# Global Perspectives

## International Trends in Commercial Disputes

April 2020

ReedSmith
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# Note from Editor

Welcome to the April 2020 edition of our Global Perspectives publication.

We recognise this comes to you at a time of unprecedented global uncertainty, with the advent of COVID-19 influencing our lives in a deeply personal manner and having an immediate, profound impact on the way we conduct our businesses.

We know that you are all dealing with COVID-19 on an evolving basis, as are we, and we will have more to say by way of practical focused insight, drawing from our global experience of the issues faced in connection with the virus by you all, soon.

We have, of course, already assisted clients with a long list of immediate concerns, a small selection of which includes: labour and employment issues; considerations of force majeure and termination of contracts more widely; data security issues surrounding the sometimes rapid adoption of new technology foisted upon all of us in the current working-from-home environment; business continuity and supply chain considerations; interpreting and implementing the many governmental requirements and guidelines issued in every nation; financing arrangements with lenders; and coping with immediate changes to access to justice through the court and other litigation processes.

Together with you all, we have dealt with all of this at a breakneck pace, while grappling with personal, logistical and organisational matters.

This issue of Global Perspectives is purposefully not COVID-19 focused.

Rather, we present a range of what we hope are informative and insightful articles drawn from our global contributors, with as much relevance within the current COVID-19 crisis environment as without. This edition reflects a range of issues dealt with by you in conducting global business and dealing with global disputes, and is designed to provide some practical insight into those topics.

We wish you all health and success in the times ahead.

**Douglas E. Cherry**
Editor
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# Germany

## German Federal Supreme Court opens the door to commercial mass litigation

Flight delayed or denied boarding? Fuel consumption of the new car not matching the advertised figures? Three clicks and the money is yours. This is what many legal tech start-ups promise, and venture capital investors flood them with financial resources unparalleled in the legal industry. As a critical milestone for this emerging business, in November 2019, the German Federal Supreme Court approved the business model of commercial mass-litigation service providers in Germany.[1] This article, discusses the legal and commercial implications of this decision in terms of both the threat of increased litigation in Germany and the opportunity for the legal services market to develop more efficient technology solutions in response.

**The German legal service market**

In Germany, the provision of legal services is a very restricted business. Service providers other than lawyers registered with the bar are generally prohibited from providing legal services – for the sake of both consumer protection and maintaining the quality of services within the industry.

However, as one of the very few exceptions to this rule, registered professional debt collection agencies are allowed to enforce a claim they have acquired, which normally includes both an evaluation of the claim and the taking of legal measures. Under the German Legal Services Act, registered professional debt collection agencies are supervised by a government authority and are liable to potential severe sanctions in case of misconduct.

**Approval of mass litigation providers**

The aforementioned very recent landmark decision of the Federal Supreme Court deals with the question of whether or not legal tech companies enforcing commercial mass claims (e.g., flight delay penalties, tenant/landlord claims, etc.) still qualify as professional debt collection agencies, or whether this type of business goes beyond their normal scope of duties. With several caveats, the Federal Supreme Court has now approved this rapidly emerging business concept, sending shockwaves through the typically rather conservative German legal market.

At first sight, this development seems to be good news for clients, as new competition vitalizes the established market, potentially resulting in less legal spending. Clients could outsource certain types of dispute to dynamic and efficient start-ups.

However, the reality is that the now legalized legal tech service providers are actually engaged in a different type of business to that provided to clients by major law firms. As the new providers are acting in the mass claimant space, clients therefore find themselves almost exclusively on the opposite side of such disputes.

**The future of the market**

So, much ado about nothing? Absolutely not. First, this recent development will very likely lead to a significant increase in the volume of commercial litigation claims faced by clients. Second, the various legal tech start-ups have demonstrated how artificial intelligence (AI) and automatic workflow management can be used to handle legal claims hyper-efficiently. This same approach can be adopted by law firms that invest heavily in business operations and developing innovative client services. For example, investment in AI and automatic document processing systems has decreased the manual working time in diesel mass litigation (Volkswagen emission claims) by 75 percent.

The use of technology reduces the level of direct human involvement in the case handling process. AI therefore facilitates new players to enter this very interesting legal market. In the past, only a very small number of law firms could actually maintain the extensive volume of staff ready and available to jump on the next big thing while running idle the rest of the time. With AI, brigades of lawyers are not necessary any more, allowing smaller entities to pitch for such work. Such increased competition generally benefits the client, as rates in high volume cases become very competitive.

However, this is just the start.


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# Dubai

## An introduction to enforcement of foreign judgments and awards in the UAE

Historically, creditors have found it difficult to enforce their foreign judgments or arbitral awards in the United Arab Emirates (UAE), many finding enforcement in the UAE courts expensive, unpredictable and time-consuming. As part of its continuing development as a global business hub, the UAE has agreed or adopted several treaties to improve cross-border legal enforcement mechanisms, at both the regional and global level. The UAE has also enacted domestic legal reforms, making it easier for creditors to enforce foreign judgments and awards in the jurisdiction.

Below we set out an introduction to the UAE legal framework, as well as providing a summary of enforcement of foreign judgments and arbitral awards in the UAE. We also set out some considerations for parties when thinking about enforcement in the UAE.

### UAE Courts legal framework

The UAE is a federation of seven Emirates with a civil law system and courts operating at a federal and Emirate level (UAE Courts). Statutes and Sharia are the primary sources of law. Save for the freezone courts (discussed below), all "onshore" proceedings of the UAE Courts are based on Arabic written pleadings, supported by documentary evidence. There is no binding precedent, and each case is decided on its own merits. The UAE Courts have inherent jurisdiction over enforcement of foreign judgments and arbitral awards where there is a nexus to the jurisdiction (e.g., where the asset for execution is in onshore UAE).

