CLYDE&CO

Arbitration & Litigation

Quarterly Update 1/2023

Contents

Dear reader,

In light of the challenges of the past year and the outlook for the year ahead of us, we are pleased to present the first issue of our Quarterly Update for 2023. Also, in this issue you will find reports on current topics and developments in the field of Arbitration & Litigation as well as the further series of our comparative law articles. In particular:

- Arbitrating complex disputes using third party notices
- Reform der Produkthaftungsrichtlinie – Status quo und Ausblick
- Sammelklagen in Deutschland: Der Referentenentwurf zur Umsetzung der EU-Richtlinie über Verbandsklagen
- Development of offshore wind energy in India
- Development of offshore wind energy in India – Legal framework
- Document production in international arbitration seated in England – a smoking gun or puff of smoke?
- Document production in international arbitration in France – a smoking gun or puff of smoke?
- Document production in international arbitration in Spain – a smoking gun or puff of smoke?
- Document production in international arbitration in Germany – a smoking gun or puff of smoke?
- Interim measures in French seated arbitrations – do they measure up?
- Interim measures in Spanish seated arbitrations – do they measure up?
- Interim measures in English seated arbitrations – do they measure up?
- Interim measures in German seated arbitrations – do they measure up?
- Interim measures in Egyptian seated arbitrations – do they measure up?
- Dispute escalation provisions and international arbitration – a rising threat in France?
- Dispute escalation provisions and international arbitration – a rising threat in the UAE?
- Dispute escalation provisions and international arbitration – a rising threat in Germany?
- Dispute escalation provisions and international arbitration – a rising threat in Canada?
- Dispute escalation provisions and international arbitration – a rising threat in England & Wales?
- Dispute escalation provisions and international arbitration – a rising threat in Spain?

Last but not least, we wish you not only an interesting read, but above all a successful start into the new Year!

As always, we welcome your questions, suggestions and feedback. Please feel free to write to us anytime at **Arbitration.Germany@clydeco.com**

Yours
Clyde & Co Arbitration Team Germany

Liebe Leserin, lieber Leser,

Im Lichte der Herausforderungen des vergangenen Jahres und dem Ausblick auf das vor uns liegende Jahr freuen wir uns, Ihnen die erste Ausgabe unseres Quarterly Updates für 2023 vorzustellen. Auch in dieser Ausgabe finden Sie Berichte zu aktuellen Themen und Entwicklungen aus dem Bereich Arbitration & Litigation sowie die Fortsetzung unserer rechtsvergleichenden Artikelreihe, insbesondere:

- Arbitrating complex disputes using third party notices
- Reform der Produkthaftungsrichtlinie – Status quo und Ausblick
- Sammelklagen in Deutschland: Der Referentenentwurf zur Umsetzung der EU-Richtlinie über Verbandsklagen
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Zu guter Letzt wünschen wir Ihnen nicht nur eine interessante Lektüre, sondern vor allem ein erfolgreiches Jahr 2023.

Wie immer freuen wir uns über Fragen, Anregungen und Feedback. Schreiben Sie uns gerne dazu an **Arbitration.Germany@clydeco.com**

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Arbitrating complex disputes using third party notices

Introduction

For cross-border projects and business relationships around the globe, arbitration is used to resolve disputes once and for "all". The finality is often given, but is the dispute also resolved for "all"? In this Clyde & Co Insight, Georg Scherpf (Counsel), Antonios Politis (Associate) and Benedikt Kaneko (Research Assistant) look at ways and initiatives to adapt the concept of third party notices to arbitration.

Especially in complex projects involving multiple parties and several layers of contractual relationships, it often comes to lengthy and expensive recourse proceedings e.g. against subcontractors, where almost identical facts are argued all over again. Apart from the unnecessary and avoidable costs of arguing the facts more than once, there is also a significant risk for the involved parties: Despite the common use of warranties and indemnification clauses in back-to-back contracts with subcontractors (e.g. based on the FIDIC Yellow Book Subcontract), the possibility of contradictory rulings on the same subject matter could lead to the loss of recourse claims against subcontractors in the vertical contractual chain.

A possible remedy lies in the procedural instrument of third party notices modelled after German procedural law. By creating a binding effect for recourse proceedings, third party notices prevent contradictory rulings and thereby increase the efficiency of dispute resolution in complex multiparty projects.

Third party notices under German procedural law

Third party notices are a popular tool whenever multiparty contracts are being litigated before German state courts. This procedural instrument – in German "*Streitverkündung*" – based on Section 72 et seqq. German Code of Civil Procedure (*Zivilprozessordnung*) may be used by either of the parties already involved in a litigation. Usually, the starting point is a party which anticipates an unfavorable outcome in pending proceedings and hopes to bring a recourse claim (e.g. a claim for warranty or indemnification) against a third party (e.g. a subcontractor or supplier).

In short, the already involved party can submit a third party notice to the court, asking for it to be served on a specific third party. The recipient of the third party notice can then decide whether it wants to join the ongoing proceedings as a so-called "intervener" in support of one of the main parties ("*Nebenintervenient*" or "*Streithelfer*") or not.

- If the third party joins the ongoing proceedings as an intervener, it directly participates in the proceedings with certain rights of its own: The intervener has the right to make procedural applications, submit briefs (including evidence) and raise defenses, as long as any of these actions do not contradict the procedural declarations and actions of the supported main party. However, the third party cannot be the addressee of any obligation under the resulting judgment since it only joins as an intervener and not as a "full" party – which is also the main distinction from the classic "joinder" ("*Streitgenossenschaft*").

- On the other hand, if the third-party refuses to join the proceedings as an intervener, the litigation continues without that third party.

Regardless of whether the third party joins as an intervener or not, the main advantage of third party notices does not lie in the ongoing "primary proceedings" but in (potential) subsequent proceedings, i.e. in case of recourse claims against the third party. In such "recourse proceedings", the third party is bound by the findings of the primary proceedings – even though not being involved as a "full" party there. By creating this binding effect of the primary ruling (so called "Interventionswirkung"), third party notices prevent contradictory rulings on the same subject matter across different proceedings. Importantly, the third party in potential recourse proceedings generally cannot argue that the previous dispute has been incorrectly resolved, as it either was involved as an intervener or has forfeited its opportunity to participate in the primary proceedings altogether (see Sections 74(3), 68 German Code of Civil Procedure). Of course, this creates a strong incentive for the third party to join the primary proceedings in the first place.

Can it be transposed to arbitration?

Through the binding effect for recourse proceedings, the instrument of third party notices contributes to the efficient dispute resolution between multiple parties and across multiple contractual relationships in German state courts. It provides an interesting mechanism that can also be made use of in arbitration by including respective provisions in the arbitration clause. Already today, it is increasingly found in complex projects relating to infrastructure and energy investments requiring all potential recipients of third-party notices to sign the same arbitration agreement and agree to a mechanism of third party notices.

However, institutional arbitration rules are currently not designed to accommodate this involvement of non-parties with specific procedural rights as none of the major arbitral institutions have provided for third party notices in their arbitration rules and model arbitration clauses. Rather, third parties are generally understood to participate either as regular parties by way of joinder or consolidation, or as non-parties for example by way of only having the possibility to weigh in by submitting *amici curiae* briefs without any actual procedural rights. Due to this lack of specific rules on participation by non-party interveners, the risk of a conflict between the institutional rules and the third party notice-mechanism included in the arbitration clause is high. Most arbitrators will try to adapt the rules applicable to the regular joinder to interveners or will have to make ad hoc decisions on the procedural rights of interveners.

To mitigate such issues without the necessity of drafting bespoke arbitration agreements, there are some initiatives to develop easily usable rules in this regard:

- From the perspective of arbitral institutions, the German Arbitration Institute (DIS) has set up a working group to look into the possibility of incorporating these procedural instruments into its arbitration rules and, to this end, has recently published a third draft on "Supplementary Rules for Third Party Notices" (*Ergänzende Regeln für Streitverkündungen* – "**Draft DIS Supplementary Rules**") for discussion. These rules – once finalized – are meant to be incorporated by a mere reference in addition to the DIS Arbitration Rules. They adapt main features of the German regulation of third party notices (Sections 72 et seqq. German Code of Civil Procedure) for arbitrations under the DIS Arbitration Rules and also contain rules meant to adjust this procedural instrument for the particularities of arbitration (for example, rules on the participation of interveners in the selection of arbitrators). A third party notice recipient will be bound by the findings of the primary proceedings for the purpose of any proceedings concerning the recourse claims and will have similar rights as a third party notice recipient in German state court proceedings. Importantly, an application of the rules and the possibility for a third party notice depends on all parties, including the third party/prospective recipient of the third party notice, to have consented to their application.

- Furthermore, there is another initiative focusing on including rules on third party notices in the arbitration agreement itself. A group of German practitioners has drafted the "Munich Rules on the Participation of Third Parties in Arbitration Proceedings" ("**Munich Rules**"), which aim to incorporate elements of the German third party notice-mechanism by virtue of an additional agreement between the parties – i.e. with no need to refer to a specific set of institutional rules. These rules, which shall apply "in addition to and taking precedence over" any chosen arbitration rules or arbitration agreement, primarily address the relationship between the parties in an arbitration and one party's possibility to issue third party notices. Interestingly, joining as an intervener or declining to join is not directly linked to any consequences as, according to § 5.3 of the Munich Rules, "[t]he legal consequences of the joinder or the failure to join the proceeding shall be governed by the applicable substantive law". Therefore, any binding

effect between the issuer of the third party notice and its recipient depend on the recourse relationship connecting the two parties. However, only if the recourse relationship is of a contractual nature (e.g. a subcontractor contract) there is room to stipulate these consequences. Therefore, the "binding effect" is only triggered if and to the degree that it is agreed upon in the recourse relationship (if at all possible), which will very often not be the case. In such cases, the above-mentioned "incentive" for a third party to join the pending proceedings will be limited.

Notwithstanding various unresolved issues, which will certainly continue to be a source of discussion, these and similar sets of rules could, once included in institutional rules, lead the way towards a more efficient resolution of multi-party contract disputes.

Key issues to consider when drafting arbitration agreements including third party notices

Until then, it is necessary to negotiate bespoke arbitration agreements which cover not only bilateral situations but the participation of third parties in ongoing proceedings and also the binding effect of the first tribunal's findings for any recourse proceedings. When considering opting for such an agreement, there are some key issues parties should consider:

- In terms of a binding effect, first of all, it is necessary to have an agreement between all parties on all contractual levels in place – i.e. specifically including prospective addressees of recourse claims. Ideally, all parties should sign a separate arbitration agreement containing the third party notice-mechanism in addition to the contracts in their respective contractual relationships. As a result of such a "multilevel arbitration agreement", all involved parties can be certain that the primary ruling will have a binding effect for any recourse proceedings. The incentive will therefore be high to resolve the dispute – as far as possible – as a "One Stop Shop" or at least in truncated and expeditious recourse proceedings.

- Equally important is a clear mechanism on the appointment of arbitrators where non-party interveners are involved: Since a third party notice recipient has an interest in the arbitration due to its binding effect, it is important to establish a mechanism that balances the stakes and interests of all participants to the arbitration and that ensures the enforceability (binding effect) of the award.

- Another aspect concerns determining the timing of any third party notice as to not disturb the arbitral proceedings and to ensure that the joining third party still has sufficient influence on the selection of arbitrators. For example, the Munich Rules allow for a third party notice at any stage of the proceedings, while the Draft DIS Supplementary Rules generally limit a third party notice to the very early stages, i.e. prior to appointment of arbitrators, unless there is no objection by the recipient to the composition of the arbitral tribunal.

- Furthermore, the procedural impact of (possibly multiple) interveners joining the proceedings should be considered: The tribunal will have to take their respective participation rights into account and e.g. provide for sufficient opportunities (and respective staggered deadlines) to submit own briefs or to participate in the taking of evidence. Here, it can be of advantage to explicitly regulate the individual rights.

- Modern arbitration rules cater for consolidation and joinder, but so far do not provide rules or guidance for third party notices. It is important to keep in mind that several standard procedures and features of institutional rules are not necessarily compatible. Careful drafting can prevent deadlock situations.

- It is also important to establish a clear framework how third party notices are to be submitted and distributed ("served") among the parties. To ensure a functioning system overall, confidentiality rules in the individual contracts might also have to be adjusted to include parties that are involved in the overall dispute but are not privy to one of the contracts that might be relevant to the dispute. The Munich Rules contain wide limits to confidentiality in arbitral proceedings. The Draft DIS Supplementary Rules refer to the DIS Arbitration Rules and apply the ordinary rules on confidentiality on the third party.

- Also, regarding the allocation of the costs of proceedings, institutional rules do not take into account the possibility of non-party participants. Parties considering using the third party notice-mechanism should include detailed rules in this regard so that any potential cost participation of interveners is already clear at the time of their joinder. In particular, it should be clarified whether and how any costs caused by the participation of intervenors are to be shared among the participants to the proceedings.

– Lastly, in terms of drafting the agreement, the multilevel arbitration agreement could be designed as a stand-alone agreement conclusively regulating all aspects of third party notices and their consequences for the primary and for recourse proceedings. Alternatively, the third party notice-mechanism could also be incorporated by mere reference to the mentioned provisions of the German Code of Civil Procedure, although the compatibility of these provisions with the particularities of arbitration should be carefully considered in each case.

Overall, the rights and obligations that exist for all parties and non-parties to an arbitral proceeding should be carefully considered. Where needed, the multilevel arbitration agreement should amend existing arbitration rules explicitly in order to give clear guidance to arbitrators which provisions to follow.

Including a multilevel arbitration agreement for a complex project or business relationship provides for a unique opportunity to solve complex disputes between multiple parties and multiple contracts in an efficient and consistent manner. Our German energy and arbitration team regularly advises on the drafting and negotiating such complex arbitration agreements providing for third-party notices and other mechanisms for an efficient dispute resolution. The author *Scherpf* is also a member of the DIS working group on third party notices.

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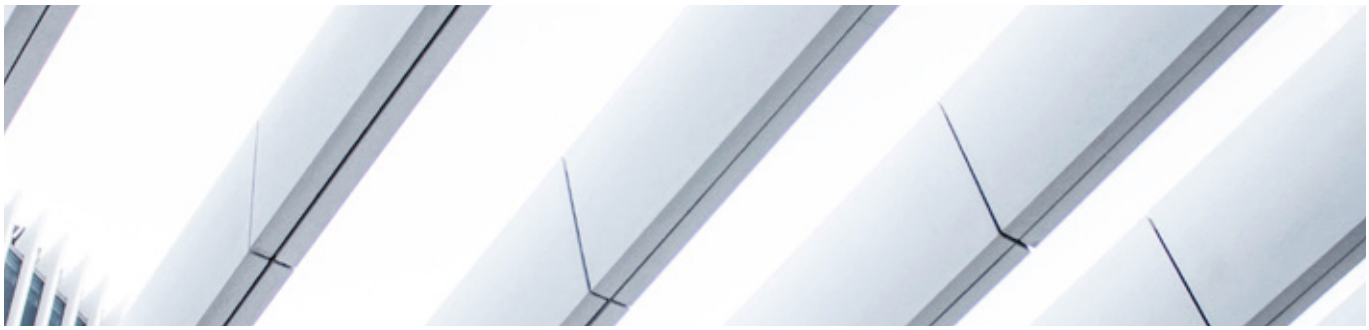


Reform der Produkthaftungsrichtlinie – Status quo und Ausblick

Die nationalen und internationalen Regelungen zur Produkthaftung sind ein Thema, welches die Industrie seit je her bewegt. Dementsprechend sind auch die aktuellen Entwicklungen im Bereich des Produkthaftungsrechts insbesondere auf internationaler Ebene mit Spannung zu verfolgen.

Einleitung

Grundlage des Produkthaftungsrechts bildet seit dem Jahr 1985 die europäische Richtlinie zur Angleichung der Rechts- und Verwaltungsvorschriften der Mitgliedsstaaten über die Haftung für fehlerhafte Produkte.[1] Der deutsche Gesetzgeber hat diese Richtlinie im Produkthaftungsgesetz („ProdHaftG“) umgesetzt. Ergänzt werden die Haftungsregelungen im ProdHaftG durch die Produzentenhaftung nach § 823 des Bürgerlichen Gesetzbuches („BGB“).

Bei der Verabschiedung der Produkthaftungsrichtline, deren Umsetzung in das deutsche ProdHaftG sowie die durch Rechtsprechung und Schrifttum konkretisierte deliktsrechtliche Produzentenhaftung waren dabei „klassische“, das heißt verkörperte Waren im Fokus des Gesetzgebers. Aufgrund der technischen Entwicklungen seit dem Jahr 1985, insbesondere die fortschreitende Digitalisierung, stand die Produkthaftungsrichtline in den letzten Jahren allerdings immer wieder auf den Prüfstand. Neben der – viel diskutierten und im Ergebnis zu bejahenden – Frage, ob es sich auch bei Software um ein Produkt im Sinne der Produkthaftungsrichtlinie handelt,[2] steht aktuell die Verteilung der Haftungsrisiken bei Produkten unter Einsatz von Künstlicher Intelligenz („KI“), sogenannter Waren mit embedded Software, im Mittelpunkt.[3] Hierbei handelt es um Software, die zur Steuerung von Maschinen und Geräten in einen körperlichen Gegenstand integriert ist und zusammen mit diesem eine funktionelle Einheit bildet. Zu denken ist beispielhaft an autonome Fahrzeuge, Industrie-Roboter sowie Smart Home Produkte wie automatisierte Staubsauger und Rasenmäher. Letztere gehören nicht nur in Deutschland mittlerweile zum Alltag. Und auch der Einsatz autonomer Fahrzeuge beschränkt sich nicht mehr allein auf Teststrecken.

Obgleich KI, autonome Systeme und das „Internet of things“ neue Möglichkeiten und Chancen für die Gesellschaft und die Industrie bieten, lassen sich gleichzeitig die hieraus resultierenden Risiken derzeit noch nicht absehen. Auf dieser Grundlage sind die derzeitigen Reformüberlegungen auf europäischer Ebene sowie die parallel verlaufenden Diskussionen im Schrifttum zu sehen, die sich insbesondere auf die Anwendbarkeit des geltenden Haftungsrechts und einem (etwaigen) Reformbedarf fokussieren. Gegenstand der Betrachtung sind dabei unter anderem die Fragen, wer als Hersteller des Produkts im Sinne von § 4 ProdHaftG anzusehen ist (Hersteller der Software? Hersteller der Trainingsdaten? Hersteller des Kombinationsprodukts, in das die Software integriert wurde?), wie mit der Fehlerdefinition in § 3 ProdHaftG sowie dem Haftungsausschluss nach § 1 Abs. 2 Nr. 5 ProdHaftG bei einer selbstständigen Weiterentwicklung der Software nach dem in Verkehr bringen des Produkts umzugehen ist sowie die gegebenenfalls bestehende Notwendigkeit einer Beweislastumkehr und/oder die Einführung einer Pflichtversicherung.

Reformüberlegungen auf europäischer Ebene

Bericht der Europäischen Kommission vom 19.02.2020

Vor dem Hintergrund der fortschreitenden technischen Entwicklungen steht eine Reform der Produkthaftungsrichtlinie seit Jahren auf der Agenda des europäischen Gesetzgebers. So hat die Europäische Kommission in ihrem Bericht über die Auswirkungen künstlicher Intelligenz, des Internets der Dinge und der Robotik in Hinblick auf Sicherheit und Haftung[4] an das Europäische Parlament vom 19.02.2020 unter anderem

1. Richtlinie 85/374/EWG – „Produkthaftungsrichtlinie“
2. Vgl. zur Diskussion statt vieler nur Wagner, in MüKo, 8. Aufl. 2020, ProdHaftG §2, Rn. 21 ff; EuGH (AZ: C-65/20)
3. Vgl. djt I/A 68; Fairgrieve/Rajneri, IWRZ 2019, 24 (26); Koch, VersR 2020, 741 (742)
4. Bericht der Europäischen Kommission vom 19.02.2020 – COM(2020)64final.

festgestellt, dass die Begriffsbestimmung für „Produkt“ weiter präzisiert werden sollte, um der Komplexität neuer Technologien besser Rechnung zu tragen.[5] Insofern gelte es, insbesondere auch die zunehmende Verflechtung von Produkten und Dienstleistungen, wie etwa die Aktualisierung von Software, zu berücksichtigen. Einen entsprechenden Vorschlag für eine Neufassung des Produktbegriffs enthält der Bericht der Europäischen Kommission indes nicht. Auch der Begriff des „Inverkehrbringens“ müsse überarbeitet werden, wobei es die Europäische Kommission erneut bei dieser Feststellung belässt.[6] Eine Konkretisierung des „Inverkehrbringens“ solle aus Sicht der Europäischen Kommission zu einer Klärung beitragen, wer für Änderungen an einem Produkt haftbar ist, weshalb damit zugleich besser beurteilt werden könne, wer als Hersteller im Sinne der Produkthaftungsrichtlinie angesehen werden könne.[7] Zugleich kann der Zeitpunkt des Inverkehrbringens – wie eingangs bereits angesprochen – dafür entscheidend sein, ob der Haftungsausschluss nach § 1 Abs. 2 Nr. 5 ProdHaftG einschlägig ist.

Bezüglich einer Beweislasterleichterung oder -umkehr wollte die Europäische Kommission ebenfalls keine Empfehlung abgeben, sondern im Rahmen einer geeigneten Umfrage das Meinungsbild einholen.[8] Gleiches gilt für die Frage, ob und inwiefern eine verschuldensunabhängige Haftung im Zusammenhang mit dem Betrieb von KI-Anwendungen mit einem spezifischen Risiko angezeigt ist.[9] Letztlich erschöpft sich der Bericht der Europäischen Kommission damit in der Benennung der derzeitigen Probleme bei der Anwendung der Produkthaftungsrichtline bzw. der jeweiligen Produkthaftungsregelungen der Mitgliedsstaaten, ohne jedoch konkrete Reformvorschläge zu unterbreiten.

