets that have been blocked in Ukraine.

As a matter of Ukrainian law, asset blocking is a type of sanction that can be imposed on legal entities and individuals on the decision of the NSDC and a decree from the President of Ukraine.

Assets can be blocked due to the actions of entities or individuals that create real or potential threats to the national interests or security of Ukraine or promote terrorist activities or violate human and civil rights. Sanctions can also be imposed if the relevant decisions regarding such entities or individuals are adopted by the Council of the European Union or the United Nations General Assembly and the Security Council.

Timing
The blocked assets can be nationalised only during martial law.

As of the date of this publication, martial law in Ukraine has already been extended three times and is currently effective until 23 August 2022.

Role of national courts

The law provides a critical role for the High Anti-Corruption Court (the **"HAAC"**) and its Appeals Chamber under the new sanctions' regime in Ukraine. These judicial bodies are entitled to impose the Sanction and effectively nationalise the blocked assets of sanctioned persons.

Once the designated state authority submits a claim to the HAAC seeking the seizure of blocked assets, the HAAC must consider and resolve the case within ten days. The suspension of these proceedings is impossible in principle and the case is considered irrespective of the sanctioned person's participation based on the preponderance of evidence standard of proof. The panel assesses the submitted evidence and issues a decision on the seizure of assets that comes into effect within five days, unless the decision is appealed within the same period.

The HACC's Appeals Chamber must consider the appeal within five days and do one of the following: dismiss it, change the HACC's decision, or revoke it, simultaneously rendering a new decision that enters into force with immediate effect.

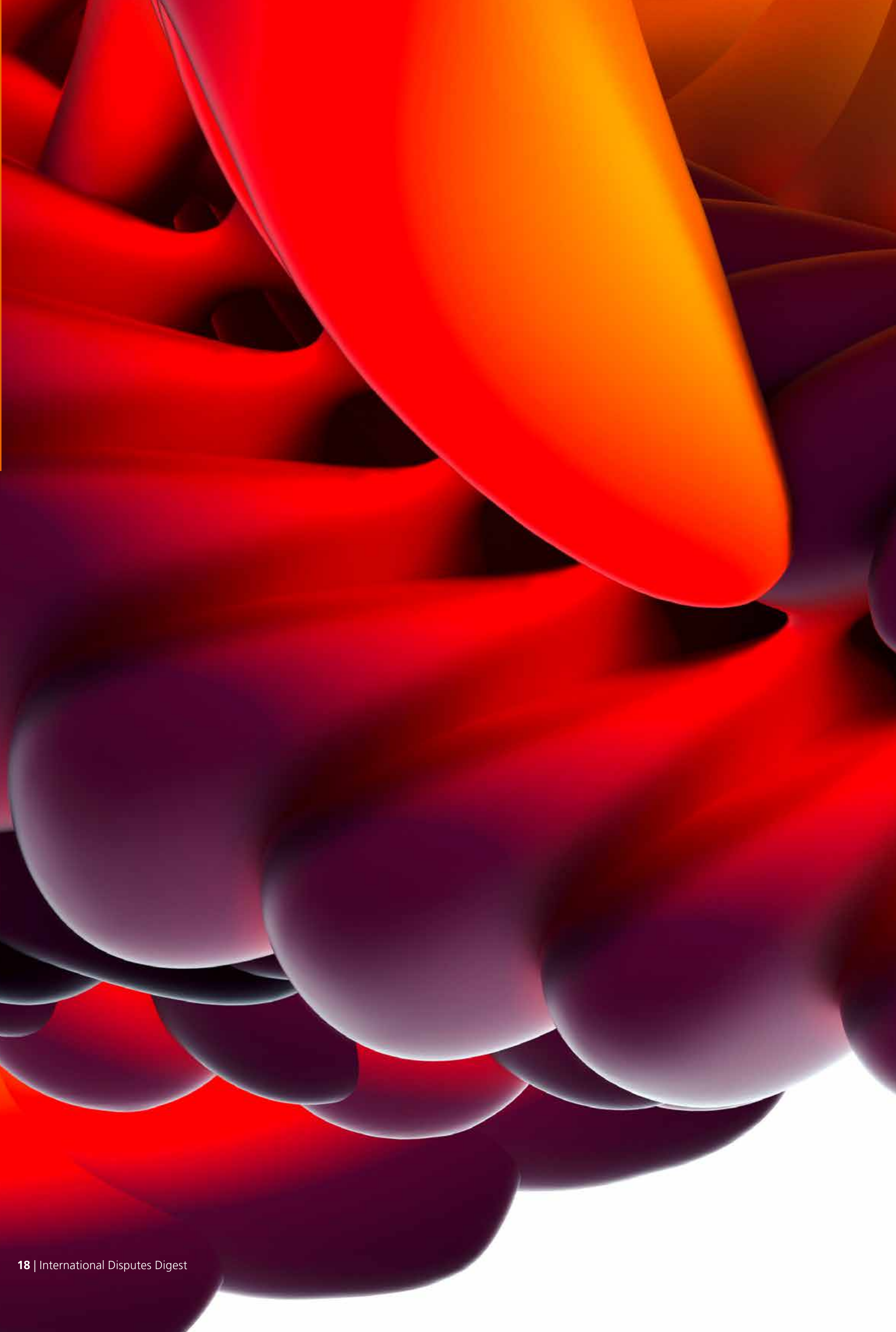
The Cabinet of Ministers of Ukraine is responsible for determining the asset's receivers (e.g. the State Property Fund of Ukraine, the military administrations or state enterprises) and the ultimate enforcement authority.

What's next?

A few days before the new sanctions law entered into force, the NSDC seized the shares of the Ukrainian offices of the Russian International Reserve Bank (formerly Sberbank) and Prominvestbank, estimated at hundreds of millions of dollars. The General Prosecutor Office of Ukraine also successfully attached USD 420m of securities allegedly controlled by the sanctioned Russian oligarch.

Furthermore, as public investigations show, Russian residents still own or control numerous other assets in Ukraine, including financial companies, metallurgy enterprises, luxury and retail entities, cargo vessels, thousands of vehicles and special equipment, which may be seized under the new sanctions law.

Although these assets would likely be insufficient to cover the colossal economic losses incurred by Ukraine, the new law provides Ukraine with a feasible countermeasure against persons who directly or indirectly contributed to Russia's armed aggression against Ukraine, and a remedy for compensation for damages inflicted in the biggest conflict in Europe since the Second World War.



The World of Dispute Resolution after COVID-19

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In December 2019, COVID-19 made its life altering world debut.

The global spread of the virus came soon thereafter with South Africa reporting its first positive COVID-19 case on 5 March 2020. As a result, on 26 March 2020 the South African government implemented a nationwide lockdown in an attempt to limit infections. With the movement of millions of people restricted, many businesses and organisations had to rethink how the world would function during a pandemic.

This article aims to highlight the major steps South Africa has taken to address the impact and effects of the COVID-19 pandemic from a litigation perspective.

CaseLines

Prior to the COVID-19 pandemic, South Africa, following the lead of the United Kingdom, United Arab Emirates, and the Common Market for Eastern and Southern Africa, implemented what is known as the CaseLines Systems. CaseLines effectively allow legal practitioners to enrol new civil matters, file relevant court documents and present evidence electronically with the Gauteng High Court and more recently with the Westen Cape High Court. This electronic judicial platform has shifted us away from the previously archaic and problem-ridden paper-based system, toward a more effective digital platform, which is readily available to millions of individuals within the country. Judges and other judicial employees are now able to access fully digital court bundles and provide options for all parties involved in a matter before the Court to interact and collaborate in pre-trial preparation and procedures. By removing the additional infrastructural barriers of the paper-based court system, CaseLines ensures the increased efficiency of civil litigation within South Africa.

Virtual hearings/online court

Prior to the COVID-19 pandemic, it often took a year for courts to hear litigant action proceedings and at least six months for individuals to have an ordinary application heard. One of the biggest steps taken by the South African judiciary has been the implementation of virtual hearings. Through the use of platforms such as Zoom, Skype and Microsoft teams, individuals are now able to attend and hold hearings virtually. Courts, such as the Constitutional Court and the Supreme Court of Appeal, in hopes of upholding the constitutionally enshrined values of public access and judicial transparency, now ensure that individuals are granted access to the court system in order to have their matters heard through a video-conferencing platform. The judiciary sought to ensure that the restriction of movement and the banning of gatherings would not bring the already-crippled judicial system to a sudden halt.

Cost-saving approach/litigation avoidance

It is no secret that solving conflict through court litigation has historically been time-consuming, costly and stressful. The severe effects of COVID-19 further emphasised these problems, which compelled South Africans to adopt a 'cost conscious' approach to litigious matters. Clients who previously had massive financial turnovers could no longer afford lengthy and unwarranted litigation. As a result, many legal practitioners were forced to implement a business-conscious strategy of litigation avoidance. The effects were two-fold: clients no longer spent substantial amounts of money on lengthy and onerous litigation proceedings, and legal practitioners still earned an income by maintaining client relationships, albeit through a different modus operandi. Instead of taking on a matter at the dispute stage, an approach was implemented to curb the risk of potential litigation for clients. Legal practitioners could now, based on an evaluation of certain aspects of a client's business (e.g. *force majeure* events, payment delays, insolvency risks, and claims arising from rights and obligations), pre-determine the potential matters that might give rise to legal disputes. These matters would then be communicated to the client, and the client would be advised to implement an effective strategy to avoid litigation. When it appeared that litigation could not be avoided, practitioners advised their clients on how best to 'project manage' the litigation process in order to ensure the limitation and management of legal costs. Such 'project management' of the litigation process includes a document-management system in relation to potential risk. Such a system also helps identify the documentary evidence that could potentially assist a client with a claim. This process allows adequate preparation of evidence if a matter ever becomes litigious.

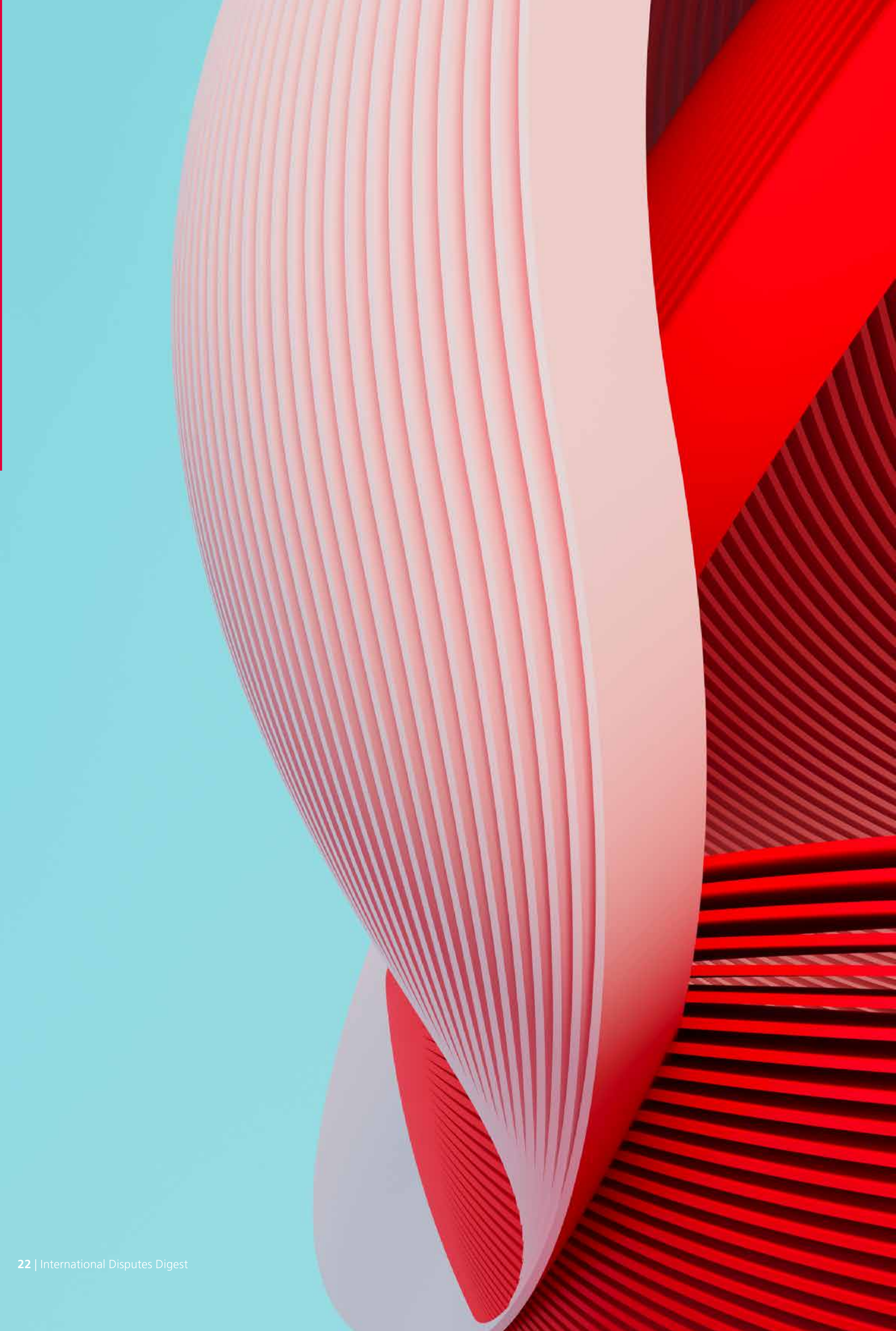
Arbitration and Mediation:

Arbitrations and Mediations in South Africa, similar to other court procedures, followed the digital platform approach during the COVID-19 pandemic. As a result, arbitrations were held virtually, with both local and international bodies responsible for the administration of arbitrations passing various rules and regulations to maintain the operation and continuity of all proceedings. Certain laws were developed, including the introduction of Rule 41A of the Uniform Court Rules, which states that every new action or application must be accompanied by a notice to the defendant / respondent indicating whether the parties agree to refer the matter to mediation. Rule 41A effectively encourages parties to a dispute to make use of the mediation process prior to instituting lengthy and potentially cost-incurring litigation proceedings. This rule also aimed to further relieve the pressure on courts by removing litigious matters deemed resolvable through mediation.