Outside the civil law framework, to encourage international investment, the UAE created "offshore" financial freezones, such as the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). Both the DIFC and the ADGM have their own respective "common law" courts, with the laws and court procedure based on English law. Pleadings and (documentary and oral) evidence are presented in the English language.[2] These freezone courts have jurisdiction to resolve disputes concerning freezone entities, laws and contracts. Each freezone court also has jurisdiction to enforce foreign judgments and arbitral awards where there is a nexus to the respective freezone (e.g., where the asset for execution is in the DIFC or the ADGM).

### International agreements and treaties

The UAE is a party to the Riyadh Arab Agreement for Judicial Co-operation 1983 (Riyadh Convention) and the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996 (GCC Convention). The UAE has also entered into several bilateral treaties for reciprocal recognition and enforcement of foreign judgments (e.g., with France, Egypt, China, Sudan, Pakistan, Tunisia, Afghanistan, Jordan, Nigeria, Morocco, Iran, the United Kingdom and Syria[3]). In January 2020, India issued a declaration implementing a 1999 enforcement treaty between the UAE and India. All these agreements set out streamlined mechanisms for cross-border judgment recognition and enforcement in the UAE, and vice versa (together, the International Agreements).

The UAE is also a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

The International Agreements and the New York Convention apply equally to the UAE Courts and the freezone courts. However, interpretation and implementation of the International Agreements and the New York Convention has, over the past 15 years, differed in the UAE Courts and in the freezone courts.

### Foreign judgments and awards in the UAE Courts

Historically, enforcement of foreign judgments and awards against an onshore party or asset via the UAE Courts has been challenging. To frustrate enforcement, UAE debtors would often employ tactics designed to undermine the substantive foreign proceedings (e.g., by commencing parallel proceedings, by avoiding service, or by not making submissions or providing representation in the foreign substantive proceedings). Upon enforcement, such tactics could result in the UAE Courts often finding that the underlying judgment or award did not conform to procedural technicalities required under the UAE Civil Procedure Code. As such, the underlying judgment or award would be invalid and unenforceable. Equally, if the UAE Court determined it had inherent jurisdiction over a party or subject matter, there was a risk of the UAE Court assuming jurisdiction over the dispute and re-hearing the merits, in effect ignoring the foreign judgment or award. In addition to these jurisdictional and procedural challenges, the enforcement process itself was time-consuming and expensive.[4]

The introduction of the new UAE Arbitration Law in 2018,[5] and a new UAE executive regulation in 2019,[6] has meant that enforcement of foreign judgments and awards should now be a quicker, less expensive, and more streamlined process. The new updates replace the old enforcement provisions of the UAE Civil Procedure Code. An application for enforcement of a foreign judgment or award may now be made directly to an enforcement judge, who will decide whether the application meets the enforcement conditions within three days. Although appealable, the resulting enforcement order is immediately enforceable.

For arbitral awards, the conditions to enforce are governed by the UAE Arbitration Law, which mirrors the conditions of the UNCITRAL Model Law and New York Convention. As such, the new conditions for enforcement are generally seen as being "arbitration-friendly."

For foreign judgments, however, the conditions to enforce are largely the same as before and will be determined by (i) any applicable International Agreement or (ii) the executive regulation and UAE Civil Procedure Code. In particular, a UAE Court will examine: whether it had inherent or exclusive jurisdiction over the dispute, whether there was due service and legal representation, whether the foreign judgment contains anything that breaches UAE public policy or morals, and whether the court that issued the foreign judgment would recognize and enforce a UAE Court judgment (i.e., "reciprocation of judgment enforcement"). If the UAE Court finds any issue with any of these conditions, the foreign judgment will be unenforceable. As such, it is likely that enforcement of a foreign arbitral award will be much easier than enforcement of a foreign judgment.

### Foreign judgments and awards in the freezone courts

The DIFC Courts, operating since 2004, and the ADGM Courts, operating since 2015, are often referred to as "common law islands operating in a civil law sea." The DIFC has enacted laws and regulations based on English civil and commercial law, while the ADGM has directly adopted English civil and commercial law and regulations.[7] Each respective jurisdiction is seen as being both international and arbitration friendly in outlook.

While the onshore UAE Civil Procedure Code does not apply to the courts, the International Agreements do. In addition to the International Agreements, the DIFC and the ADGM have separately entered into guidance agreements on enforcement of judgments with authorities outside the freezones (e.g., the DIFC with: the UAE Ministry of Justice, the Federal Court of Australia, the Supreme Court of Singapore, the Supreme Court of New South Wales and the Commercial Court of England and Wales).

For foreign arbitral awards, upon enforcement application, the freezone courts will not review the underlying substantive dispute and consider whether there are grounds not to enforce the award. The grounds for recognition and enforcement are set out, respectively, in the DIFC Arbitration Law[8] and the ADGM Arbitration Regulations[9] (each modeled on the UNCITRAL Model Law). Enforcement applications can often be resolved within a matter of weeks or a few months and can be supported by interim injunctive relief (if necessary) and, as a result, can be cost efficient.