➤ Vorschlag des Europäischen Parlaments vom 20.10.2020

Im Nachgang zu dem vorgenannten Bericht der Europäischen Kommission hat das Europäische Parlament am 20.10.2020 eine Empfehlung für eine Verordnung zur Regelung der zivilrechtlichen Haftung beim Einsatz künstlicher Intelligenz verabschiedet.[10]

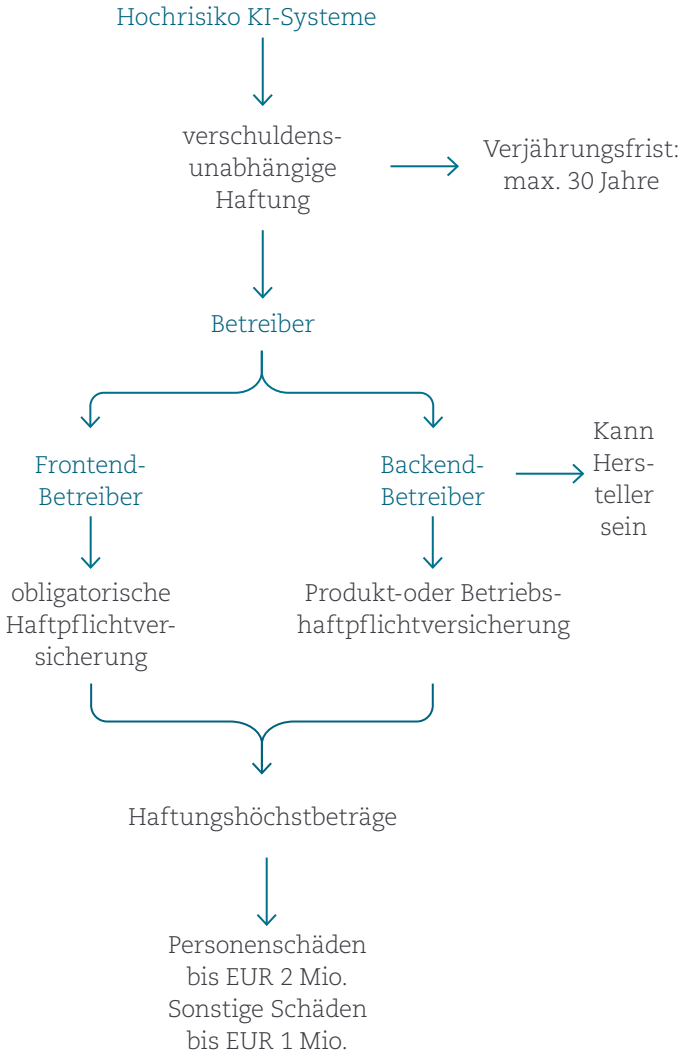
Gegenstand dieser Empfehlung war insbesondere der Vorschlag, die zivilrechtliche Haftung beim Einsatz von KI durch eine Verordnung (neu) zu regeln. Auffällig ist dabei, dass eine eigenständige und von den Mitgliedsstaaten direkt anzuwendende Verordnung und damit gerade keine Ergänzung oder Überarbeitung der Produkthaftungsrichtlinie angedacht war. Hinsichtlich der Haftung solle nach Auffassung des Europäischen Parlaments zwischen „KI-Systemen mit hohem Risiko“ und sogenannten „anderen KI-Systemen“ unterschieden werden. Ein KI-System mit hohem Risiko soll dabei als KI-System definiert sein, dass ein signifikantes Potential hat, Personen- oder Sachschäden auf eine Weise zu verursachen, die zufällig ist und darüber hinausgeht, was vernünftigerweise erwartet werden kann.[11] Die Faktoren, die hierbei in die Bewertung einfließen sollten, lassen sich wie folgt zusammenfassen:

- die Schwere des möglichen Schadens;
- die Frage, inwieweit die Entscheidungsfindung autonom erfolgt;
- die Wahrscheinlichkeit, dass sich das dem KI-System inhärente Risiko verwirklicht; und
- die Art, in der das KI-System verwendet wird.[12]

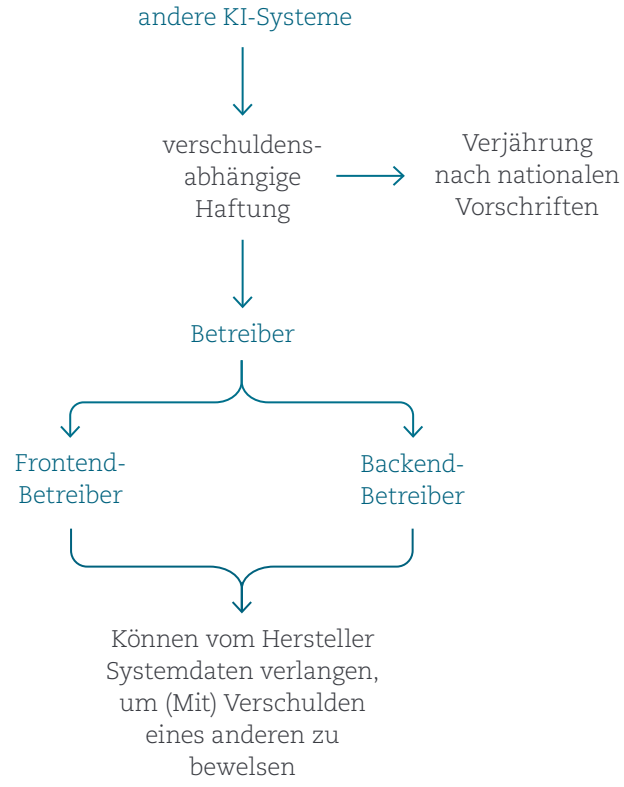
Als Haftungssubjekte hat das Europäische Parlament sowohl die sogenannten „Frontend-Betreiber“ wie auch die „Backend-Betreiber“ vorgeschlagen. Frontend-Betreiber solle dabei sein, wer ein gewisses Maß an Kontrolle über ein mit dem Betrieb und der Funktionsweise des KI-Systems verbundenes Risiko ausübt und für den der Betrieb einen Nutzen darstellt, während Backend-Betreiber als Betreiber umschrieben werden, die auf kontinuierlicher Basis Merkmale der Technologie definieren und einen wesentliche Backend-Support-Dienst bereitstellten.[13] Daneben hat das Europäische Parlament konkrete Vorschläge zur Haftung, zu Haftungshöchstgrenzen, dem Abschluss von (Pflicht-)Versicherungen und Verjährungsregelungen beschlossen. So sollen etwa die Betreiber eines KI-Systems mit hohem Risiko verschuldensunabhängig

5. Bericht der Europäischen Kommission vom 19.02.2020 – COM(2020)64final, S.17
6. Bericht der Europäischen Kommission vom 19.02.2020 – COM(2020)64final, S.17
7. Bericht der Europäischen Kommission vom 19.02.2020 – COM(2020)64final, S. 19
8. Bericht der Europäischen Kommission vom 19.02.2020 – COM(2020)64final, S.19
9. Bericht der Europäischen Kommission vom 19.02.2020 – COM(2020)64final, S. 19
10. Vorschlag des Europäischen Parlaments vom 20.10.2020 – P9_TA(2020)0276 / (2020/20148INL))
11. Art. 3 lit. a), c) 2020/2014(INL)
12. Art. 3 lit. c) 2020/2014(INL)
13. Art. 3 lit. d) – lit. f) 2020/2014(INL)

bis zu einem Höchstbetrag von 2 Millionen Euro haften.[14] Daneben solle für KI-Systeme mit hohem Risiko eine Versicherungspflicht eingeführt werden.[15] Begründet wird diese Forderung mit dem Potenzial, erheblichen Schaden anzurichten.[16] Die Verjährungsfrist für die verschuldensunabhängige Haftung bei KI-Systemen mit hohem Risiko beläuft sich nach dem Verordnungsvorschlag auf 30 Jahre.[17]



Hinsichtlich der sogenannten anderen KI-Systeme hält das Europäische Parlament hingegen eine verschuldensabhängige Haftung für ausreichend,[18] deren Verjährungsfristen sich nach den jeweiligen nationalen Vorschriften der Mitgliedsstaaten richten sollen.[19] Haftungssubjekte sollen wiederum sowohl die Frontend- als auch die Backend-Betreiber sein, die allerdings vom Hersteller eines KI-Systems die Zusammenarbeit sowie die Herausgabe von Systemdaten verlangen können, soweit dies angesichts des Schadensfalls gerechtfertigt ist, um ein Mitverschulden zu beweisen.[20]



14. Art. 4, 5 Abs. 1 lit. a) 2020/2014(INL)
15. Art. 4 Abs. 4 lit. d) 2020/2014(INL)
16. Erwägungsgründe 23 ff. des Vorschlags des Europäischen Parlaments vom 20.10.2020 – P9 TA(2020)0276.
17. Art. 6 2020/2014(INL)
18. Art. 8 Abs. 1 2020/2014 (INL)
19. Art. 9 2020/2014 (INL)
20. Art. 8 Abs. 4 2020/2014 (INL)

Konsultation der Europäischen Kommission

Im Nachgang zu dem Verordnungsvorschlag des Europäischen Parlaments aus Oktober 2020 hat die Europäische Kommission die EU-Bürgerinnen und -Bürger sowie Interessensträger zur Stellungnahme bis zum 10.01.2022 aufgefordert. Im Kern ging es in dieser Konsultation zur Produkthaftung um die Frage, ob und, wenn ja, inwieweit Änderungen des geltenden Rechts der EU-Mitgliedsstaaten erforderlich sind, um die Haftungsrisiken für fehlerhafte Produkte im Zeitalter KI-basierter Produkte zu erfassen und adäquat zu verteilen.

Stellungnahmen zu den Reformvorschlägen

Im Rahmen der Konsultation hat die Europäische Kommission insgesamt 291 Antworten erhalten, wobei der Großteil aller Rückmeldung mit 37,1 Prozent aus Deutschland kam.[21] Aus der Auswertung der Europäischen Kommission ergeben sich dabei deutlich zwei Gruppen, wobei NGOs, Verbraucherverbände und akademische Institutionen privaten Unternehmen und Wirtschaftsverbänden gegenüberstehen. Während zwar auch mehr als die Hälfte derjenigen Unternehmen, die zu den Reformvorschlägen teilgenommen haben, sich insgesamt für eine Harmonisierung der Haftungsregelungen bei Produkten mit KI ausgesprochen haben, werden insbesondere die Überlegungen zu einer Neuregelung der Beweislastverteilung kritisch gesehen. Gleiches gilt – wenig überraschend – für den Vorschlag einer verschuldensunabhängigen Haftung bei Hochrisiko KI-Systemen.

Ausblick

Das Europäische Parlament scheint entschlossen, ein neues Rahmenwerk für die Produkthaftung einzuführen, um auf den technologischen Fortschritt der letzten Jahre und die damit verbundenen neuen Produkttypen zu reagieren. Ob und welche Änderungen letztlich auf die Hersteller und Betreiber zukommen, lässt sich derzeit aber nicht absehen. So liegt zwischenzeitlich zwar ein detaillierter Verordnungsvorschlag des Europäischen Parlaments vor, dieser ist jedoch nicht unumstritten. Grund hierfür sind insbesondere die neuen Haftungsrisiken Angesichts der eingangs angesprochenen Fragen, die sich bereits heute bei der Anwendung der Produkthaftungsrichtlinie bzw. den jeweiligen nationalen Regelungen auf Schäden durch hybride Produkten mit embedded Software ergeben, wird der Europäische Gesetzgeber die angestoßenen Reformüberlegungen aber mit Sicherheit weiterverfolgen.

Dr. Isabelle Kilian

Dr. Behrad Lalani

21. Zusammenfassung der Stellungnahmen abrufbar unter https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12979-Zivilrechtliche-Haftung-Anpassung-der-Haftungsregeln-an-das-digitale-Zeitalter-und-an-die-Entwicklungen-im-Bereich-der-kunstlichen-Intelligenz/public-consultation_de

Sammelklagen in Deutschland: Der Referentenentwurf zur Umsetzung der EU-Richtlinie über Verbandsklagen

Das Bundesjustizministerium hat einen ersten Entwurf zur Umsetzung der EU-Verbandsklagerichtlinie vorgelegt. Der Referentenentwurf sieht vor, dass es Verbrauchern und kleinen Unternehmen ermöglicht wird, mit einer neuen Abhilfeklage gegen Unternehmen vorzugehen. Da die Einführung der Abhilfeklage das erste kollektive Rechtsschutzinstrument darstellt, das die Geltendmachung von Schadensersatzansprüchen und bestimmten Leistungen ermöglicht, schafft das Bundesjustizministerium ein echtes Novum im deutschen Zivilrecht.

Die Vorgaben der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher müssen durch die Mitgliedstaaten bis zum 25.12.2022 in nationales Recht umgesetzt werden, das seinerseits spätestens zum 25.06.2023 in Kraft treten soll. Die Richtlinie zielt insbesondere darauf ab, den Verbrauchern in den Mitgliedstaaten ein einheitliches Regelwerk zur Rechtsdurchsetzung bei Massenschäden zur Verfügung zu stellen. Folgende Eckpunkte sind zusammenfassend vorgesehen:

- Einführung einer Abhilfeklage, mit der auf Leistung bzw. Zahlung geklagt werden kann und die eine auf Schadensersatz gerichtete Sammelklage ermöglicht.

- Die Ansprüche müssen „gleichartig“ sein. Diese Gleichartigkeit erfordert einen Grad der Ähnlichkeit der Ansprüche, der eine schablonenhafte Prüfung zulässt. Die Auslegung dieses Kriteriums wird für die Reichweite des Anwendungsbereichs der Abhilfeklage entscheidend sein.

- Die Musterfeststellungsklage bleibt weiterhin bestehen.

- Sämtliche bürgerrechtliche Streitigkeiten können Gegenstand der Musterfeststellungs- sowie der Abhilfeklage sein (zusammen: „Verbandsklagen“).

- Auch kleine Unternehmen sollen von den Verbandsklagen profitieren können.

- Vorgesehen ist – wie bei der bereits bestehenden Musterfeststellungsklage – das Opt-in-Modell, durch das die Verbraucher weiterhin ihre Ansprüche in einem Verbandsklageregister anmelden müssen.

- Eine Prozessfinanzierung ist in engen Grenzen möglich.

- Im Rahmen einer Abhilfeklage ist die Verurteilung auf einen zu schätzenden kollektiven Gesamtbetrag möglich. Die Höhe kann das Gericht unter Würdigung aller Umstände nach freier Überzeugung bestimmen. Ein Sachwalter wird mit der Verteilung des Gesamtbetrags an die teilnehmenden Verbraucher beauftragt. Die hierfür anfallenden Kosten hat das beklagte Unternehmen zu tragen.

Nachfolgend stellen wir zunächst kurz die gegenwärtige Rechtslage dar (**dazu Gegenwärtige Rechtslage**), bevor wir anschließend die zukünftige Rechtslage nach den derzeitigen Regelungen des Referentenentwurfs zusammenfassen (**dazu Zukünftige Rechtslage nach dem Referentenentwurf**). Sodann erläutern wir den Verfahrensablauf der Verbandsklagen (**dazu Verfahrensablauf der Verbandsklagen**) und gehen darauffolgend auf die Regelungen zur Verjährung ein (**dazu Verjährung / Opt-in Modell, § 46 Abs. 1 VDuG-RefE**). Wir schließen mit einem Fazit (**dazu Fazit**).

Gegenwärtige Rechtslage

Durch die Kodifizierung der Musterfeststellungsklage 2018 wurden bereits zahlreiche Ansprüche von Verbrauchern, die aus dem Dieselskandal resultierten, gerichtlich geltend gemacht. Mit der Musterfeststellungsklage werden Ansprüche und/oder Rechtsverhältnisse von Verbrauchern grundsätzlich bei etwaigen Masseschäden festgestellt. Eine qualifizierte Einrichtung (vgl. derzeit § 606 Abs. 1 Satz 2 ZPO) übernimmt in diesem Fall für die Verbraucher die Klageerhebung und Klagedurchsetzung. Bei einer solchen qualifizierten Einrichtung handelt es sich in der Regel um Verbraucherverbände.

Der Ablauf der Musterfeststellungsklage zeichnet sich dadurch aus, dass in einem ersten Schritt Rechtsverhältnisse und/oder Ansprüche durch ein Gericht festgestellt werden. Auf Grundlage dieses Musterfeststellungsurteils haben die Verbraucher sodann in einem zweiten Schritt die Möglichkeit, ihre Ansprüche mittels einer Leistungsklage durchzusetzen.

Neben der Musterfeststellungsklage existiert das Musterverfahren in Kapitalanlegerstreitigkeiten. Das Kapitalanleger-Musterverfahrensgesetz erlaubt es Investoren unter anderem Schadensersatzansprüche zu erheben und durchzusetzen, die ihren Ursprung in falschen oder irreführenden Kapitalmarktinformationen haben.

Zukünftige Rechtslage nach dem Referentenentwurf

Mit dem neuen Verbraucherrechtedurchsetzungsgesetz (nachfolgend: „**VDuG-RefE**“) soll zusätzlich eine kollektive Leistungsklage in Form der Abhilfeklage eingeführt werden. Die Musterfeststellungsklage bleibt daneben bestehen. Beide Klagen sollen zukünftig als Verbandsklagen bezeichnet werden.

Im Gegensatz zu der derzeit geregelten Musterfeststellungsklage ermöglicht die Abhilfeklage umfassenderen Rechtsschutz, da es sich um eine Leistungsklage handelt. Insofern können mit der Abhilfeklage, im Gegensatz zur Musterfeststellungsklage, auch Zahlungen oder andere Leistungen durch qualifizierte Einrichtungen unmittelbar geltend gemacht werden. Der Verbraucher muss daher seine Ansprüche grundsätzlich nicht individuell weiterverfolgen. Sämtliche Ansprüche sind von den Verbandsklagen erfasst. Sie ermöglichen daher Klagen in allen bürgerlich-rechtlichen Streitigkeiten.

Ferner sieht der Referentenentwurf ein Opt-in-Modell vor. Dies bedeutet, dass ein betroffener Verbraucher seinen möglichen Anspruch im Verbandsklageregister anmelden muss, um von den Verbandsklagen auch tatsächlich profitieren zu können. Im Übrigen wird darüber hinaus der Anwendungsbereich der Verbandsklagen auf kleine Unternehmen erweitert. Diese werden somit Verbrauchern gleichgestellt. Kleine Unternehmen sind solche, die weniger als 50 Personen beschäftigen und deren Jahresumsatz oder Jahresbilanz EUR 10 Mio. nicht übersteigt.

Der Gesetzgeber ist bemüht, für die Zulässigkeit der Verbandsklagen („Musterfeststellungsklage“ und „Abhilfeklage“) grundsätzlich dieselben Voraussetzungen zu schaffen. Es bedarf daher der Einhaltung bestimmter formeller (**dazu Formelle Voraussetzungen**) sowie materieller Voraussetzungen (**dazu Materielle Voraussetzungen**).

Formelle Voraussetzungen

Mit Blick auf die formellen Voraussetzungen ist eine Orientierung an den derzeitigen Regelungen der §§ 606 ff. ZPO hilfreich.

Klageberechtigte Stellen, § 2 VDuG-RefE

Verbrauchern ist es weiterhin verwehrt, selbstständig ihre Sammelklage zu erheben und durchzusetzen. Der Gesetzgeber hat keine grundsätzlichen Änderungen an den klageberechtigten Stellen vorgenommen, vgl. derzeit § 606 Abs. 1 Satz 2 ZPO.

Für Verbandsklagen bleiben neben qualifizierten Verbraucherverbänden (§ 2 Abs. 1 Nr. 1 VDuG-RefE) auch ausdrücklich qualifizierte Einrichtungen aus anderen Mitgliedstaaten klageberechtigt, § 2 Abs. 1 Nr. 2 VDuG-RefE, an deren Berechtigung künftig weniger strenge Voraussetzungen geknüpft werden.

Allerdings können Sammelinkassoklagen, bei denen Ansprüche an ein Klagevehikel abgetreten werden, sowie massenhaft erhobene Individualklagen auch weiterhin erhoben werden. Sie werden durch die Abhilfeklage nicht ausgeschlossen.

Quorum, § 4 Abs. 1 VDuG-RefE

Für die Zulässigkeit der Verbandsklagen ist es nach dem derzeitigen Referentenentwurf nicht mehr erforderlich, dass innerhalb einer bestimmten Frist mindestens 50 Verbraucher ihre Ansprüche im Klageregister angemeldet haben (vgl. derzeit § 606 Abs. 3 Nr. 3 ZPO). Auf diese Prüfung wird nunmehr verzichtet.

Dagegen muss die klageberechtigte Stelle künftig glaubhaft machen, dass von der Abhilfeklage mindestens 50 Verbraucher betroffen sind oder von den Feststellungszielen der Musterfeststellungsklage die Ansprüche oder Rechtsverhältnisse von mindestens 50 Verbrauchern (derzeit zehn Verbraucher, vgl. § 606 Abs. 3 Nr. 2 ZPO) abhängen.

Prozessfinanzierung, § 4 Abs. 2, 3 VDuG-RefE

Schließlich sollen bei den Verbandsklagen Regelungen zur Prozessfinanzierung aufgenommen werden. Derzeit ist nur geregelt, dass die Musterfeststellungsklage nicht zum Zwecke der Gewinnerzielung erhoben werden darf und die klageberechtigten Stellen nicht mehr als fünf Prozent ihrer finanziellen Mittel durch Zuwendungen von Unternehmen beziehen dürfen, vgl. § 606 Abs.1 Satz 2 Nr. 4 und 5 ZPO. Diese Regelung soll weiterhin bestehen bleiben, vgl. § 2 Abs. 1 Nr. 1 lit. d) und e) VDuG-RefE.

Nunmehr wird darüber hinaus eine ausdrückliche Regelung zur Prozessfinanzierung getroffen. Diese bleibt durch Dritte weiterhin möglich. Die Verbandsklagen sollen jedoch unzulässig sein, wenn sie von einem Dritten finanziert werden,

- der ein Wettbewerber des verklagten Unternehmens ist,
- der vom verklagten Unternehmen abhängig ist oder
- von dem zu erwarten ist, dass er die Prozessfinanzierung der klageberechtigten Stelle, einschließlich Entscheidungen über Vergleiche, zu Lasten der Verbraucher beeinflussen wird.

Materielle Voraussetzungen

Auf materieller Ebene sind folgende Voraussetzungen zu beachten:

Abhilfeklage - Gleichartigkeit der Ansprüche, § 15 Abs. 1 VDuG-RefE

Mit Blick auf die neue Abhilfeklage fordert der Gesetzgeber, dass die von der Klage betroffenen Ansprüche gleichartig sind.

Gleichartig sind die Ansprüche von Verbrauchern, wenn

- sie auf demselben Sachverhalt oder auf einer Reihe vergleichbarer Sachverhalte beruhen und
- für sie die gleichen Tatsachen- und Rechtsfragen entscheidungserheblich sind.

Diese Gleichartigkeit liege demnach unter anderem vor, sofern eine "schablonenhafte Prüfung" in rechtlicher und tatsächlicher Hinsicht möglich ist. Als Orientierungspunkt für eine mögliche Gleichartigkeit von Ansprüchen verweist der Referentenentwurf etwa auf Entschädigungsansprüche nach der Fluggastrechteverordnung (EG) Nr. 261/2004, da es hierbei in der Regel um dieselben Anspruchsvoraussetzungen geht und die gleichen entscheidungserheblichen Tatsachen zugrunde gelegt werden können.

Dabei liegt auf der Hand, dass die Prüfung der Gleichartigkeit zukünftig den Gegenstand der Diskussionen bilden wird.

Musterfeststellungsklage

Für die Musterfeststellungsklage hat der Gesetzgeber keine Änderungen eingeführt.

Verfahrensablauf der Verbandsklagen

Hinsichtlich des Verfahrensablaufs sollen folgende Regelungen getroffen werden:

Abhilfeklage

Mit Blick auf die Abhilfeklage gestaltet sich das weitere Verfahren vor dem zuständigen Oberlandesgericht wie folgt:

1 Phase: Abhilfegrundurteil, § 16 Abs. 1 VDuG-RefE

Die erste Phase der Abhilfeklage endet mit einem Abhilfegrundurteil, sofern das Gericht die Abhilfeklage dem Grunde nach für zulässig und begründet hält. Hält das Gericht die Abhilfeklage für unzulässig oder unbegründet, weist es die Klage dagegen ab.

2 Phase: Vergleichsphase, § 17 VDuG-RefE

Darauffolgend kommt es zur Vergleichsphase. Die Parteien sollen in diesem Stadium eine gütliche Einigung zur Umsetzung des Abhilfegrundurteils anstreben.

3 Phase: Abhilfeendurteil, § 18 VDuG-RefE

Kommt keine Einigung in der zuvor eingeleiteten Vergleichsphase zustande, erlässt das Gericht in der dritten Phase ein Abhilfeendurteil. Mit diesem Abhilfeendurteil wird das verklagte Unternehmen entweder zu einer Leistung oder zur Zahlung eines kollektiven Gesamtbetrages verurteilt. Darüber hinaus ordnet das Gericht unter anderem das Umsetzungsverfahren an:

(a) Kollektiver Gesamtbetrag, § 19 VDuG-RefE

Der kollektive Gesamtbetrag wird nach § 287 ZPO durch das Gericht geschätzt. Das Gericht darf im Rahmen dieser Schätzung im Einklang mit seinem Abhilfegrundurteil unterstellen, dass alle angemeldeten Ansprüche in voller Höhe berechtigt sind. Nach Erlass des Abhilfegrundurteils hat das Gericht darüber hinaus die Möglichkeit den Betrag zu erhöhen, sofern der zuvor bestimmte Betrag nicht ausreicht, um sämtliche Ansprüche der Verbraucher zu erfüllen, vgl. § 21 VDuG-RefE.

(b) Umsetzungsverfahren des Abhilfeendurteils

Mit dem Umsetzungsverfahren wird sichergestellt, dass die Entscheidung durch einen von dem Gericht bestellten Sachwalter umgesetzt wird, § 23 VDuG-RefE.

Der Sachwalter errichtet unter anderem einen Umsetzungsfonds für den durch das Gericht geschätzten Betrag und verteilt das Geld an die Verbraucher, § 25 VDuG-RefE.

Zudem ist es Aufgabe dieses Sachwalters auf Grundlage des Abhilfegrundurteils zu prüfen, ob den Verbrauchern, die ihre Ansprüche im Verbandsklageregister angemeldet haben (müssen), die Ansprüche tatsächlich zustehen. In diesem Zuge kann der Sachwalter auch entscheiden, dass die Ansprüche dem jeweiligen Verbraucher nicht oder nur teilweise zustehen. In diesem Fall sind Individualklagen des Verbrauchers weiterhin möglich, § 39 VDuG-RefE.

Da die Prüfungen des Sachwalters umfassend sind, kommen derzeit als Sachwalter beispielsweise Rechtsanwälte, Steuerberater, Betriebswirte, Insolvenzverwalter oder Wirtschaftsprüfer in Betracht. Dies ist insbesondere vor dem Hintergrund sinnvoll, da die Umsetzung einer Abhilfeklage sehr komplex sein kann.

Musterfeststellungsklage

Das Verfahren der Musterfeststellungsklage soll nicht verändert werden.

Verjährung / Opt-in Modell, § 46 Abs. 1 VDuG-RefE

Die Regelung zur Hemmung der Verjährung bei Abhilfeklagen entspricht den Regelungen der derzeitigen Musterfeststellungsklage.

Demnach tritt eine rechtshemmende Wirkung nur dann ein, sofern der jeweilige Verbraucher seinen Anspruch oder das Rechtsverhältnis wirksam im Verbandsklageregister angemeldet hat und damit an der Klage teilnimmt. Das heißt ausdrücklich, dass die Verbraucher ihre Ansprüche spätestens am Tag vor der ersten mündlichen Verhandlung zum Verbandsklageregister anmelden müssen.

Verzichten die Verbraucher daher auf die Anmeldung im Verbandsklageregister, profitieren sie weder von der verjährungshemmenden Wirkung noch – im Falle einer erfolgreichen Klage – vom Umsetzungsverfahren, § 26 VDuG-RefE

Fazit

Mit der neuen Abhilfeklage schafft der Gesetzgeber ein Novum. Erstmals haben Verbraucher die Möglichkeit, eine Leistungsklage kollektiv mittels klageberechtigter Stellen direkt zu erheben, womit der Verbraucherschutz gestärkt wird. Der neue Gesetzgebungsvorschlag reiht sich damit in einen allgemeinen Trend ein, wonach die Hürden für Verbraucher, Ansprüche gegen Unternehmen geltend zu machen, sinken. Zugleich müssen sich Unternehmen gegen (ggf. unberechtigte) Verbraucheransprüche mit hohem Aufwand verteidigen.