Conclusion

South Africa has adopted measures to ensure that life from a litigation and alternative dispute-resolution perspective has continued despite the COVID-19 pandemic. The move to an online digitised judicial platform is a welcome alternative from what we consider to be South Africa's previous outdated legal system. In the early stages, the effectiveness of this move was questionable. Now, however, the online digitised platform promotes greater judicial transparency and access to justice. Although still inundated with cases, the courts have now received a slight reprieve in hearing litigious matters, which were resolved using mediation through the enactment of Rule 41A of the Uniform Court Rules. One could not argue there is a cost-saving benefit to virtual hearings due to the elimination of travel to and from court to file documents and the end of the printing of physical hard copies of bundles for court hearings. In addition, legal practitioners have adopted a more client-centric approach, which is more proactive than reactive.

Updates on China's modernisation of its Arbitration Law: Will 2022 bring a breakthrough?



Updates on China's modernisation of its Arbitration Law: Will 2022 bring a breakthrough?

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The current *Arbitration Law of the People's Republic of China* (the **"Arbitration Law"**) was brought into force in 1994. Other than cosmetic amendments made in 2009 and 2017, this law has been in force and nearly unchanged for 27 years. During this time, certain provisions of the law were deemed not in line with international standards: the legal nature of arbitration institutions is unclear, disputes over the determination of the effectiveness of arbitration agreements can arise, and controversial cases and problems in the judicial review of arbitral awards emerged. In the Chinese legislator's opinion, this has seriously hindered the internationalisation process and development of arbitration in China. Consequently, in 2019, the CPC Central Committee and the State Council issued the *Opinions on Improving the Arbitration System and Improving the Credibility of Arbitration*, requiring that the Arbitration Law be revised.

On 30 July 2021, the Ministry of Justice issued the *Revised Arbitration Law (Draft for Comment)* (the **"Draft"**) for public comments by 29 August 2021. Major innovations of this Draft include the following:

Institutional reform

Historically before the Arbitration Law of 1994, Chinese arbitration institutions were established as state public institutions. Against this background, the Arbitration Law of 1994 did not clarify the legal nature of arbitration institutions and used the concept of an "arbitration committee", which made arbitration institutions operate similarly to public institutions (i.e. to be indirectly led by government departments). The Draft revises the expression of "arbitration committee" into "arbitration institution", and further clarifies the legal nature of arbitration institutions as non-profit legal persons. It also adds provisions for arbitration institutions to establish a legal person governance structure and an information disclosure mechanism. These changes aim at emphasising the independence of the arbitration institutions and enhancing their credibility.

Branch offices of foreign arbitration institutions in China

Previously, there has been a controversy over whether overseas arbitration institutions fall into the concept of "arbitration committees" under the Arbitration Law, and related arbitration agreements have also been questioned. The clarification of the nature of arbitration institutions and the removal of the expression of "arbitration committee" may lay the foundation for the recognition of overseas arbitration institutions by the Arbitration Law.

With the introduction of the new policies of the State Council in 2019 and 2020, the establishment of branch offices of foreign arbitration institutions was permitted in the Free Trade Zones **(FTZs)** of Shanghai and Beijing. This allows for the ability to conduct foreign-related arbitration for civil and commercial disputes in the fields of international commercial affairs, investment and other fields. Furthermore, the People's Republic of China **("PRC")** Supreme People's Court and other courts sporadically recognised arbitral awards made by foreign arbitration institutions when the arbitration was staged in China. The Draft might further open the door for this practice as it reflects FTZ rules and further allows foreign arbitration institutions to establish branch offices within the whole territory of the PRC. Furthermore, the Draft authorises the State Council to formulate the related measures for the registration management of arbitration institutions. However, it is too early to predict which competencies these branch offices will have and if they will be granted any actual powers to administer cases.

An arbitration agreements' validity

Article 16 of the current Arbitration Law requires that an arbitration agreement is invalid if no explicit arbitration institution is selected. Also, it does not expressly recognise the existence of foreign arbitral institutions. This restriction has been criticised by foreign investors for many years as it limits the parties' choices of arbitral institutions or procedural rules. This article is deleted in the Draft, meaning that if there is no agreement on the arbitration institution, the arbitration agreement will still be valid. An agreed and specifically identifiable arbitration institution is no longer a requirement for the validity of the agreement.

Adoption of "seat of arbitration"

In the past, arbitration legislation was centred on the arbitration institution. The location of the arbitration institution determined the nationality and affected recognition and enforcement of arbitration awards. The Draft removes these crucial roles of the arbitration institution and instead introduces the concept of "seat of arbitration". Under the Draft, the seat of arbitration determines the nationality of the arbitral award and the applicable provisions for the recognition and enforcement of the award, replacing the previous standard of the location of the arbitration institution. The revision eliminates the previous oddity where awards issued in Mainland China made by foreign arbitral institutions are considered foreign awards under the current Arbitration Law. It is expected that in the future they will be regarded as PRC awards and can be enforced on the established basis of enforcement rules applicable to PRC awards.

Interim measures

The Draft entitles the arbitral tribunal to decide on interim relief. This differs from the current Arbitration Law, which requires that the judicial court has an exclusive right to grant interim relief and other injunctions. Under the Draft, the parties may apply to the court or the arbitration tribunal for interim relief. Notwithstanding the above, the courts with their judicial power will ultimately enforce such interim relief.

Limited recognition of ad hoc arbitration

Ad hoc arbitration is a popular dispute resolution method under a private agreement in international arbitration. Due to China's accession to the New York Convention, foreign ad hoc arbitral awards could be recognised and enforced in China, but domestic ad hoc arbitration was not permitted. Considering the equal treatment of domestic and foreign arbitration, the Draft now recognises ad hoc arbitration. However, the arbitral matters are limited to "foreign-related commercial disputes". This means that for Chinese domestic disputes, ad hoc arbitration will not be acknowledged. This remains behind the current legal situation in China's FTZs, which permit ad hoc arbitration for domestic disputes between foreign-invested enterprises in China. According to the "Opinions of the Supreme People's Court on Providing Judicial Safeguard to the

Construction of Free Trade Zones", where enterprises registered in the FTZ have agreed with each other to settle relevant disputes by specific arbitrator(s), in accordance with the specific arbitration rules at a specific place in Mainland China, the arbitration agreement may be deemed valid. To be at least as progressive as this FTZ regime, it is hoped that the Draft will be further amended during the next round of review.

Potential for expanded scope of arbitration

Disputes in the field of investor-state and sports have so far not been included in the scope of arbitration in China. Both areas are currently not addressed in the Draft but are referred to in the official statement on the Draft by the PRC Ministry of Justice. It states that coverage of investor-state and sports disputes is to be facilitated by deleting the previous restriction of arbitration to "equal subjects".

The first article in the Draft replaces "equal parties" by "natural persons, legal persons and other organisations", which leaves possibilities for investor-state arbitration. The draft does not reveal too much information on this speculation. It is still hard to conclude whether the court would recognise and enforce an arbitral award made in investor-state disputes. It can be inferred that the attitude of the Chinese government is to support domestic arbitration institutions in accepting investment arbitration cases. This is due to many arbitration institutions in China having issued their arbitration rules for investor-state arbitration in recent years. As the highest law to regulate arbitration matters, it would be reasonable for the Arbitration Law to be changed to reflect this trend.

Shortcomings

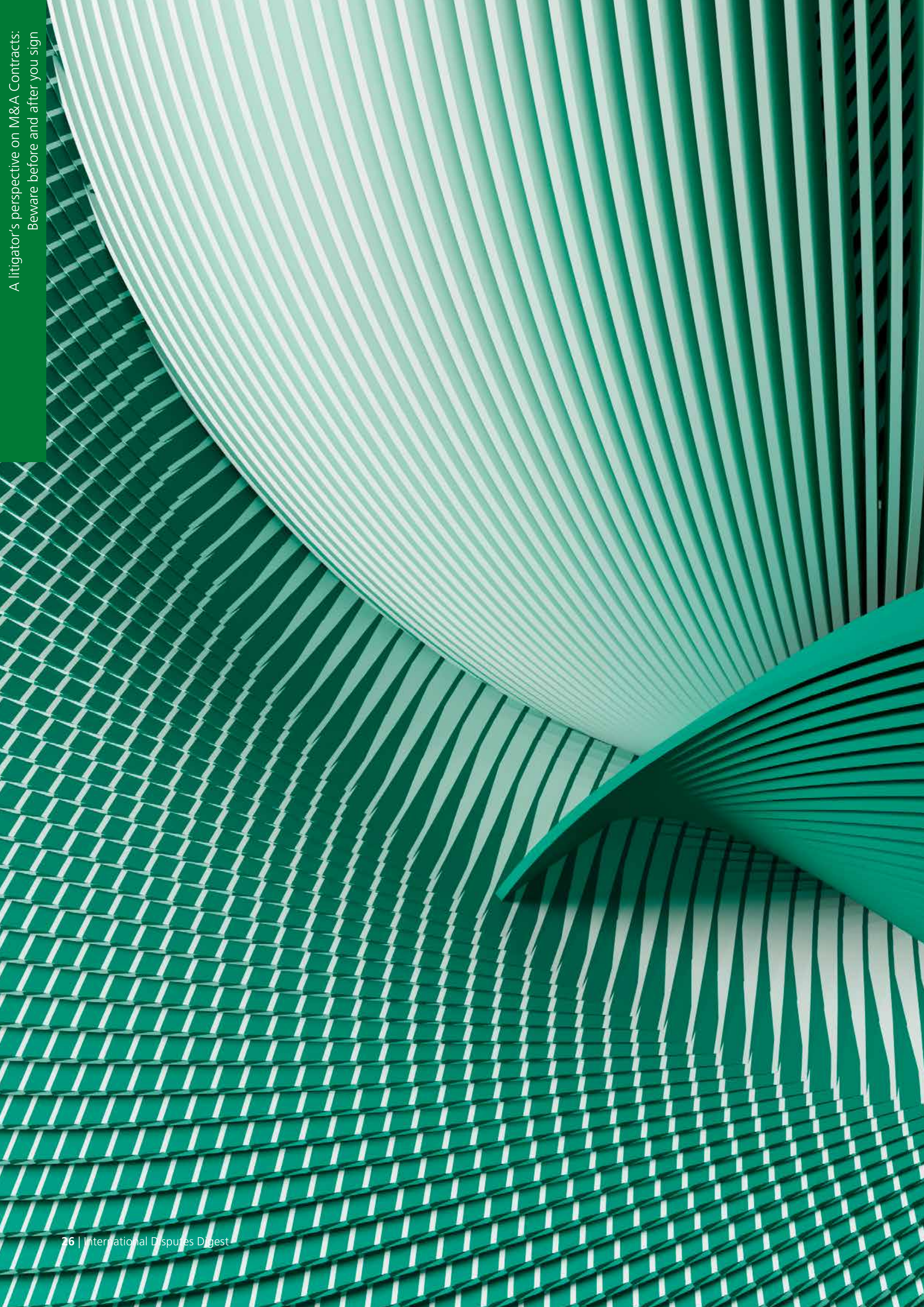
There is a reformed competence-competence mechanism in the Draft. This mechanism still gives the court the authority to ultimately decide on the arbitrability of a case and the jurisdiction of an arbitral tribunal. A party can apply to the intermediate court to review an arbitral decision on jurisdiction and arbitrability. Furthermore, ad hoc arbitration under the Draft only applies to foreign-related cases, which would create more incompatibilities of the enforcement system between domestic and foreign arbitration and would fall behind the current status in the FTZs. The judicial department has a filing requirement for ad hoc arbitration awards, including the status of a case and information of the award. The strict supervision of ad hoc arbitration may incur unnecessary exposure of the information of the parties and their case, which is contrary to the confidential principle of arbitration. Further details remain to be clarified on the actual power of the branch offices of the overseas arbitration institutions to administer cases.

Conclusion and outlook

The changes proposed in the Draft, in particular, allowing overseas arbitration institutions to set up branch offices and the adoption of the "seat of arbitration" concept are positive signals that China's lawmakers intend to change the landscape of the arbitration environment in China, and to develop gradually into a seat that is more friendly to international arbitrations. If the Draft can be implemented with these few suggestions for improvement, and with the adoption of further rules setting out the implementation details on the changes, it can have a significant positive impact on China's reputation in the international arbitration arena.

So far, there is no further information on a second Draft or the announcement of a formal amendment. During March 2022's meetings of the National People's Congress **(NPC)** and the National Committee of the Chinese People's Political Consultative Conference **(CPPCC)**, the Shanghai delegation submitted a proposal on amending the Arbitration Law, which partly overlaps with the Draft but also suggests further amendments. Further amendments were discussed when the CPPCC conducted online seminars on the Draft in Beijing, Shanghai and Shenzhen with local governments, arbitration institutions, arbitrators, experts, lawyers, and enterprise representatives. In May 2022, the NPC Standing Committee published the 2022 legislative work plan, which includes the Draft as a preliminary-consideration item. Most recently, on 30 May 2022, the CPPCC held a consultation forum on "the revision of the arbitration law", which, also addressed the problems of inadequate judicial support and supervision and inadequate integration with international arbitration rules. It is thus yet too early to predict when the Draft will take effect in one or the other version. Business operators with exposure in China should closely monitor the legislative process.