For foreign judgments, upon an enforcement application, the freezone courts will not seek to review the underlying substantive dispute. Where there is an International Agreement, the freezone courts will apply the treaty conditions for enforcement. Where there is no International Agreement, the courts will largely be concerned with whether (i) the foreign court had jurisdiction to hear the underlying dispute, (ii) the judgment has a monetary value and (iii) the judgment is final (i.e., there is no recourse to appeal).

**Other considerations for parties**

*Location of the debtor or asset*

For both enforcement of foreign judgments and awards, the issue of where the subject matter of execution is located in the UAE (i.e., in onshore UAE or in a freezone) has become a serious point of dispute. In the past several years, the DIFC Courts have enforced foreign judgments and awards where the asset or party for execution was based onshore in the UAE (i.e., the DIFC Courts acted as a "conduit jurisdiction" for enforcement in onshore UAE). This has led to a jurisdictional overlap between the freezone court and the onshore UAE Courts. This overlap resulted in the establishment in 2016 of a judicial tribunal to determine questions of conflicting jurisdictions between the DIFC Courts and the UAE Courts. Notwithstanding the judicial tribunal, parties may often find themselves embattled in court proceedings both onshore and offshore, with resulting delays and increasing costs to any enforcement action. Judgment creditors will need to carefully consider where assets are located, either onshore UAE or in a freezone, and what the respective enforcement regimes are, before proceeding to enforcement.

*UAE Court jurisdiction*

Although the UAE Courts accept the principle of freedom of contract, and should recognize a foreign choice of law and court in a contract, they may not uphold such a choice. In particular, where the UAE Court considers it has inherent jurisdiction (e.g., in real estate disputes), it may ignore the choice of foreign law and apply UAE law to the dispute. In enforcement cases, this could mean the UAE Court ignoring a foreign court judgment and re-hearing the merits of the case on the basis of UAE law and principles.

To help avoid this risk, parties should consider (i) either choosing the law and jurisdiction of the DIFC or ADGM (and the forums of the DIFC Courts or ADGM Courts, respectively) for disputes or (ii) otherwise providing for disputes to be referred to arbitration. Unless one of these options is agreed, there is an increased risk of the UAE Courts assuming jurisdiction.

*Seat and supervisory court*

Similarly, where parties wish to have disputes governed by arbitration, it is important that they (in particular, the party likely to enforce any award) consider the seat of the arbitration. The seat determines not only the procedural law of the arbitration, but also the supervisory court. Choosing the wrong seat can ultimately lead to an arbitration clause or award being challenged and the supervisory court not supporting, or being unable to uphold the integrity of, the arbitration clause or the award. For example, if a bank and a debtor agree to an asymmetric dispute resolution clause (e.g., where the default dispute forum is a foreign court, but where the bank has other options of dispute forum, including arbitration), the question of the seat of the arbitration becomes vital if the debtor is UAE based. Asymmetric dispute resolution clauses are untested in the UAE Courts, and parties must have equal rights to choose arbitration. For such asymmetric clauses, the UAE Courts would likely deem the clause invalid, and the UAE Courts may not give deference to a supervisory foreign court (e.g., if the seat were London and the English courts, the supervisory courts). In such circumstance, any award would likely be unenforceable and the UAE Courts would assume jurisdiction over the dispute.

To help avoid this risk, parties should consider the DIFC or ADGM as the choice of arbitral seat. If chosen, upon any challenge by a UAE debtor, the UAE Courts would give deference to the DIFC Courts or ADGM Courts as the supervisory courts of those jurisdictions. The DIFC Courts and ADGM Courts are more likely to uphold the arbitration clause and any resulting award. Further, interim or injunctive relief from the DIFC Courts or ADGM Courts is directly enforceable onshore in the UAE (which would not be the case for foreign court interim or injunctive relief).

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# France

## Terminating commercial relationships in France: not just a question of contractual terms

In many common law jurisdictions, the voluntary termination of a commercial relationship is essentially a matter of contract law, determined by the exit provisions agreed privately between the parties. However, in France, voluntary termination is also subject to the mandatory rules of the French civil code on "sudden break" termination. These rules can make exiting a commercial relationship with a French party a less certain and more time-consuming process.

**General principle: a "reasonable" notice period is required for a smooth transition**

French law[10] states that a party must provide a reasonable notice period when it wants to terminate an "established commercial relationship" for convenience (i.e., without specific reason), in the absence of which, the terminating party may be liable for damages. This does not prevent parties from terminating without a notice period in case of breach of contract by the other party, or of force majeure.

The principle behind this law is that the party facing termination should benefit from a smooth transition rather than a sudden break. A key issue for French lawmakers is that the party facing termination should have sufficient time to find alternative business partners and/or similar products and services.

**Definition of an "established commercial relationship"**

Although the term is used in French law, there is no codified legal definition of an "established commercial relationship." French case law has instead adopted a broad definition, requiring an overall stable and lasting commercial relationship between the parties. However, this definition does not necessarily imply the existence of a permanent and continued relationship. The definition includes commercial relationships without any written agreement, as well as those governed by definite and indefinite-term contracts.

**Mandatory rule and contractual provisions**

As a matter of public policy, the rule is mandatory, and any contractual provisions aimed at bypassing the rule in preference to foreign law are, by definition, null and void.

French law on sudden break termination is applicable (and thus mandatory) if the loss has taken place on French territory, defined as both the place of occurrence of the loss and the event that gave rise to the loss. Accordingly, this rule will apply even if foreign law generally governs the contract terms.

The mandatory nature of the rule generates a significant volume of case law, as contracts rarely foresee or contemplate an extendable termination notice period. A terminating party faces notable legal risks if it sticks to the wording of the contract, as the rule may also override explicitly agreed termination provisions.