Unklar ist derzeit, welchen tatsächlichen Anwendungsbereich die Musterfeststellungsklage neben der Abhilfeklage haben wird. Sollte es nämlich an der Gleichartigkeit der Ansprüche und somit an einem identischen Sachverhalt fehlen, stellt sich nachträglich auch die Frage, welche Feststellungsziele mit der Musterfeststellungsklage noch verfolgt werden können. Praktische Anwendungsfälle drängen sich derzeit noch nicht auf. Da laut Gesetzesbegründung sowohl Abhilfe- als auch Musterfeststellungsklage Verstöße gegen die EU-

Datenschutz-Grundverordnung (Verordnung (EU) 2016/679 – DSGVO) erfassen sollen, könnte sich die Abgrenzung am Beispiel des Schadensersatzanspruchs nach Art. 82 DSGVO wie folgt darstellen: Betrifft der streitgegenständliche, behauptete Datenschutzverstoß alle betroffenen Personen hinsichtlich derselben Kategorien an personenbezogenen Daten und ist den betroffenen Personen auch tatsächlich zumindest ein immaterieller Schaden durch den Datenschutzverstoß entstanden, wäre die Abhilfeklage aufgrund Gleichartigkeit der Verbrauchansprüche einschlägig. In einer Konstellation, in der unterschiedliche, aber ähnlich gelagerte Datenkategorien zu einem zumindest immateriellen Schaden geführt haben, läge ein „vergleichbarer Sachverhalt" vor, der ebenfalls zur Möglichkeit einer Abhilfeklage führen würde. Da das Bestehen eines immateriellen Schadens im Rahmen des Art. 82 DSGVO aber bereits Frage der Anspruchsvoraussetzungen und nicht nur der Anspruchshöhe ist, verbliebe der Musterfeststellungsklage hier nur noch ein Anwendungsbereich, wenn bereits unklar ist, ob den betroffenen Verbrauchern aufgrund unterschiedlicher Kategorien betroffener personenbezogener Daten und persönlicher Situation überhaupt ein immaterieller Schaden entstanden ist. Hier könnte die Musterfeststellungsklage, gerichtet allein auf die Feststellung, dass der Beklagte gegen die DSGVO verstoßen hat, noch einen Anwendungsbereich haben. In diesem Szenario wäre die Abhilfeklage mangels Gleichartigkeit oder vergleichbarem Sachverhalt nämlich nicht zulässig.

Zudem gilt es kritisch zu hinterfragen, inwieweit Unternehmerinteressen im Rahmen des Referentenentwurfs Berücksichtigung gefunden haben. Insbesondere die Möglichkeit, dass der kollektive Gesamtbetrag nachträglich erhöht werden kann, wird für verklagte Unternehmen nicht zur Rechtssicherheit beitragen. Diesbezüglich bleibt – sofern der Referentenentwurf in dieser Fassung verabschiedet wird – abzuwarten, ob kollektive Gesamtzahlungen die verurteilten Unternehmen in ihrer Solvenz bedrohen könnten.

Im Anschluss an die laufende Ressortabstimmung wird der aktuelle Referentenentwurf das formale Gesetzgebungsverfahren durchlaufen. Da die Umsetzungsfrist am 25. Dezember 2022 abläuft, ist mit einem zügigen Verfahren zu rechnen.

Dr. Henning Schaloske

Christoph Pies

Dr. Ciya Aslan

Development of offshore wind energy in India

India is a country with an estimated population of 1.4 billion. It is only second in rank in terms of population in the world. With the increase in population, the demand for electricity is also increasing. It poses challenges such as power shortages in the country. In April 2022, India's peak power demand for electricity touched 207 GW, which was an all-time high.

It is important for India to increase its power supply without compromising on climate change action plans. In the National Action Plan on Climate Change 2008, the Government of India announced that the development of renewable energy will be one of its goals for combating climate change. With wind energy technology being one of the sustainable means to achieve the increasing electricity demand, the Government of India is taking measures to tap into the wind energy potential of the Indian Coast.

At present, the installed generation capacity is dominated by fossil fuels, especially, coal. As of 31 March 2022, India has installed generation capacity of 4.07.797 MW. Almost Fifty-eight percent of this installed generation capacity is based on fossil fuels. While India has a large-scale deployment of onshore wind energy technologies, there are no offshore wind farms in India. India has a wind power potential of 695.50 GW at 120m hub height. The states with high potential are Andhra Pradesh, Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Rajastan, and Tamil Nadu.

India has set a target of 30 GW of offshore wind installations by 2030. In order to aid India's transition to sustainable technology, two projects supported by European Union were undertaken: Facilitating Offshore Wind Energy in India (FOWIND) and First Offshore Wind Power Project in India (FOWPI). Also, the Indian Ministry of New and Renewable Energy with the Danish Energy Agency established the Centre of Excellence for Offshore Wind and Renewable Energy as a joint initiative.

It aims to facilitate and accelerate the implementation of the Indian offshore wind strategy through various initiatives for spatial planning and permitting process, financial framework and auction design, grid and supply chain infrastructure, and technical standards and rules.

Based on the assessments, Gujarat and Tamil Nadu are states with the most potential for offshore wind energy development. As per the National Institute of Wind Energy (NIWE), Tamil Nadu has a potential of approximately 35 GW, and Gujarat has a potential of 36 GW.

Gujarat

Gujarat is a state located on the Western Coast of India. Gulf of Khambhat in Gujarat is identified as a proposed location for the development of offshore wind energy farm. In 2018, the National Institute of Wind Energy invited expressions of interest for the development of the first 1 GW commercial offshore wind farm in India. In-principle clearance is already granted by several ministries including the Ministry of Home Affairs and the Ministry of Defence. However, the project has not yet commenced.

Tamil Nadu

Tamil Nadu is a state located on the southern tip of the Indian Peninsula. The Gulf of Mannar is located within the territory of Tamil Nadu. NIWE aims to collect data (wind speed and direction, sea surface temperatures, and wave heights and directions) for the Gulf of Mannar to facilitate the development of offshore wind energy in this region. The National Institute of Wind Energy (NIWE) issued a tender for the supply and installation of a floating LiDAR buoy for this purpose in February 2022.

Outlook

India has a coastline of approximately 7600 km and has great untapped potential for offshore wind energy. India has successfully deployed onshore wind energy technology. It has the third and fourth largest onshore wind farms in the world. However, it requires land which is an increasingly high-demand commodity. Thus, offshore wind energy technology is India's way forward to harness wind energy and transition to clean energy.

Georg Scherpf

Dhanya Thejraj Mallar

Development of offshore wind energy in India – Legal framework

The legal framework is governed by several layers of laws and regulations, with certain aspects that are still not fully regulated. Below we only provide a broad and initial overview.

Legal framework for the development of wind energy

The Ministry of New and Renewable Energy ("Ministry") creates policies and schemes for promoting electricity generation through renewable energy sources. The National Offshore Wind Energy Policy - 2015 ("Policy") was released by the Ministry to ensure optimum exploitation of the offshore wind energy potential in India. Under the Policy, the National Institute of Wind Energy (NIWE) is responsible to call for proposals regarding the development of offshore wind power projects through an open international competitive bidding process. It also states that a designated agency or a distribution utility or a private company to enter into a power purchase agreement with the offshore wind power developers as per the guidelines fixed by the electricity regulatory commissions.

The Electricity Act, 2003 ("Electricity Act") governs the generation, transmission, distribution, trading, and use of electricity in India. Compliance with technical standards prescribed by the Central Electricity Authority under the Electricity Act is necessary for the construction of power plants. The Electricity Act also establishes regulatory commissions at the central and state level whose functions include regulating tariffs and transmission of electricity.

Overall, it is a complex legal framework that is still evolving and very much susceptible to unforeseen changes. Against that background, effective dispute resolution and investment protection is essential when it comes to projects with state-owned actors.

Dispute resolution

Apart from the courts of India, other dispute resolution mechanisms include:

- **Dispute Resolution Committee**

The Ministry has designated different agencies as renewable energy implementing agencies ("REIA"). These agencies facilitate the implementation of various schemes of the Ministry. They also enter into contracts with renewable energy developers for the purchase of power with power plants set up by developers on a build-own-operate basis. These contracts have clauses that provide 'scheduled commissioning date' which may give rise to delay related claims.

For disputes that may arise between REIA and developers, the developers must submit an application regarding the dispute to the REIA and the REIA is obliged to pass a speaking order. If the developer is not satisfied with the decision of the REIA, it can approach the dispute resolution committee to appeal the decision. The dispute resolution committee deals with disputes regarding the following:

- requests for extension of time due to recognized 'force majeure' events;
- requests for extension of time not covered under the terms of contract;
- all disputes other than disputes relating to extension of time between REIA and developers

The dispute resolution committee, after hearing the dispute, submits its recommendations regarding the dispute to the Ministry. The recommendations of the dispute resolution committee along with the observations of the Ministry is then submitted to the Minister for New and Renewable energy for a final decision. The dispute resolution committee has already resolved 27 cases as of March 2022. It is expected that the local courts will address any issues arising due to competing jurisdiction of the other agreed dispute resolution mechanisms such as arbitration as well as possible appeal mechanisms in the future.

Commercial Arbitration

Commercial arbitration is often considered the gold standard for resolving complex disputes between international parties, often also involving several contractual layers [See also Arbitrating complex disputes using third party notices article further above in this Quarterly Update]. India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention). It is also possible to initiate arbitration against state and state-owned entities. Sovereign immunity is not extended to state entities in commercial disputes.

It must be noted that party autonomy to choose arbitration as means of resolving disputes in the power sector is limited by the Electricity Act. The regulatory commissions adjudicate disputes as per section 79(1) (f) and section 86(1) (f) of the Electricity Act. Under both these provisions, the regulatory commissions can either adjudicate the disputes themselves or can refer the disputes to arbitration at their discretion. The orders of the commissions can be appealed before the Appellate Tribunal for Electricity (APTEL). The decisions of APTEL are appealable before the Supreme Court of India. In simple words, only disputes which do not fall within the jurisdiction of regulatory commissions under the Electricity Act are open to arbitration, where agreed.

Investment Arbitration

Complex energy projects often involve large upfront capital investments with third party financing. Such investments are often based on a regulatory framework in place at the time of the investment. However, the regulatory framework is susceptible to political interference and changes to that framework can render investments unprofitable or even threaten existing business models and financing. Investment protection under international treaties can offer protections against discriminatory and arbitrary action, among others whilst providing the possibility to commence arbitration directly against the host state.

Till 2015, India had bilateral investment treaties and agreements in place with 83 nations. However, India published a model bilateral investment treaty in 2015 and terminated existing (old) bilateral investment treaties with 77 nations. The investments made prior to the termination are governed by sunset clauses under some of those treaties. India is currently negotiating new bilateral investment treaties.

Article 15 of the new model bilateral investment treaty retains investment arbitration as an option only after domestic remedies are exhausted. Further, it does not provide 'Fair and Equitable Treatment' as a standard of protection and, hence, also no protection of investor's legitimate expectations.

Enforcement of investment arbitration awards is also a challenge in India. India is a not party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (ICSID Convention). Moreover, India has signed the New York Convention with the 'commercial reservation'.

There are conflicting decisions regarding the applicability of the Arbitration and Conciliation Act 1996 ("Arbitration Act") to investment arbitration. While the High Court of Delhi, in Union of India v. Vodafone Group PLC, United Kingdom and in Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors., excluded the application of the Arbitration Act to investment arbitrations stating they are not commercial in nature, the High Court of Calcutta in the Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS applied the Arbitration Act to investment arbitration. Due to such conflicting decisions, enforcement of investment arbitration awards in India poses various challenges.

For investors, the dispute resolution committee and commercial arbitration remain the recommended mechanisms for dispute resolution also with state entities. Investment protection in India is limited due to the restricted wording of the new model treaties and the termination of many existing treaty. For certain investments, it might well be advisable to conclude stabilisation agreements with the state in order to ensure sufficient protection against a detrimentally evolving regulatory framework in absence of sufficient protection under bilateral treaties. Considering that many treaties have been terminated, structuring your investment through countries that continue to have existing BITs in force with India, might be advisable and in some cases feasible. There are certain limits to treaty structuring that also need to be taken into account. In particular, restructuring an investment after a dispute is already "on the horizon", could be considered an abuse of process and restrict access to investment arbitration.

We recommend investors to always assess whether adequate investment protections (BITs, stabilisation clauses) and sufficient arbitration mechanisms are in place before making an investment or concluding a contract. If need be, effective treaty structuring prior to the investment might be advisable. Moreover, complex energy investments with several contractual layers and subcontractors can benefit from arbitration clauses that also provide for the involvement of "third parties" in order to cover also recourse claims [See also Arbitrating complex disputes using third party notices article further above in this Quarterly Update].

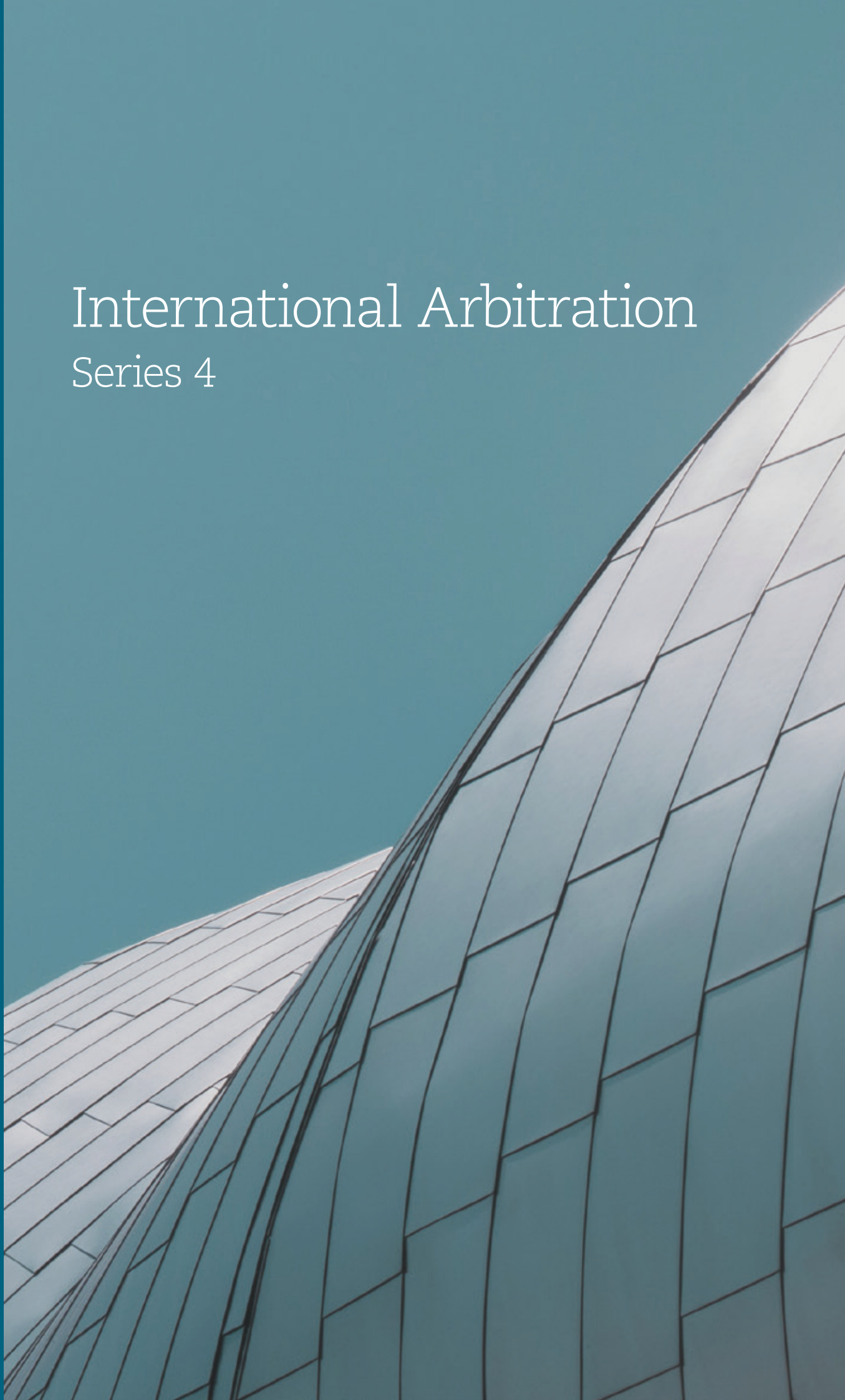
We continue to monitor the developments in India in the offshore wind sector together with our colleagues in the region.

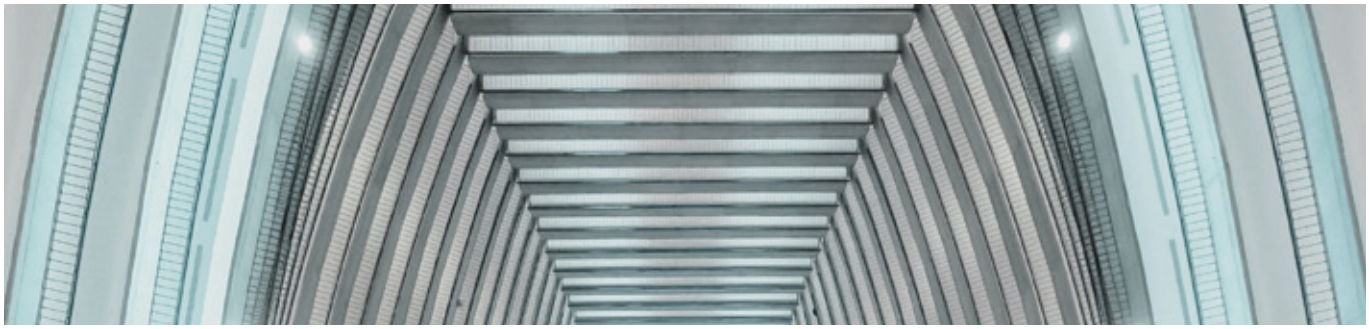
Georg Scherpf

Dhanya Thejraj Mallar

International Arbitration

Series 4





Document production in international arbitration seated in England – a smoking gun or puff of smoke?

This is the first article in Clyde & Co's international arbitration series covering document production in international arbitration. In this piece, senior associate Scott Wightman from our London office provides the English law perspective.

In domestic litigation in England and Wales, the parties' obligations in respect of the disclosure of documents is governed by strict rules of evidence and civil procedure. Broadly, under the English Civil Procedure Rules a party is required to disclose all documents that are in support of its own case but also those that could support the opponent's. Disclosure, or document production as it is better known in international arbitration, is noticeably different.

This is primarily because document production is not mandatory in either commercial or investment treaty arbitration, and there is no universally recognised set of procedural rules that prescribe the parties' disclosure obligations. In English arbitrations, the parties can agree whether there should be disclosure and, if so, the scope of it. However, in the absence of any agreement, tribunals seated in England & Wales tribunals are afforded a wide degree of discretion under the Arbitration Act 1996 (**AA 1996**) as regards the scope of any disclosure and applicable procedure.

Document production in arbitrations seated in England and Wales

Historically the English courts had the power to intervene in arbitrations to assist the disclosure process, including to order document production and interrogatories. However, since the introduction of the AA 1996, tribunals seated in England and Wales are afforded a broad discretion and are not bound to apply any concept of national law with respect to the document production process, unless the parties agree otherwise. The AA 1996 devolves issues concerning evidence and procedure to the tribunal. For example, Section 34(2)(d), provides that:

> *"it shall be for the Tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter. Procedural and evidential matters include [among other things] whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage."*

This is not to say, however, that tribunals have unfettered freedom in exercising their discretion on matters of procedure and evidence. Tribunals must still adhere to the general duty under section 33 of the AA 1996 to conduct the arbitration fairly, and to give each party "*a reasonable opportunity of putting its case and dealing with that of his opponent*". In doing so they are to "*adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense*". Moreover, the tribunal's general discretion is subject to the overarching principle of party autonomy enshrined by the AA 1996, allowing the parties the freedom to agree on the rules of disclosure that are to be applied.

Under AA 1996 it remains open for a party, with permission from the tribunal or the agreement of the other parties, to apply to the English courts for an order requiring the attendance of a witness in the United Kingdom to give oral testimony or to produce documents (Section 43(1), AA 1996). In this respect, it will be necessary for the requesting party to identify clearly the documents required so that there can be no doubt as to what is to be produced (*Tajik Aluminium Plant v Hydro Aluminium AS and others* [2006] 1 WLR 767). The court will also consider whether the documents are necessary in order to dispose of the claim or to save costs (*Council of the Borough of South Tyneside v Wickes Building Supplies Ltd* [2004] EWHC 2428 (Comm)).

What happens in practice

In practice, the scope of document production is usually more limited than the disclosure required in English court proceedings.[1] In English arbitrations the parties typically agree to adopt the International Bar Association's Rules on Taking of Evidence in International Arbitration (IBA Rules) which sit between the wide disclosure generally permitted in common law courts (such as those of England or the USA) and the far more limited document production orders granted in civil law courts (such as those of France and Germany).

The IBA Rules "are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration" (IBA Rules, Preamble, No. 1). They adopt what is often seen as a bridge between the common law and civil law traditions in that disclosure of documents is permitted where it is "relevant to the case and material to its outcome" (Article 3(3)(b)). The parties therefore tend to disclose the documents they intend to rely on but also request the disclosure of limited categories of documents from the opposing party.

Unlike English court proceedings in which disclosure is broadly provided after statements of case (pleadings) have been served, in arbitration a document production phase typically will take place after the first exchange of submissions between the parties, on the basis that there are usually two exchanges of submissions. Many parties find this approach beneficial as it allows the tribunal to be able to rule on contested document production requests having first had the opportunity to understand the case and parties' respective positions by virtue of the first round of submissions. This approach also comes with the advantage that it allows each party to address in the second round of submissions the documents obtained from the opposing party during the document production phase.

An issue which can often lead to disagreement between the parties is a concept that is familiar to any English legal professional, namely client-advocate confidentiality, otherwise known as privilege. This is particularly acute when the parties come from competing legal backgrounds, as concepts of privilege vary greatly across jurisdictions, in particular between common law and civil law traditions. The AA 1996 does not directly address how a tribunal should determine the issue of privilege, thereby affording tribunals great flexibility in determining the applicable privilege rules in the event of a dispute. Similarly, the IBA Rules do not provide guidance on how an arbitral tribunal might determine which national privilege rules to apply (IBA Rules Art 9(2)(b)). However, they do allow a tribunal to take into account the expectations of the parties when balancing the conflicting understandings of parties from different legal traditions.

Conclusion

Document production nearly always features in international arbitration processes and, as is the case in England and Wales, it is common for national laws to afford tribunals wide discretion as to what is expected of the parties in terms of evidence and procedure. Absent agreement between the parties regarding the production of documents, a tribunal is best advised to make provision for this element of procedure (including potentially difficult issues such as the scope of privilege) at the outset of the proceedings as part of its general duty to manage the case fairly and efficiently. Ideally, it will address the issue at the time of the terms of reference or the initial procedural order, especially when faced with parties and counsel from differing legal backgrounds.

Scott Wightman

1. Standard disclosure, English Civil Procedure Rule 31.6, provides requires each party to disclose "(a) the documents on which he relies; and (b) the documents which – (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction." Even under the disclosure pilot scheme, which operates in many parts of the English High Court, "known adverse documents" have to be disclosed by each party regardless of the kind of disclosure ordered (Practice Direction 51U paragraph 3.1(2).

Document production in international arbitration in France – a smoking gun or puff of smoke?

This is the second article in Clyde & Co's international arbitration series covering document production in international arbitration. In this piece, jurist Dilara Khamitova from our Paris office provides the French law perspective.

Even though document production is becoming a common feature of international arbitrations, the issues related to this procedure are still hotly debated at both the theoretical and practical level. Numerous factors provoke such debates, ranging from a variety of procedural laws and rules which may apply to specific aspects of document production to the different cultural and legal backgrounds of arbitrators and counsel, which can influence their reasoning and strategies in the proceedings.

There is no uniform standard applicable to document production in all arbitrations, even when seated in a particular jurisdiction. The form it takes will largely depend on the parties' agreement regarding rules governing various aspects of arbitration proceedings, as well as the nature and complexity of a particular case. In the absence of the parties' agreement on such applicable rules, an arbitral tribunal will be guided by the national procedural law of the arbitral seat.

What would be the key features of document production when the seat of an international arbitration is in France?

In France, production of evidence is primarily governed by Articles 1467, 1469 and 1470 of the Code of Civil Procedure (CCP) which apply to international arbitration by virtue of Article 1506. In principle, each party must prove the facts it relies on in making its submissions. Even though proof may be achieved by any means, French law emphasises the value of documentary evidence. Therefore, document production can play a crucial role in the fact-finding process.

However, as a civil law country, France does not provide for pre-trial disclosure and discovery procedures – parties have no duty to produce all the documents in their possession, for instance, even those which might be relevant but harmful to their case.

Nevertheless, there are certain exceptions under French law to this approach. For example, Article 1467 of the CCP empowers arbitrators to compel a party to produce evidence at the request of the opposing party, and failure to do so may lead to the imposition of penalties.[1] That said, the requesting party must identify narrowly and specifically the evidence it is seeking and not engage in any potential "fishing expeditions".

Furthermore, when a document or other type of evidence is in possession of a third party to the arbitration, an arbitral tribunal seated in France is authorized under Article 1469 of the CCP to invite parties to request the president of the French court of the first instance to order production of this evidence. Such a document production order against a third party is administered under the expedited procedure.

It should be noted that parties in international arbitrations, including those seated in France, often refer to the IBA Rules on the Taking of Evidence in International Arbitration, which not only combine different elements of the common law and civil law systems but also provide ethical guidance in some delicate situations.

1. Article 1467 CCP: "Si une partie détient un élément de preuve, le tribunal arbitral peut lui enjoindre de le produire selon les modalités qu'il détermine et au besoin à peine d'astreinte". See also Société Otor c. Carlyle Holdings, Cour d'appel de Paris, 7 octobre 2004.