A litigator's perspective on M&A Contracts: Beware before and after you sign



A litigator's perspective on M&A Contracts: Beware before and after you sign

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When finalising an M&A deal, we often see that when signing takes place, champagne is understandably popped as the parties celebrate what seems like the end of the process. M&A-market conditions, however, show an increasing trend of disputes arising after completion and potentially leading to arbitration or litigation.

In the spring of the first year of the coronavirus pandemic (2020), the disruptive consequences of the first lockdown had a major impact on ongoing and envisaged acquisitions. Because of the uncertainty that had arisen, parties tried to postpone ongoing transactions or avoid takeovers. During the second half of 2020, the market recovered, resulting in a huge increase in deals. This upward trend continued in the second year of the pandemic (2021), despite lockdowns in the spring and autumn of 2021.

This was partly because corporates and private equity players had built up a lot of capital in recent years. In addition, the complexity of deals had increased and there was a greater focus on Material Adverse Change (MAC), Material Adverse Effect (MAE) and *force majeure* clauses. In 2021, there was also a trend towards a more 'buyer-friendly' environment in M&A deals. In Europe, for instance, there was an increase in liability caps, longer limitation periods and fewer locked box deals.[1]

Increased deal activity in 2021 is also expected to lead to more disputes in the coming years. According to recent research, global disputes may be expected to occur in sectors with economic performance issues such as the hospitality and leisure industry. Technology, life sciences and financial services are also struggling with an increased number of disputes, including disputes due to the complexity of the deal and post-deal valuation. Remarkably, according to this research, private equity players are involved in more than 65% of international post-M&A disputes.

[1] CMS European M&A Study 2021

Recent macro-economic and geopolitical disruptions (e.g. the war in Ukraine) may lead to more economic disruption potentially impacting business performance across a range of sectors in the near future. These litigious market conditions highlight the need to look at an envisaged M&A-deal from a litigator's perspective. Being aware of the risks that can arise in relation to arbitration/litigation before and after you sign may help avoid (or limit the scope of) future disputes.

Contract and warranty certainty

A key starting point is to focus on the drafting of the Share Purchase Agreement (SPA) and other contractual documents. In so far as possible, the parties should aim for contract certainty. However, while clarity of drafting is paramount, it is also important to bear in mind how contractual terms might be interpreted in different jurisdictions.

For example, in civil law jurisdictions M&A contracts will be interpreted objectively as a starting point: (a) the text of the clause is read in (b) the context of the entire agreement, whereby (c) also the known purport of the relevant clause is considered, and (d) the plausibility of the explanation. In most situations, however, all the circumstances of the case – such the meaning of the parties based on declarations towards each other – are Decisive, which is called the Haviltex standard in Dutch law.

In large transactions, a professional buyer is treated more critically regarding its own responsibilities for the due diligence investigation and contractual risk allocation. Recent case-law shows that this often leads to an uphill battle of buyers in case of warranty breaches and lack of performance if they are not formulated correctly.

An important guarantee is the information guarantee, which frames the seller's information obligation and the buyer's obligation to investigate (in a due diligence). This is always an interesting area of tension, where under civil-law jurisdictions the bar is high for a professional buyer with expert advisers, especially if he knows that something is going on. An information guarantee is in principle limited by what the buyer knows or should have known (through due diligence).

From a buyer perspective, it is important to include concrete clear and unambiguous norms and accountancy standards in the purchase agreement, especially if there is reason to doubt the financial performance of the target.

In the current market conditions, we see also specific interpretation disputes arising from MAC, MAE and *force majeure* clauses and 'ordinary course' clauses, such as "What is ordinary course in extreme situations"?

From a litigation perspective, there is the benefit arising from clear and unambiguous formulation of the agreement and important warranties & indemnities.

Valuation/damages/earn out

In takeover disputes, the discussion of damages resulting from breach of warranties, such as balance sheet or financial statement warranty, is regularly complicated and often fertile ground for financial valuation and accountancy specialists. In litigation, this can lead to a battle of experts.

In principle, breach of a guarantee in a takeover contract creates an obligation for the seller to pay damages if the buyer has suffered loss as a result of this breach. In a takeover contract, this means that the buyer must, as far as possible, be put in the same position that he would have been in if the guarantee had been correct. In calculating the loss, a comparison must be made between the purchaser's position that would have existed if the guarantee had been correct and the position the purchaser is now in. This amounts to compensation of a positive interest; the injured party must be put in the situation as if the guarantee was correct, and not only in the situation as if there had been no breach of the guarantee (i.e. negative interest). The assessment of damages depends on the circumstances of the case. If it is established that during the negotiations with the seller, the buyer made it clear how the buyer valued the company and what changes in the financial situation of the company would affect its valuation, this should play a role in the damage assessment.

Phased payment of the purchase price with subsequent payment by means of earn-out upon good performance of the target also regularly leads to disputes looking at the published case-law.

From a litigation perspective, it is advisable to define the concepts of damages and earn-out included in the SPA as precisely and exhaustively as possible, in order to avoid the risk of future ambiguities and discussions.

Evidence and safeguarding it

Evidence is key if the parties are to be able to properly assess their respective positions and reach a resolution in any potential litigation. Therefore, active preservation and safeguarding of information is essential in order to be well prepared for potential litigation.

Next to the semantics of the M&A contract, communication (based on testimonies of key personnel), correspondence and legal documents from the precontractual phase might be decisive.

After the transaction, the seller in particular will lose access to email correspondence, documents and key personnel of the target company (who will by then be employed by the buyer). This can lead to a significant mismatch in the information and documentation available to the respective parties, which may not be conducive to an early, negotiated, resolution of the potential claims.

In case-law we see significant numbers of disputes arising from the request for disclosure of discovery of important documents by the seller. The seller would, therefore, be wise to preserve the data room provided by the seller post-completion, as well as to secure the mailboxes of key-employees in escrow, only to be released to the seller once a dispute arises.

It is naturally important that such safeguarding of evidence is implemented in the relevant agreements, and structured in a GDPR compliant way, under supervision of a legal support team.

If parties cannot agree upon such evidence preservation, an alternative may be to elaborate in the SPA on the parties' access to information, exact disclosure, discovery obligations and the procedure post-signing.

Notification period

In M&A contracts, the guarantee period is usually between one and three years. In a more buyer-friendly market, we see longer limitation periods during which claims under the guarantee must be reported on penalty of lapse or limitation of rights. Furthermore, there is often a specifically agreed complaint period. Failure to complain in time may already result in the lapse or limitation of rights. In the case of complaints' clauses with precisely formulated periods, the text of the clause will lead to a clear result. There is little room for the restrictive effect of reasonableness and fairness. Relevant factors are the professionalism of the parties (with the assistance of advisors), disadvantages due to inertia and how long the creditor could have known about the defect or circumstances that could have resulted in an earlier notification. With a vaguely formulated complaint, there will be more room for the circumstances of the case to be taken into account in any dispute.

The available case-law confirms that there are regular disputes about the timely notification of warranty & indemnity claims. In those cases, we generally see a strict interpretation applied by the courts.

For parties, it is advisable to incorporate a structured post-signing process for the timely notification of potential issues (and start of dispute resolution mechanisms where necessary) to safeguard their respective positions. It is also wise to take timely steps to seek legal and expert input where necessary – e.g. in relation to the valuation of the company for purchase-price adjustment and earn-out discussions.

Disputes resolution (courts v arbitration)

When entering into an M&A transaction, parties can choose the dispute resolution body that will decide on any claims that may arise after completion.

When choosing arbitration, parties can appoint the arbitrators that will decide on the matter at hand and in doing so decide on the expertise and experience they deem necessary. Parties may consider arbitration preferable to litigation in order to avoid courts in certain jurisdictions, as well as for reasons of discretion by avoiding a public trial. Large internationally listed companies in particular prefer their proceedings to be handled in private to avoid reputational damage and any adverse effect on their stock-market value. Arbitration may also be more efficient if, for example, a fast track is agreed upon in the event of disputes that take place pre-completion over the fulfillment of conditions. Furthermore, arbitral awards can be enforced with relative ease across national borders. The main disadvantages of arbitration are often the relatively high overall costs of well-known arbitration institutions and the fear that the above-mentioned efficiencies may not actually be achieved in practice.

In contrast, designating the court as the dispute-resolution body in the relevant M&A documents may be preferable where parties deem relying on the local legal system to be of added value, such as in presenting evidence and obtaining such evidence from the other party or relying on well-established precedent in certain jurisdictions.

The current popularity of arbitration as a dispute-resolution mechanism averages 33% of all deals, according to our 'CMS European M&A Study 2022'.

Conclusion: structured process before and post M&A

An M&A lawyer must strategically check the contract from a litigator's perspective before signing. It is important take into account the risks resulting from disputes post-signing, such as evidence position, notification position and legal rights/ hurdles in possible court or arbitration proceedings. No one likes to think about disputes before they happen, but being aware of the risks of potential disputes at an early stage and taking a structured approach to post-signing planning gives the parties to an M&A transaction the opportunity to build in measures that may facilitate a quicker and more consensual approach to dispute resolution.

The legacy of COVID – how "Green" can we make International Dispute Resolution?

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Rob Wilson, a Partner and Solicitor Advocate at CMS in the UK, discusses changes that have taken place as a result of the COVID pandemic and the climate change concerns facing international dispute resolution. He considers how dispute resolution might become greener in the future.

We all now know the importance of being kind to the planet and reducing our carbon footprint. However, for decades international dispute resolution has been responsible for generating an ever-increasing amount of carbon. Solicitors and Counsel have flown all over the world for decades, often merely to attend a conference. The pandemic caused a cultural shift in what we considered to be acceptable in dispute resolution; that shift has had a positive green impact. But the question remains – How "GREEN" can we make international dispute resolution in the future?

Why does international dispute resolution give rise to climate change concerns?

I have been involved in international dispute resolution for over 20 years. When I first started practising as a disputes lawyer, laptops were in their infancy in the work place and the courts had yet to embrace the so-called "new" technology. I am pleased to say that much has changed over the last 30 years. However, our individual carbon footprints remain far too large. The legal profession has travelled for as long as it was able to do so, attending conferences and opening up new markets. A more acceptable reason has been to represent a party in a hearing. The need for all courts or arbitral hearings to be in person has resulted in higher amounts of carbon being generated. Likewise, the production of vast volumes of documentation in conjunction with international dispute resolution and the couriering of document bundles to different parts of the world has not been kind to the planet.

In what way did the pandemic help international disputes become greener?

Over the last two years there has been no real alternative to the increased use of technology. During the pandemic we were forced to grapple with the reality of the situation and the virtual options available to us. We have relied heavily on the use of technology and document sharing platforms and we have been forced to adapt to virtual hearings. The learning curve was steep for many, not only for the parties involved but also for the Tribunal, the witnesses and the experts involved.

Because of the pandemic and the resulting need for virtual hearings, flying and travelling in general around the world has reduced significantly. Connected to that printing and sending paper copies has also reduced.

However, consideration must now be given as to what has worked well and what has not worked so well if we are to craft the best format for the future, whilst remaining as "green" as possible.

Pre-pandemic we had a choice and going forward we will have the choice again. I believe the use of technology is now with us for the long-term but that is not to say that we should replace all in person hearings with virtual ones.

What changes made during the pandemic should we hang onto?

In my opinion we should not allow changes made during the pandemic to become now the default position automatically. Instead, we have a choice as to whether changes that were forced on us by the circumstances of the pandemic should remain. Whilst we want to make "green" decisions (in the context of international dispute resolution) we have the opportunity to consider afresh the best approach to resolving international disputes.

For example, careful consideration should be given to the following:

The nature of the hearing – in particular, the degree to which a hearing should be entirely virtual or whether a hybrid or in person hearing might be better. Much may depend on whether the hearing will be purely procedural or whether it will seek to resolve substantive issues and/or the hearing of evidence from witnesses of fact or experts. Further, will there be issues of credibility which may not be easily addressed at a virtual hearing? How many different locations will be involved?

The potential for a technology gap – will the parties have parity at the hearing if it takes place on a virtual basis? Will there be technological issues for one party that the other party may not suffer? There are different degrees of connectivity around the world, and this should not be ignored or forgotten. A stable broadband connection is vital. When dealing with virtual hearings as Counsel during the pandemic there were sometimes connectivity issues that hampered at least one member of the Tribunal and caused concern for the parties involved. Therefore, connectivity is not only a potential issue for the parties and lawyers involved but also for the Tribunal.

The wealth gaps – I believe the wealth gap may affect the extent to which the parties have parity in arbitration when using technology. The reality is that whilst technology can provide greater efficiency and flexibility to the process of arbitration there are a number of additional costs that arise such as the set-up costs of the virtual digital platform, the costs of administering that platform and the engagement of neutral observers when ordered by the Tribunal.

The location of the Tribunal – ideally, I would prefer that all members of the Tribunal are located together as the in-person interaction between them is something that cannot easily be replicated during a virtual hearing.

The use of protocols – Protocols can be helpful when used by the parties when preparing for a virtual hearing. They can allow/force the parties to anticipate with the Tribunal in advance of the hearing the possible issues that may need to be overcome and to make provision for them in advance.

For example, in one case I dealt with there were witnesses located in Africa, the US, the Middle East and Europe. Of course, the parties were keen to ensure that due process was observed notwithstanding that all cross-examination was to be undertaken remotely. Early on the Tribunal ordered that every witness of fact should have a legally qualified neutral observer physically present in the room with them when giving evidence. This created a logistical challenge and became impossible in relation to some of the witnesses when they tested positive for COVID and were forced to isolate. The Protocol allowed such issues to be managed and for all available witnesses to give evidence, when well enough to do so, even from isolation.

The protocol also made provision for Third-Party platform providers to assist with issues of accessibility by the parties and the sharing of costs. Issues such as data protection were also dealt with by the protocol.

Lessons learnt!