The rule does not, however, prevent parties including an arbitration or jurisdiction clause in their contract to determine the forum of the dispute. In the absence of such a clause, disputes in relation to this rule will be heard before specialised French courts.

**Legal and case law factors determining the length of the notice period**

The determination of the "reasonable" notice period depends on many factors and may vary from one jurisdiction in France to another. On the one hand, there are legal factors, namely, the duration of the commercial relationship and the market practices regarding the notice period. On the other hand, there are many factors that have developed through case law, usually grouped under the categorical term "state of economic dependency." Under this term, courts notably assess (i) the share of turnover represented by the business relationship for the party facing termination, (ii) the existence or otherwise of exclusivity, (iii) the difficulty in finding alternative business partners and similar products and services for the party facing termination, and (iv) any other difficulties incurred by the party facing termination.

Considering the various factors taken into account by the courts, there is a high degree of uncertainty regarding the length of the notice period and thus the amount of damages that the courts may award. The notice period requires case-by-case analysis. Historically, French case law has determined that a three-month period is the minimum, while longstanding relationships could warrant longer notice periods, such as two years for a 20-year commercial relationship. A terminating party therefore faces notable legal risks, as the statute may override shorter contractual notice periods.

**Damages allocated by courts: compensation for parties facing termination**

In the absence of a reasonable notice period being observed, the court will provide compensation for the loss of profit suffered by the party facing termination during the unfulfilled notice period. The calculation of compensation is based on the monthly average profit margin over the last two or three financial years, as may be relevant in a particular case.

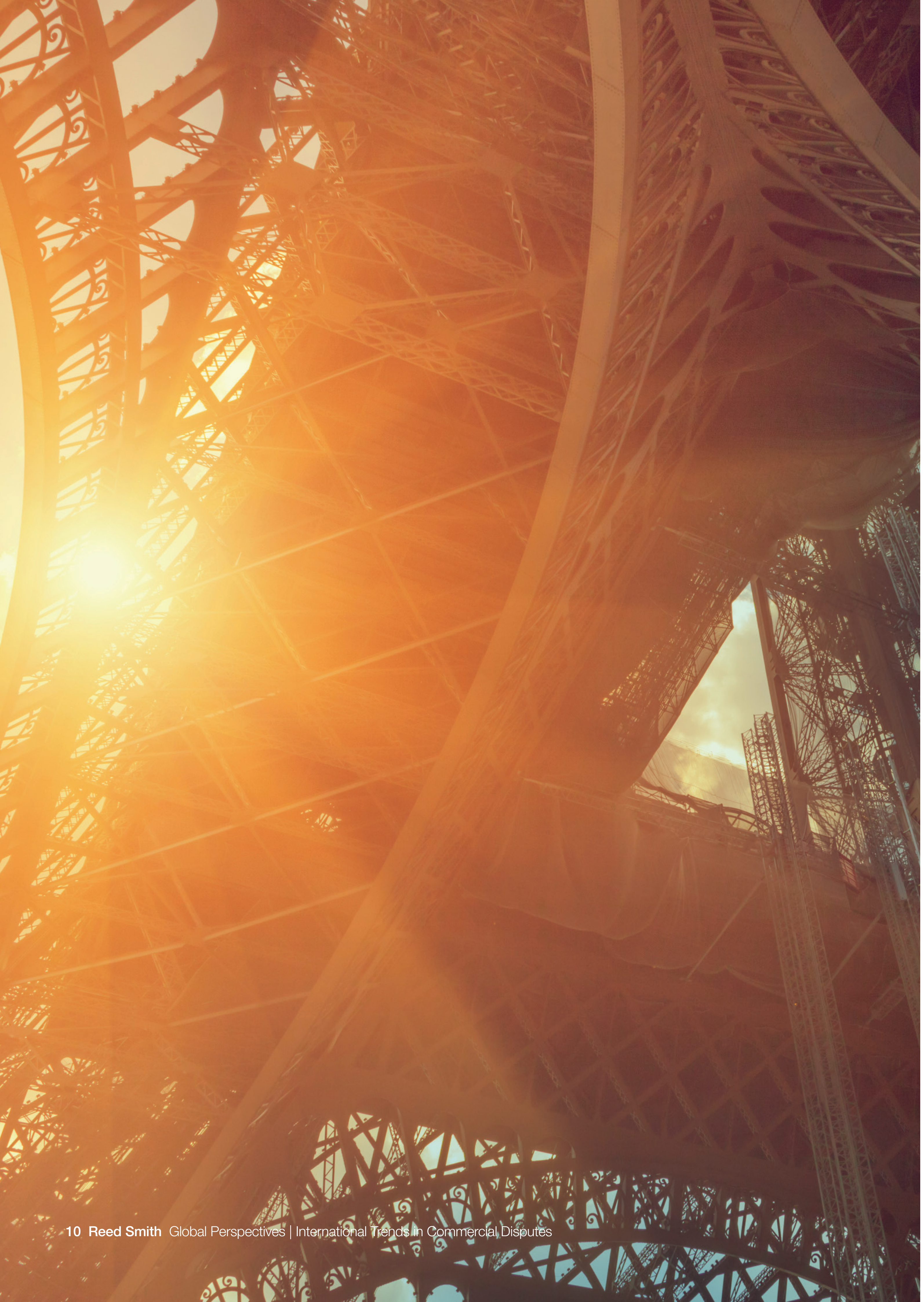
There has been much debate in French law about the definition of "margin," be it gross margin (sales turnover minus purchasing price) or contribution margin (sales turnover minus variable costs). This debate creates uncertainty around the quantum of damages the court is likely to award and may require the intervention of financial experts if the issue is subject to litigation.