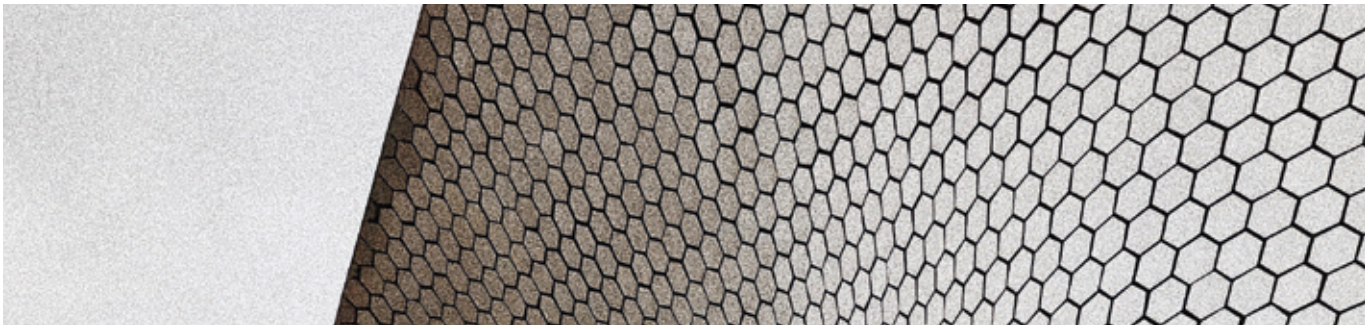
The application of the IBA Rules can facilitate resolution of certain issues of document production which are not regulated in detail in French law – for example, when parties and arbitrators have to address the admissibility of the documents which might be covered by a certain type of privilege. Whereas most communications between a client and a French advocate are protected under the professional secrecy principle (like attorney-client privilege), advice provided in France by in-house counsel is not generally recognized as privileged under French law.[2]

In practice, parties (or rather their counsel) in "global" international arbitrations seated in France are sometimes required to solve complex legal conundrums. These often arise where the parties, their businesses and counsel are located in various parts of the world, each with its own legal traditions. Counsel on both sides must consider carefully their requests and objections to document production, as such demands will in principle be addressed by an arbitral tribunal, first, in relation to the rules governing the specific aspects of document production, and second, by reference to the adversarial principle, the principle of equality of arms, and due process. If the tribunal does not take all these factors into account when granting or denying a request for documents, this might eventually be examined as a ground for annulment of an arbitral award.[3]

In conclusion, the document production process in international arbitrations seated in France is equipped with a solid toolkit which can facilitate the fact-finding process. That said, counsel and arbitrators are expected to consider carefully and ethically the use of those tools in light of all the circumstances of a particular case. It is essential to ensure that document production does not simply result in a waste of time and money, but becomes a crucial element of justice.

Dilara Khamitova

2. Roman Mikhailovich Khodykin, Carol Mulcahy , et al., A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, Commentary on the IBA Rules on Evidence, Article 9 [Admissibility and Assessment of Evidence] (Oxford University Press 2019), 12.130.
3. Société Golden Power International Creation Limited c. SAS Airbus Helicopters, Cour d'appel de Paris, n° 20/01980, 2 novembre 2021; Société Lebanese Media Holding Limited c. Société Lebanese Broadcasting Corporation International SA, Cour d'appel de Paris, n° 18/16891, 2 mars 2021.



Document production in international arbitration in Spain – a smoking gun or puff of smoke?

This is the third article in Clyde & Co's international arbitration series covering document production in international arbitration. In this piece, associate Cristina Perez from our Madrid office provides the Spanish law perspective.

Within the Spanish civil legal system, the idea of a party demanding that an opponent produce a document, which could even be harmful, is simply inconceivable. The parties mainly rely on the evidence at their own disposal and they are not normally obliged to produce any document they might hold if they are not willing to do so.

That said, under Spanish Civil Law there are only two legal procedures which are vaguely similar to document production. These are known as the anticipated evidence (Art. 293 et seq. Spanish Civil Procedure Act[1]) and preliminary proceedings (Art. 256 Spanish Civil Procedure Act). However, these procedures are extraordinary and used only in specific circumstances.

In relation to anticipated evidence, documents are requested only where there is a concern that they cannot be produced later. In relation to preliminary proceedings, on the other hand, the typical scenario is that the Claimant requests a document evidencing the capacity, representation or title to be sued, so the lawsuit can begin[2] (e.g. an insurance policy).

How does the document production procedure plays a role in an international arbitration related to the Spanish jurisdiction?

When it comes to performing a document production procedure within an international arbitration, subject to Spanish Law or to be enforced in the Spanish jurisdiction, there is no specific regulation to rely on.

In practice, this issue is normally remedied by the Rules of the Arbitral Institution in case of an administered arbitration and/or by the supplementary application of the IBA Rules on the Taking of Evidence (whether it is an ad hoc arbitration or an administered one).

What the Spanish legal system does expressly endorse is the granting of powers to the arbitrators, so that they are empowered to request a party to produce documents and to take evidence in accordance with the rules of the relevant arbitral institution or the IBA rules.

Further, under Art. 8.2 Spanish Arbitration Act,[3] the arbitrators are allowed to request the assistance from the Spanish courts. But as already noted, such assistance is inevitably limited, given that the courts cannot order a party directly to provide a document in civil proceedings.

1. Art. 293 et seq. of Spanish Civil Procedure Act: "Prior to the commencement of any proceedings, the person who intends to initiate the proceedings, or any party during the course of the proceedings, may apply to the court for an anticipated taking of evidence, where there is a well-founded fear that, owing to persons or the state of affairs, such evidence could not be taken at the time generally provided for in the proceedings."
2. Art. 256.1.1 of Spanish Civil Procedure Act: "By request that the person to whom the claim is addressed should declare, under oath or promise to tell the truth, any fact relating to their capacity, representation or title to be sued, knowledge of which is necessary for the lawsuit, or produce the documents in which such capacity, representation or titled to be sued is evidenced."
3. Article 8.2 of the Spanish Arbitration Act: "For legal assistance in the taking of evidence, the First Instance Court of the place of arbitration or of the place where the assistance is to be given shall have jurisdiction."

In practice, when a party fails to provide a document requested by the arbitral tribunal and/or by the Spanish court in ancillary proceedings,and is unable to give any substantial reason for the omission, the normal outcome would be for the arbitral tribunal to reject or negatively interpret the statements made by the party failing to produce the missing document. Although this is common sense, it is not set out in the Spanish court rules, and so certain Spanish Arbitration Rules, such as the Madrid Court of Arbitration Rules, expressly stipulate it.[4] However, no sanctions are imposed in case of a failure to comply with an arbitral tribunal's document production orders within the Spanish legal system.

A further point to note is that if an award is issued without taking such a failure into account, a party could allege that its right to effective judicial protection has been violate, and on that basis ask for the award to be annulled (Art. 41 of Spanish Arbitration Act).

Conclusion

Despite of the fact that there is now a legal basis for a proper document production procedure in the Spanish Arbitration Act and rules of certain arbitral institutions, there is still a long way to go before document production is fully recognised and supported in the Spanish legal system.

For the time being, the success of this procedure still depends on the goodwill of the parties and the consequences of the failure to comply with it are limited to the potential impact it might have within the Award itself and on any attempt to enforce it.

Cristina Pérez Ruiz

4. Article 30.8 of the Madrid Court of Arbitration Rules: "If evidence is in the possession or under the control of a party and the party unreasonably refuses to produce or give access to it, the arbitrators may draw from that conduct such conclusions on the facts in evidence as they deem appropriate."

Document production in international arbitration in Germany – a smoking gun or puff of smoke?

This is the fourth article in Clyde & Co's international arbitration series covering document production in international arbitration. In this piece, counsel Georg Scherpf and associate Victor Gontard from our Hamburg and Munich offices, respectively, provide the German law perspective.

The disclosure of documents in German state court proceedings is characterized by an absence of discovery-like principles usually found in common law jurisdictions (Cf. "*Ausforschungsverbot*"). Therefore, in principle parties only disclose documents on which they intend to rely. There is no duty for a party to put "all cards on the table" or even disclose documents which could be detrimental to its own case. Where courts in common law countries tend to follow a fact-finding approach to reach a somewhat more "absolute truth" when deciding a case, German civil courts tend to rely, with few exceptions, on the "relative truth" resulting from the cross-referencing of the respective submissions and disclosures of the parties. Although the German Code of Civil Procedure ("**CCP**") provides for a duty to tell the truth ("*Wahrheitspflicht Section 138 CCP*"), this only explicitly prohibits parties from knowingly making untrue statements or deliberately distorting facts. It does not necessarily oblige a party to disclose documents that are detrimental to their case.

Where facts are disputed, the burden of proof is usually on the party making allegations. If a party alleging facts fails to substantiate them, it will generally be considered by the court as having failed to discharge its burden of proof. That said, civil law tradition does not preclude the judge from taking an active part in the disclosure process by ordering a party to provide material evidence of its allegations. However, such powers are exercised with restraint and generally only in respect of very specific and identifiable documents (Cf. Section 142 CCP).

The practice of document production in international arbitration

Cultural differences between civil law and common law procedural traditions are however less pertinent in international arbitrations seated in Germany, which are largely in line with internationally accepted principles and best practices. Indeed, document production in international arbitration proceedings is hardly handled differently in Germany relative to most other jurisdictions.

Often, parties agree to document production in accordance with or guided by the provisions of the International Bar Association Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"). More recently, the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration ("**Prague Rules**") have gained increasing traction among international arbitration practitioners as an alternative to the IBA Rules. Whereas the IBA Rules provide for broad document production mechanisms, the Prague Rules remain more in line with the restricted approach to document production characteristic of the civil law tradition. However, experience with the Prague Rules remains limited due to their relatively recent publication (December 2018) and the fact that parties often stick with the "usual suspects" that provide for more extensive requests for the production of documents - after all, it is the facts that decide cases.

However, even where an agreement on document production has not been reached, it is accepted practice in international arbitrations seated in Germany that there ought to be some form of document production to reveal those facts and ensure the legitimacy of the arbitral process.

Parties may also opt for institutional arbitration e.g. under the rules of the German Arbitration Institute (*Deutsche Institut für Schiedsgerichtbarkeit*, "**DIS**") - the latest version of which was published in 2018 ("**DIS Rules**").

Regarding production of documents, the DIS Rules grant the arbitral tribunal wide powers to request documents and information to establish the facts relevant to the determination of the case (Article 28.1). Interestingly, Article 28 provides that this power can be exercised ex officio and explicitly states that the arbitral tribunal is not solely bound by the evidence produced by the parties (Article 28.2). In brief, the arbitral tribunal can take initiatives similar to those envisaged in common law countries depending on what is appropriate in any given case. This also corresponds to the wide discretion afforded to the tribunal under 1042 (4) CCP.

The practice of document production in domestic arbitration

German-seated domestic arbitration might – at times – be characterised by a more restrictive approach to document production where the decision is left to the tribunal in absence of specific institutional rules or agreement between the parties. That is, a tribunal might well be dissuaded from allowing the parties to request, for example, "categories of documents" and might be guided by the more restrictive approach of the German CCP regarding disclosure, even though that is not directly applicable to arbitration. The arbitrator's discretion may even be limited when it comes to unilateral orders for extensive document production. Ordering, for example, a US-style discovery processes in a German-seated arbitration would arguably be contrary to the *lex fori* and the German public policy (*Schütze, Schiedsgericht und Schiedsverfahren*, 5th edition, p. 92).

In this context, the provisions of Section 142 CCP outlined below provide an understanding of the German legal tradition, even though it is not directly applicable to German seated arbitrations, whether international or domestic.

Although the original disclosure principle of Section 142 ZPO was limited to the requirement for parties to produce documents that support their allegations, it has been broadened since its inception in 2002. It now provides that the court may order a party (or third party) to produce documents which it has in its possession and to which it or the opponent has referred, irrespective of who must discharge the burden of proof. Pursuant to Section 427 CCP, failure to comply with such a court order may result in the counterparty's allegations being deemed proven.

However, the German Federal Court of Justice (*Bundesgerichtshof*) has ruled in favour of a restrictive interpretation of the practical scope of Section 142 ZPO. According to the court, this provision should only be used to obtain evidence. It cannot be used as a tool to discover new facts (see decision XI ZR 318/09 dated 15 June 2010). In this respect, the decision of the BGH remains consistent with civil law tradition limiting document production to supporting allegations of the parties.

Document production and privileges

A key practical issue – and difference – in relation to the production of documents is the status of professional privileges and the extent to which they may be raised as an objection.

Attorney-client privilege is legally recognised in Germany and enforceable before state courts and arbitral tribunals. Indeed, the German CCP explicitly recognises an exception to the obligation to produce documents for parties who are entitled to refuse to testify, notably by virtue of their professional capacity (Section 142 (2) ZPO). The attorney-client privilege is covered by this exception (Section 383 (1) Nr. 6 ZPO).

The question of whether this privilege also extends to in-house counsels was left open for a long time in Germany. Since 2016, German law has recognised that in-house counsels may invoke the attorney-client privilege to the extent they are registered with the bar and free to act for clients other than their employer. This approach departs from the one traditionally adopted in other continental civil law jurisdictions such as France or Switzerland. In those countries, the lack of independence of in-house counsels vis-à-vis their employers still precludes them, by and large, from benefitting from the attorney-client privilege.

Where international arbitration is concerned, the applicability of such provisions will depend on whether German law applies to evidentiary privileges or not. Where the IBA Rules apply, the arbitral tribunal must consider whether document production might be impacted by any legal privilege, leaving it to the arbitral tribunal to determine which rules should apply (Article 9.2(b)). In this respect, Article 9.4 provides a series of detailed guidelines aiming at guiding the arbitral tribunal in its determination. However, those guidelines do not prescribe the conflict rules that should resolve this question.

Georg Scherpf

Victor Gontard

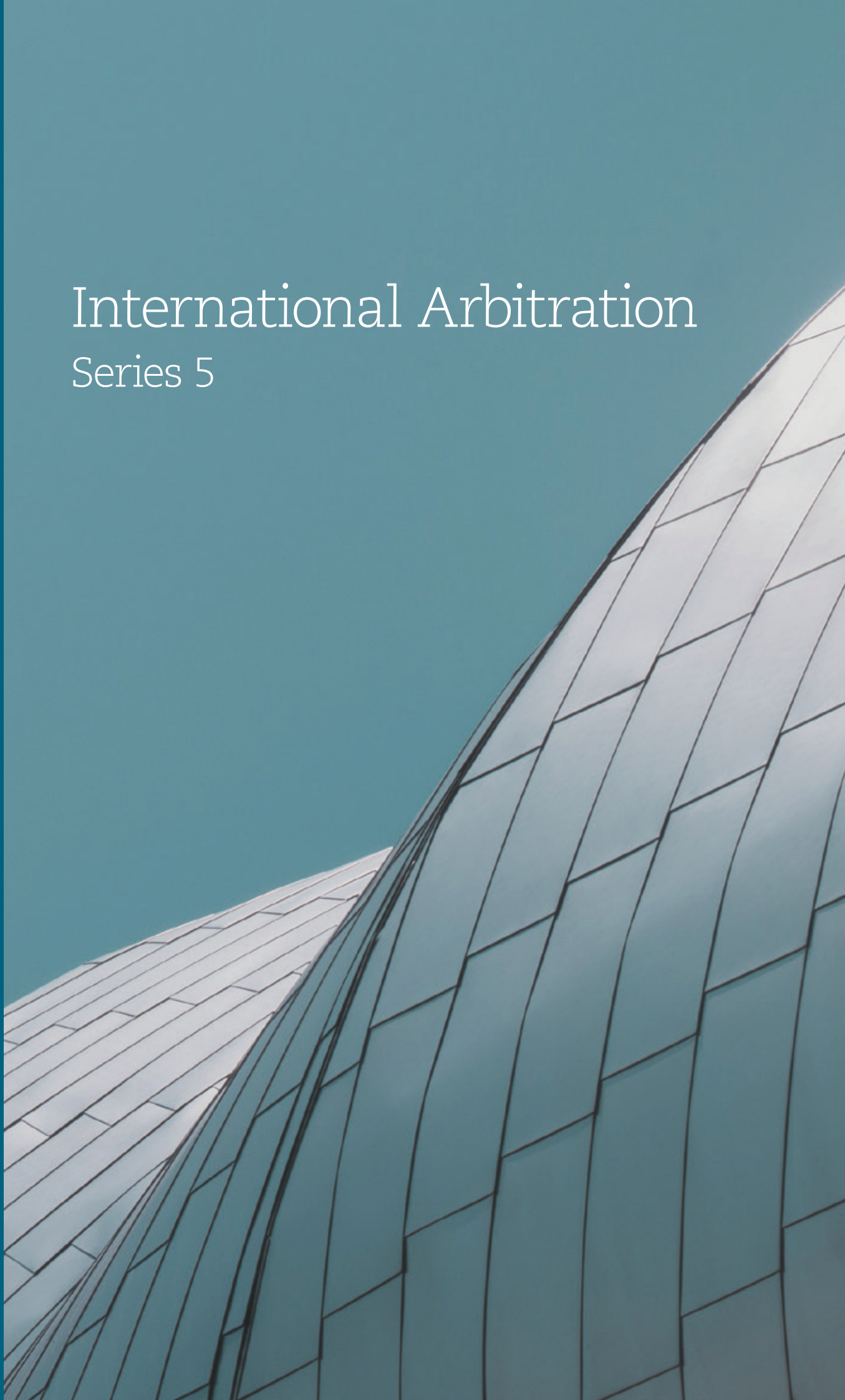
Thus, in practice, this decision rests mostly with the arbitral tribunal itself. Indeed, given that the law applicable to legal privileges cannot be automatically equated with the law applicable to the arbitration agreement, this issue is rarely settled by an express choice of the parties. Although the arbitral tribunal may utilise several methods to resolve the conflict of laws arising from this question, the "closest connection test" generally seems to prevail. When this happens, the arbitral tribunal reviews and identifies relevant factors linking the issue raised by legal privileges to one specific applicable law (e.g., seat of the arbitration, law applicable to the factual matrix of the case etc.).

Smoking guns: the right test?

The smoking gun, or lack thereof, is often raised in debates on this side of the Channel against the utility of document production in international arbitration. However, complex commercial disputes mostly deal with multi-faceted factual and legal issues. Exceptionally, such disputes or transactions involve "smoking guns" or can be boiled down into a single decisive factual allegation that might be proven or disproven by a "smoking gun". In the authors' view, the proper test for the usefulness of document production should therefore be whether the documents produced can make your case – or defence - more consistent and convincing. We believe it can and international arbitrations seated in Germany provide parties with the opportunity to request documents in line with international arbitral practice whilst avoiding, perhaps, an excessively broad application of, for example, the IBA-Rules, given the choice of a German seat. After all, the parties choose the seat not only because of the local food (see Schütze above). In addition, German courts provide assistance in evidentiary matters (Section 1050 CCP) (for more on this, see **Scherpf, von Berlepsch, Quarterly Update 2/2021, "With a little help from my friends - court assistance in arbitration**"), and do so even where a tribunal is seated in another jurisdiction (Section 1025 (2) CCP).

International Arbitration

Series 5



Interim measures in French seated arbitrations – do they measure up?

This is the first article in Clyde & Co's international arbitration series covering the availability of interim measures across various European jurisdictions. In this piece, associate Constance Malleville from our Paris office provides the French legal and procedural perspective.

In lengthy and complex disputes, parties may be faced with the need to obtain immediate and temporary protection of their rights or property, pending a decision on the merits. Applications for interim and conservatory measures are therefore common in international arbitrations. Under the French law of arbitration, Articles 1449[1] and 1468[2] of the Code of Civil Procedure (CCP) authorise state courts and arbitral tribunals to order such measures.[3]

French law governing the order of interim measures by arbitral tribunals

It is a well-established rule of international arbitration that arbitral tribunals have the power to grant interim or conservatory measures. Indeed, all major arbitral institutions provide for this in their rules[4] and it is widely accepted in practice.[5]

Under French law, Article 1468 of the CCP specifies that arbitral tribunals are empowered to "*take any protective or provisional measure it deems appropriate under the conditions it shall determine*".

Hence, absent any specific definition, this provision covers all interim and conservatory measures and reflects the liberalist approach of French law towards the scope of arbitral tribunals' jurisdiction.

Such liberalism is confirmed by the Paris Court of Appeal's ruling that the arbitrators' jurisdiction to issue such measures is an "*inherent and necessary extension of the function of judging to ensure greater effectiveness of the jurisdictional power*".[6]

As for enforcement, parties usually comply voluntarily with interim and conservatory measures awarded by arbitral tribunals, for fear of adverse inferences being drawn in decisions on the merits. This is particularly true now that Article 1468 of the CCP recognizes the power of arbitrators to attach a fine to the ordered interim measure (*astreinte*), which applies additional pressure on the parties.[7]

However, the power of arbitral tribunals to grant interim measures is limited in two ways. First, arbitrators cannot order measures against third parties to the arbitration, given the principle of privity of the arbitration agreement.

1. Article 1449 of the CCP: "*The existence of an arbitration agreement shall not prevent a party, as long as the arbitral tribunal has not been constituted, from bringing an action before a court of the State for the purpose of obtaining a measure of inquiry or an interim or protective measure. Subject to the provisions governing protective attachments and judicial securities, the application shall be brought before the president of the judicial or commercial court, who shall rule on the investigative measures under the conditions provided for in Article 145 and, in case of urgency, on the interim or protective measures requested by the parties to the arbitration agreement.*" This provision is applicable to international arbitration by reference to Article 1506(1) of the CCP.
2. Article 1468 of the CCP: "*The arbitral tribunal may order the parties, under the conditions it shall determine and if necessary, under penalty of a fine ("astreinte"), to take any protective or provisional measure it deems appropriate. However, the State court alone shall have jurisdiction to order protective attachments and judicial securities. The arbitral tribunal may modify or supplement the provisional or protective measure it has ordered.*" This provision is applicable to international arbitration by reference to Article 1506(1) of the CCP.
3. In addition, the seizure or freezing of assets and methods of enforcement are governed by the Civil Enforcement Proceedings Code.
4. See for instance: Article 28 of the 2017 ICC Rules, Article 25.1 of the 2014 LCIA Rules, Article 26 of the 2010 UNCITRAL Rules, Rule 30 of 2016 SIAC Rules, Article 37 of 2017 SCC Rules, and Article 47 of the ICSID Convention.
5. See generally Chapter 17: 'Provisional Relief in International Arbitration', in Gary B. Born, *International Commercial Arbitration* (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2021), pp. 2601 – 2758.
6. CA Paris, 7 October 2004, *Otor Participations v. Carlyle*: Revue de l'Arbitrage, (© Comité Français de l'Arbitrage; Comité Français de l'Arbitrage 2005, Volume 2005 Issue 3), pp. 737 - 741.
7. Arbitrators' jurisdiction to attach a fine (*astreinte*) was introduced by the reform of French arbitration law carried out by the Decree of 13 January 2011.

Second, arbitrators lack *imperium* (the authority of the state) and therefore cannot force the execution of the ordered interim measures in the absence of voluntary compliance by the debtor. In such circumstances, the applicant is generally left with no choice but to apply to the competent state courts to seek exequatur of the interim decision, and then obtain an order compelling the recalcitrant party to comply.

Obtaining exequatur from state courts often seems incompatible with the urgency of such interim measures. Moreover, it implies that the arbitrators' interim decision must be recognized as an arbitral award. French case law defines an arbitral award as a decision "*which **definitively** settles, in whole or in part, the dispute submitted to them, whether on the merits, on jurisdiction or on a procedural ground **which leads them to terminate the proceedings***" (emphasis added).[8] It follows that interim decisions should not normally be called 'awards' since they do not decide the main issue, nor do they definitively settle the dispute.[9] However, in a recent decision, the Paris Court of Appeal conceded that a decision ordering an interim measure could qualify as an arbitral award.[10]

French law governing the order of interm measures by French state courts

Interim measures available from French State courts before the arbitral tribunal is constituted

Paragraph 1 of Article 1449 of the CCP now specifies that parties can only apply for interim measures as long as the arbitral tribunal has not yet been constituted, with certain exceptions.[11]

Applications may be made either before the President of the *Tribunal Judiciaire* or of the *Tribunal de Commerce*, at the claimant's option.

Interim measures that are available include:

- all investigative measures necessary "*to preserve or establish before any trial the evidence of facts on which the solution of a dispute may depend*", including pre-arbitration disclosure of documents (**Article 145 of the CCP**);
- all provisional measures to avoid a damage, the aggravation of a damage, or to put an end to a manifestly unlawful disorder, including protective seizures or sequestration (**Articles 809 paragraph 1, 834, and 835 of the CCP**);
- all provisional measures "*which are not seriously disputed, or which are justified by the existence of a dispute*" (**Article 808 of the CCP**); and
- any interim relief order (*référé-provision*) which allows the creditor of an obligation which cannot be seriously disputed to obtain an advance covering all or part of its claim (**Articles 835, paragraph 2 and 873, paragraph 2 of the CPP**).

The CCP now draws a clear distinction between investigative measures under Article 145, which do not require any demonstration of urgency,[12] and other interim and conservatory measures which do[13].

Contrary to interim and conservatory measures ordered by an arbitral tribunal, state judges have the authority of the state (*imperium*) and can therefore order immediately enforceable measures, which may be complemented by a fine (*astreinte*) as set out in Article L.131-1 of the Civil Enforcement Proceedings Code.