In one matter I dealt with in 2020, the case management conference was the first time that the Tribunal/Parties had attended any hearing together on a virtual basis. There were teething difficulties in relation to the use of the technology and the hardware available to the members of the Tribunal. As a result, a fair bit of time was wasted trying to sort out those issues. Whilst those initial issues were largely resolved in advance of the merits hearing, problems still arose with the Tribunal members not all having two screens available to them and also not having a stable broadband connection.

During the merits hearing some of the witnesses were not clearly visible. There were a number of factors that contributed to this – the location of the person's camera, the lighting in the room in which they were sitting and them sitting back in their chair. Whilst this was commented on and corrected, the changes made were often temporary and as a result, cross-examination continued notwithstanding some of these issues recurring. This impacted the ability of both Counsel and the Tribunal to engage properly with the witness.

However, a positive aspect was the ease at which all those involved were able to view exhibits during the hearing which was facilitated by using hearing services operated by a third party with real-time connections and access to a platform on which all documents had been uploaded and fully indexed in advance. That aspect worked very well but of course at a cost that might have been less had the hearing not taken place remotely. That said, it may well be the case that the use of a local server and the presentation of documents electronically in this way will now form part of most merits hearings in the future irrespective of whether they take place in person or on a remote basis.

In short, connectivity and cost issues need to be properly understood and addressed if a "greener" approach to international dispute resolution is to become the norm. Whether green decisions are made should be decided on a case-by-case basis.

In my opinion, some types of hearings (such as procedural) are well suited to being undertaken on a virtual basis and should not take place in person going forwards. In my opinion when it comes to the merits hearings, factual evidence is best given in person. However, much will of course depend on the location of the parties and their availability to travel to a location that is convenient to them and to the Tribunal for the hearing.

Therefore, we need to consider how disputes will resolved in a post-pandemic world. Climate change could be exacerbated by international dispute resolution if green changes do not become the default.

So how "Green" can we make International Dispute Resolution?

Much will depend on how we manage the issues I have flagged above. Although we have come a long way towards greener dispute resolution, there are potential challenges to overcome.

The associated costs of virtual hearings and issues such as connectivity will need to be considered by those involved. Whilst the costs can be balanced up against the travel and accommodation costs traditionally associated with in person hearings, connectivity will not be so easily overcome in some parts of the world. Also the importance of ensuring the justice is at least seen to be done is also important and must not be sacrificed even in the name of "greener" dispute resolution.

Now is the time for such matters to be considered properly so that the best way of working can be found going forwards.

Corporate low carbon policies will be important in encouraging parties not to revert to the pre-pandemic ways of working. Promoting green policies will demonstrate commitment from both individuals and organisations. This will encourage parties to make greener decisions alongside the dispute resolution community.

What about the Green Pledge?

CMS is a signatory to The Campaign for Greener Arbitrations which states that it *"…seeks to raise awareness of the significant carbon footprint of dispute resolution. The Campaign addresses the need for environmentally sustainable practices in arbitration, and encourages all stakeholders (including counsel, arbitrators, parties to disputes and institutions) to commit to the Campaign's Guiding Principles and reduce their carbon footprint when resolving disputes."*

The Green Pledge is one of a number of great initiatives that we have witnessed in recent years coming out of the international arbitration community. The Green Pledge can be adopted by any organisation engaged in litigation, clients, and agents alike. The Pledge signals their commitment to keeping climate change at the forefront of the dispute resolution process.

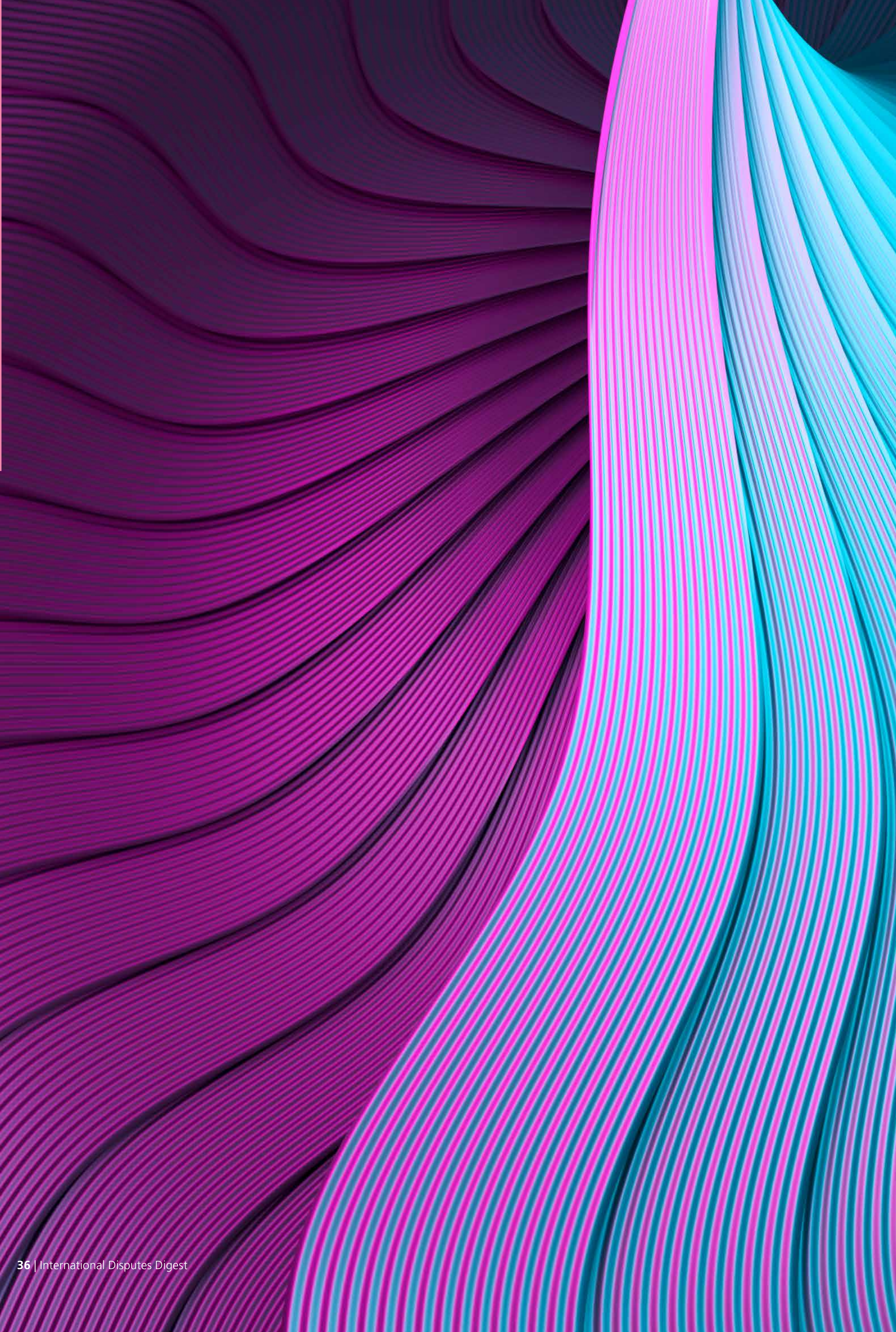
Some of the steps which show commitment to the Green Pledge include engaging with the court or the tribunal to reduce environmental impact and actively to promote greener options when resolving a dispute. You can make small green decisions such as choosing to correspond electronically or limiting the use of hard copies. Minimising travel and the use of virtual platforms instead will of course have a significant impact on a carbon footprint and is encouraged.

In the run up to ICCA 2022 in Edinburgh, ICCA has recently published on whether a right to physical hearing exists in international arbitration, which also links to the "greening" of arbitration.[1]

Conclusion

We have an opportunity and a responsibility to make international disputes resolution Greener. There are choices available to us. One size will not fit all. Virtual hearings may work well for procedural matters but not be appropriate where evidence is to be heard. Hybrid hearings may have a place but parity of the parties respective positions is paramount and should not be ignored. Our future should be greener than it has been in the past but not at any cost.

[1] https://www.arbitration-icca.org/right-to-a-physical-hearing-general-report



NFTs and enforcement proceedings

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Brief introduction to the technical characteristics of NFTs

The exponential development of the digital world is no longer a surprise since it is a catalysing topic generating the greatest interest in the global economy.

The terms “bitcoin”, “esports”, “blockchain” and “NFT”, to name those digital products best known to the public, have not only become customary, but have created a fervour and attraction not witnessed in a long time, triggering a level of attention we might even call “Gold Rush 2.0”.

In particular, over the last two years “Non-Fungible Tokens” (NFTs) have turned out to be actors in a true digital revolution, which market players, including lawyers, cannot remain indifferent to, especially considering the lucrative turnover of this constantly growing sector.

To discourage systematic framing and provide background for those less familiar with this topic, it seems useful to provide some notions about NFTs, such as their technical characteristics and the technologies through which they are stored and circulated.

A NFT can be defined as a digital asset endowing the holder with specific rights.

In particular, a cryptographic token of this type is characterised by its uniqueness and indivisibility, a peculiarity that distinguishes NFTs from “Fungible Tokens” or FTs, which are by their nature divisible, replaceable and exchangeable with other tokens of the same type, such as cryptocurrencies. Precisely because of these attributes, tokens are associated with (and more importantly, are aimed at) the concept of verifiable digital scarcity: the limitation of digital resources and the possibility of proving their number and authenticity. The practical motivation is clear: controlling the number of circulating tokens, a circumstance that naturally increases their value. In short, if tokens were unlimitedly duplicable, their value would be enormously lower.

Digital scarcity is ensured using the blockchain, which is the technology that allows for the maintenance of a “Distributed Ledger Technology” (DLT) structured as a chain of blocks (hence, the term blockchain) containing transactions, the validation of which operates through a distributed consensus mechanism on the nodes of the network itself.

Importantly, the original asset linked to an NFT and purchased by a user is not “physically” in his or her possession, but remains on the platform on which it was generated or offered for sale and shared via the “darknet” (i.e. decentralised file services, which are used when the file is too heavy to be hosted directly by the blockchain, over which a hash travels that can be described as an algorithmic function, a kind of fingerprint, that uniquely identifies each block).

The end user receiving the transfer receives the token through a system, also based on the blockchain, which operates through a scheme of keys: a public one, representing the receiving address, and a private one, representing the personal access PIN to the user's own "wallet" (i.e. digital wallet). Both public and private keys are generated simultaneously and thus remain closely related to each other.

Given the above, it is clear that the practical applications of such a technology are considerable and constantly evolving. Think, for example, of intellectual property rights on songs, artistic representations, patents or video-game collectibles, such as skins or weapons, up to and including the certification and tokenisation of real estate. The area in which we are presently witnessing a conceptual revolution, both in the way it is conceived and transferred, is art or rather "Crypto-art", the first definition of which was provided in 2018: "digital works of art associated with unique and demonstrably rare tokens that exist on the blockchain in the form of NFTs. The concept is based on the idea of digital scarcity that allows digital goods to be bought, sold and exchanged as if they were physical goods".

Practical issues of NFT and consequences on their enforceability

Leaving aside copyright issues, Italian litigation and dispute resolution fields have begun to look, albeit still timidly, into the field of NFTs, trying to understand whether and how it is possible to offer protection or even to seize them in the context of enforcement proceedings.

First, it must be noted that the sector as a whole is still mainly decentralised and self-regulated with the consequence that, in case of infringements and defaults, the individual platforms through which tokens are traded provide for protection and compensation mechanisms. It will therefore be essential, also through future legislative interventions at EU and national level, to understand how to coordinate what has been established at the level of self-regulation with the applicable legislation.

Secondly, the typical characteristics of NFTs lead to practical issues such as understanding whether, when and how assets of this kind (i.e. tokens or cryptocurrencies) can be subject to enforcement.

Despite the extensive debate over doctrine, triggered by a situation of legal uncertainty on the legal qualification of NFTs, the majority of authors consider that cryptocurrencies and NFTs can be included in the category of intangible assets and, as such, can be bearers of rights.

A further characteristic that may generate concerns in enforcement procedures is the "aterritoriality" of NFTs (i.e. understanding the "location" where such digital assets are situated). This issue also recurs in the case of cryptocurrencies. In fact, the first problem that arises in an enforcement procedure is linked to the place where these intangible assets are stored (i.e. crypto wallets), which contain the keys allowing the owner to process transactions. The question therefore is whether, also from the perspective of possible precautionary actions, the object of the seizure is the physical wallet (e.g. inhibiting any evasive action on the part of the debtor through the transfer of the various assets from the debtor's wallet to the judicial wallet).

