PARISBABYARBITRATION

BIBERON

PARISARBITRATIONWEEK

SPECIAL EDITION

28 March - 1 April 2022

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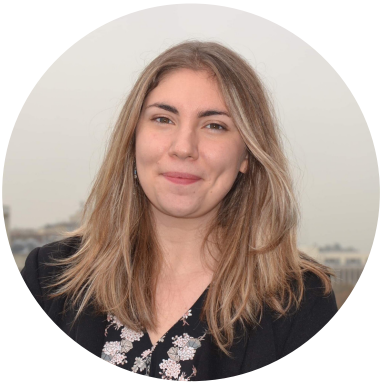

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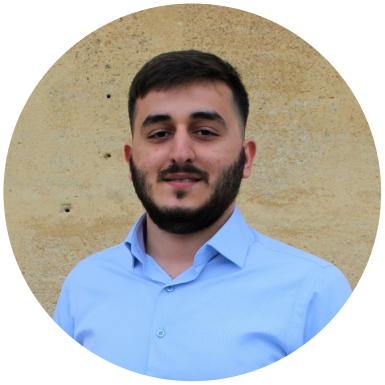

Dani Habel

Dear loyal Biberon readers and newcomers,

We have the great pleasure and honour to present the second special edition of our "Biberon" focused on the Paris Arbitration Week (PAW). Indeed, for the second year in a row, we have partnered with the Organizing Committee of the PAW to cover and summerise conferences organised during the 2022 edition of the PAW.
This year, 18 seminars were covered, addressing hot and various topics in international arbitration, with the help of our 24 reporters.

We would like to express our sincere thanks to Marily Paralika and Claire Pauly from the Marketing team of the Organizing Committee, with whom it was a real pleasure to work. We also wish to thank the firms and compagnies that allowed us to cover their seminars, as well as all our reporters for their work.

We sincerely hope you will enjoy reading this special edition of our newsletter, and do not hesitate do follow us our on social media to be updated on all our projects.

Sincerely yours,

Bénédicte Marquise
Paris Baby Arbitration

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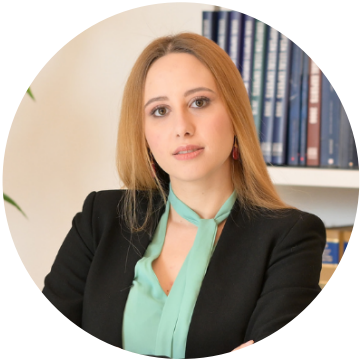

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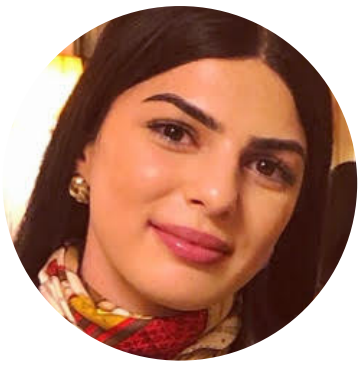

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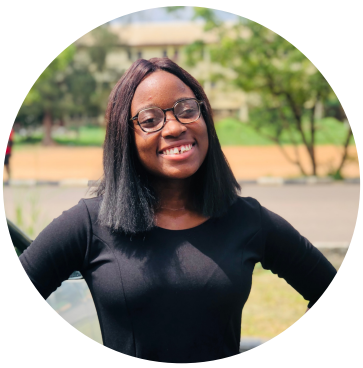

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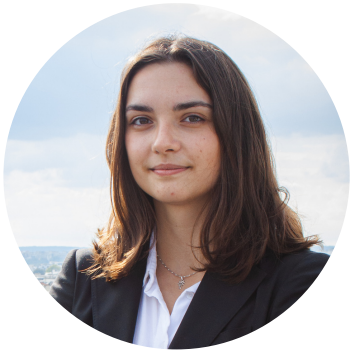

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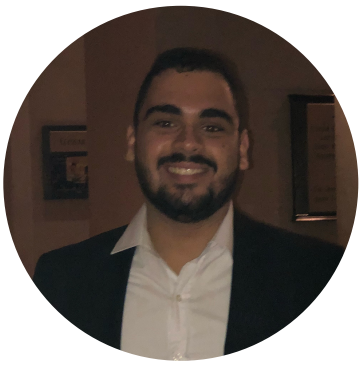

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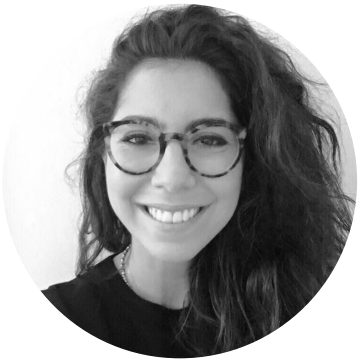

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MONDAY

"*AFFAIRES D'ETATS*: PRACTICAL CONSIDERATIONS WHEN DEFENDING STATES IN INTERNATIONAL ARBITRATION"

By Sanam Pouyan and Renaud Grenier

On Monday the 28th of March 2022, the first day of the 6th Paris Arbitration Week, Curtis, Mallet-Prevost, Colt & Mosle ("Curtis"') hosted a seminar introduced by Geoffroy Lyonnet (Partner at Curtis) on challenges to be considered when defending States in international arbitration. The panel, which was moderated by Simon Batifort (Partner at Curtis), included Marie-Claire Argac (Partner at Curtis), Jaroslav Kudrna (Head of the International Arbitration and Investment Protection Unit, Ministry of Finance of the Czech Republic), Claudia Salgado Levy (National Director of International Litigation and Arbitration, Attorney General Office of Ecuador) and Jeremy Sharpe (Independent Arbitrator, formerly Chief of Investment Arbitration in the Office of the Legal Adviser at the U.S. Department of State).