8. Cass. 1st Civ., 12 October 2011, No. 09-72.439; CA Paris, 25 March 1994, *Sardisud*: Revue de l'arbitrage 1994, p. 391, note C. Jarosson.
9. Cass. 2nd Civ., 6 December 2001, No. 99-21.870, *Petit Perrin c/ Dor de Saint Pulgent*. In this case, the *Cour de Cassation* (French Supreme Court) ruled that a decision ordering an expert opinion as well as urgent and provisional measures could not be appealed independently of the award on the merits because it "*participated in the investigation of the dispute and did not prejudge its settlement*".
10. CA Paris, 7 October 2004, S.A. *Otor Participations v S.A.R.L. Carlyle (Luxembourg) Holdings 1*, JurisData No. 2004-262342. In this case, the Court ruled that "*the arbitral tribunal made a final decision on the request for interim measures submitted to it, and the limitation of the measures ordered to the duration of the proceedings did not undermine the res judicata effect of its decision, which the arbitrators were able to express in the form of an award*".
11. Cass. 3rd Civ., 20 December 1982, *Société Le Panorama v Simt*, No. 81-15.746; Cass. 1st Civ., 6 December 2005, *Société Léon Grosse v Société Schwind*, No. 03-16.572; J. Ortscheidt and C. Seraglini, *Droit de l'arbitrage interne et international*, LGDJ, p. 620; E. Schwartz, The New French Arbitration Decree: The Arbitral Procedure: Cahier de l'arbitrage No. 2, 2011.
12. Article 1449 paragraph 2 of the CCP provides that the president of the commercial court or the court of first instance "*shall decide on the measures of inquiry under the conditions provided for in Article 145 [...]*", which does not include urgency.
13. For instance, see case law extending the requirement for urgency under Article 835 and 873 of the CCP: Cass. 1st Civ., 6 March 1990, No. 88-16.369; Cass. 1st Civ., 21 October. 1997, No. 95-18.561; Cass. Com., 29 June 1999, No. 98-17.215. See also case law extending the requirement for urgency under Articles 809 of the CCP: Cass. 2nd Civ., 13 June 2002, No. 00-20.077; Cass. Com., 29 June 1999, No. 98-17.215.

In practice, and despite significant improvements since the reform of 13 January 2011, the French legal regime remains controversial.

On one hand, interim relief orders (*référé-provison*) raise difficulties in the presence of an arbitration agreement, since the judge must assess the merits of the case so as to determine the amount of the interim *provision*, in anticipation of the decision that will eventually be adopted by the arbitral tribunal. Therefore, it is not rare that creditors apply for such measures so as to collect debts before the arbitration has commenced, thus avoiding costly and lengthy arbitral proceedings on the merits. Such tactics are heavily criticised as contravening the essence of the arbitration agreement, according to which the arbitral tribunal should stand as the natural judge while state judges should only play a supportive role (*juge d'appui*).

On the other hand, the fact that state courts may only grant interim measures if the arbitral tribunal has not yet been constituted appears inappropriate to some arbitration practitioners, since arbitral tribunals are not always the most proper body to order such measures in a speedy and efficient way.

It is worth noting that so-called "emergency arbitrators" have the power to grant interim relief before the constitution of the arbitral tribunal.[14] Recourse to emergency arbitrators can therefore be an effective way to escape state court proceedings at an early stage.

Interim measures in the exclusive jurisdiction of French state courts, even when the arbitral tribunal is constituted

➤ Protective attachments and judicial securities

Articles 1449 and 1468 of the CCP provide that in any case, and even after the constitution of the arbitral tribunal, the state courts' enforcement judges (*juge de l'exécution*) have exclusive jurisdiction to order two types of interim measures, namely conservatory attachments (*saisie conservatoire*) and judicial securities (*sûreté judiciaire*),[15] as well as to enforce such measures.[16]

This exclusive jurisdiction is easily understandable as these two types of interim measures require the exercise of the judges' *imperium*, which arbitrators lack, and may also be directed towards third parties to the arbitration which are not bound by the arbitration agreement and in relation to which arbitrators lack jurisdiction.

Conservatory attachments can indeed be made against all movable assets even if they are held by a third party (for instance, freezing of bank accounts), and judicial securities for a claim can be made in relation to immovable assets (mortgage, pledging of shares, etc.).

It should be noted, however, that the interim decision of the enforcement judge, which will be limited to verifying that the claim appears to be well-founded in principle and that its prosecution is threatened, will of course have no authority over the jurisdiction of the arbitral tribunal on the merits.

➤ Obtaining documents held by a third party

Article 1469 of the CCP now authorises a party to the arbitration who "*intends to refer to an authenticated or private document to which he or she was not a party or to a document held by a third party*" to summon, at the invitation of the arbitral tribunal, this third party before the President of the *Tribunal Judiciaire* for the purpose of obtaining the production of the deed or document.

Such a request, albeit being in the exclusive jurisdiction of state courts, still requires the consent of the arbitral tribunal.

We note in passing that it is unfortunate that the 13 January 2011 Decree has not provided any mechanism to compel a third party to appear as a witness before an arbitral tribunal.

Constance Malleville

14. See, for example, Article 29 of the 2017 ICC Rules, Article 9B of 2014 LCIA Rules, Rule 30 and Schedule 1 of the 2016 SIAC Rules, and Appendix II of the 2017 SCC Rules.
15. See Article 213-5 of the Code of the Judicial Organization granting jurisdiction to the President of the *Tribunal Judiciaire*.
16. See also Articles L.511-1 and L.511-3 of the Civil Enforcement Proceedings Code.

Interim measures in Spanish seated arbitrations – do they measure up?

This is the second article in Clyde & Co's international arbitration series covering the availability of interim measures across various European jurisdictions. In this piece, associate Marta Cerrada Pérez from our Madrid office provides the Spanish legal and procedural perspective.

The adoption of interim measures in arbitration has and will continue to play a major role in the regulatory development of the practice of arbitration in Spain. It is relevant not only in the Spanish domestic sphere, but in national rulings that have international relevance.

As is well known, one of the advantages of arbitration is that it can be a quicker and more flexible process than litigation. Despite this, it is essential in some cases to adopt measures to ensure that a decision or an arbitral award can be effectively enforced.

In order to respond to this need, and to avoid differences between litigation and arbitral proceedings which could be detrimental to the right to effective judicial protection of the parties, interim measures must also be obtained in arbitration proceedings.

The Spanish legislative framework, the progress made and the issues still to be resolved

The passing of the Civil Procedure Act No. 1/2000 (the "**Spanish Civil Procedure Act**") provided for the first time the possibility of adopting interim measures in arbitration. The act provides that any person who can prove to be a party to an arbitration agreement, or to arbitration proceedings pending in Spain or abroad, can request interim measures before the ordinary courts.

Although the adoption of interim measures by the courts has become a very frequent and commonly accepted practice in Spain, the legislation on this topic initially begged a number of questions. Did arbitrators have the power to adopt interim measures? Could judicial cooperation be requested to adopt an interim measure prior to the initiation of arbitral proceedings? If so, how?

Now these questions have been answered with the entry into force of the Spanish Arbitration Act No. 60/2003 (the "**Spanish Arbitration Act**"), which puts Spain in the same position as its neighbours and represents a step forward in terms of cooperation between judicial and arbitral bodies. As amended, the Spanish Arbitration Act recognises the power of arbitrators to adopt any type of interim measure in arbitration proceedings (Article 23), as well as the power of the parties to request the adoption of such measures even before the arbitration proceedings are initiated (Article 11).

Whilst it is possible to request interim measures before the initiation of arbitration (confirmed by the Spanish courts in numerous cases, such as Judgment no. 946/2005 of the Malaga Provincial Court of 19 September), certain practical questions remain and are the subject of some controversy.

For example, the Spanish Civil Procedure Act requires interim measures to be maintained for as long as the requesting party carries out "*all the actions aimed at setting the arbitration proceedings in motion*" (Article 730). However, unlike litigation (where legal action must be brought before the court within 20 days for interim measures to be maintained), the act does not set a specific time limit within which the applicant must initiate an action.

The Spanish Arbitration Act also does not provide an answer to the question of who should receive the request for the interim measures in cases where the applicant does not wish to go to the ordinary courts and the arbitration proceedings have not yet commenced. In these circumstances, the tribunal has not yet been appointed.

This question can be answered easily in cases where the parties have agreed to submit the management of the proceedings to an arbitral institution. In these scenarios arbitral institutions located in Spain, such as the Madrid Court of Arbitration or the Spanish Court of Arbitration, have provided in their rules for the role of an Emergency Arbitrator who, at the request of the parties, will decide on the adoption of interim measures.

However, this issue becomes more complicated in *ad hoc* arbitrations, given the difficulties that could arise in reaching an agreement as to who should decide on the adoption of interim measures or the appointment of an emergency arbitrator. In these cases, intervention by the courts might be the only viable option to preserve the applicant's right to effective judicial protection (Article 24 of the Spanish Constitution), especially given the risks that any delay in the adoption of interim measures could entail.

The application for interim measures before a Spanish Court vs. before an arbitrator

Although both arbitrators and courts can order interim measures (in the alternative and concurrently), there are differences in the way they exercise this power.

As recognized in the Explanatory Memorandum of the Spanish Arbitration Act, arbitrators only have a *declaratory* power to grant interim measures. Therefore, in the event of non-compliance, arbitrators do not have the executive power to guarantee performance, in which case they must request assistance from the courts. For this reason, it is most effective to obtain interim measures directly from a Spanish court where there are doubts as to the voluntary compliance with ordered measures.

Arbitrators' lack of executive power constitutes the main difference in this context. However, there are no significant differences regarding the *type* of interim measures that arbitrators and judges may order under Spanish law.

Although the Spanish Civil Procedure Act lists a series of interim measures that the courts may order (such as seizure of assets, preventive annotation of the claim or suspension of corporate agreements reached, (Article 727)), this list is not exhaustive. Therefore, parties may request any measure they consider appropriate, regardless of whether it is listed, and it is for the court to decide, at its discretion, which is the most appropriate measure according to need and convenience.

In this liberal regime parties are free to request interim measures from either the tribunal, the court or both, in order to exercise their right to effective judicial protection.

The adoption of interim measures in foreign arbitration proceedings

Spanish courts can go even further, and order interim measures to enforce foreign awards, as well as orders for interim measures made in arbitrations abroad. This arbitration-friendly approach means that courts acknowledge their own jurisdiction and power to order interim measures to secure the enforcement of a foreign award, when such interim measures are required in Spain (Supreme Court Judgment of 19 April 2006 and Order of the Provincial Court of Cadiz of 12 June 1992).

One area where there is continuing uncertainty, however, is the enforcement of interim measures ordered by arbitrators abroad. This is not a straightforward issue with a clear solution under the Spanish legal system, but the majority view is that such enforcement is possible, provided that the foreign decision adopting the measures is the subject of a prior *exequatur* procedure.

This presents considerable practical challenges and might even limit the utility of the interim measures ordered by arbitrators abroad.

By way of example, it should not be overlooked that the competent body to hear the *exequatur* proceedings would be the corresponding High Court of Justice (Article 8.6 of the Spanish Arbitration Act), while the jurisdiction for the enforcement of such a decision would be attributed to the Courts of First Instance (Article 8.4 of the Spanish Arbitration Act). In other words, for the interim measure adopted by the foreign arbitrator to be enforced in Spain, it would be necessary to initiate two consecutive court proceedings that could last for years.

Marta Cerrada Pérez

Conclusion

In the last decade there has been gradual change in relation to the interim measures that are available in Spain in the context of arbitration proceedings. This process culminated in the entry into force of Arbitration Act No. 60/2003, which recognized the concurrent jurisdiction of courts and arbitrators to order interim measures in arbitration proceedings, and the power of the parties to request such measures even before the arbitration proceedings are initiated.

Despite these important legislative advances, there is still a long way to go. It is not without consequence that the Spanish Arbitration Act is silent on issues such as the procedure for the adoption of interim measures by the arbitrators or the role of the emergency arbitrator. These issues are particularly problematic in *ad hoc* arbitration proceedings where there are no institutional rules to fill these gaps.

That said, Spanish courts have been in favour of adopting and enforcing interim measures not only in national but also in international arbitration proceedings, and have also tried to circumvent some of the practical problems that have arisen by adopting a flexible interpretation of the rules in favour of arbitration.

Interim measures in English seated arbitrations - do they measure up?

This is the third article in Clyde & Co's international arbitration series covering the availability of interim measures across various European jurisdictions. In this piece, associate Alexander Stewart from our London office provides the legal and procedural perspective from England and Wales.

Interim and conservatory measures are increasingly a necessary component of international arbitrations, as they are in litigation. The Arbitration Act 1996 (the **Act**) outlines the various powers of the Tribunal and, where necessary, the English courts to grant interim and conservatory measures in order to protect the rights of parties in English seated arbitrations.

English law governing the order of interim measures by arbitral tribunals

The starting point under the Act is that the parties are free to agree on the powers of the tribunal to grant interim measures.[1] As has been noted in a previous article in this series,[2] the major arbitral institutions all provide for the tribunal's power to grant interim or conservatory measures. The powers provided for under these institutions' rules can be very broad - for example, the tribunal, pursuant to Article 28(1) of the ICC Rules 2021, can 'order any interim or conservatory measure it deems appropriate'. By incorporating institutional rules (or by bespoke agreement between the parties), the tribunal can be granted significant powers to grant interim measures as a matter of English law.

In the absence of any agreement between the parties, the tribunal's powers are much more limited under the Act. The default position is that the tribunal can grant the following interim and conservatory measures:

- Security for costs;[3]
- 'Directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings and which is owned by or is in possession of a party to the proceedings - (a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or (b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property';[4]
- 'Direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation';[5]
- Giving 'directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control'.[6]

These powers are clearly very limited in scope.[7]

Furthermore, the parties may grant the tribunal the power 'to order on a provisional basis any relief which it would have power to grant in a final award'.[8] However, the Act makes clear that the tribunal does not have this power by default, and the parties must agree to confer the power on the tribunal if it is to be exercised.[9]

1. Arbitration Act 1996, section 38(1).
2. Interim measures in French seated arbitrations – do they measure up? : Clyde & Co (clydeco.com), paragraph 2, footnote 4.
3. Arbitration Act 1996, section 38(3).
4. Ibid, section 38(4).
5. Ibid, section 38(5).
6. Ibid, section 38(6).
7. Although these are the main codified interim and conservatory powers set out in the Act, as a matter of English law, tribunals may have other powers to grant interim relief. For example, Merkin and Flannery note that 'it seems settled that tribunals seated in England have the power to grant anti-suit injunctions' *Merkin and Flannery on the Arbitration Act* 1996, 6th Edition, §38.1, fn 166).
8. Arbitration Act 1996, section 39(1).
9. Ibid, section 39(4).

In these circumstances it is generally in the interests of parties to agree on such expanded powers. If they are not agreed upon, parties may have to apply to the courts, rather than the tribunal, to obtain necessary interim or conservatory measures.

English law governing the order of interim measures by arbitral tribunals

The Act provides the English courts with more significant powers in relation to the support of arbitration proceedings, and specifically interim and conservatory measures. It is worth noting that the English courts have held that they are not the only courts competent to order interim measures in support of an English seated arbitration.[10] Parties could, therefore, apply to foreign courts to obtain interim and conservatory measures where applicable.

Section 42 of the Act confirms that, unless otherwise agreed by the parties, 'the court may make an order requiring a party to comply with a peremptory order made by the tribunal'. However, the court shall not act unless satisfied that 'the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order'[11] and any time limit in the order has expired (or a reasonable time has passed if no time limit is in contained in the order).[12]

Section 43 of the Act confirms that a party to arbitral proceedings may use 'the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence'.[13] This is a mandatory provision, i.e. the parties cannot agree to contract out of it (unlike section 42 above and section 44 below); however, any application to court can only be made with the permission of the tribunal or the agreement of the other parties.[14]

The court is granted further powers under section 44 of the Act, unless the parties agree otherwise. The court has the same power to make orders in arbitration as it has in litigation where the following are concerned:

- taking witness evidence;[15]
- preservation of evidence;[16]
- making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings;[17]
- sale of any goods which are the subject of the proceedings;[18] and
- granting an interim injunction or appointing a receiver.[19]

These are quite wide-ranging powers and the most notable of them is the court's power to grant interim injunctions, including freezing injunctions. [20]

It should be noted that the court's powers under section 44(2) are moderated by the remainder of section 44 of the Act - in particular, section 44(5), which makes clear that the court 'shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively'. In other words, the court will not exercise its powers under section 44 to grant interim relief if the tribunal itself is able to grant effectively the same relief. For example, if a tribunal has not been constituted, it would evidently not be in a position to act effectively.

10. *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2013] EWHC 260 (Comm).
11. Arbitration Act 1996, section 42(3).
12. Ibid, section 42(4).
13. This power is subject to sections 43(2)-(4) of the Act.
14. Arbitration Act 1996, section 43(2).
15. Ibid, section 44(2)(a). Notably the Court of Appeal has determined that the court may make orders under this provision in respect of non-party witnesses and in respect of arbitrations seated outside of England and Wales (see A and B v C, D and E [2020] EWCA Civ 409).
16. Ibid, section 44(2)(b).
17. Ibid, section 44(2)(c). The court can only make orders 'for the inspection, photographing, preservation, custody or detention of the property' or 'that samples be taken from, or any observation be made of or experiment conducted upon, the property'.
18. Ibid, section 44(2)(d).
19. Ibid, section 44(2)(e).
20. The Court of Appeal has, also, confirmed that the court can order mandatory as well as prohibitory injunctions pursuant to section 44 - see *Cetelem SA v Roust Holdings Ltd* [2005] 2 Lloyd's Rep 494. See also Merkin and Flannery on the Arbitration Act 1996, §44.12.5.1.2 Freezing injunctions.

Pursuant to section 44(6) of the Act, the court can stipulate that any order it makes pursuant to section 44 shall cease to have effect in whole or in part on the order of the tribunal. In other words, the court may leave it to the tribunal to decide how long an interim or conservatory measure should remain in force, or whether it should be overturned. This is particularly relevant in circumstances where a court orders an interim measure prior to the constitution of the tribunal.

A final interim power of the court is provided for by section 45 of the Arbitration Act, which allows the court, on agreement between the parties, to determine a preliminary point of law.

Do they measure up?

By allowing the parties significant freedom to decide on the tribunal's power to grant interim and conservatory measures, the Act is in keeping with the spirit of the arbitration and the parties' freedom of contract. However, the default position is limited.

The Act does, however, provide the courts with fairly substantial powers to support the arbitral process via interim and conservatory measures, in particular regarding the issuance of injunctions. This could be argued to "balance out" the lack of powers afforded to the tribunal by default. However, parties needing recourse to the courts in order to ensure justice is done is arguably not in keeping with the spirit of international arbitration.

In this regard, it should be noted that the Law Commission is currently conducting a review of the Act, with a consultation paper due to be published in late 2022. One of the issues that may be dealt with by the Law Commission is the extent of the courts' powers to support arbitral proceedings.[21] Accordingly, the English law position may change on interim and conservatory measures in the not-too-distant future.

Alexander Stewart

21. https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/

Interim measures in German seated arbitrations – do they measure up?

This is the final article in Clyde & Co's international arbitration series covering the availability of interim measures across various European jurisdictions. In this piece, Counsel Georg Scherpf, and Senior Associate Styliani Ampatzi from our Hamburg and Dusseldorf offices provide the legal and procedural perspective in Germany.

With commercial arbitration incrementally encroaching on state courts competence to provide interim relief, this article outlines both the possible interim relief in German state courts – during a pending arbitration – as well as the possibilities to obtain such relief from the arbitral tribunal.

When the German arbitration law was reformed in 1998, provisions regulating the interim relief in arbitration were adopted. Arbitral tribunals now have the power to order interim relief under German law (section 1041 of the 10th book of the German Code of Civil Procedure, hereafter "CCP").

Competent bodies to order interim measures

Following the example of the 1985 UNCITRAL Model Law ("Model Law"), the German arbitration law allows both the German courts and arbitral tribunals, to issue measures of interim relief in support of the arbitration proceedings. The competence of arbitral tribunals is based on the Model Law, Article 17, in its original 1985 version, and is set out in section 1041 para 1 CCP. The respective concurrent competence of the German courts follows Article 9 of the Model Law and is found in sections 1033 and 1041 para 2 CCP.

While parties can exclude the jurisdiction of the arbitral tribunal to provide interim relief, it is disputed, under German law, if the same applies to the jurisdiction of the German courts. The German Federal Court of Justice has yet not taken a position on this issue. However, according to the prevailing opinion, the parties may too, exclude the jurisdiction of the German courts to order interim relief. To do this, the Parties must state the exclusion of the respective competence of the courts explicitly. Including an arbitration agreement into their contracts alone does not suffice.

The reasoning behind this is that since the parties may agree to exclude a claim from legal proceedings altogether (*pactum de non petendo*), the parties may agree on the exclusion of only the interim relief all the more.

As long as neither competence is excluded, the party seeking interim relief may choose whether it turns to the arbitral tribunal or a German court seeking interim protection. There are, however, differences between the two alternatives concerning both the application procedure as well as the remedies available and their effect that should be carefully considered when deciding on how to proceed.

Interim measures ordered by German courts

Pursuant to section 1033 CCP the agreement to arbitrate does not preclude a court from granting interim relief before or after the arbitral proceedings have been commenced.

Moreover, German courts may issue measures of interim relief irrespective of whether the arbitration is seated in Germany or not. This is regulated explicitly in section 1025 para 2 CCP.

However, German courts may only grant interim measures which are available in German litigation proceedings. These are:

- Attachment order (*Arrest*, section 916 CCP). The attachment is ordered to secure the enforcement of a monetary claim against the debtor's property where an enforceable title does not exist (yet).

To substantiate its request for an attachment order, the applicant has to have a *prima facie* case against the debtor (*Arrestanspruch*) and demonstrate that there are objective reasons to fear that without the order, the enforcement of any award on that claim would be frustrated or become considerably more complicated (*Arrestgrund*). A debtor's difficult financial situation alone does not justify an application for attachment. However, if there are indications that the debtor plans to transfer assets to another jurisdiction, attachments are commonly ordered. Yet, the threshold to obtain such an order remains generally high.

– Interim injunction (*einstweilige Verfügung*, sections 935 et seq. CCP). Interim injunctions serve to secure a non-monetary claim until a decision is made in the main proceedings. Interim injunctions are permissible to prevent the change of existing circumstances (protective injunction, *Sicherungsverfügung*) or to regulate an interim condition in relation to a disputed legal relationship (regulatory injunction, *Regelungsverfügung*). The court determines at its own discretion which orders are necessary to achieve the relief sought. It then orders the respondent to either carry out or refrain from carrying out a specific act.

  The party requesting the interim injunction must again prima facie prove its claim (*Verfügungsanspruch*) and establish the urgency of the interim injunction (*Verfügungsgrund*).

Finally, the German courts may order the applicant to provide reasonable security (sections 921 and 936 CCP). The court shall decide on reasonable security irrespective of a request of the opposing party. Pursuant to section 110 CCP, nationals of foreign states (non-EU/EEA member states) who appear as plaintiffs before German courts must provide the defendant with security for the costs of the proceedings at the latter's request. It is disputed whether the obligation to provide that kind of security can also be imposed in interim relief applications. The currently prevailing opinion rejects this (see Regional Court Berlin, Judgement of 5 March 1957 – 64 S 21/57, FHZivR 5 Nr. 19942).

According to another opinion, however, the provision of security should be considered at the latest when oral proceedings are held (*Leible*, NJW 1995, 2817; *Schulz* in Münchener Kommentar zur ZPO, 6th Ed. 2020, § 1041 margin no. 4).

Interim measures ordered by arbitral tribunals

Section 1041 para 1 CCP regulates:

> *"Unless otherwise agreed by the parties, the arbitral tribunal may order at the request of a party, such interim measures or measures of protection as it considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may require either party to provide reasonable security in connection with such a measure."*

The arbitral tribunal may order interim measures as it considers necessary once it has been fully constituted. The wording of section 1041 para 1 CCP does not restrict arbitral tribunals to only order interim measures available in German litigation proceedings. In this regard, the powers of the arbitral tribunals, technically, exceed the possibilities of the German courts. However, the competence of the tribunals is inherently restricted as they do not wield any state authority. Yet, the arbitral tribunal may in theory order any interim measure if that measure is non-coercive and has a factual connection to the arbitrated claim. The applicant should succeed with its request before the arbitral tribunal if it has a *prima facie* claim and demonstrates the claim being in danger of being frustrated as well as the urgency of the interim measure. Lastly, the tribunal can order both the applicant as well as the respondent to provide a security. The security must not be requested by the parties but can be ordered by the arbitral tribunal *ex officio*. The tribunal can order a security if the opposing party to the one having requested the interim relief may suffer damage due to the measure ordered. The amount of the security must be reasonable. The decisive factor in determining the appropriateness is the maximum amount of the potential damage.

In the interest of effective legal protection, the arbitral tribunal may also decide without an oral hearing and without hearing the opposing party to the one requesting the interim relief, unless the parties have agreed otherwise. Section 1042 CCP does not prevent this since it does not grant the right to be heard to a greater extent than before the state court. Therefore, it is not excluded that the arbitral tribunal grants a hearing only after the order has been issued and, if necessary, revokes or amends the measure, as a court would also do. It should be noted, however, that in court proceedings, the requirements for issuing a temporary injunction without hearing the opposing party have been considerably tightened in order to maintain procedural equality (see *Voit* in Musielak/Voit, ZPO, 19th Ed. 2022, § 1041 margin no. 3).