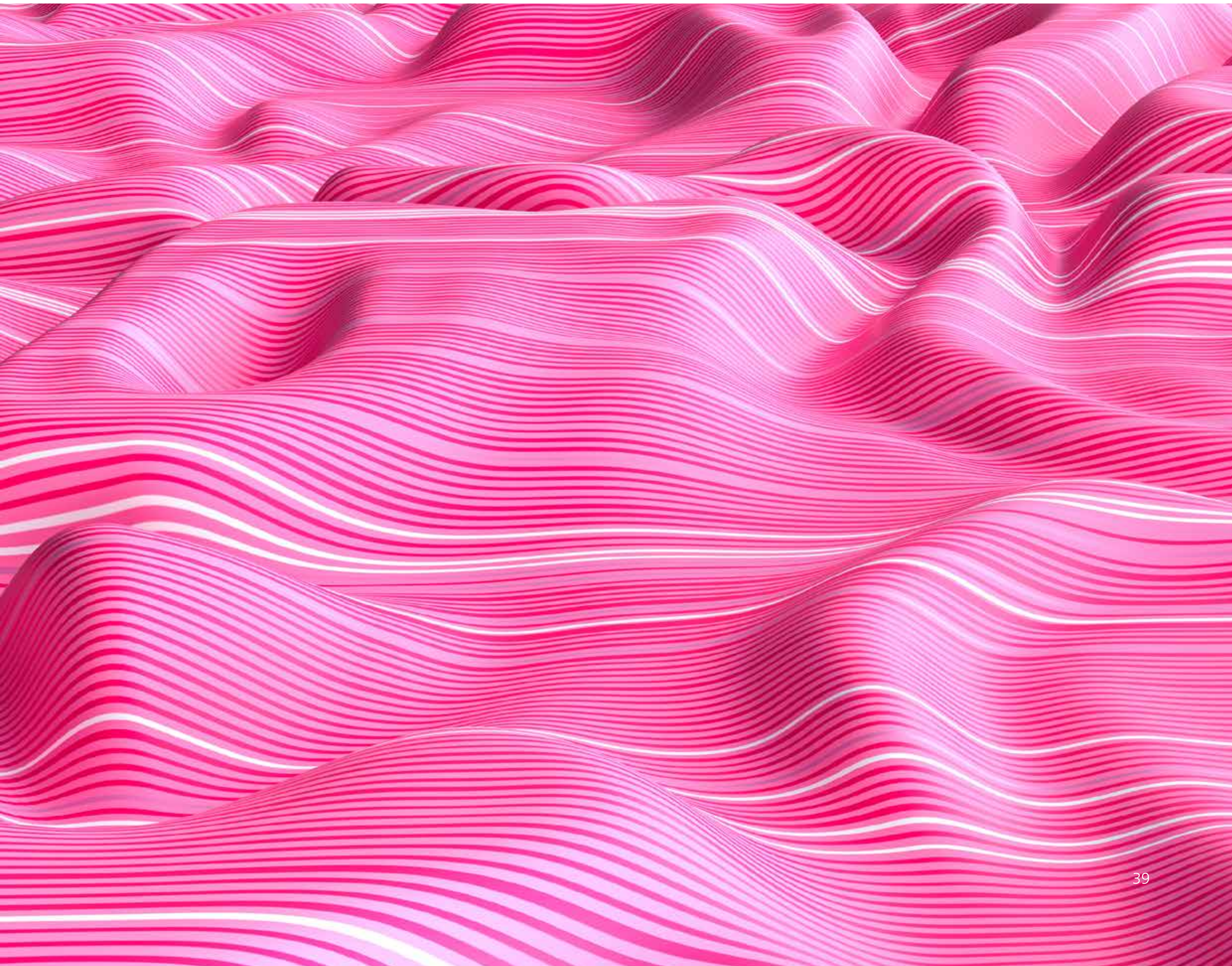
The second problem that makes enforcement even more complicated is determined by the difficulty in finding out whether the debtor actually owns cryptocurrency or NFTs. Generally speaking, there are three possibilities: either informally (e.g. it becomes known, even indirectly, that the debtor owns cryptocurrencies or accepts them as a means of payment) or by virtue of a specific contractual relationship. This can include a search for assets to be attached electronically pursuant to Article 492-bis of the Italian Code of Civil Procedure. (By accessing the tax registry, it will thus be possible to become aware of any professional activity that the debtor performs in the relevant sector), Thanks to the Decree of the Ministry of Economy and Finance of 13 January 2022, stringent identification obligations have been imposed on all entities that provide virtual-wallet services and services related to the use of virtual currency, such as registration in the special section of the OAM (Organismo Agenti e Mediatori) that was requested to legally exercise activity on Italian territory. The Decree also obligates services to periodically inform the OAM about the personal data of clients and any transactions carried out.

As for possible legal initiatives, the main actions to be faced and chosen on a case by case basis can be summarised as follows: (i) specific enforcement by requesting the delivery or release of the property in the event the good enforced by the creditor actually corresponds to the one owed by the debtor; (ii) a general enforcement where, following the debtor's failures, his assets are generally identified and converted into money until the debt is paid with the result that there will be no coincidence between the enforced asset and the payment received; (iii) third-party expropriation where the debtor is not the direct owner of the asset, but rather uses a third-party intermediary for the execution of the transactions.

The third case appears to be the most realistic. Indeed, the attention of European and Italian legislators towards the regulation of virtual currencies seems to be directed towards the imposition of increasingly stringent identification obligations. In this sense, it is reasonable to think that professional operators have every advantage in finding a platform that is trustworthy in terms of issues like transparency and the fight against fraud.

As for a strategy to be adopted in the event of enforcement on crypto assets, one possibility includes filing an appeal for an urgent measure (before the commencement of proceedings on the merits and in the presence of the requirements laid down by law) in which the court orders the handing over of the keys relating to one or more wallets with non-compliance bringing about the imposition of a financial penalty. This would ultimately result in a seizure whereby the crypto-assets transfer to a wallet created *ad hoc* by the court.

Clearly, the possible implications, even in disputes, surrounding intangible assets, such as NFTs and cryptocurrencies, are vast and still to be solved. However, due to the importance of these assets and the constantly growing number of their transactions, Italian courts will assume a central role and try to apply national legislation that has not yet been able to give systematic order and homogeneity to this recently formed sector.



The umbrella clause and its application for the benefit of foreign investors

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All bilateral contracts include rights and obligations from which controversies can arise. A contract between a host state and a foreign investor is no exception. This is because the contract either constitutes a highly complex legal relationship in which various legal sources often coexist or it could be regulated by the national law of the host state.

In an investment contract, it is possible to identify two parties: the foreign investor, long considered the weaker party in a contract, who develops the investment in a territory other than his own, and the state receiving the investment (the host state).

It is understood that in any dispute arising between the contracting parties due to a breach or violation of contractual obligations, the parties must resort to the dispute resolution mechanism agreed upon in the investment contract.

In this case, an important query arises. What would happen if the mechanism elected by the parties does not turn out to be impartial or neutral since it is generally agreed that the dispute will be settled by the jurisdiction of the host state (i.e. before its national courts)?

In this scenario, the foreign investor's interests may be seriously affected. For this reason, an additional layer of protection to the foreign investor's interest, besides the classic standards of protection (e.g. the rights of national treatment, most favoured nation treatment, fair and equitable treatment, and compensation for expropriation), is provided in some bilateral investment treaties through the denominated umbrella clause. This implies that the host state is obliged to comply with its commitments to foreign investors.

Indeed, the purpose of an umbrella clause is to ensure that the obligations assumed by a host state in an investment contract have the protections of international law provided for in a treaty between the host state and the investor's state. In the words of Elina Mereminskaya,[1] an umbrella clause includes "those provisions contained in the international treaties that oblige the signatory states to comply with the commitments undertaken concerning the investor or the investment".

Furthermore, Christoph Schreuer points out that umbrella clauses are "clauses in BITs [bilateral investment treaties] that put undertakings made by host States vis-à-vis investors under the Bits' protective umbrella."[2] In that sense, by linking the contravention of a contractual obligation to the breach of treaty obligations, breaches of the investment contract could generate a breach of an international obligation. Its scope will depend on the wording of the clause agreed to by the parties in each of the international investment treaties.

However, could it be affirmed that in the application of the umbrella clause, contractual breaches must necessarily be understood as breaches of treaty obligations? The answer is far from unanimous. There is no uniformity of criteria and it will depend on the interpretation made by the international tribunal in each specific case.

In this regard, reiterated international doctrine has pointed out that there are two types of interpretations of umbrella clauses: one restrictive and the other extensive.

A restrictive interpretation of this clause is basically that the phrase "obligations undertaken", which is usually included in umbrella clauses, should not be understood as any obligation assumed by the host state through treaties. In other words, the breach of an obligation under the investment contract does not necessarily imply a breach of the investment treaty. This theory boils down to the fact that umbrella clauses cannot transform any contractual claim into a treaty claim.

At this point, it is impossible to ignore the arbitration case in which the concept and scope of the umbrella clause were discussed for the first time. The dispute arose between the Swiss company Société Générale de Surveillance S.A. and the Islamic Republic of Pakistan over a contract for the provision of inspection services for goods imported by Pakistan. Article 11 of the Treaty between Switzerland and Pakistan provided that "Each Contracting Party shall constantly ensure the observance of the commitments into which it has entered concerning the investments of investors of the other Contracting Party".

Considering the text of Article 11 (the umbrella clause), the Arbitral Tribunal determined that the word "commitments" was not necessarily restricted to contractual obligations, but also included administrative and legislative measures. Additionally, it specified that since Article 11 was separate from the section in which the articles related to the material obligations of the host state and located after the dispute settlement clause, it was concluded that the umbrella clause was nothing more than a commitment of the host state to implement regulatory measures to comply with the legal or contractual obligations assumed in favour of the investor. Based on a restrictive interpretation, the Arbitral Tribunal rejected the claim on conceptual grounds.

On the other hand, we have an extensive interpretation of umbrella clauses, which is criticised by various doctrines and case law because it considers that any contractual claim, however small it may be, constitutes a contravention of the host state's treaty obligations.

One of the main reasons why some arbitral tribunals prefer to give a restrictive interpretation to umbrella clauses is that applying an extensive interpretation would generate a permanent imbalance between the rights and obligations of the host state and the investor,[3] and would also leave the dispute resolution clauses of the investment agreements without support.

[1] Mereminskaya, Elina, "Las Cláusulas paraguas: lecciones de convivencia para los sistemas jurídicos, en Ensayos Revista Internacional de Arbitraje", July – December, 2009, p. 13

[2] Schreuer Christoph, "Travelling the Bit Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road", 2004, p. 231

[3] SGS Societé Generale de Surveillance S.A. vs. República Islámica de Pakistán, CIADI N° ARB/01/03, jurisdiction decision, August 6, 2003

To date, international arbitral tribunals have not adopted a single interpretation. Therefore, it will be the case law issued in future investment arbitrations that will determine whether a restrictive or extensive interpretation should be applied or, perhaps, an intermediate one.

In any case, if the breach is considered a contravention of the international treaty obligations, the foreign investor may resort to the dispute resolution clause of the referred treaty, leading to an investment arbitration before international tribunals, which may turn out to be neutral and impartial for the sake protecting the principle of equality of arms of the foreign investor.

Overview of current issues for third-party funding in France

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Third-party funding originated in Australia in the early 1990s and primarily developed in common law countries such as the US and UK.

In France, this practice was first recognised in 2006 in a decision of the Versailles Court of Appeal (Société Veolia Propreté c/Foris AG), regarding a financing contract with a third-party paying arbitration costs.

Since this decision, third-party funding has developed in France, but mainly in international arbitration-related matters. Compared to common law countries, however, the practice remains limited given the absence of a specific legislative or regulatory framework. Therefore, only French civil law principles governing commercial contracts apply.

Today, third-party funding is widely recognised as a mechanism for financing litigation by a third party, who pays all of the litigant's bills relating to the trial, in exchange for a percentage of the damages [between 20% and 50%] won at the end of the trial and should not be confused with the funding by the counsel and the application of contingency fees.

In practice, the funder is speculating by anticipating the success of the funded party on the merits of the case. Third-party funding also promotes access to justice for insolvent parties and allows small-sized companies to avoid risking their own funds in expensive arbitration proceedings.

However, practice shows that third-party funding also presents challenges and issues for both the client's counsel (1) and the funder himself (2), which must be addressed by the parties to the dispute as these issues can have a significant impact on the procedure.

Issues to be addressed by counsels

In the relationship between the counsel and the client, the interference of the third-party funder can create what could be called a "ménage à trois". It is then up to lawyers to ensure that their professional and ethical rules are respected.

Obligation of independence and prohibition of conflicts of interest

Considering the risk taken, when financing the procedure, the funder may wish to have a say in the strategy and the conduct of the procedure. However, this interference can present some risks.

But most importantly, the privileged relationship between the counsel and his client must be protected as the third-party funder remains outside of this relationship and does not stand for the counsel's client. This vests in the fact that payment by a third-party funder does not confer the status of client.

The client should in principle be the only one to choose the lawyer and give directions for the conduct of proceedings. But above all, the lawyer will have to keep in mind that the intervention of the funder does not give the latter the status of a client.

In this logic, the third-party funder cannot influence counsels in the litigation strategy (e.g. by threatening to withdraw from the proceedings). Nor should they pressure counsels to refuse a settlement on the grounds that the contractual amount is lower than the amount they invested, while the client would be willing to accept such settlement if he benefits from it.

In terms of fees, French law allows counsels to receive payment from a third person other than their clients. A fortiori, the third-party funder can pay the counsel's fees on behalf of the funded party. Once again, this payment does not make the funder the client.

However, if the President of the Bar (the "bâtonnier") has exclusive jurisdiction for all disputes relating to the payment of lawyers' fees and fee issues between lawyers and clients, they consider themselves incompetent to rule in disputes in which the fees are paid by a third-party funder, thereby depriving counsels of access to justice and of any recourse regarding their fees, which may result in a denial of justice.

Lawyers should therefore pay careful attention to the funding agreements and their terms. One option suggested by the Paris Bar is that the funding agreement expressly grant jurisdiction to the President of the Bar on these issues.

Professional secrecy

One of the main consequences of the funder not being the client is that the lawyer's professional secrecy prevents him from disclosing any information concerning the client or the case to a third-party funder.

Information can only be communicated to the client themself, who remains free to disclose the information they wish to the funder. However, the lawyer should always be careful not to communicate privileged information to the funder directly, therefore avoiding any professional liability.

Duty of transparency of counsels and the disclosure of third-party funding

In principle, French law does not provide for any specific obligation to disclose the existence of a third-party funder in a procedure. However, on 21 February 2017, the Paris Bar Council adopted a resolution recognising the interest of third-party funding and at the same time suggested that counsels representing funded parties advise their clients to disclose the existence of the funding to the arbitral tribunal.