The French courts may also provide compensation for indirect losses incurred by the party facing termination, such as lay-off costs, non-amortized investments, image and reputation deterioration, and restructuring costs, among others. Despite these possibilities, the French courts are generally reluctant to compensate losses of this kind without a compelling rationale.

**Recent reform: a liability exoneration with an 18-month notice period**

Article L442-1 of the French commercial code came into force on April 26, 2019. The main objectives of this reform were to regulate the large number of litigation matters prompted by the rule (approximately 300 decisions per year) and to enhance free competition between suppliers.

The major innovation of the reform exists in a liability waiver for the terminating party, where an 18-month notice period is granted to the party facing termination. That 18-month period, which is required to be applied across the board, can be seen as an effective cap on liability. Unfortunately, however, there is no provision to reduce the cap if the length of the commercial relationship would otherwise on its own justify such a notice period. Therefore, although the cap is intended to promote certainty, the reality is that such certainty will often be theoretical only. Ultimately, many cases will need to be assessed on their individual merits, despite the intention of the reform.



### Practical tips

Parties seeking to terminate commercial relationships with commercial counterparts based in France should consider following these practical tips:

- **Carry out a risk assessment before terminating a commercial relationship.** The decision to terminate a commercial relationship requires a proper risk assessment prior to termination. Anticipating the hurdles to come, in close cooperation with operations relevant to the subject of the contract, remains the safest way forward.
- **Keep notification of the termination simple but clear.** When notifying of the termination decision, unambiguous and explicit written notification is required. It should state the desire to terminate in clear terms. An accompanying letter requesting acknowledgment of receipt is recommended to evidence the recipient's receipt and understanding of the termination.
- **Evaluate possible litigation scenarios prior to sending notice.** This ensures that the terminating party is prepared should the recipient counterparty dispute the termination.
- **Maintain legal privilege.** Parties should be careful to maintain privilege over any legal assessments undertaken in accordance with French privilege law, which may differ from the laws in other countries, in particular, the United States and the United Kingdom.

### Are the provisions above affected by the turmoil created by the global COVID-19 pandemic?

Unprecedented and temporary restraint on the binding force of contracts has just been enacted by the French government. The health emergency measures implemented to maintain activity now directly impact contract termination rights. The French government recently issued a set of ordinances to deal with the COVID-19 emergency in France. Among those measures was one relating to the extension of contractual time limits (for a defined period) during the public health emergency period (the "Ordinance").[11]

The Ordinance affects, in particular, termination in cases of breach of contract (where no notice period is required). Article 4 provides that all termination clauses that sanction any breach of obligation due to have been performed under a contract between 12 March 2020 and 24 June 2020 shall now be deemed not to come into force or effect until 24 July 2020.

The Ordinance may also affect convenience terminations (where a notice period is required), as Article 5 provides for the extension of the period for termination and the deadline for notifying the termination of a tacitly renewable contract. Whether this right to terminate expires between 12 March 2020 and 24 June 2020 or a sanction notification is made in that period, neither will take effect before 24 August 2020. Furthermore, COVID-19 may impact the length of the notice period required. A judge may well consider the difficulty in recovering from a termination in the context of COVID-19, and require a longer notice period.

It is also predictable that as soon as the terminating party will want to raise a default of its contractual counterpart in order to reduce the length of the notice period, the current situation will bring complexity into the debate, as a contractual default that will not have been raised in time, or even a force majeure argument (for complete avoidance of the notice period) will have to undergo the judges' scrutiny.

Terminating a business relationship in France will require, more than ever, anticipation and preparation in order to avoid and effectively manage what has become a particularly contentious and specialised area of litigation, pre-dating the pandemic.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# United Kingdom

## The European Union holds that intra-EU BITs are incompatible with Union law – what's next for claims under intra-EU investment treaties?

On March 6, 2018, the Court of Justice of the European Union (CJEU) published its preliminary ruling in *Slovak Republic v. Achmea BV* (the Achmea Ruling),[12] which held that the application of the investor-state dispute settlement provision at article 8 of the Netherlands-Slovakia bilateral investment treaty (BIT) was incompatible with EU law. In particular, the CJEU held that articles 267 and 344 of the Treaty of the Functioning of the European Union must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one Member State may bring proceedings against another Member State before an arbitral tribunal.

Thereafter, the European Commission issued a communication to the European Parliament and Council on the "protection of intra-EU investments" on July 19, 2018 (the Communication).[13] With reference to the Achmea Ruling, the Communication notes that the CJEU has "confirmed that investor-State arbitration clauses in intra-EU BITs are unlawful." This finding was stated to be consistent with the CJEU's view that "intra-EU BITs are incompatible with Union law."

On January 17, 2019 the European Commission website published declarations from all 28 EU Member States in which each committed to terminating its intra-EU BITs by December 6, 2019 in order to comply with the Achmea Ruling. The days preceding this saw three separate variations of declarations from Member States on the legal consequences arising out of the Achmea Ruling (together, the January Declarations).