A further confirmation of the above position of German law regarding the possibility of deciding *ex parte* on a request for interim relief could be considered Article 25 para 2 DIS Arbitration Rules, which regulates:

> *"In exceptional circumstances, the arbitral tribunal may rule on a request pursuant to Article 25.1 without giving prior notice to or receiving comments from the other party, if otherwise it would risk frustrating the purpose of the measure. In such case, the arbitral tribunal shall notify the other party of the request, at the latest, when ordering the measure. The arbitral tribunal shall promptly grant the other party a right to be heard. Thereafter, the arbitral tribunal shall confirm, amend, suspend, or revoke the measure."*

Although the opposing party needs, in principle, to be heard before the tribunal makes its decision, an exception of that rule is accepted where the purpose of the measure is in risk of frustration. In fact, an order without prior hearing is sometimes the only way to secure the effectiveness of an interim measure. In practice, however, proceedings under Art. 25.5 are rather impractical and therefore not common due to the enforceability issues that a measure ordered *ex parte* by a tribunal raises. There is no case law on whether ordering interim relief without hearing the opposing party violates the right to be heard.

Enforcement of interim measures issued by arbitral tribunals

Interim measures issued by an arbitral tribunal are not directly enforceable. Their enforcement must be approved by the courts first. Section 1041 para 2 CCP regulates:

> *"On request by a party, the court may permit the enforcement of a measure pursuant to subsection (1), unless an application for a corresponding measure of temporary relief has already been filed with a court. It may recast the order if this is necessary for the enforcement of the measure."*

While the courts will not decide on the merits of the application, they will review the interim measure for errors of judgement and the validity of the arbitration agreement (see *Voit* in Musielak/Voit, ZPO, 19th Ed. 2022, § 1041 margin no. 7; *Münch* in Münchener Kommentar zur ZPO, 6th Ed. 2022, § 1041 margin no. 41 et seq.). Pursuant to the above provision, the courts may modify interim measures ordered by an arbitral tribunal if they find it unsuitable for enforcement (section 1041 para 3 CCP).

The courts may, on request, set aside or amend their order of enforcement of the arbitrators' interim measures (Higher Regional Court Thüriger, Judgement of 24 November 1999 - 4 Sch 3/99, OLG-NL 2000, 16). This is the last line of defence for the respondent against the interim measure.

Where to apply for interim measures

While deciding where to apply for interim relief, the following considerations should be made:

- Interim relief ordered by German courts are directly enforceable. Interim measures granted by an arbitral tribunal must be approved for enforcement by a state court first.

- If the applicant seeks to enforce interim relief issued by the arbitral tribunal but has already filed an application for a corresponding measure with a court, the court will not permit the enforcement of the measure (see *Voit* in Musielak/Voit, ZPO, 19th Ed. 2022, § 1041 margin no. 6). Although there is no jurisprudesnce yet on a situation similar to that in the UK case of Gerald Metals S.A. v Timis & Ors [2016] EWHC 2327 (Ch).

- The German courts may only order interim relief which is available under the lex fori. An arbitral tribunal is not limited in this respect and its orders may allow for more flexibility in some situations. However, the enforcement of a tribunal ordered measure, which is unavailable to the German courts, might prove complicated.

- The German courts may grant interim relief on an *ex parte* basis, without hearing the other party. While the same might be possible for an arbitral tribunal, the enforcement of a measure ordered by a tribunal without hearing the opposing party is, as discussed above, unclear.

- The arbitral tribunal has jurisdiction only once it has been fully constituted. Thus, the parties may need to sit tight for interim relief. Many arbitral institutions provide for an emergency arbitrator (e.g., Article 29 ICC Arbitration Rules, Appendix II SCC Arbitration Rules, Article 9B of LCIA Arbitration Rules) or – in addition – for expediated formation of the tribunal (see, for example, Articles 5 and 9A LCIA Arbitration Rules). The DIS Arbitration Rules do not include a similar provision. Nevertheless, the German arbitration law does not prevent the parties from contractually agreeing to emergency arbitration seated in Germany. This could be done either by a specific agreement (identifying an appointing authority) or by reference to the provisions of another set of arbitration rules providing for emergency arbitration.

- The applicant will be required to *prima facie* prove his application. This task might turn out to be more challenging before an arbitral tribunal than a court since the arbitral tribunal is prevented from accepting affidavits for the purpose of establishing *prima facie* evidence, since it is not an authority empowered to take affidavits in lieu of an oath (see *Schütze*, Institutionelle Schiedsgerichtsbarkeit, DIS-Schiedsordnung, Art. 25 margin no. 3).

Compensation for the order of unjustified interim measures

A party to the arbitration enduring an unjustified interim measure is entitled to compensation irrespective of whether a German court or the arbitral tribunal ordered the measure.

If the interim measure was ordered by a tribunal, section 1041 para 4 CCP applies:

> *"Where a measure ordered pursuant to subsection (1) proves to have been unjustified from the outset, the party that has obtained its enforcement is under obligation to compensate the opposing party for the damage the latter has suffered as a result of the measure being enforced or as a result of their having provided security in order to avert the enforcement. The claim may be asserted in the pending arbitral proceedings."*

In relation to interim relief ordered by a state court, section 945 CCP stipulates a similar liability.

A compensation due to improper ordered interim relief requires that the application for the measure was unjustified already at the time it was ordered. It is possible to assert the claim for compensation in the pending arbitral proceedings.

Conclusion

In Germany, when a party needs to obtain an interim relief, in most cases it will be advisable to apply directly to the state courts. Obtaining interim measures from an arbitral tribunal bears the risk of delaying the urgent relief sought and, in some cases, where the interim measure significantly deviates from the options available to state courts, the measure may not be enforced at all (two-step process). There may also be due process considerations at play when trying to seek *ex parte* relief from an arbitral tribunal (section 1041 CCP, Article 25.2 DIS Arbitration Rules).

Arguably, the better way is, for the time being, to a void *ex parte* decisions of tribunals in light of enforcement considerations.

Nonetheless, each case is to be assessed in its specific context. For that, the parties should seek support from an experienced counsel.

Georg Scherpf

Dr Styliani Ampatzi, LL.M.

Interim measures in Egyptian seated arbitrations – do they measure up?

This is an additional article in Clyde & Co's international arbitration series covering the availability of interim measures. In this piece, associate Moamen Elwan from our Dubai office provides the Egyptian legal perspective.

The Egyptian Arbitration Law No. 27 of 1994 (the **Arbitration Law**) allows parties to agree to grant arbitral tribunals the power to issue interim measures upon the request of any of the parties. The Arbitration Law also grants the competent courts the power to issue interim measures before or during the arbitration proceedings.

Measures ordered by arbitral tribunals

Where the parties agree, Article (24) of the Arbitration Law allows the arbitral tribunal to "*order, upon request of either party, interim or conservatory measures considered necessary in respect of the subject matter of the dispute.*"[1] The parties' agreement to confer this power can be made in the arbitration agreement itself, or at a later stage. It can also be inferred from the arbitration rules which the parties agree to apply. For example, the rules of the main arbitration institution in Egypt, the Cairo Regional Centre for International Commercial Arbitration (**CRCICA Rules**), authorise arbitral tribunals to issue interim and conservatory measures.[2] Therefore, parties' agreement to resort to arbitration under CRCICA Rules would be considered as an agreement by the parties to confer power to the arbitral tribunal to issue these kinds of measures.

Once the request to issue a conservatory or interim measure is made, the arbitral tribunal is free to order any party to the arbitration proceedings to take the relevant measure without any restriction of such order to be directed to the party against which it was made. However, the arbitral tribunal cannot issue such an order on its own initiative (*sua sponte*). Even if the parties agree to grant the arbitral tribunal the necessary authority, one of the parties must submit a request.

Legal theory explains that, when considering whether or not to issue an interim or conservatory measure, a tribunal would consider whether each of the following conditions is fulfilled:[3]

– The parties must explicitly agree to authorise the arbitral tribunal to issue interim or conservatory measures;

1. Article (24) of the EAL provides " 1. *The Parties to the arbitration may agree to confer upon the arbitral tribunal the power to order, upon request of either party, interim or precautionary measures considered necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the ordered measure. 2. If the party against whom the order was issued fails to execute it, the arbitral tribunal, upon the request of the other party, may authorize the latter to undertake the procedures necessary for the execution of the order, without prejudice to the right of said party to apply to the president of the court specified in Article 9 of this law for rendering an execution order."*

2. Article (26) of CRCICA's Rules provides *"1.The arbitral tribunal may, at the request of a party, grant interim measures. 2.An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party for example and without limitation, to: a. Maintain or restore the status quo pending determination of the dispute; b. Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself; c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or d. Preserve evidence that may be relevant and material to the resolution of the dispute. 3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that: a. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and b. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. 4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate. 5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative. 6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure. 7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted. 8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances prevailing at the time of granting the interim measure, the measure should not have been granted. The arbitral tribunal may, at the request of any party, award such costs and damages at any point during the proceedings. 9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."*

3. Fathi Wali 'Arbitration Law in Theory and Practice,' (2007), p. 402.

- The arbitral proceedings must have commenced;
- One of the parties must request that the arbitral tribunal issue the order;
- The measure ordered should be an interim or conservatory measure;
- The measure must be required by the nature of the dispute subject to arbitration;
- The general conditions for the issuance of interim measures must be met. In particular, there must be (i) a probability that the applicant is entitled to its claim; and (ii) an imminent danger that damage would be caused to the subject matter of the dispute if the interim measure were not issued.

If the arbitral tribunal is satisfied that all of these conditions for issuance are fulfilled, it will issue its decision in the form of an order which does not have to be supported by written reasons and which cannot be challenged or appealed and may not be subject to annulment (set aside) proceedings.[4] However, the tribunal may cancel (i.e. revoke, terminate or stop) the relevant measure at a later date, at its own discretion without explaining its reasoning.[5]

The tribunal may order the party benefiting from the order to provide a guarantee in respect of the relevant measure if the parties have granted the arbitral tribunal this power. The guarantee can take the form of an amount of money to cover the costs, for example, or it might be a personal guarantee to compensate the other party for any damage it sustains.

The kinds of interim or conservatory measures that a tribunal may order are not listed in the law.

4. Fathi Wali 'Arbitration Law in Theory and Practice,' (2007), p. 403.
5. Fathi Wali, 'Arbitration of International Commercial Disputes in Theory and Practice,' (2014), p. 514, para. 281.

There are several practical issues related to interim or conservatory measures resulting from arbitral tribunals' lack of authority (the *imperium* which domestic courts possess) to (1) force the execution of measures if the party concerned refuses to enforce them; and (2) order interim or conservatory measures against third parties.

Measures of this kind should be enforced voluntarily. If they are not, the applicant may follow any necessary procedure to enforce them. It can claim damages for failure to enforce the measure or ask the court to issue an exequatur as specified in Article (9) of the Arbitration Law.[6] In this case, the court's role would be limited to issuing the exequatur without reviewing the compatibility, or correctness of the measure issued by the arbitral tribunal. This is because the court would be acting only as an annotating authority to the measure.[7]

The current trend is for Egyptian courts to agree to enforce interim measures, even where they are ordered by foreign seated arbitral tribunals. For example, the Egyptian Court of Appeal[8] has recently enforced an interim measure rendered by the International Chamber of Commerce (ICC) in an arbitration seated abroad. In that judgment, the Court of Appeal laid out the general requirements to be met where an interim measure has been issued by an arbitral tribunal is seated abroad:

- The measure must be final – it is considered final if it is rendered by a competent arbitral tribunal;
- The measure was ordered on the basis of a valid arbitration agreement;

6. The Court in Article (9) would differ depending on whether the arbitration is considered domestic or international. If domestic it would be the court having the original jurisdiction. In case of international commercial arbitration in Egypt or abroad, Cairo Court of Appeal would be the competent court. In this respect, Article (9) of the EAL provides "1. *Competence to review the arbitral matters referred to by this Law to the Egyptian judiciary lies with the court having original jurisdiction over the dispute. However, in the case of international commercial arbitration, whether conducted in Egypt or abroad, competence lies with the Cairo Court of Appeal unless the parties agree on the competence of another appellate court in Egypt. 2. The court having competence in accordance with the preceding paragraph shall continue to exercise exclusive jurisdiction until completion of all arbitration procedures.*"

– The parties had the opportunity to present their case; and

– The measure does not breach public policy.

Measures ordered by a court

Egyptian law recognises the principle of concurrent jurisdiction. A party to an arbitration agreement can, in addition to applying to the arbitral tribunal, apply to the court to request the issuance of an interim or conservatory measure before or during the arbitral proceedings.[9] Such application would not be considered as a waiver of the arbitration agreement and the parties can still bring their dispute before the arbitral tribunal.

The main, and most important, difference between an order issued by the courts and one issued by an arbitral tribunal is that the former has an *imperium* effect. In this respect, the court has the same power to make interim or conservatory orders related to arbitration proceedings as it does in litigation matters. The other difference is that a measure to be issued by the court must be requested by filing a lawsuit to be heard before the court.[10] This would require hearing the other party and making submissions. (Enforcement of orders from arbitral tribunals could be made by a petition).

There is no limitation on the types of measures a court can take. These include any temporary, conservatory, or interim measures that aim to protect an "apparent right" without delving into the details of the application to issue such measure.[11] For instance the court may order:

– Pre-award attachment;

– Any security to ensure the implementation of an interim measure;

– Attachment of assets.[12]

Until recently, it was not clear whether a court could suspend the liquidation of a letter of guarantee. The Cairo Court of Appeal has settled the matter by rendering a judgment suspending the liquidation of a letter of guarantee issued by a bank until an award is issued in the ongoing arbitration.[13]

Do they measure up?

The Arbitration Law provides an easier route to enforce interim and conservatory measures issued by arbitral tribunals as opposed to resorting directly to the competent court. Seeking such a measure from an arbitral tribunal (if not enforced voluntarily) is through making a fast-tracked petition, while seeking such a measure from the courts (without an order by the arbitral tribunal) is through commencing a lawsuit.

There is also no limitation on the types of measures the arbitral tribunals can issue as long as they are satisfied that the relevant conditions are met.

Although the Egyptian courts have taken positive steps to enforce interim measures issued by foreign-seated arbitral tribunals, it is still not clear whether the Egyptian courts would enforce an interim measure issued by an emergency arbitrator (whether seated in Egypt or abroad) since emergency arbitration is not regulated in Egypt.

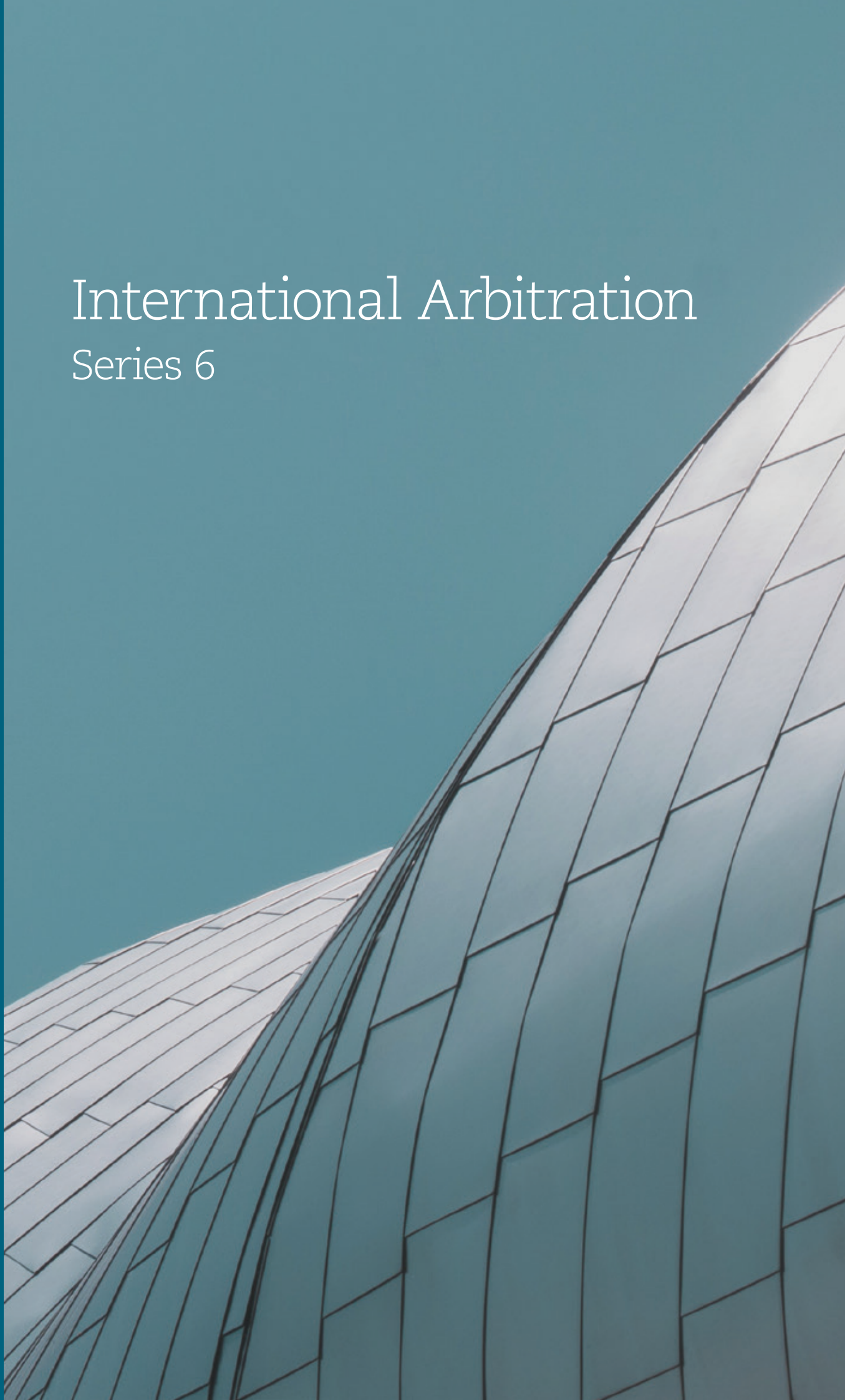
However, there has been a recent effort by the Egyptian authorities to create an arbitration- friendly environment. To this end, the Egyptian Ministry of Justice set up a committee in early 2022, tasked with proposing amendments to the Arbitration Law. No proposals have been made to date.

Moamen Elwan

7. Mohamed Selim El Awa, 'Arbitration in Egypt and the Arab States,' Volume I, Article 24, P. 797.
8. Cairo Court of Appeal Challenge No. 44 of 134 JY dated 9 May 2018.
9. Article (14) of the EAL provides "Upon request of either party to the arbitration, the court referred to in Article 9 may order the taking of an interim or conservatory measure, whether before the commencement of the arbitral proceedings or during said proceedings."
10. Court of Cassation Challenge No. 489 of JY 67 dated 12 March 2013.
11. Cairo Court of Appeal Challenge No. 29 of JY 133 dated 7 September 2016.
12. Mohamed Abdel Raouf, Chapter 12 'Egypt,' in Lawrence W. Newman & Colin Y. C. Ong, 'Interim Measures in International Arbitration,' (2014), p. 234.
13. Cairo Court of Appeal, Circuit (50), Challenge No. 60 of JY 137 dated 27 January 2021.

International Arbitration

Series 6



Dispute escalation provisions and international arbitration - a rising threat in France?

This is the first article in Clyde & Co's latest international arbitration series covering dispute escalation provisions and pre-action ahead of commencing international arbitration across various jurisdictions. In this piece, associate Sophie Bayrou from our Paris office provides the French legal perspective.

It is a well-known fact that France is a favourable forum for arbitration. This supportive environment extends to other alternative dispute resolution mechanisms as well, as French law strongly encourages parties to resolve their disputes amicably before submitting it to a court or an arbitral tribunal. In fact, in some civil and commercial matters it is even mandatory for parties to attempt to settle their dispute amicably before referring a claim to a French court, and failure to do so results in the claim being inadmissible.[1]

It is against this backdrop that clauses requiring parties to take certain steps before submitting their disputes to litigation or arbitration offer several advantages from a commercial and procedural point of view. An "*escalation clause*", also known as a "*multi-tiered dispute resolution*" clause, is a contractual provision establishing a dispute resolution mechanism on a staged basis. This clause may take different forms but, in general, it requires contracting parties to comply with two obligations when a dispute arises: (i) an "*obligation to do", ("obligation de faire*") i.e., to attempt to reach an amicable resolution through negotiations or use of a third party (expert, conciliator, mediator, dispute board, etc.); and (ii) an "*obligation not to do" ("obligation de ne pas faire*"), i.e., not to bring the dispute before a judge or an arbitral tribunal before complying with the clause through an amicable settlement process. However, an escalation clause does not impose a performance obligation ("*obligation de résultat*") on the parties. In other words, they are not required to compromise or to reach a specific settlement agreement. Attempting to resolve the dispute amicably is enough.[2]

The use of escalation clauses is governed by an evolving legal framework under French law, meaning that careful consideration must be given to the effects of such clauses and care must be taken when drafting them.

The validity of escalation clauses under French law

The French Supreme Court (*Cour de cassation*) recognised the validity of escalation clauses in the *Poiré v. Tripier* decision of 14 February 2003. In that case it ruled that the clause containing an obligation to carry out prior negotiation or conciliation before formally starting a dispute is mandatory, and therefore the judge must rule the claim inadmissible if there was no prior attempt at amicable settlement.[3]

Subsequent court decisions have attempted to build up a legal framework around these clauses.

❯ To be enforceable, an escalation clause must be express and precise

If an escalation clause is to be enforceable, it must expressly provide for a mandatory (not an optional) amicable settlement process.[4] In a decision dated 6 May 2003, the French Supreme Court ruled that an escalation clause must be expressly provided for in a contract and cannot, for example, be inferred from model contracts commonly used in a specific trade or profession.[5]

1. French Code of Civil Procedure, Art. 750-1.
2. G. Born, International Commercial Arbitration, 3rd Edition, Kluwer Law International, pp. 993-997.
3. Mixte, 14 February 2003, n° 00-19.423.
4. For instance: see Soc., 13 January 2010, n° 08-18.202: in case of a collective agreement that does not make the prior conciliation procedure mandatory, trade unions can directly refer to the judge requests for the execution or interpretation of the said agreement.
5. Civ. 1re., 6 May 2003, n° 01-01.291.

In a further decision, dated 6 February 2007, the French Supreme Court upheld an appeal decision which ruled that a clause is not a true escalation clause if it only provides for an obligation for the parties to consult with each other about whether they want to refer their dispute to arbitration, instead of a compulsory preliminary conciliation procedure. Therefore, non-compliance would not result in the inadmissibility of the claimant's action.[6]

Courts also require an escalation clause to be drafted in a precise manner for its application to be effective, although French case law is not entirely clear on this point. In a decision dated 29 April 2014, the Commercial chamber of the French Supreme Court required the parties to specify in the clause the escalation procedure to be followed, failing which such clause would not be deemed applicable.[7] This solution was confirmed in a decision dated 3 October 2018, in which the same Commercial chamber of the French Supreme Court considered that an escalation clause failing to appoint a mediator directly or to specify, at least, the details of her or his appointment, could not be actioned.[8] However, there were two subsequent decisions by different chambers of the French Supreme Court (the Third Civil chamber[9] and the Social chamber[10]) that appear to have departed from the position of the Commercial chamber by upholding the inadmissibility of the claim brought by a party who did not comply with the disputed escalation clause, even though such clause did not specify how the compulsory preliminary conciliation procedure was to take place. Nevertheless, in a decision dated 11 July 2019, the Third Civil chamber appears to have come into line with the position of the Commercial chamber, ruling that an escalation clause, drafted in "*an elliptical manner and in general terms*", does not constitute a valid escalation clause.[11]

➤ Scope of an escalation clause

An escalation clause applies only to disputes covered by its wording, which the French Supreme Court can interpret strictly. For instance, the French Supreme Court has ruled that an escalation clause whose application was limited to disputes relating to the termination of a specific contract would not apply to a tort action based on Article 442-6 I, 5° of the French Commercial Code relating to the brutal termination of established commercial relationship between the parties.[12]

➤ Survival of an escalation clause

In the event of the termination of a contract, Article 1230 of the French Civil Code states that "*termination does not affect clauses relating to the settlement of disputes, nor those intended to be effective even in the event of termination, such as confidentiality and non-competition clauses*". Termination therefore does not affect escalation clauses. The French Civil Code is silent on whether an escalation clause survives in the event of the nullity of the contract. However, that would be logical, given Article 1447 of the French Civil Code, which provides for the independence and the survival of an arbitration clause in these circumstances.[13]

Effects and sanction

➤ Non-compliance with escalation clause in domestic proceedings

Since the *Poiré v. Tripier* decision mentioned above, failure to comply with an escalation clause is sanctioned by the dismissal of the proceedings, which are deemed inadmissible. This plea of inadmissibility or "*fin de non-recevoir*"[14] can be invoked by the party even for the first time on appeal[15] and, unlike in other jurisdictions,[16] may not be regularised during the proceedings.[17]

6. Civ. 1re., 6 February 2007, n° 05-17.573.
7. Com., 29 April 2014, n° 12-27.004.
8. Com., 3 October 2018, n° 17-21.089.
9. Civ. 3e., 19 May 2016, n° 15-14.464.
10. Soc., 30 January 2019, n° 17-22.640.
11. Civ. 3e., 11 July 2019, n° 18-13.460. The disputed clause provided that "*in case of a dispute, prior to any judicial action, the parties agree to refer their dispute to a conciliator to be appointed by the President of the Chamber of Notaries*".
12. Soc., 7 mars 2007, n° 05-45.157; Com., 12 June 2012, n° 11-18.852:
13. S. Guichard et a., *Procédure civile*, Précis Dalloz, 2020, §2417.
14. Defined by article 122 of the French Civil Procedure Code as a plea which tends to establish the opposing party's claim inadmissible due to the lack of right of action, before any consideration of the merits, e.g., the time limit to bring the claim has elapsed.
15. Com., 22 February 2005, n° 02-11.519.
16. For instance, in a decision dated 16 March 2016 (DSFC 142 III 296), the Swiss Federal Supreme Court ruled that a party can commence arbitral proceedings even if the said party has not complied with the first stage of an escalation stage providing for a mandatory preliminary conciliation. The Swiss Federal Supreme Court took a pragmatic approach and ruled that the arbitral tribunal will simply have to stay the proceedings and set a time limit for the parties to proceed with the preliminary conciliation.
17. Mixte, 12 December 2014, n° 13-19.684.