As highlighted in this resolution, the disclosure makes it possible for arbitrators to identify potential conflicts of interests that could result from ties with the funder and therefore prevent the risk of annulment of the award based on a potential lack of independence of the arbitrator.

In this context, the amended ICC rules of 2021 provide for a new Article 11(7) according to which: "each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences […]" to ensure the impartiality and independence of arbitrators towards the funded party.

Failure to make such a disclosure can indeed cause an annulment of the award and thus the liability of lawyers.

Therefore, faced with a third-party funder, lawyers should comply with the obligation of transparency, set out in Articles 4.4 and 4.5 of the CCBE Code of Conduct for European Lawyers, by encouraging the client to disclose third-party funding and by warning the client of the consequences of non-disclosure.

Issues for funders

Aside from the investment risk that constitutes third-party funding, funders may face several issues during the procedure, such as the risk of seeing their fee reduced by a judge, the risk of the funding agreement being annulled or the risk of being considered a party to the proceedings. Yet, these risks remain rather limited in the context of third-party funding in arbitration, and recent court decisions confirm this.

Risk of reduction of the contractually agreed funder's fee if the judge deems it disproportionate

Under article 1165 of the French Civil Code, judges are granted the power to terminate contracts if they deem it necessary, but they also have the power to reduce the contractually agreed funder's fee when it is considered disproportionate.

In 2011, the French Supreme Court ("Cour de cassation") ruled on a dispute between the parties to a funding agreement and considered that when adressing such a dispute the court must verify whether the agreed fee is excessive in light of the service provided by the funder, and if so, the fee should be reduced (case n°10-16.770). In their appreciation, the courts may for instance rely on the scope of the services as well as the duration of the proceedings compared to the percentage of the funder's success fee to reduce it significantly (case n°11/22443) (with the understanding that this case was very fact specific and that the funder was not a professional one).

Therefore, the funder should always pay attention to the amount requested for his intervention and be able to justify it before the judge to avoid any judicial reduction.

Risk of extension of the arbitration agreement to the funder to make it a party to the procedure

In a very recent decision from 25 January 2022, the Paris Court of Appeal (case n°20/12332) received an annulment request of an arbitral award in which, among other things, the arbitral tribunal had considered it had no jurisdiction over the funder. In its decision, the Court refused to consider the third-party funder as a co-claimant to the procedure.

The Court considered that the extension of the arbitration clause to the funder would only be possible in cases of exceptional circumstances, which is the demonstration of an interference that is sufficiently important and above what is reasonably expected from the participation of a funder in a procedure.

According to the Court, the official disclosure of the funder's intervention, the fact that his interest is not only financial or that he was only an occasional funder do not constitute exceptional circumstances.

By doing so, the Court of Appeal sends a positive message to the funders in the context of a French law otherwise keen to extend arbitration clauses to third parties. This decision thus seems to revise the position of the Court of Cassation in the ABS ruling of 2007 (case n°04-20.842), which considered it possible to join third parties to a procedure if they had participated in the negotiation or the performance of the contract.

Considering the absence of any specific legal framework applicable to third-party funding in France, some people have called for more regulation, while others consider that the existing lawyers' professional rules, the provisions of the ICC rules or the principles set out in the IBA rules should be sufficient.

In any event, this matter will continue to raise many questions and issues considering its constant evolution and development in practice.

Key practical issues regarding the enforcement of international arbitral awards in Spain

Key practical issues regarding the enforcement of international arbitral awards in Spain

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The recognition and enforcement of arbitral awards handed down by a foreign arbitral court are governed by the Spanish Law on International Legal Cooperation on Civil Matters in conjunction with the treaties relating to recognition and enforcement that Spain is a party to, such as the 1958 New York Convention, the 1961 European Convention on International Commercial Arbitration (Geneva Convention), the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention) and several bilateral treaties.

In certain respects, the Spanish Law on International Legal Cooperation in Civil Matters is incomplete, so it is necessary to refer to the Spanish Arbitration Law or the Spanish Judiciary Law. An example may be found when it is necessary to determine which court has jurisdiction to hear the exequatur procedure.

In this case, there are discrepancies not only regarding jurisdiction but also about procedure. However, Articles 46 and 8 of the Spanish Arbitration Law consider the Civil Chamber of the High Court of Justice of the Autonomous Community competent for the recognition and enforcement of foreign arbitral awards.

In line with this, Article 73. 1. c) of the Spanish Judiciary Law attributes jurisdiction to the Civil Chamber of the High Court of Justice of the Autonomous Community unless another court or tribunal is competent to hear the case in accordance with EU Treaties or Regulations. Conversely, Article 52 of the Spanish Law on International Legal Cooperation attributes jurisdiction to the Courts of First Instance of the registered address of the party against whom recognition or enforcement is sought.

For the exequatur of an arbitral award, it is more convenient to attribute jurisdiction to the Civil Chamber of the High Court of Justice of the Autonomous Community, as established by the Spanish Judiciary Law, since it is more consistent with Spanish Arbitration Law. In addition, Spanish Judiciary Law has a wider scope and ranks higher than the Spanish Law on International Legal Cooperation.

However, regarding the procedure for the exequatur request, the Spanish Law on International Legal Cooperation allows for the application of recognition and enforcement in the same document, given that the same court has the power to resolve both issues.

However, it is advisable to apply for recognition and enforcement separately, given that both the Spanish Arbitration Law and the Spanish Judiciary Law attribute jurisdiction to the Civil Chamber of the High Court of Justice of the Autonomous Community for hearing exequatur proceedings, and to the First Instance Court for the enforcement of the award. In other words, first obtain recognition of the award and, once the exequatur has been secured, request enforcement through a separate writ before the First Instance Court.

Regarding the requirements for the court to have jurisdiction over an application for recognition, the Spanish Arbitration Law does not include any specific conditions. However, in a recent ruling, the High Court of Justice of the Basque Country declared that it lacked jurisdiction over the application for recognition because the claimant failed to identify assets within the jurisdiction of the court of enforcement (court order of the High Court of Justice of the Basque Country no. 104/2021, of 1 March 2021). This decision is not without controversy, so other High Courts of Justice may not apply the same criterion.

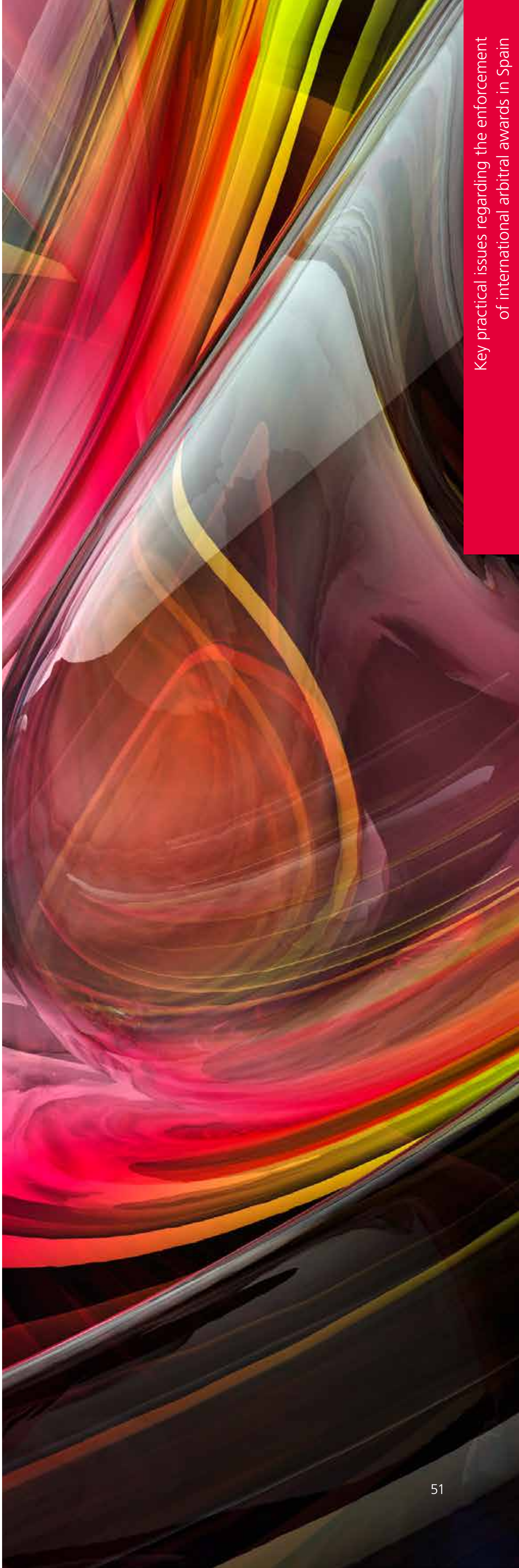
In view of such circumstances, there are several practical issues to be noted regarding the recognition and enforcement of foreign arbitral awards in Spain.

Notwithstanding that both matters are governed by the rules set out above, other basic requirements under Spanish law must be met as well. These include the need for both the claimant and the defendant to be represented by court representatives (*procurador*, whose role is that of a party agent) and assisted by a lawyer. To that end, even though the *procurador* may be authorised directly to act in court, the most frequent practice is that the relevant party grants a power of attorney to their chosen *procurador* before a notary or through a digital procedure. If the power of attorney is granted outside of Spain, it should be apostilled and, if it has not been drafted in double-column format (in Spanish and in the language of the country where the power of attorney is granted), it should be provided with a translation. Additionally, all documents attached to the writ requesting the exequatur and subsequent enforcement that are drafted in a language other than Spanish or an official language of the region in question must be translated as well. Even though it is not strictly mandatory, except for the arbitral award, it is advisable to ensure all translations are certified by a sworn translator. Otherwise, there is a higher risk of the opposing party challenging the translations for their inaccuracy, with the subsequent delay as a result in the proceedings.

Legal and *procurador* fees may be negotiated freely. According to a recent change of the Spanish rules, the *procurador's* fees must be quoted in writing in advance. For lawyers, on the other hand, this is not a requirement, although it is recommended. Should the court proceedings result in one party being ordered to bear court costs, then the criteria issued by the local bar association (in the case of lawyers/solicitors) or the maximum stated by law (for *procuradores*) are usually used as a reference.

Aside from the issues from a procedural perspective, there are other practical matters worth mentioning. One of the grounds on which an arbitral award may be refused recognition is: the award is not binding yet or was stayed or set aside by the appropriate authority (pursuant to the New York Convention). However, there are no specific rules on the effects on the exequatur procedure for ongoing annulment proceedings against the award. In that regard, the fact that there is an annulment procedure currently underway at the seat of the arbitration does not entail automatic stay of the exequatur procedure. Therefore, it is the defendant who will submit a request to the court asking for a stay of the recognition procedure. However, given the absence of specific rules in the New York Convention ordering the stay of the exequatur procedure in this scenario, the court may reject such request. For instance, the High Court of Justice of Madrid dismissed a request for the stay of a recognition proceeding by a court order dated 23 January 2018 that stated (i) the New York Convention does not establish the stay of the exequatur procedure due to the mere hearing of an annulment procedure against the arbitral award – the authority hearing the annulment proceedings must explicitly order the suspension of the arbitral award and the party must provide the court with evidence of such an order; and (ii) the Spanish Arbitration Act sets out that an arbitral award is enforceable even if an action of annulment has been lodged against it.

However, the situation varies when a party requests the stay of the enforcement proceedings (i.e. after the foreign arbitral award has been recognised) based on the hearing of a request to set aside an award before the relevant authority at the seat of the arbitration. In this case, the Spanish Arbitration Act does allow for a stay in enforcement proceedings at the request of either of the parties as long as sufficient security is provided to cover not only the value of the award, but also the damages that may arise from the delay in the enforcement proceedings. The security may be posted either in cash, or by means of an indefinite joint and several guarantee payable on first demand issued by a credit institution or mutual guarantee company or by any other means which, in the opinion of the court, guarantees the immediate availability of the amount in question.



Tackling energy crisis through windfall taxes – a litigious Pandora's Box in the energy sector

Tackling energy crisis through windfall taxes – a litigious Pandora's Box in the energy sector

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Windfall tax on energy companies is the new trend. After Romania, Italy, Bulgaria and Spain introduced windfall taxes, the UK is now following suit. Energy companies are taking steps to diminish the impact of the windfall tax and litigation seems to be one route. The wrongful design of the windfall tax may cause issues related to state aid and/or potential breach of the principles contained in national Constitutions, the EU Energy Directive, or the Energy Charter Treaty.

Across Europe, energy prices began to rise to high levels in 2021 and hit their highest recorded point in March 2022.[1] These high energy prices have led to higher bills, adversely affecting consumers worldwide. The latest market estimates indicate that energy prices will likely remain high for the rest of 2022 and into 2023.[2] Such sustained high-energy prices could lead to further impacts on all industry sectors.

[1] ACER's Final Assessment of the EU Wholesale Electricity Market Design, April 2022.
[2] Ibid.

Additionally, the price spike worsened at the end of February 2022 due to unexpected geopolitical tensions surrounding the energy-supply distortion linked to Russia's military aggression against Ukraine.[3] Even before this crisis, in the autumn of 2021, several EU member states introduced certain national measures to ease the effects of rising energy prices. Many of these measures were guided by the European Commission's Communication on **"Tackling rising energy prices: a toolbox for action and support"** (the **"Toolbox"**)[4] released on 13 October 2021. However, these measures have done little to alleviate the price shock that followed due to events from February 2022 onwards.

Consequently, on the 8th of March 2022, the Commission published "RePowerEU: Joint European action for more affordable, secure and sustainable energy Communication" (the **"Communication"**).[5] This Communication outlined several measures to respond to rising energy prices in Europe such as the need to diversify the EU's sources of gas supply, speed up the roll-out of renewable electricity sources as well as renewable gases, and replace gas in heating and power generation.[6] The Communication pointed out that to finance such emergency measures, member states could consider temporary tax measures on windfall profits. Furthermore, the Annex to the Communication provides step-by-step guidance to EU member states on the application of infra-marginal profit fiscal measures. As per the Commission, such measures should not be retroactive, should be technologically neutral and allow electricity producers to cover their costs and protect long-term market and carbon price signals.