On October 24, 2019, the European Commission announced that the EU Member States had reached agreement on a plurilateral treaty for the termination of intra-EU BITs (the PTT).[14] The text of a draft of the PTT, which was subsequently leaked, states simply that intra-EU BITs are terminated.[15]

**The silver lining for potential claimants under intra-EU treaties**

The January Declarations do not preclude an investor from commencing an arbitration under an intra-EU treaty while these treaties remain in effect. The PTT has not yet entered into force, though the text of the draft suggests that it will only require ratification by two Member States to become effective.[16] Furthermore, the draft provides for the provisional application of the PTT to any BIT by agreement of both of the BIT's (state) parties.[17] Notwithstanding the current status of intra-EU BITs, potential claimants should bear in mind the additional costs likely to be incurred as a result of interventions by EU Member States (possibly both state parties to the BIT) pursuant to their undertakings in the January Declarations, and the Commission itself.

Tribunals appointed to hear disputes arising under intra-EU BITs and the Energy Charter Treaty (ECT) have so far, and without exception, rejected objections made in reliance on the Achmea Ruling and on the basis that intra-EU dispute resolution clauses are incompatible with EU law.

However, the position in respect of BITs terminated pursuant to the PTT in the future is less clear-cut. The draft text of the PTT mirrors the treatment of sunset clauses[18] in the January Declarations, noting that the same "shall not produce legal effects."[19] Moreover, the draft holds that a BIT will cease to serve as a legal basis for arbitration proceedings as from the date on which the last of its signatories became a Member State of the European Union.[20] It remains to be seen whether tribunals will give effect to these provisions, which may be deemed contrary to international law.

Notably, claims under the ECT are specifically carved out of the draft PTT, with the draft text noting that "[t]he Union and its Member States will deal with this matter at a later stage."[21]

**The bottom line for potential claimants under intra-EU treaties**

It is self-evident that an unenforceable award will be of little value, and the Achmea Ruling, January Declarations, and future ratification of the PTT significantly increase the enforcement risk for awards rendered under intra-EU treaties.

The long-running enforcement proceedings arising out of the International Centre for Settlement of Investment Disputes award in *Micula v. Romania*[22] highlight this risk. In March 2015, following partial payment of the award by Romania, the European Commission issued a ruling ordering Romania to seek recovery of this payment, and precluding Romania from paying the balance on the basis that any such payment constituted new state aid, which is incompatible with the Treaty on the Functioning of the European Union. The decision on the Micula brothers' application to annul the European Commission's ruling was handed down by the General Court of the CJEU on June 18, 2019. The General Court held that the European Commission had erred in declaring that payments arising under the Micula award constituted state aid, since the European Commission was not entitled to retroactively apply EU law to events occurring prior to Romania's accession to the European Union. In this regard, the General Court briefly distinguished between the Micula award and the Achmea award ("in the present case, the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation [giving rise to the Achmea Ruling]").

This will not assist many potential claimants whose disputes with the host state arose after its accession to the European Union.

The ratification and entry into force of the PTT, which reflects the undertakings given in the January Declarations, looks set to make enforcement even more difficult. The draft, which implicitly includes ongoing enforcement proceedings within its definition of "Pending Arbitration Proceedings," requires signatories to "ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it."[23] It remains to be seen how extra-EU domestic courts will interpret the PTT once ratified, but any heightened enforcement risk will have a knock-on effect, including making obtaining third-party funding for claims more difficult.

From a practical perspective, the PTT marks the culmination of the European Union's long-running efforts to put an end to intra-EU BITs. Whilst claims remain possible, at least pending actual termination of intra-EU BITs and even thereafter dependent on the effect given to the PTT by international tribunals, obstacles to enforcement are increasingly likely to render the purpose of such claims obsolete. Would-be investors in EU Member States will be well-advised to consider alternative means of protection prior to the making of any investment in an EU Member State, including incorporating their investment vehicle in an extra-EU jurisdiction in order to take advantage of its investment treaties.

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# Hong Kong

## Can Chinese state-owned enterprises claim crown immunity under Hong Kong law?

In recent years, foreign companies have increasingly engaged in commercial transactions with Chinese state-owned enterprises (SOEs) against the backdrop of the Belt and Road Initiative, in which the parties have designated the Hong Kong courts as the forum to determine any disputes.

However, China[24] adheres to the doctrine of "absolute" state immunity.[25] This provides that a state is immune from suit, enforcement and execution of assets, even if the acts involved are commercial in nature, unless the state has specifically waived such immunity.

In contrast, the trend in some jurisdictions[26] has been to adopt a "restrictive" position on state immunity, which narrows the protection to a state's public acts, such that purely commercial or private acts of the state are not protected through immunity.

Commercially, this means there may be an important difference in the point of departure when contracting with a limb of the Central People's Government (CPG), as opposed to sovereign bodies in other jurisdictions. The question therefore arises: can parties rely upon the enforcement of contractual obligations against SOEs in the Hong Kong courts?

**Application of the doctrines of absolute state immunity and crown immunity in Hong Kong**

Hong Kong is considered an administrative area of China[27] and the doctrine of state immunity in Hong Kong is applied through the common law doctrine of crown immunity (absolute and unrestricted).

In the recent case of *TNB Fuel Services Sdn Bhd v. China National Coal Group Corporation*[28] (the TNB Case) the Hong Kong Court of First Instance rejected a claim for state immunity by a Chinese SOE under the supervision of the PRC State-owned Assets Supervision and Administration Commission of the State Council of the CPG (the SASAC).



The primary reason for rejecting the claim to immunity was lack of authority. China National Coal Group Corporation (CNCGC) relied on an affidavit prepared by its general counsel in which there was no assertion of authorization by the SASAC or the CPG to make the claim.