However, the party which has refused to participate in the mediation prior to the start of the proceedings may not invoke the plea of inadmissibility.[18]

It should be noted that the dismissal of the proceedings in the event of a failure to comply with an escalation clause only applies to actions on the merits before the domestic courts and not to actions brought before an interim relief judge ('*juge des référés*')[19] since the provisional nature of the interim decisions does not affect the merits of the dispute.[20]

There is uncertainty as to whether such an escalation obligation also applies to civil enforcement procedures. Although the First Civil chamber of the French Supreme Court upheld the application of escalation clause to "*any legal proceedings, whatever their nature*" including to the enforcement of the attachment of a property,[21] the Second Civil chamber took the opposite view when it ruled that an escalation clause, in the absence of an express provision to that effect, cannot prevent the performance of enforcement measures.[22]

Counterclaims are not subject to the application of an escalation clause, unless expressly provided for in the clause.[23]

The activation of an escalation clause suspends the limitation period. Indeed, according to article 2238, 1st paragraph of the French Civil Code, "*the limitation period is suspended from the day when, after a dispute has arisen, the parties agree to have recourse to mediation or conciliation …*".

The suspension begins from the day a letter was sent to the conciliator[24] or from the day of the first conciliation meeting, according to legal scholars.[25] However, a simple negotiation, even if conducted in good faith, or an informal mediation, will most likely not stop the limitation period from running.

Non-compliance with escalation clause in arbitral proceedings

National courts and arbitral tribunals have reached a variety of inconsistent results in addressing issues related to escalation clauses.[26] A claim that a party has failed to comply with contractual pre-arbitration requirements can be considered as (a) a "jurisdictional" defence (an arbitral tribunal does not have authority until the pre-arbitration procedural requirements have been complied with), (b) an "admissibility" defence (the arbitration agreement provides jurisdiction, but does not permit assertion of substantive claims until after specified requirements have been satisfied), or (c) a "procedural" requirement (the pre-arbitration requirements merely concern the procedural conduct of the dispute resolution mechanism, but do not affect either the tribunal's jurisdiction or the parties' substantive rights).[27]

The relevant chamber of the Paris Court of Appeal dedicated to arbitration matters[28] has ruled several times that the failure to comply with an escalation clause goes to the admissibility of claims before the arbitral tribunal, not its jurisdiction, and therefore is not subject to the review of the French judge in charge of setting aside arbitral awards under article 1520 of the French Civil Procedure Code.[29]

18. Com., 3 June 2014, n° 12-17.089.
19. Eg., Civ. 3e., March 28, 2007, n° 06-13.209: for a request to appoint an expert.
20. G. Huchet, « *La clause de médiation et le traitement de l'urgence* », LPA 30 octobre 2008, n° PA200821802, p. 3.
21. Civ. 1re., 1st October 2014, n° 13-17.920.
22. Civ. 2e., 22 June 2017, n° 16-11.975; Civ. 2e., 21 March 2019, n° 18-14.773.
23. Com., 24 May 2017, n° 15-25.457. However, the French Supreme Court ruled that if the counterclaim is based on a second contract which, contrary to the first contract on which the principal claim is based, includes an escalation clause providing for a mandatory preliminary conciliation, such a counterclaim would have to be preceded by an attempt at amicable resolution to be admissible - see Com, 30 May 2018, n° 16-26.403.
24. Civ. 1re., 27 January 2004, n° 00-22.230: the implementation of the prior conciliation before the "*bâtonnier*" in a collaboration contract between a lawyer and a law firm suspends the time limit from the day a letter has sent by the lawyer to initiate the conciliation process.
25. H. Croze, JCl. Procédures Formulaire, Fasc. 10: Conciliation, updated on 25 February 2022, §13.
26. G. Born, op. cit., pp. 973 – 1008.
27. G. Born, op. cit., pp. 973 – 1008.
28. While cases related to set-aside and enforcement proceedings for arbitration awards were traditionally allocated to the Pole 1 Chamber 1 of the Paris Court of Appeal, new cases in these matters are now referred to the International Commercial Chamber at the Paris Court of Appeal (ICCP-CA) (Pole 5 Chamber 16).
29. Eg., Paris (Pole 1 Chamber 1), 28 June 2016, n° 15/03504; Paris (Pole 1 Chamber 1), 29 January 2019, n° 16/20822; Paris (Pole 5 Chamber 16), 25 May 2021, n° 18/27648.

Can the disgruntled party seek damages?

Unless the parties have provided for the payment of liquidated damages in the contract in case of a breach of escalation clause (which does not seem to be very common in France), it will be difficult for a claimant to prove, before the judge or an arbitral tribunal, the loss caused by their opponent's failure to comply with the escalation clause. Certain legal scholars have suggested that specific performance such as the award of a fine ("*astreinte*") until compliance by the defaulting party with the escalation clause may be considered.[30]

Practical implications

Escalation clauses need careful drafting to be commercially useful and enforceable. As explained above, since French case law is not entirely clear as to how escalation clauses should be applied, contracting parties in France should keep in mind the following points when drafting escalation clause and to strictly follow the established procedure when enforcing their claims:

- state explicitly the mandatory nature of the amicable settlement process;
- define widely the scope of the clause;[31]
- consider providing for the consequences of non-compliance (e.g., express prohibition of referral of the claim to a court or an arbitral tribunal to ensure that the disputed clause will be qualified as an escalation clause, provide for liquidated damages, etc.);
- set a time-limit for the amicable process;
- define the specific requirements as to negotiations between the parties (e.g., meetings between senior managers of the parties);
- identify specific rules of mediation or a particular dispute resolution institution, and in case of ad hoc procedure, the terms of appointment of the mediator/conciliator. Helpfully, the ICC provides on its website a model mediation clause which can be used prior to arbitration or other proceedings.[32]

Sophie Bayrou

30. Ch. Jarrosson, Rev. Arb. 2001, pp. 752-746; P. Bernard, *Multi-Tiered Dispute Resolution Clauses*, IBA Litigation Committee, 1st October 2015.
31. For example, the parties can provide that the escalation clause would cover all claims relating to any dispute arising out of or in connection with the contract, including but not limited to the validity, interpretation, execution, termination of the contract, claims based in tort such as action on brutal termination of established commercial relationships, as well as counterclaims, interim measures, enforcement measures, etc.
32. https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/, see "Clause D: Obligation to Refer Dispute to the ICC Mediation Rules, Followed by Arbitration if Required".

Dispute escalation provisions and international arbitration - a rising threat in the UAE?

This is the second article in Clyde & Co's latest international arbitration series covering dispute escalation provisions and pre-action ahead of commencing international arbitration across various jurisdictions. In this piece, associate Maria Andraos and trainee Caitlin Coady from our Dubai office provide the legal perspective from the United Arab Emirates.

The United Arab Emirates (the UAE) is a federation of seven emirates and a civil law jurisdiction. Exceptionally, two out of the seven emirates, namely Dubai and Abu Dhabi, have carved out financial free zones consisting of defined territories within each emirate. These are intended to incentivise investment by providing a sophisticated legal framework based largely on international model laws and the common law legal system to secure investments. Dubai's financial free zone is the Dubai International Financial Centre (commonly referred to as the "DIFC"). Abu Dhabi's financial free zone is named the Abu Dhabi Global Markets (the "ADGM"). Both the DIFC and the ADGM have their own courts, each broadly speaking having jurisdiction over matters concerning its free zone. These two courts are independent of one another, and are separate to the courts having jurisdiction outside the free zones.

The UAE is therefore "one country with two systems": on the one hand, the UAE 'onshore' legal system, and on the other, the UAE 'offshore' legal system consisting of the DIFC and the ADGM free zones. Parties may freely choose the DIFC or ADGM as the seat of arbitration, regardless of whether the contract (or any related dispute) has any nexus to either of those jurisdictions, and regardless of the governing law applicable to the contract. They also have the freedom to choose whatever arbitration rules they prefer - for example, those of the Dubai International Arbitration Centre (the DIAC), the International Chamber of Commerce (the ICC), or the London Court of International Arbitration (the LCIA), to name the most commonly applied rules in the UAE.

Onshore arbitration

The UAE Federal Law on Arbitration (Federal Law No 6 of 2018), which is applicable 'onshore', does not include specific provisions that relate to pre-action conduct or provisions that require settlement to be attempted before commencing arbitration.

Nonetheless, the UAE 'onshore' courts tend to give effect to contractual clauses including pre-conditions to arbitration. For example, the Dubai Court of Cassation has held that non-compliance with pre-conditions to arbitration provides grounds to dismiss a request referring the dispute to arbitration (*Dubai Court of Cassation Commercial Appeal No 124 of 2008*). The court further held that the burden of proving that pre-conditions to arbitration have been complied with lies with the party seeking to commence arbitration proceedings.

The Dubai Court of Cassation also declined to ratify an arbitral award on the basis that certain pre-conditions to arbitration, requiring (inter alia) the parties' executive directors to attempt to amicably settle their dispute before engaging in arbitration, had not been complied with (*Dubai Court of Cassation Commercial Appeal No 188 of 2012*).

In other cases, the Dubai Court of Cassation ruled in a similar vein that an award is invalid if pre-conditions to commencing arbitration are not complied with.

These include recourse to an engineer for a decision under clause 67 of the standard conditions of contracts of the FIDIC (the International Federation of Consulting Engineers) – see, for or example, *Dubai Court of Cassation No 140 of 2007, Dubai Court of Cassation Commercial Appeal No 757 of 2016*).

The Court of Cassation has dismissed a request to appoint an arbitrator on grounds that the pre-conditions to arbitration agreed by the parties and their dispute to be first heard by an engineer must be complied with before engaging in arbitration (*Dubai Court of Cassation Commercial Appeal No 53 of 2011*).

Offshore arbitration

Arbitrations seated in the DIFC are subject to the procedural framework set out in DIFC Law No 1 of 2008 (the DIFC Arbitration Law). As in the onshore regime, the DIFC Arbitration Law does not contain provisions requiring parties to attempt settlement or other forms of alternative dispute resolution before commencing arbitration. The DIFC Courts Rules (the RDC) may provide some guidance on the treatment of pre-action protocols in the DIFC. RDC 27.1 states that the DIFC Courts "*[encourage] parties to consider the use of alternative dispute resolution (such as, but not confined to, mediation and conciliation*)". While the use of alternative dispute resolution prior to commencing DIFC Courts proceedings is not a mandatory requirement, RDC 27.1 suggests that such pre-action steps may be taken by parties to a potential litigation in the DIFC. By extension, it may be expected that parties to a potential arbitration may also take such steps. Although there is limited case law on this issue, arbitral tribunals in DIFC seated arbitration may be expected to enforce pre-conditions, if those pre-conditions are required and part of a valid and binding agreement.

It is worth noting that there are also provisions in the RDC where particular pre-action protocols mandatorily apply to certain circumstances. For example, RDC 41.19 provides that "*a claimant intending to commence proceedings against the Government must serve a notice of such intention at least 15 days before proceedings are served*." In *Limsa v Lordon A Trading Platform of Dubai Multi Commodities Centre & Ors* [2020] DIFC ARB 008, a failure by the claimant to comply with pre-action protocols, including the one set out in RDC 41.19, resulted in the judge concluding that the claimant should be ordered to pay the defendants' costs.

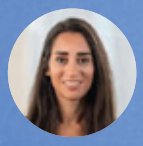
Arbitrations seated in the ADGM are subject to the procedural framework set out in the ADGM Arbitration Regulations 2015. These do not contain provisions requiring parties to attempt settlement or other forms of alternative dispute resolution before commencing arbitration. The ADGM is still a developing jurisdiction, and it does not appear that the issue of enforceability of pre-action protocols has yet been considered. However, English common law "*as it stands from time to time*" has direct application in the ADGM by virtue of the Application of English Law Regulations 2015. Therefore, it may be expected that the English approach to pre-action provisions would be applied in the ADGM, for example in relation to issues of substantive jurisdiction or admissibility.

DIAC rules

The main arbitration institution in the UAE is currently the DIAC. The most recent version of the rules (the 2022 DIAC Arbitration Rules) that came into effect on 21 March 2022 includes provisions on conciliation proceedings (Article 3 of Appendix II regarding exceptional procedures). Nonetheless, the 2022 DIAC Arbitration Rules do not require the parties to engage in conciliation before the arbitration begins: the consent of the parties is required. The previous version of the DIAC rules (the 2007 DIAC Arbitration Rules) does not include provisions that require settlement negotiations before commencing arbitration or provisions relating to mediation or conciliation.

Conclusion

Although there are currently no express provisions within UAE law compelling parties to engage in pre-arbitration negotiations to resolve their dispute, the 'onshore' and 'offshore' systems allow parties to a contract to agree that settlement negotiations, mediation, or other forms of alternative dispute resolution must precede the commencement of arbitration proceedings. Where the parties do agree to a pre-condition before commencement, the UAE courts will generally give effect to such an agreement and require that the parties comply with the mechanism before they move to request arbitration.



Maria Andraos

Caitlin Coady

Dispute escalation provisions and international arbitration - a rising threat in Germany?

This is the third article in Clyde & Co's latest international arbitration series covering dispute escalation provisions and pre-action ahead of commencing international arbitration across various jurisdictions. In this piece, counsel Michael Pocsay from our Dusseldorf office provides the legal perspective from Germany.

A general objective of pre-action protocols is to allow the parties to an emerging dispute to understand each other's position. This enables them to make an informed decision whether an amicable settlement of the dispute is possible or if commencing litigation or arbitration proceedings is necessary and appropriate.[1] While German procedural law generally does not impose any mandatory pre-action conduct,[2] it does include certain incentives for a claimant to work towards an out-of-court solution before filing a claim.

For instance, Section 93 of the German Code of Civil Procedure states that a claimant must bear the costs of litigation proceedings if the defendant has not prompted the filing of a claim by its conduct (eg by refusing to accept the claim[3]) and accepts a claim filed against it immediately. This includes, in particular, cases in which the defendant would have satisfied the claim if the claimant had requested payment or performance before initiating court proceedings. Section 93 Code of Civil Procedure thus serves to prevent unnecessary claims and protect the defendant from the cost risk of a legal action in cases where the latter is willing to accept the claim without a judgment but has not been given the chance to do so.[4]

Section 253 (3) no. 1 of the Code of Civil Procedure provides that a claimant should state in its statement of claim whether the parties have attempted mediation or another type of alternative conflict resolution prior to filing an action. The purpose of this (non-mandatory) requirement is also to encourage the claimant to consider attempting settlement before filing a claim.[5]

While these provisions (in particular Section 93) may encourage a claimant to attempt settlement before filing a claim in court, they are not directly applicable in arbitration proceedings. As with arbitration in general, any pre-action conduct required before initiating arbitration proceedings in Germany is a matter of agreement by the parties and thus an expression of the principle of party autonomy.

Escalation clauses

A common way to provide for a pre-action protocol through an agreement is to include an "escalation clause" or "multi-tier dispute resolution clause" in the contract. Such clauses provide for dispute resolution in several steps, typically by requiring the parties to attempt to resolve a dispute amicably (ie through negotiations and/or mediation) before being allowed to commence arbitration.

1. Cf. in England: Pre-Action Protocol for Construction and Engineering Disputes 2nd edition.
2. There are a few exceptions to this rule which apply mostly to low value or non-commercial claims, cf. Article 15a Introductory Law to the Code of Civil Procedure (ZPO).
3. *Flockenhaus* in Musielak/Voit, Code of Civil Procedure, 19th ed. 2022, Sec. 93 para. 2.
4. *Flockenhaus* in Musielak/Voit, Code of Civil Procedure, 19th ed. 2022, Sec. 93 para. 1.
5. *Anders* in Anders/Gehle, Code of Civil Procedure, 80th ed. 2022, Sec. 253 para. 79; Foerster in Musielak/Voit, Code of Civil Procedure, 19th ed. 2022, Sec. 253 para. 36.

Validity of escalation clauses

The validity of escalation clauses is generally recognized under German law, provided that it is sufficiently clear to be operable in practice. An escalation clause providing for arbitration must, however, comply with the general requirements for the validity of an arbitration agreement as set out in Sections 1029 and 1031 of the Code of Civil Procedure. In particular, the arbitration agreement must pertain to disputes arising in respect to a defined legal relationship (Section 1029 (1)) and it must be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement (Section 1031 (1)).

Temporary waiver of the right to claim

Where the parties have agreed on an escalation clause and a claimant initiates arbitration proceedings without having adhered to the agreed multi-tiered dispute resolution process, ie without having attempted settlement through negotiations or mediation, the question arises as to how this affects the arbitration proceedings.

The failure to comply with the requirement to conduct negotiations or mediation before filing a claim does not prevent the constitution of the arbitral tribunal,[6] just as a jurisdictional objection does not prevent the constitution of the arbitral tribunal. Instead, it is the responsibility of the arbitral tribunal to assess the impact on the arbitral proceedings of any non-compliance with an escalation clause.

Once the arbitral tribunal is constituted, it will thus have to decide if the escalation clause was validly concluded under the applicable law and if the claimant has met all pre-action requirements agreed in the escalation clause. Where this is not the case, the arbitral tribunal may reject the claim as inadmissible if the defendant objects to the non-compliance with the escalation clause.[7] This is because escalation clauses are generally construed as including a temporary waiver of the right to file a lawsuit.[8]

Nevertheless, German courts have held in some cases that a court action may be admissible despite non-compliance with the mediation requirement of a multi-tier dispute resolution clause where the applicable mediation rules would have allowed either party to terminate the mediation process unilaterally at any time. The courts reasoned that, in such cases, the requirement to mediate before filing a claim would be a mere formality.[9]

This last point illustrates a major challenge parties face when drafting escalation clauses. It is crucial that the clause gives clear guidance on when the transition from one step of the dispute resolution process to the next is admissible to be operable in practice. This can be achieved, for instance, by stipulating a clearly defined timeframe within which the dispute must be resolved before moving on to the next stage.

Section 1032 (2) of the Code of Civil Procedure

Besides preventing avoidable claims, complex questions of jurisdiction are often an issue in cross border disputes. In these cases, the parties (particularly the claimant) may benefit from the possibility of ascertaining which court or tribunal has jurisdiction before filing a claim.

6. *Dendorfer-Ditges* in Salger/Trittmann, Internationale Schiedsverfahren, 1st ed. 2019, § 25 para. 77.

7. Cf. regarding admissibility of court proceedings in case of escalation clauses: Federal Court of Justice, judgement dated 18 November 1998, VIII ZR 344-97 and judgement dated 23 November 1983, VIII ZR 197/82; Higher Regional Court Rostock, judgement dated 18 September 2006, 3 U 37/06; another view is that the arbitration proceedings should be suspended, cf. *Arntz* SchiedsVZ 2014, 237, 238.

8. *Loos, Brewitz* SchiedsVZ 2012, 305; *Dendorfer-Ditges* in Salger/Trittmann, Internationale Schiedsverfahren, 1st ed. 2019, § 25 para. 76. 9. Cf. Regional Court Heilbronn, judgement dated 10 September 2010, 4 O 259/09 Ko; Higher Regional Court Frankfurt a.M., court order dated 12 May 2009,14 Sch 4/09.

In some jurisdictions, pre-action protocols may require a defendant to raise jurisdictional objections even before the initiation of proceedings, when they receive a letter of claim.[10] While such a pre-action protocol is not available in Germany, German arbitration law provides the opportunity of requesting a declaratory judgment from the Higher Regional Court regarding the admissibility of arbitration proceedings. Section 1032 (2) of the Code of Civil Procedure allows the parties to file an application to the court to declare whether arbitration proceedings are admissible prior to the composition of the arbitral tribunal. This gives them the opportunity of attaining clarity with regard to the validity as well as scope of an arbitration agreement before filing a claim in litigation or arbitration proceedings. If the court declares that arbitration proceedings are inadmissible, a defendant cannot successfully invoke the objection that the court lacks jurisdiction due to the existence of an arbitration agreement if the claimant files a claim in court.

If an arbitral tribunal issues an award in spite of the court's declaration that arbitration is inadmissible, the prevailing view is that the award is null and void.[11] If, on the other hand, the court confirms the admissibility of arbitration proceedings and thus the jurisdiction of an arbitral tribunal, then the prevailing view is that this decision is binding on courts and arbitral tribunals.[12]

Conclusion

No mandatory pre-action protocols apply in Germany. It is the responsibility of the parties to take appropriate measures to avoid unnecessary legal action, for example through the use of escalation clauses requiring them to attempt settlement before initiating arbitration proceedings. At the same time, German arbitration law serves to prevent unnecessary delays due to jurisdictional objections by giving the parties the opportunity to clarify crucial questions of jurisdiction and admissibility of arbitration before filing a claim.

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10. Cf. in England: Pre-Action Protocol for Construction and Engineering Disputes 2nd edition.
11. *Saenger* in Saenger, Code of Civil Procedure, 9th ed. 2021, Sec. 1032 para. 17; Voit in Musielak/Voit, Code of Civil Procedure, 19th ed. 2022, Sec. 1032 para. 14; Wolf/Eslami in BeckOK Code of Civil Procedure, 45th ed. 2022, Sec. 1032 para. 43.
12. *Saenger* in Saenger, Code of Civil Procedure, 9th ed. 2021, Sec. 1032 para. 16.

Dispute escalation provisions and international arbitration - a rising threat in Canada?

In this article, Clyde & Co explores the enforceability of contractual pre-arbitration steps and whether failure to meet such steps could result in an arbitration clause becoming unenforceable. Eric van Eyken, Senior Counsel in Clyde & Co's Montreal office, and Mark Mandelker, Associate in Clyde & Co's Toronto office, consider this subject from the Canadian perspective on conditions precedent.

Canadian courts, both provincially and federally, have recognized the importance of alternative dispute resolution ("**ADR**") mechanisms insofar as they can "assist in the efficient, speedy and just resolution of disputes."[1] Such alternative mechanisms include negotiation, informal claim determinations by a third party (for example, by a relevant tradesperson), mediation, and arbitration. In this regard, parties may seek to outline in a contract certain mandatory procedures to try to resolve disputes prior to going to arbitration. These clauses are sometimes referred to as "tiered dispute resolution clauses". As one leading Canadian scholar has noted, "*there is little Canadian law as yet on the extent to which provisions for negotiation or mediation will be enforced as a true condition precedent.*"[2] Nonetheless, it should be noted that in investor-state arbitrations, the Government of Canada's position is that pre-conditions to arbitration, including cooling off-periods, are an absolute bar to arbitration and parties contemplating such claims against the Canadian state should take care to satisfy these conditions to avoid lengthy jurisdictional disputes.[3]

In the absence of appellate case law on the question, the analysis of whether a tiered dispute resolution clause (or any particular step noted within the clause) is enforceable requires consideration of whether the clause is sufficiently clear as to whether the procedures are "true conditions precedent" to an arbitration.

Where pre-arbitration procedures are deemed to be true conditions precedent and are not followed, the arbitration clause can be unenforceable.

The Ontario *Commercial Mediation Act*[4] has adopted a rather pragmatic approach to the interaction between mediation and arbitration. Section 11(1) of that Act identifies that "*the parties may agree not to proceed with arbitral proceedings […] before the mediation is terminated.*". Section 11(2) however clarifies that "*an arbitrator or court may permit the proceedings to proceed and may make any order necessary if the arbitrator or court considers, (a) that proceedings are necessary to preserve the rights of any party; or (b) that proceedings are necessary in the interests of justice.*" This exception would apply such that both the courts and arbitrators can waive mandatory mediation provisions and allow an arbitration to commence where it is necessary or just to do so. However, the Act also resolves any potential conflict in this regard by, at Section 11(3), stating "*that the commencement of any arbitral or judicial proceedings is not of itself to be regarded as a termination of the agreement to mediate the commercial dispute or as the termination of the mediation.*" Nova Scotia has adopted a similar statutory framework.[5]

1. *Risebrough v Co-operators General Insurance Co.*, 2012 ONSC 2738 at para 16 [*Risebrough*]. See also *Comren Contracting Inc. v Bouygues Building Canada Inc.*, 2020 NUCJ 2 at para 47 [*Comren*]
2. See e.g. J. Brian Casey, *Arbitration Law in Canada: Practice and Procedure*, 3rd ed (New York: JurisNet, LLC, 2017) at 137 [Casey].
3. See e.g. *Mesa Power v Government of Canada*, Award of 24 March 2016 (Gabrielle Kaufmann-Kohler (Presiding Arbitrator), Charles N. Brower, Toby Landau).
4. *Commercial Mediation Act*, 2010, SO 2010, c 16, Sch 3.
5. *Commercial Mediation Act*, SNS 2005, c 36, Section 14.