Different EU member states have considered a variety of measures that range from less interventionist measures that safeguard wholesale market functioning to more interventionist measures, such as taxing windfall profits.[7] In line with the more interventionist approach, Romania adopted a series of measures that combine a compensation scheme for vulnerable consumers with taxing the "additional revenues" of electricity producers. These measures have been heavily criticised by all stakeholders of the energy sector and have generated a wave of litigious action.

Measures adopted in Romania

In October 2021, Romania enacted a compensation scheme applicable to vulnerable consumers, which lasted from the 1st of November 2021 to the 31st of March 2022, which intended to alleviate the consequences of the initial spike in electricity and natural gas prices for household consumption and prevent the exacerbation of energy poverty (the **"Compensation Scheme"**).

The Compensation Scheme was backed by an 80% windfall tax (the **"Windfall Tax"**) levied on the additional revenues obtained by electricity producers resulting from the difference between the average monthly selling price of electricity on the market and the pre-set threshold of RON 450/MWh (i.e., approximately EUR 91/MWh). The Windfall Tax was to be applied only from November 2021 to March 2022, and this exempted all electricity producers based on fossil fuels, including cogeneration. On 17 February 2022, the government introduced an additional exemption from the Windfall Tax for biomass electricity producers for revenues from electricity sales obtained after 1 January 2022.

The Windfall Tax was heavily criticised by the electricity market stakeholders, mainly due to the unjustified exemption of fossil-fuel producers and the lack of guidance on the calculation method of the tax that generated fragmentary application among electricity producers.

Resultingly on 22nd March 2022 the Romanian government decided to revise the Windfall Tax through Emergency Ordinance No. 27/2022 (**"GEO 27"**). GEO 27 prolonged the applicability of the 80% windfall tax set in November 2021 until 31 March 2023, but it no longer excluded fossil fuel, cogeneration and biomass-based electricity. Moreover, GEO 27 provided a detailed calculation method for the taxable net revenues obtained by electricity producers from electricity sales, which takes into account certain costs normally attributable to electricity production (the **"Revised Windfall Tax"**). However, GEO 27 appears to still favour fossil fuel-based electricity producers as it allows such producers to deduct from the calculation of the Windfall Tax the CO2 emission certificates acquisition costs which account for a large share of their overall costs. On top of that, the calculation method provided in GEO 27 would be retrospective in regarding the November 2021 to March 2022 period allowing renewable electricity producers to recalculate their Windfall Tax, while maintaining the exemption for fossil-fuel producers for the same period. New capacities commissioned following the effective date of the GEO 27 are exempt from the Windfall Tax, while such an exemption was not available during the November 2021 to March 2022 period, meaning that new capacities commissioned any time from November 2021 to March 2022 owe the Windfall Tax.

[3] Ibid.
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0660&from=EN
[5] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0660&from=EN
[6] Ibid.
[7] ACER's Final Assessment of the EU Wholesale Electricity Market Design, April 2022.

Waves of litigation against the Windfall Tax legislative mayhem

Firstly, renewable electricity producers argue that the initial Windfall Tax, applicable for November 2021 – March 2022, represents illegal state aid for fossil fuel, cogeneration, and biomass electricity producers. Such state aid is prohibited under EU law and is subject to formal complaints with the European Commission for breach of Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU). According to settled EU case-law[8] surrounding Art. 107 of the TFUE, measures by which public authorities grant certain undertakings favourable tax treatment, which place them in a more favourable financial position than other taxpayers, may amount to State aid within the meaning of Article 107(1) of the TFEU.

The Windfall Tax meets the specific requirements to qualify as state aid and is in breach of EU law because (i) it implies an intervention by Romania through State resources, which, in this case, takes the form of an 80% tax exemption awarded selectively; and (ii) such state intervention offers fossil fuels, cogeneration and biomass electricity producers exemptions on a selective basis from paying the 80% tax, which creates for these specific electricity producers an economic/fiscal advantage as opposed to all renewable electricity producers on the market. As a result, competition has been or may be distorted since the Windfall Tax relieves the beneficiaries of this exemption of significant tax liability that they would have otherwise been obliged to bear, thereby improving their competitive position in the markets in which they operate. Moreover, the intervention is likely to affect trade between EU member states since the companies benefiting from the Windfall Tax exemption are both Romanian national companies and companies that are part of multinational groups operating in various markets in other EU member states. Hence, any aid in their favour is liable to affect intra-EU trade.

According to Article 108(3) of the TFEU, EU member states are obliged to inform the Commission of any plan to grant aid, which is known as a notification obligation. Consequently, they may not put into effect any proposed aid measures until the Commission has adopted a final decision on the aid in question, which is the standstill obligation. Since Romania did not notify the Commission of any plan to grant the Windfall Tax nor did it respect the standstill obligation laid down in Article 108(3) of the TFEU, the tax treatment granted based on the Windfall Tax constitutes unlawful aid, which breaches Article 108(3) of the TFEU.

Secondly, since the Windfall Tax is levied only on green electricity producers, it is in breach of the goals set forth by EU Directive 2019/944,[9] of ensuring a "competitive, consumer-centred, flexible and non-discriminatory electricity markets" in the EU (i.e., Articles 3 and 5).

Additionally, under EU Regulation 2019/943,[10] the Romanian State is bound to ensure that electricity markets are operated in accordance with the principles listed in Article 3 and Article 4 of Regulation 943. Such obligations entail, among others, that the rules governing the electricity market should: (i) facilitate the development of more flexible generation and sustainable low carbon generation; (ii) enable the decarbonisation of the electricity system and thus the economy, including by integration of electricity from renewable energy sources and by providing incentives for energy efficiency; and (iii) deliver appropriate investment incentives for generation, in particular for long-term investments in a decarbonised and sustainable electricity system, facilitating fair competition and ensuring security of supply. The 80% Windfall Tax, which mainly targets renewable electricity producers, breaches all these rules since it interferes with the long-term aims of cost-efficient decarbonisation, cross-border exchanges and security of supply.

Thirdly, the Windfall Tax is in clear breach of the EC Joint Communication that outlines strict guidelines for member states to observe in to stop them from resorting to exceptional restriction measures related to infra-marginal profit fiscal actions. Consequently, the electricity market was under the legitimate expectation that any tax measures adopted by Romania should be in line with the EC Joint Communication.

However, both the Windfall Tax and the Revised Windfall Tax failed to secure such compliance, *inter alia* by: (i) discriminating between technologies (i.e. by exempting fossil fuels, including cogeneration, and biomass) and by taxing the net income of the producers rather than the profits (as recommended under EC Joint Communication); (ii) the method for the calculation of revenues that are taxed under the Windfall Tax is not linked to the specific crisis environment, and the trigger/deactivation mechanisms of the Windfall Tax are not clearly specified and justified; (iii) the Windfall Tax claws back not only the share of profits that were actually made, but also targets electricity that did not profit from higher market prices because it was already sold forward; (iv) the revenue from the Windfall Tax is not specifically passed to households in a non-selective and transparent manner but is aimed to generally "fighting" energy poverty, etc.

[8] Please see Case C-105/14 Taricco and Others EU:C:2015:555, paragraph 61; Case C-6/12 P Oy EU:C:2013:525, paragraph 18; Joined Cases C-106/09 P and C-107/09 P Commission and Spain v. Government of Gibraltar and United Kingdom, paragraphs 72 and 73; Joined Cases C-78/08 to C-80/08 Paint Graphos and Others EU:C:2009:417, paragraph 46; and Case C-387/92 Banco Exterior de España EU:C:1994:100, paragraph 14.

[9] EU Directive 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU (**"EU Directive 2019/944"**).

[10] EU Regulation 2019/943 on the internal market for electricity (**"EU Regulation 943"**).

Fourthly, besides being in breach of EU legislation, the Windfall Tax is also unconstitutional. Referring to Article 16, paragraph (1) of the Constitution of Romania, in conjunction with Article 56 thereof, the electricity producers from renewable sources are subject to discriminatory treatment as opposed to electricity producers from fossil fuels and cogeneration, given that the latter are exempted from an additional tax burden, which is only levied on the revenues of green electricity producers. This would ultimately affect the formation of the electricity price, creating advantageous pricing conditions for fossil fuel/cogeneration/biomass electricity as opposed to green electricity, as electricity producers from renewable sources would have to factor into their electricity sale price the Windfall Tax's impact. Similar discrimination and unfair fiscal treatment also apply to other market participants (i.e., traders) who – although, reaping the benefits of high electricity prices – are not subject to the Windfall Tax.

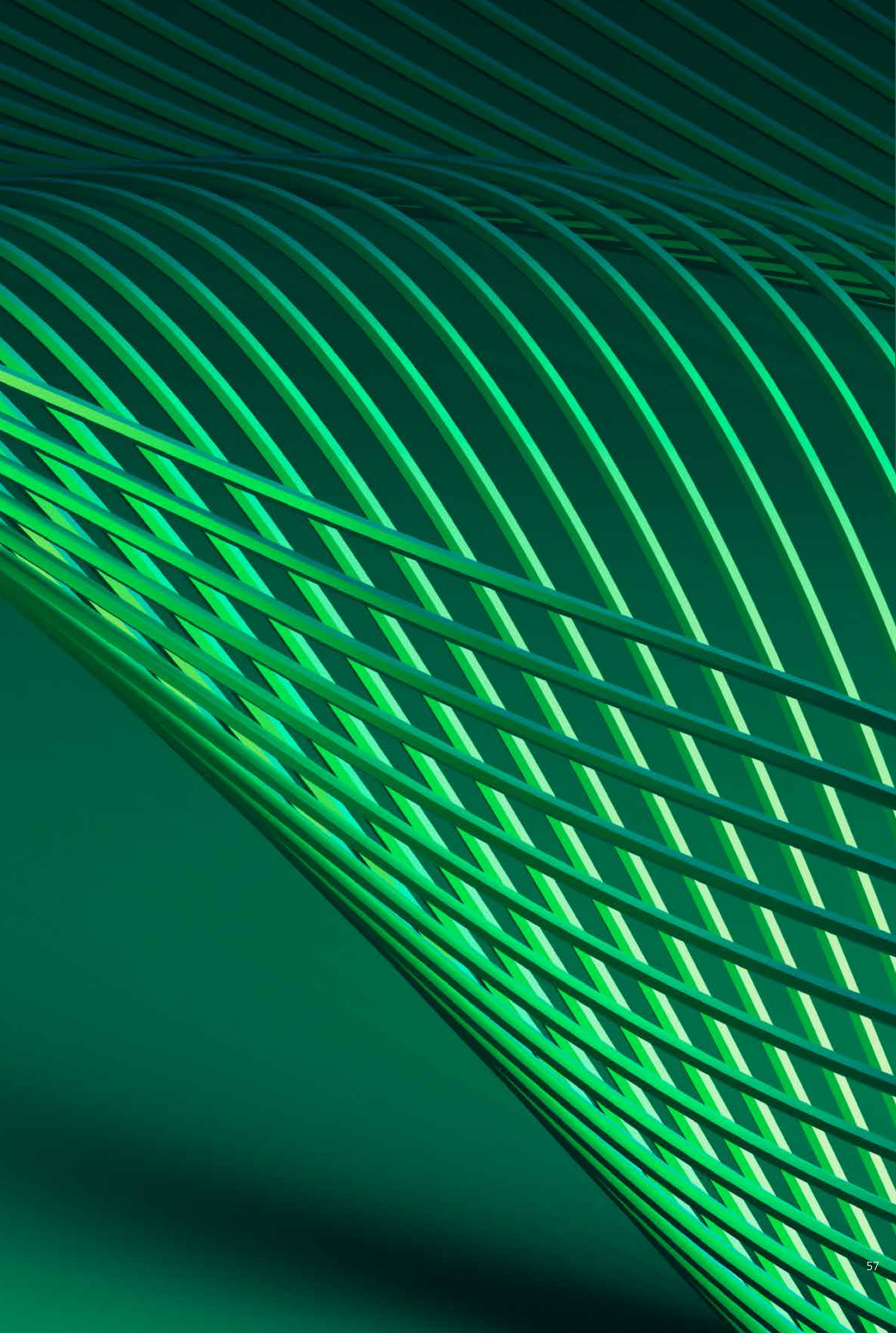
Additionally, the Windfall Tax may be viewed as infringing on Article 135 of the Romanian Constitution according to which Romania must ensure, among other considerations, free trade, protection of fair competition, and a favourable framework to stimulate and capitalise on every factor of production, environmental protection and recovery and the implementation of regional development policies in compliance with the objectives of the European Union. Likewise, it is argued that the Windfall Tax is in breach of Article 44 of the Constitution if one considers that the Windfall Tax is tantamount to an indirect expropriation of electricity producers.