Furthermore, the Hong Kong and Macau Affairs Office of the State Council had issued a letter asserting that all Chinese SOEs respond to litigation related to their commercial activities in the capacity of independent legal persons. Accordingly, the court found that Chinese SOEs should not be deemed as bodies performing functions on behalf of the CPG when carrying out commercial activities, save in "extremely extraordinary circumstances" where such activities are performed on behalf of the CPG with the necessary authorization.

The court also affirmed the court of first instance's decision in *The Hua Tian Long (No 2)*,[29] in which it was held that a PRC entity may invoke crown immunity only if it can demonstrate that it is subject to the control of the CPG. This is assessed by reference to the following factors:

- whether the PRC entity can exercise any independent discretion;
- as an investor, whether the crown/CPG has exerted any control over the PRC entity;
- whether the PRC entity enjoys a separate legal personality;
- whether the crown/CPG enjoys the power to appoint and remove senior officers of the PRC entity; and
- whether the PRC entity enjoys financial autonomy.

In light of these factors, the court concluded that even if it had been able to establish authority, CNCGC's claim for immunity would have failed due to an absence of control because:

- CNCGC's articles of association and expert evidence on PRC law indicated that the control exerted by the SASAC over CNCGC was essentially that from a company's controlling shareholder. SASAC was therefore only considered to be an investor of CNCGC.
- CNCGC enjoys operational autonomy and extensive independence and has the capacity to carry out its business operations. There was no evidence suggesting any *de facto* control by the SASAC over the management of CNCGC's ordinary commercial activities or daily business.
- In considering the issue of control, the court distinguished the facts of the TNB Case from *The Hua Tian Long (No 2)* as in the latter case the relevant PRC entity was found to be part of the PRC Ministry of Communications because it was a public institution instead of a separate legal entity and it had no shareholders or paid-up capital.

**Practical steps**

The Hong Kong court's reasoning in the TNB Case strongly suggests that, unless there are "extremely extraordinary circumstances," it is unlikely that the CPG would support any assertion of crown immunity by Chinese SOEs under the SASAC's supervision if they enjoy a high degree of independence and autonomy in the overall decision-making process. It would also be difficult for a PRC entity to assert crown immunity without seeking endorsement from the CPG beforehand.

Nevertheless, the position mandates assessment on a case-by-case basis. When entering into a commercial transaction with a PRC entity, it is important to carefully consider the entity's status and the likelihood that it can satisfy the common law control test for crown immunity in respect of the transaction in question. Parties should also consider the following measures:

(a) Factual information regarding the business operations of the PRC entity should be sought in order to ascertain whether it is considered a public institution performing functions on behalf of the CPG as opposed to a Chinese SOE under the supervision of the SASAC.

(b) Before agreeing on the appropriate dispute resolution process, the governing law and the jurisdiction for resolving disputes, parties should consider whether the PRC entity would be entitled to assert crown immunity and whether it has assets in other jurisdictions.

(c) Given that the effectiveness of state immunity waiver clauses varies between jurisdictions, as a matter of prudent practice parties should ensure that unequivocal waiver-of-immunity clauses covering all assets of the PRC entity are included in all underlying transaction documents.

(d) Obtaining a written statement expressly confirming that the PRC entity is not performing functions on behalf of the CPG when carrying out the commercial activities in question is also recommended.

(e) If there is any potential litigation or enforcement in other jurisdictions, advice from local counsel should be sought.

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# United States

## Studies by U.S. Federal Trade Commission indicate consumer confusion and skepticism regarding class action settlements

In U.S. courts, consumer class actions remain a common vehicle for challenging a broad range of business conduct, products, and services. By allowing for the aggregation of claims, injunctive relief, attorney fees, and other remedies, class actions can present significant risks for companies across the commercial spectrum. Accordingly, many defendants choose to settle, even when they may have viable defenses to the case. Class action settlements, however, can also pose substantial problems and uncertainties, some of which are the focus of a recent report by the U.S. Federal Trade Commission (FTC).

**Class settlement basics**

While some consumer class actions settle with individual plaintiffs, others are resolved through class-wide settlements, which generally provide greater protection from future suits but which are also more costly and complicated. Under federal class action rules, class settlements require judicial certification of a defined group of persons or entities, court approval of the fairness and sufficiency of the settlement terms and procedures (after a lengthy hearing process), and other protections for members who are not parties to the suit but may be bound by the outcome.

For example, class settlements that resolve claims seeking primarily monetary relief require that members receive court-approved notice – specifically, the best notice practicable under the circumstances. That notice must include clear information on the case and the members' options, including how to request exclusion or to object to the proposed settlement terms. Such notice may be provided by U.S. mail, electronic means, or other methods (e.g., publication, text, social media), or by a combination of approaches. Because defendants often lack class member contact information and other relevant data, many class settlements are also structured to include a claims process. Especially in larger complex cases, notifying members of settlement terms and complying with these various procedures can disrupt business and present considerable administrative hurdles, often requiring engagement of outside administrators or other experts. All of this can materially increase the costs of settlement, and defendants may be asked to bear these expenses as part of the settlement agreement.

Adding to these obstacles, proposed class settlements are often scrutinized by regulators, media organizations, consumer protection groups, and potential objectors, sometimes prompting courts to reject the deals. A class settlement can therefore become a public event with the potential to affect a company's reputation as well as its bottom line.