Under Quebec civil law, while parties "*must*" "*consider*" mediation before proceeding with other dispute mechanisms, it is also the case that a "*party may withdraw from or put an end to the mediation process at any time at its own discretion and without being required to give reasons.*"[6] Further, Quebec Courts have enforced arbitration clauses as a defence to litigation even where mandatory mediation has not taken place, sending the parties to arbitration.[7]

Requirements to Negotiate Pre-Arbitration

In Canada, an "*agreement to agree*" (or an "*agreement to negotiate*") has occasionally been held to be unenforceable.[8] The concern is that such agreements often lack certainty with respect to the specific obligations of each contractual party.[9] Nonetheless, where the agreement is sufficiently certain as to the obligations on each party, either by the plain language of the agreement or the factual circumstances surrounding the agreement, a requirement to negotiate can be upheld.[10]

Some Canadian legal commentators have suggested that, in light of the Supreme Court of Canada's dictate that there is an obligation to perform a contract both honestly and in good faith,[11] where parties are bound in contract to negotiate or participate in mediation, they must be so bound unless the wording in the agreement is unclear.[12] Such was the case in *SCM Insurance Services Inc. v Medisys Corporate Health LP*[13] where the motion judge found that the parties to the subject agreement intended to create "*an enforceable obligation to negotiate…*" due to the presence of sufficiently clear language and valid consideration.[14] The obligation was stated to be as follows: "*…while the terms of the 2012 Agreement did not obligate Medisys to agree to whatever price or other terms the plaintiffs considered reasonable, Medisys was required to refrain from adopting a negotiating position that 'eviscerates or defeats the objectives of the agreement that they have entered into.*"

Where the language is insufficiently clear, however, a court may not enforce negotiation steps as conditions precedent. For example, in *Alberici Western Constructors Ltd. v Saskatchewan Power Corporation,*[15] the chambers judge refused to find that a disputes clause requiring the parties to "*make all reasonable efforts to resolve all disputes and claims by negotiation…*" was a true condition precedent to arbitration. In so doing, the chambers judge noted that "*[s]tronger language would be required to draw such an interpretation.*"[16]

In addition, some Canadian Courts have treated "*pre-condition*" clauses as extending prescription and limitation periods, finding that where a clause requires negotiations before arbitration is entered into, the limitation period to commence arbitration does not start unless there has been a negotiation.[17] In our view, the true impact of so called pre-conditions can be to effectively prevent the commencement of the limitations clock, such that respondents should avoid a strategy of running out the clock where there is a tiered dispute resolution clause.

The "True Condition Precedent" Requirement

As noted above, in order to be enforceable, a particular step in a tiered dispute resolution clause must be considered to be a true condition precedent (i.e. mandatory) to the arbitration. Certainly, the issue of sufficient clarity, described above, is relevant. However, in addition to that, a review of the relevant agreement as a whole may be necessary to decide whether a particular step is mandatory in the dispute resolution procedure or is an otherwise independent step. For example, in *Urban E. Homes Ltd. v Condominium Corp. No. 0313563,*[18] the builder of a condominium development challenged the condominium corporation's initiation of arbitration proceedings on the basis that the parties were first obligated to participate in a conciliation procedure.

6. Quebec Code of Civil Procedure, Articles 1 & 614.
7. *Corporation Inno-Centre du Québec c. Média Opti Rythmix* 2012 QCCQ 8980
8. See e.g. *Georgian Windpower Corp. v Stelco Inc.,* 2012 ONSC 3759.
9. *Molson Canada 2005 v. Miller Brewing Co.,* 2013 ONSC 2758 at para 96.
10. *Ibid* at para 96.
11. *Bhasin v Hrynew,* 2014 SCC 71.
12. See e.g. *Casey*, *supra* note 2 at 137.
13. 2014 ONSC 2632.
14. *Ibid* at paras 34-36.
15. 2015 SKQB 74, aff'd 2016 SKCA 46.
16. *Ibid* at para 67.
17. See e.g. *Maisonneuve v. Clark*, 2021 ONSC 1960, paras 46-64.
18. 2013 ABQB 109.

The motion judge held that the conciliation procedure was mandatory with respect to warranty obligations between the parties but was independent of the dispute resolution process. In other words, the condominium corporation's failure to engage in the conciliation procedure was fatal to any attempt to rely on warranty obligations outlined in their agreement, but there was no mention in the dispute procedure clause mentioning any such obligation. As a result, the arbitration could proceed, despite the failure to engage in conciliation.

Pre-arbitration steps are not only found in contract, but many also be found in legislation. Care should be taken to consider the relevant legislative scheme to determine whether such a requirement exists. For example, until 2016, the Ontario *Insurance Act*[19] provided that "no person may … refer the issues in dispute to an arbitrator … unless mediation was sought, mediation failed…."[20] Failure to comply with such a step can estop a party from bringing its claim via arbitration or to the court.[21]

Who Decides?

We are unaware of any Canadian authority as to whether a pre-condition to arbitration is a question of jurisdiction or procedure. To the extent it is a question of jurisdiction, under Supreme Court guidance, "*in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law.*" Accordingly, "*where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact requiring only superficial consideration of the documentary evidence in the record.*"[22]

Whether a party has complied with a pre-condition to arbitration would generally be a pure question of law or one required only superficial consideration of the facts (i.e. did a negotiation/mediation, cooling off period take place) and as such in our view would be decided by the courts. However, to the extent that a court would consider this a question of arbitration procedure, Canadian courts systematically refer such questions to the arbitrator.

Drafting Considerations

Due to the paucity of relevant case law, no specific language suggestions to include in a tiered dispute resolution clause can be offered. However, some general principles can be highlighted. When drafting such clauses, care should be taken to fully describe, with as many particulars as possible, the obligations of the parties prior to engaging in arbitration steps in order to increase the likelihood of enforcement of such steps. References to chosen procedural rules could be useful in this regard. Additionally, specific triggers or mechanisms to begin or end any particular pre-arbitration step should be clearly defined.

The importance of getting this right cannot be overstated. In Canada, if you initiate arbitration proceedings prior to completing any mandatory pre-arbitration steps and have the arbitration struck due to a failure to comply with the required procedure, you may be totally barred from bringing the claim in the future due to the expiry of a limitation period or stipulated timelines in the agreement.[23]

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19. RSO 1990, c .I.8.
20. S 281(2).
21. See e.g. *Risebrough*, *supra* note 1.
22. *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, at paras 84-85.
23. See e.g. *Suncor Energy Products Inc. v Howe Baker Engineers Ltd.*, 2010 ABQB 310 & Comren, supra note 1.

Dispute escalation provisions and international arbitration - a rising threat in England & Wales?

In this article, Clyde & Co considers the enforceability of dispute escalation provisions. Laura Nelson, Senior Associate, and Ana Favretto, Trainee Solicitor, in Clyde & Co's London office, consider this subject from the perspective of English and Welsh law.

When agreeing the terms of a contract at the outset of a relationship, many parties sometimes include explicit contractual provisions setting-out steps that must be complied with should a dispute arise. Parties may choose to adopt a staged approach such as including service of a notice of dispute, an initial meeting of the parties or directors of those entities to engage in negotiations, and a period that should be allowed before a dispute can be referred to either the court or arbitration. Contractual provisions of that nature are known as dispute escalation clauses and are commonly seen in long-term agreements such as construction contracts (e.g., the FIDIC 2017 suite) and power purchase agreements for the supply of renewable energy. A failure by one party to comply with the exact process prescribed may give rise to arguments that the court or tribunal lacks jurisdiction to hear the dispute.

At the time of drafting, it is, therefore, important to consider the impact a dispute escalation clause may have later in the relationship should a dispute arise, and whether the contractual provisions accurately reflect the intention of the parties.

Multi-tiered ADR clauses and the need for certainty

Historically, under English law a dispute escalation clause was viewed as an "*agreement to agree*" and, therefore, lacking sufficient certainty to be enforceable[1]. More recently, the courts have adopted a different approach and will usually enforce a dispute escalation clause if it makes clear what steps must be taken by the parties, and that those steps are mandatory.

When drafting this type of clause, it is therefore important to ensure that each step is clearly defined and there is no ambiguity as to the time period for completion of those steps. To avoid potential deadlocks, is essential to specify clear deadlines if parties are required to complete each step before moving on to the next e.g., 30 days for a meeting of directors, 30 days for negotiation to take place thereafter, and 60 days for a mediation to take place.

In the important case of *The Channel Tunnel Group Ltd and Another v Balfour Beatty Construction Ltd* and Others[2], the court looked at this issue in an arbitration context. The parties had contractually agreed to first submit any dispute to a panel of experts, moving onto an 'appeal' under ICC Rules of Conciliation and Arbitration if a party was dissatisfied with the decision. When a disagreement arose over works related to a cooling system, the Claimants applied for injunctive relief in the UK, which Balfour Beatty challenged. The House of Lords decided to stay the proceedings brought by the Claimants, on the basis the Court had inherent jurisdiction to "*inhibit proceedings brought in breach of an agreed method of resolving disputes*"[3].

More recently, the issue arose in the 2014 *case of Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd*[4] ("***Emirates v Prime Minerals***"). The clause that was the subject of the dispute required the parties to engage in "friendly discussions" over a specified time period. The court's view was that it should give effect to the parties' agreement and held that the discussions were a pre-condition precedent to the right to refer the claim to arbitration.

1. *Walford v Miles* [1992] 2 AC 128

2. *The Channel Tunnel Group Ltd and Another v Balfour Beatty Construction Ltd and Others* ***[2]*** [1993] Adj.L.R. 01/21

3. *The Channel Tunnel Group Ltd and Another v Balfour Beatty Consruction Ltd and Others* [1993] Adj.L.R. 01/21 [Para 15]

4. *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* ***[4]*** [2014] EWHC 2104 (Comm)

The tribunal, therefore, lacked jurisdiction and any award would be deemed invalid and ineffective. The case has been criticised as it is generally thought that the parties were unlikely to have intended that the clause would have such consequences.

Failure to comply with the requirements

So, what is the effect of failing to meet the established pre-arbitral requirements? The Arbitration Act 1996 (the "**AA**") is the relevant legislation governing arbitration agreements in England and Wales. The AA does not contain any explicit provisions requiring parties to take certain steps to settle a dispute prior to it being referred to arbitration, but it does not necessarily follow from this that failure to comply with a contractual escalation clauses actually precludes a tribunal from dismissing a request to refer the dispute to arbitration or ruling that it lacks substantive jurisdiction.

Under section 30 of the AA, the tribunal has competence to rule on its own jurisdiction, unless otherwise agreed by the parties. That includes making a ruling on both whether there is a valid arbitration agreement between parties, and what matters have been submitted in accordance with the arbitration agreement. Under section 31(3), any objection to substantive jurisdiction must be raised at the outset of proceedings, no later than the time at which the objecting party takes its first step in the proceedings.

Similarly, the London Court of International Arbitration (the "**LCIA**") Rules 2020 give a tribunal the power to rule on its own jurisdiction and authority to hear a dispute, and an objection must be raised no later than the time for submission of a Respondent's Statement of Defence. The arbitral tribunal may decide the objection to its jurisdiction or authority. Despite having the power under both the AA and the LCIA Rules, a tribunal may nonetheless be reluctant to accept jurisdiction as this may give rise to a challenge or grounds for appeal of an award under section 67 of the AA, and challenges to enforcement on the basis that the tribunal lacked jurisdiction.

The New York Arbitration Convention is also important in the context of enforcement. Articles II.1 and II.3 provide that where there is an agreement in writing to submit a dispute to arbitration, and unless that agreement is null and void, inoperable or incapable of being performed, the court of a Contracting State shall recognise an arbitration agreement between the parties and, at the request of a party, refer the dispute to arbitration. Parties should therefore be mindful not to render the agreement "inoperable" on the basis that pre-arbitral stages in a dispute resolution procedure have not been complied with.

In *Emirates v Prime Minerals*, the facts allowed it for the court to take for granted that the tribunal had jurisdiction. In the more recent case of *Sierra Leone v SL Mining Ltd*[5], the court considered a similar clause which stipulated a three-month period for negotiation between the parties. In this instance, the court decided that the clause was not a pre-condition to arbitration and did not prevent arbitration proceedings being commenced within that period. The court's view was that the three-month period was an opportunity for the parties to engage in negotiations, but they were under no obligation to do so, and proceedings could be commenced within that period if settlement was not possible. The court then went on to decide that this was an issue of admissibility rather than jurisdiction i.e., whether the tribunal should not, versus could not, hear the case as, ultimately, it was the tribunal who was best placed to decide whether the relevant conditions precedent were met.

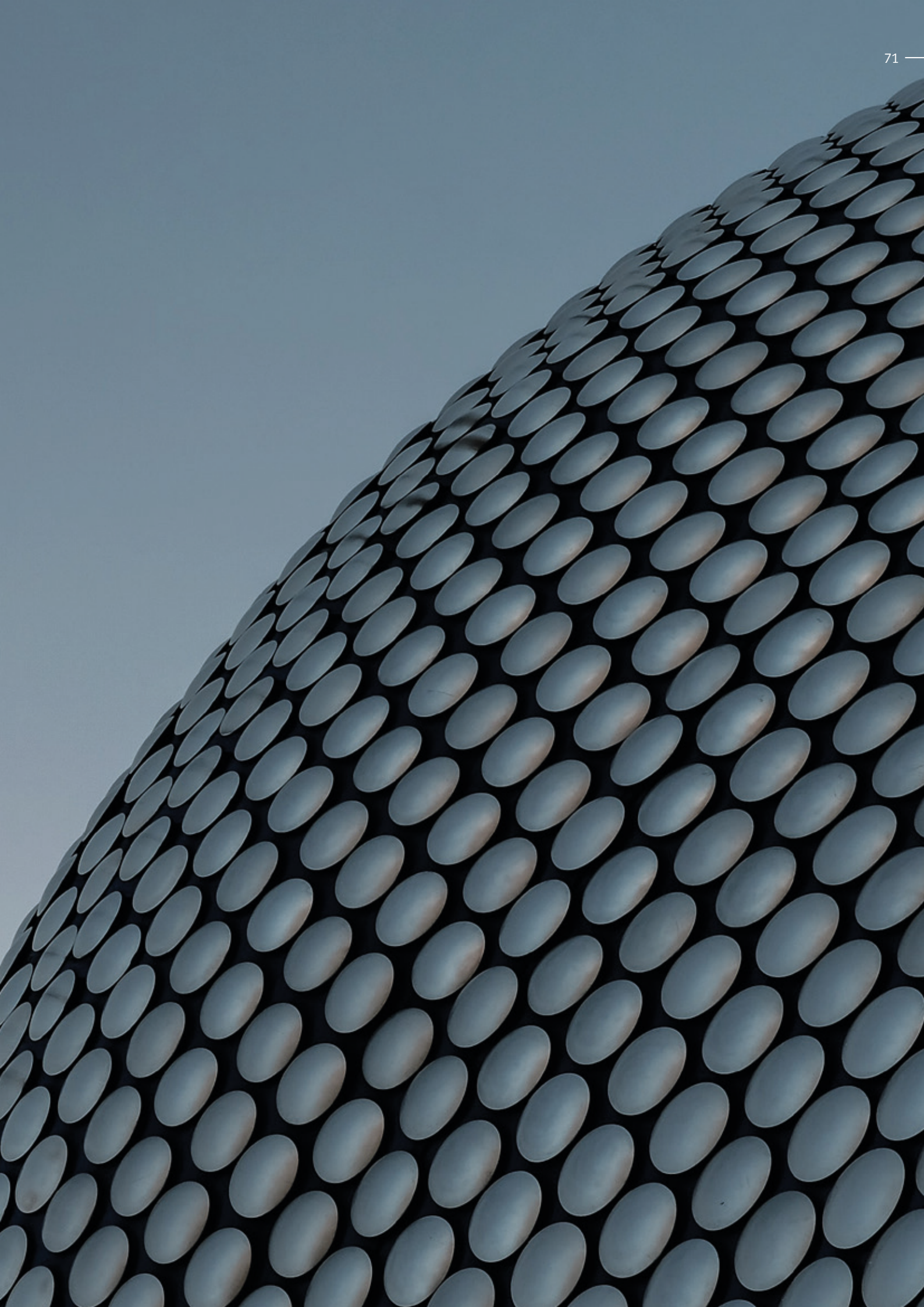
The court also took this position in *NWA v NVF*[6], where the agreement included a 30-day window for mediation in which a party to an arbitration agreement commenced proceedings without engaging in mediation as provided by the relevant agreement. The requirement to seek a settlement first was procedural, and therefore falling within the tribunal's powers.

5. *Sierra Leone v SL Mining Ltd*[5] [2021] EWHC 286 (Comm)
6. *NWA v NVF*[6] [2021] EWHC 2666 (Comm)

Those recent decisions support what can be considered as the English courts' pro-arbitration, non-interventionist approach. The decisions matter in light of the new Commercial Court Guide instruction that a challenge to the tribunal's substantive jurisdiction under section 67 AA will only be appropriate where "*substantive jurisdiction… as referred to in section 30*" is affected. Practitioners should keep in mind the courts' latest decisions on admissibility, but note that the circumstances were fact-specific and outcomes will still be dependent upon the interpretation of an arbitration clause, meaning that non-compliance with dispute escalation provisions could still lead to a finding that the tribunal lacks jurisdiction.

Laura Nelson

Ana Favretto



Dispute Escalation provisions and international arbitration – a rising threat in Spain?

This is the final article in Clyde & Co's latest international arbitration series covering dispute escalation provisions and pre-action ahead of commencing arbitration across various jurisdictions. In this piece, associate Bea Hockton from our London office provides the Spanish legal perspective.

For now, Spanish procedural law does not impose any mandatory pre-action conduct. However, this is currently under review and a bill on procedural efficiency ("*La Ley de Eficiencia Procesal del Servicio Público de Justicia*") has been approved by the Council of Ministers and is now in the parliamentary process. If passed, this law is expected to make it compulsory for parties to engage in ADR before commencing proceedings.[1]

Escalation clauses

A standard way to provide for a pre-action protocol through an agreement is to include an "escalation clause" or "multi-tier dispute resolution clause" in the contract. Such clauses provide a gradual approach to the resolution of conflicts, typically obliging the parties to progress through different phases or steps such as negotiation, dispute boards and mediation before commencing an arbitration. These are becoming increasingly common in Spain, especially in construction and engineering contracts.

Validity of escalation clauses

Since there is no specific legislation regulating pre-action conduct in Spain, the status of this type of clause is governed by the principle of freedom of contract, ("*el principio de la libertad de contratación*") and the pacta sunt servanda doctrine that agreements must be kept.

The validity of escalation clauses is recognised under Spanish law, provided they are drafted in a way that is unambiguous. In order to avoid any uncertainty, these clauses should clearly set out the steps to be followed (for example, negotiation, mediation and arbitration); the rules and limitations to be observed at each step; the minimum period of time within which to carry out each step; when time limits start to run (for example, from the moment in which the mediator is nominated); and the process for notifying the parties that each step has been completed. It is also important to note that, pursuant to Article 17.4 of the Spanish Arbitration Act, the arbitrator must not have acted as a mediator in the same dispute unless otherwise agreed by the parties.

The Spanish Arbitration Act does not include any model escalation clauses. It is therefore recommended that contract drafters take into account the model clauses in the IBA Guidelines,[2] whose validity is unlikely to be contested pursuant to Spanish law. It is also recommended to consult the rules and bylaws of the principal Spanish arbitral institutions: the Corte Española de Arbitraje, the Corte de Arbitraje de Madrid, and the Corte Civil y Mercantil de Arbitraje.

Effects and sanctions

National law does not impose specific penalties on parties failing to comply with compulsory escalation clauses, given constitutional concerns that they might violate the principle of effective judicial protection ("*el postulado de la tutela judicial efectiva*").

1. The Ley de Eficiencia Procesal del Servicio Público de Justicia forms part of the Justice Plan 2030 (el "plan Justicia 2030").

2. IBA Guidelines 2010.

There is also no clear Spanish precedent concerning the consequences arising from the breach of an escalation clause; namely from commencing domestic proceedings or arbitration without having participated in or concluded the steps required by the escalation clause. However, the arbitral institutions in Spain are obliged to review the *prima facie* existence of an arbitration agreement prior to the formation of the arbitral tribunal.[3] It seems likely, therefore, that any objections related to an escalation clause would be dealt with at this stage.

If the court finds that an arbitration agreement may exist, it will continue with the arrangements for the arbitration proceedings, without prejudice to the admissibility of any objections that might be pleaded. The prevailing view is that any decision as to the jurisdiction of the arbitrators shall be made by the arbitrators themselves.[4] If, on the other hand, the court does not find *prima facie* that an arbitration agreement may exist, the prevailing view is that it will notify the parties that the arbitration cannot continue.

Bea Hockton

3. See Article 9 of the Rules and Bylaws of the Corte Espanola de Arbitraje and Article 9 of the CIMA Arbitration Rules.
4. See Article 22 of the Spanish Arbitration Act ("De la competencia de los árbitros") which establishes the rule that arbitrators have the power to decide on their jurisdiction.

Insight: Clyde & Co

Global

Who's Who Legal (WWL) recognition

For one further year, Who's Who Legal (WWL) has launched their biggest ever arbitration rankings, setting out the leading international arbitration practitioners in the market.

After months of comprehensive research, peer-to-peer voting and client recommendations, multiple members of our International Arbitration team have been recognised in this year's GAR and WWL Arbitration 2023 rankings.

Congratulations go to eight of our valued team members, from across the globe: Nadia Darwazeh; Ben Knowles; Georg Scherpf; Prof Loukas Mistelis FCIArb; Nassif BouMalhab; Beth Cubitt; Devika Khanna and Michael Grose.

Our International Arbitration team is a truly global practice specialising in cross-border, multi-jurisdictional and complex international arbitration across a range of sectors which build, power, move and protect the global economy. Our breadth and depth of arbitration experience is unparalleled at a global level in the market. It is underpinned and enhanced by our deep sector knowledge and long experience of local arbitral centres and the rules that apply in various jurisdictions.

We have consistently one of the largest dockets of commercial arbitration of any firm in the GAR 100. Our strength in investor and state cases is reflected in our 2-decade long relationship with the Government of Yemen which sees us stand as the only internationally ranked firm for Yemen in Chambers. One standout case includes successfully representing Yemen at the largest ICC cases of the day (worth around US$10 billion). Over 40% of our arbitration activity is more complex work. The sheer volume of cases sees Clyde & Co once again among the top users of UK High Courts, retaining our title as the largest litigation practice in terms of revenue and headcount (The Lawyer, Litigation Tracker 2022).

Growth

Our continuous growth is personified by the recent addition of arbitration star (as dubbed by clients and peers alike) Professor Loukas Mistelis in our London office. As a leading expert in international dispute resolution and investment treaty law, Loukas boasts an enviable list of titles and accolades including most recently being once again named as an Arbitration Thought Leader, and Recommended as a Global Arbitration Leader by WWL; in addition to extensive experience as an arbitrator, counsel, and expert witness in complex matters across multiple jurisdictions.

Loukas' arrival coincided with our recent merger with Legacy BLM, which has seen the International Arbitration team and firm as a whole, reinvigorated to embrace key growth opportunities as our collective revenue rises to over £700m per annum, and our headcount to over 5,000, with offices in over 60 cities worldwide. Indeed, our presence on six continents has enabled us to build a particularly strong reputation in new and emerging markets, with the International Arbitration team routinely acting for and against governments in investment disputes in many of the rapidly expanding and sometimes unpredictable markets of the world.

Using our extensive network of offices and mature team of legal specialists, we respond rapidly in high pressure scenarios, delivering a tailored, flexible service to meet the requirements of individual disputes.

Our clients include corporates, investors, financial institutions, private individuals, governments, states and state-owned entities.

Further ways we seek to add value for our clients include advocacy options, a growing global recoveries team and several long running relationships with key funders, offering clients a diverse range of options for their litigation funding. With clients saying, "*This first-class team has a complete mastery of the detail of cases, manages clients incredibly well, and is excellent at presenting cases to arbitrators (both orally and in writing).*"

Germany

"Top Law Firm" for Dispute Resolution by WirtschaftsWoche

Germany's leading business magazine, WirtschaftsWoche has recognized Clyde & Co, as well as three of its lawyers, in its 2022 list of the most renowned law firms and lawyers for both Litigation and Arbitration in Germany: Partner Henning Schaloske and Counsel Christoph Pies have been named on WirtschaftsWoche's annual list of top litigators in Germany, and Counsel Georg Scherpf was recognized for his work in Arbitration.

Congratulations to all of the teams!

Clyde & Co supports Vis Moot

This year also, Clyde & Co continues supporting Vis Moot. We are pleased to announce that we hosted our second Clyde & Coach event in November 2022, welcoming a total of 24 coaches from 14 German universities to our Dusseldorf office.

Furthermore, Clyde & Co will be hosting the next PreMoot in February 2023, where students from various universities across Germany will be holding trial pleadings in our Dusseldorf office.

With nearly 400 universities now participating, the Vis Moot is one of the largest and also most prestigious student competitions in the world. The students take on the role of lawyers, draft briefs and represent clients in a fictitious commercial law case in several rounds of simulated arbitration.

We wish all the teams good luck and are very pleased that Clyde & Co was able to contribute to their successful participation.

France

Arbitration seminar

On 5 October 2022, the Paris team held a construction arbitration client roundtable entitled: "Tips and Tricks from the Trenches: How to Win a Construction Arbitration Case", hosting 25 external guests, including clients and target clients.

The Legal 500

Nadia Darwazeh, Ivan Urzhumov, Sophie Bayrou, Constance Malleville in: The Legal 500 International Arbitration Comparative Guide – **access the chapter here**.

480

Partners

2,400

Lawyers

3,200

Legal professionals

5,000

Total staff

60+

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