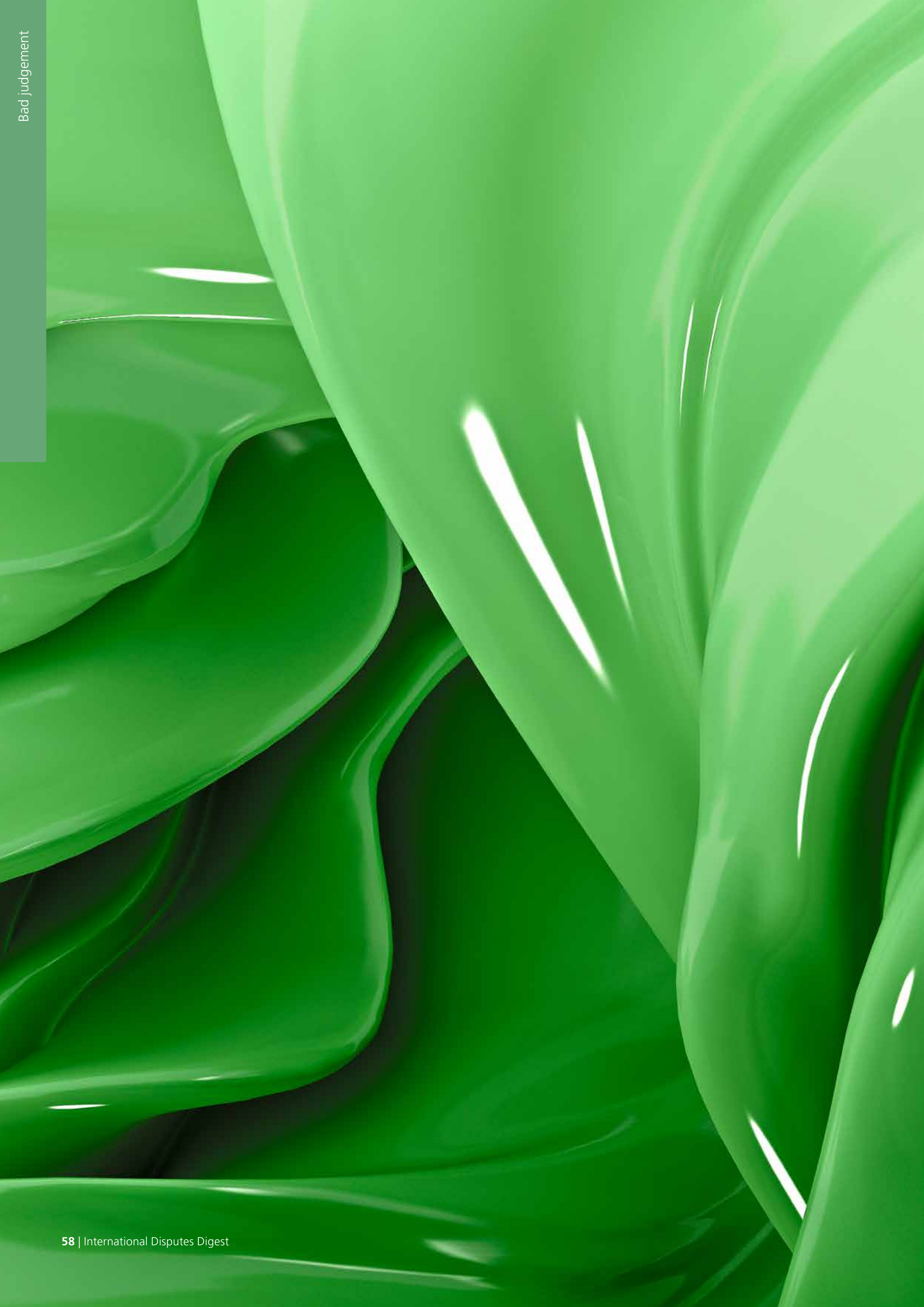
Finally, a breach of foreign investment protection under the Energy Charter Treaty (**"ECT"**) may also be claimed. The ECT is a comprehensive legal framework for energy investment protection, including investment in renewables, which is backed up by a dispute-solving mechanism available to investors against the host states of the investments. The ECT also includes a taxation carve-out provision in Article 21, which, in principle, excludes tax measures enacted by contracting parties from ECT provisions. However, there are certain exceptions to this carve-out where a tax measure will still be covered by the ECT foreign investment protection mechanism. For example, the ECT provisions and dispute mechanism apply where an investor can prove that a tax (i.e. on income or capital) imposed by the host state constitutes an expropriation or that a tax alleged to constitute an expropriation is discriminatory. However, the difficulty of intra-EU bilateral investment treaties arbitration or ECT intra-EU arbitration disputes may stall investors from commencing ECT-based investment arbitrations, given the strong view of the CJEU on the invalidity of such arbitrations as established in the *Achmea* and *Konstroy* cases.

Conclusion

The "interventionist measures" implemented by Romania through the 80% Windfall Tax carry the risk of eliminating the significant benefits already achieved by national electricity market integration over the years. These measures may also make it more difficult for Romania to achieve its decarbonisation commitments in the medium-term by negatively impacting investor confidence.

These measures have generated a strong reaction from electricity-market participants who have challenged the measures both in front of the European Commission and national courts. However, the measures are in the early stages of implementation and depending on the medium-to-long-term implications, stakeholders are expected to initiate further proceedings, including investor-state arbitrations under the ECT.





Bad judgement

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As a non-party, being criticised in a judgment can be highly damaging. But the options to fight back are beginning to emerge

As any experienced litigator will know, a major piece of litigation can be a minefield of potential reputational damage regardless of who ultimately wins the case. Legal cases provide a basis on which embarrassing internal correspondence has to be disclosed and then can be ventilated in open court. Or the other side can make serious and harmful accusations which can obtain traction, no matter how false they may be. The recent twin libel trials of Depp v Heard in the United States and the so-called Wagatha Christie case in the UK both garnered immense public attention, with reputations made and broken.

So far so typical. In many cases, careful media management is simply part of the ordinary duties of the litigation team (which may include PR specialists). However, sometimes a particular reputational problem emerges which is especially difficult to deal with. That is, as occasionally happens, where a person, who may not be a party to the action at all (but for example merely a witness), is the subject of allegations in the judgment of some form of serious wrongdoing. And those difficulties can be severely exacerbated when the person accused of the wrongdoing is one of the lawyers on the case.

At one time in the UK, court judgments once delivered would have been thought to be effectively unchallengeable. If there was any adverse criticism of any person in a judgment, that simply had to be taken on the chin. That was extremely unfortunate because not only are judgments seen as highly authoritative – and so the ensuing reputational damage can be severe, but the reporting of them is highly protected in English law. So by and large any allegation made in a judgment can be reiterated by a journalist in the media, provided he or she does not to do with actual malice.

But now things have changed, at least a little. In the past 20 years there has been a revolution in English law as regards privacy law. And more recently, there has been a focus on the extent to which privacy law can be used to protect reputation. Given that this privacy law is based on the European Convention of Human Rights, it even applies to judges giving judgments. For these reasons, in 2017 the Court of Appeal allowed a third party who was mentioned adversely (and he said falsely) in a first instance judgment to challenge the wording.

Shortly after that, Mr Justice Nicklin[2] in the English High Court set out the parameters for referring to third parties in these situations (in that case in a regulatory adjudication, but there is no reason to believe that the same approach should not apply to judgments). These were that it:

1. must be decided whether it is necessary to include criticism of the individual, that is whether it is within "all fours" of the substance of the decision;
2. if so, whether the individual's interests could be protected by anonymising him or her; and

[1] *Re W (A Child)* [2017] 1 WLR 2415
[2] *Taveta Investments v The FRC & Ors* [2018] EWHC 1662

3. if the individual cannot be anonymised then the duty of fairness will arise, so that the criticism of the individual should be put to him or her and an opportunity should be given to respond.

Only then can the criticism be included in the decision.

Around the same time, this approach was backed up by the European Court on Human Rights in a case from Spain[3] with the Court saying "that the inclusion by the High Court of Justice of the applicant's identity coupled with the statement on his acts as part of its own reasoning in the judgment constituted an "interference" with the applicant's right to respect for his private life…"

This potentially provides significant protection to third parties inculpated in English judgments. If you are a third party and find that you are criticised unfairly in a judgment – or hear that you are about to be – you may first of all be able to contend that the reference should not be included because it is not necessary for the substance of the judgment, secondly that any such reference should be anonymised and thirdly, failing that, that it should be included only if you have had a fair chance to respond to the criticism and explain your side. Such an engagement with a judge is plainly much better before the judgment is handed down. However, there is a difficulty in that draft judgments before they are handed down are almost invariably provided only to the parties and then subject to a strict embargo.

So if you are a third party and believe that you might be criticised in a pending judgment, you might specifically write to the judge stating your concerns and asking exceptionally to be provided a copy in advance to handing down. Or you might alternatively ask one of the parties that when they receive the judgment in draft to assess it to see if there is any such criticism and if so, ask the judge to extend the embargo so that the draft judgment can be provided to you.

That is potentially quite complex, not least as you would want to be certain that there was a high likelihood that the judge was intending to criticise you before proceeding. It also is not certain to succeed, but the law now provides significant support for this approach. And proceeding like that might be better than simply allowing a judgment to be made public which has damaging accusations in it without making any attempt to prevent it.

But what if you are a lawyer working on the case and are criticised in a draft judgment? You are likely to be able to see the draft judgment because you are acting for one of the parties. The first problem is that you may be taken up with acting for your client. When a judgment is first provided in draft it is often a busy time with the parties considering its effect, the significance and the consequential orders. The second problem is that you are working under twin duties of (a) acting in the best interests of your client and (b) not being able to disclose material confidential to your client, and it may be that such material is vital to exonerate you from the criticism.

This creates the most acute of difficulties. At this stage for a lawyer in this situation, one of the most important things is to obtain independent advice. But even that is not simple, for example the courts have recently pointed out that judgments cannot even be shared internally within a law firm without potentially breaching the embargo. Moreover, typically, litigators when they receive a draft judgment will be 100% focused on protecting their client. But in this situation, their own interests loom large as well. They cannot possibly reconcile both, hence the needs for specialist advice.

Being criticised in an English judgment will always thrust the person being criticised into a very difficult situation. This situation becomes even more complex when that person is a lawyer working on the case. But it is worth knowing that there are legal bases for pushing back. These need to be exercised deftly, but if done so, they may provide significant reputational protection.

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This piece forms part of this year's "In Dispute" thought leadership campaign being led by the London Litigation & Arbitration team into "Reputation in Litigation". They gave a webinar on 23 June 2022 and have issued three videos looking at detailed aspects on the topic (see: In Dispute | Reputation in Litigation (cms.law)).

[3] *Vicent Del Campo v Spain* [2018] ECHR 909

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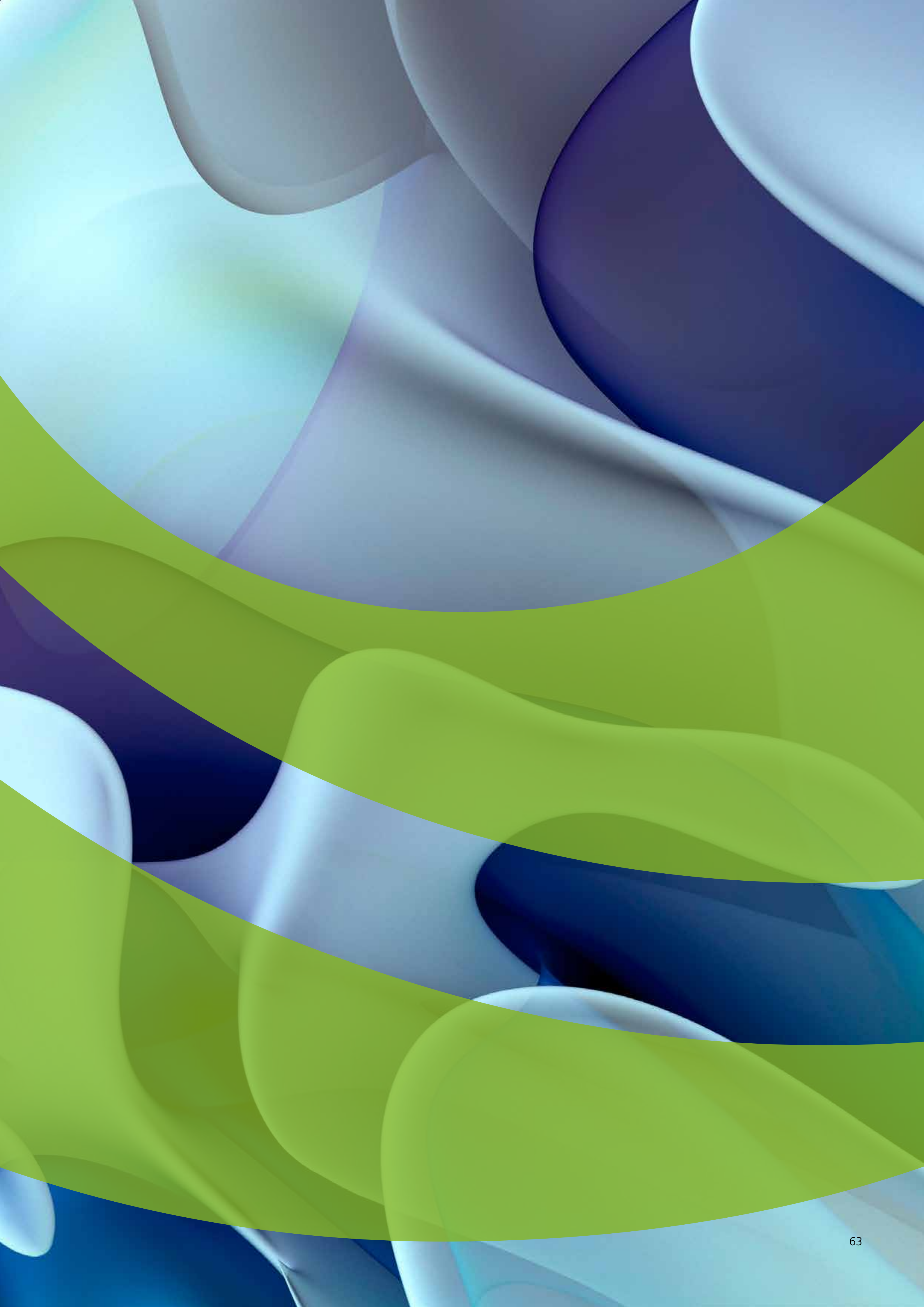

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