**The FTC report**

Given the above risks, it is advisable for companies considering class settlements to proactively assess the administrative and consumer-perception challenges these settlements present. On this front, a September 2019 preliminary report by the FTC (FTC Report), produced as part of its consumer protection function, suggests that significant confusion and skepticism exist among consumers regarding class settlements. *See* https://www.ftc.gov/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns.

The FTC Report is based on two studies: the Administrator Study and the Notice Study. The Administrator Study evaluated 149 consumer class action settlements to determine whether variations in the manner or content of the notice or the amount of compensation in settlements impacted participation. Amongst other things, the results revealed that:

- Overall, claims rates (the percentage of members who applied for benefits) were very low, with a weighted average of 4 percent.
- Email notices generally had lower claims rates than traditional (and more expensive) mailed notices.
- Notices containing more definite, visible information about payment availability had higher claims rates.
- Settlements with higher compensation had better check-cashing rates but not better claims rates.

The Notice Study analyzed a sample of 8,000 responses from an internet consumer survey to test whether various email characteristics – such as the information in the subject line or the email format – influenced participants' likelihood of opening the email or understanding its contents. The findings included the following:

- Less than half of respondents understood that the emails pertained to a class action settlement or what steps were required to receive a refund.
- Referring to a refund in the subject line (but not an exact amount) increased opening rates but not comprehension, whereas mentioning a class action in the subject line decreased opening rates but improved comprehension.
- Longer, text-heavy email formats performed better overall than streamlined, bulleted formats.

Based on these results, the FTC Report suggests that further study and consumer education about the potential monetary benefits of class settlements may be warranted.

**Takeaways**

The FTC Report identifies many limitations on the studies and cautions against broad extrapolations. Nevertheless, class action proponents may use the studies to support more extensive, costly, or personalized notice procedures (i.e., greater contact with defendants' customers, notices on defendants' websites, etc.), streamlined payment processes, or other measures. Opponents may argue that the studies simply underscore that class actions tend to benefit plaintiff lawyers over consumers and are inferior to other dispute resolution mechanisms, such as individual arbitration.

In any event, U.S. courts have already been scrutinizing proposed class settlements more closely for the past several years – including notice procedures and claims rates – and have rejected settlements in several instances, inevitably increasing the defendants' cost exposure and often generating negative press coverage. Also, even where the settlement is approved, inadequate notice may affect whether class members are precluded from bringing additional suits. While it remains to be seen what impact the FTC Report may have in practice, it is sensible for companies and their counsel to monitor developments in the area of class settlement and notice practices as methods for customer interactions – and as the related technological, data security, and privacy issues – continue to evolve. Defendants should consider class notice requirements as part of their overall risk assessment and not merely as an administrative task to be addressed once a settlement is imminent.

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## Endnotes

### German Federal Supreme Court opens the door to commercial mass litigation

1 decision of 27.11.2019, docket no. VIII ZR 285/18

### An introduction to enforcement of foreign judgments and awards in the UAE

2 Arabic is another option, and the ADGM courts have now accepted Hindi as a third official court language.
3 The respective agreements do not provide the uniform mechanisms and conditions for enforcement. As such, advice should be obtained in each case.
4 For example, enforcement claims would need to be issued in the UAE Court of First Instance, with two levels of appeal and, following any UAE Court enforcement order, execution of that order in the execution court.
5 UAE Federal Law No. 6 of 2018.
6 UAE Cabinet Resolution No. 57 of 2018 concerning the Executive Regulations of Federal Law No. 11 of 1992 (in force on February 17, 2019).
7 Application of English Law Regulations of 2015.
8 DIFC Law No. 1 of 2008, as amended.
9 ADGM Arbitration Regulations 2015.

### Terminating commercial relationships in France: not just a question of contractual terms

10 Article L442-II of the French commercial code.
11 Ordinance No. z2020-306 of 25 March 2020.

### The European Union holds that intra-EU BITs are incompatible with Union law – what's next for claims under intra-EU investment treaties?

12 *Slovak Republic v. Achmea B.V.* (Case C-284/16).
13 Brussels, 19.7.2018, COM(2018) 547 final.
14 https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en.
15 Article 2.1 of the draft PTT. Note that the specific BITs to be terminated pursuant to the PTT are listed at annex A of the draft.
16 See article 16.1 of the draft PTT: "This Agreement shall enter into force 30 calendar days after the date on which the Depositary receives the second instrument of ratification, approval or acceptance."
17 Article 17.2 of the draft PTT provides: "When both Parties to a Bilateral Investment Treaty have decided to provisionally apply this Agreement, the provisions of this Agreement shall apply in respect of that Treaty 30 calendar days from the date of the later decision on provisional application."
18 Sunset clauses are protections which hold that the protections contained within the treaty will continue to apply to investments made prior to the termination of the treaty for a specified period of time following termination (typically between 10 and 20 years).
19 Article 2.2 of the draft PTT.
20 *Id.*, article 4.1.
21 Recital X of the draft PTT.
22 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20).
23 Article 7(b) of the draft Plurilateral Termination Treaty.

### Can Chinese state-owned enterprises claim crown immunity under Hong Kong law?

24 Based on PRC jurisprudence and with reference to the position taken by the CPG in various matters involving foreign and Hong Kong courts.
25 It has signed but not ratified the the United Nations Convention on Jurisdictional Immunities of States and Their Property (the UN Convention).
26 For example, the European Convention on State Immunity and U.S. Foreign Sovereign Immunities Act 1976.
27 *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* [2011] HKCFA 41.
28 [2017] HKCFI 1016.
29 [2010] 3 HKLRD 611.

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