By way of introduction, Mr. Batifort mentioned the rise of Investor-State Dispute Settlement ("ISDS") cases in the last three decades due to both the advent of International Investment Agreements ("IIAs") and Third-Party Funding ("TPF").

The floor was first given to Mr. Jeremy Sharpe. According to Mr. Sharpe, one of the biggest challenges arising from the ISDS system, as opposed for instance to the WTO system, is its lack of institutionalization either at the international level or at the domestic level. At the international level, Mr. Sharpe stated that the non-institutionalization of the ISDS system was notably due to the absence of a set of rules applicable to all States. As pointed out by Mr. Sharpe, the lack of institutionalization is indeed a structural challenge in itself as States are left to organize themselves, but it is also the source of other challenges.

The floor was then given to Dr. Claudia Salgado Levy. Dr. Salgado Levy, whose opinions should not be attributed to those of the Republic of Ecuador ("Ecuador"), started with some preliminary remarks on Ecuador's experience of ISDS. Since the 2000s, Ecuador has faced 30 investment arbitration cases and 25 commercial ones. At first, Ecuador did not have any State agencies dedicated to ISDS claims. Often, investors were not aware whom to notify about the dispute. Dr. Salgado Levy emphasized Ecuador's unfamiliarity with the ISDS system and notably referred to the importance of the choice of a specialized counsel to illustrate her statement. Nowadays, Ecuador is well familiarized with the ISDS system. The Office of the Attorney General now has a division of 12 people used to handling international investment claims, in collaboration with external and local counsel.

Dr. Jaroslav Kudrna was then called upon to contribute to the discussion. By way of introduction, Dr. Kudrna, whose opinions should not be attributed to those of the Czech Republic, pointed out a few general challenges before addressing two specific ones. Generally, Dr. Kudrna referred to the fact that notices of dispute often provide limited information to States, the absence of enough materials to enter into negotiations and the fact that States often receive many notices of disputes that do not turn into actual requests for arbitration. Dr. Kudrna then addressed several specific challenges more in depth.

The first challenge faced by States in arbitral procedures occurs during the document production request stage. Often, investors bring claims on events that occurred decades ago due to the absence of any statute of limitation rules in IIAs. The era of digitalization of official records and documents being rather recent, the process of going through ministry archives can be very challenging for States, from both a work and time perspective. Moreover, the requested documents may have been shredded. In addition, Dr. Kudrna highlighted that contrary to investors' beliefs, different State organs have generally limited access to one another.

A second challenge faced by States in arbitral procedures concerns the freedom of information request. Finally, Dr. Kudrna referred to the fact that increased transparency may lead public officials to refuse to testify in a case if they

know their testimony will be made public. This may ultimately be detrimental to the State's defense. By contrast, witnesses for the claimant, often being employees of the claimant's company, may be more motivated to testify.

Dr. Salgado Levy was the second speaker to list what she believes constitute challenges faced by States in ISDS claims. Dr. Salgado Levy referred mainly to 3 challenges.
The first challenge is in connection to frivolous claims which, in her opinion, have increased with the advent of TPF. Dr. Salgado Levy deplored the abuse of process by investors who frequently engage in parallel proceedings and/or parallel arbitrations. For instance, Dr. Salgado Levy stated that Ecuador received 27 notices of dispute while it was denouncing its Bilateral Investment Treaties.
The second challenge relates to the lack of coordination between public entities and the difficulty to hear public officials as witnesses, echoing Dr. Kudrna's previous observation.
The third challenge concerns the lack of arbitrators and the possibility of being subject to the same arbitrator in two different cases. Indeed, if an arbitrator finds that there has been a denial of justice by Ecuador in one case, it is more likely that they will find a denial of justice in the other.

Ms. Marie-Claire Argac made the point that some challenges inherent to the very nature of ISDS can be mitigated by an early and smart recourse to outside counsel. Such challenges arise firstly from the very tight timeframe for the composition of the tribunal, which may have important consequences later on. Secondly, the preparation and information asymmetry between claimants, who have spent months if not years building their case, and the respondent State, which often only really learns about the specifics of the claims in the memorial on the merits, creates a disparity that can even hamper the exercise of certain rights, such as the early dismissal of claims "manifestly without legal merit" under the ICSID Arbitration Rules. Finally, echoing comments made earlier, Ms. Argac described the State's difficult evidence-gathering exercise.
Getting specialized legal advice early on and through every step of the process is Ms. Argac's first of five recommendations to States. Of course, such counsel should be carefully selected based on relevant experience and sensibility to the interests of States. It is also important to be cautious in the pre-litigation phase, while trying to gauge the seriousness of the claims. The retained counsel should be granted facilitated access to evidence and to potential witnesses to mount an effective defense strategy. Finally, Ms. Argac called upon claimants, tribunals and arbitral institutions to ensure that the current trend of pushing towards more expediency in international arbitration does not prevent the State from effectively defending itself.

The PAW being, after all, a practitioner's gathering, Dr. Kudrna was asked in turn to give insights on what States value most in their international arbitration outside counsel. In the Czech Republic, the Arbitration unit preselects 5 law firms of different profiles depending on the specifics of the case and asks for an *appel d'offre*. The State is particularly interested in experience, understanding of the State's point of view, excellent pleading skills reflecting both confidence and humility, and adaptability in their counsel. It is a true collaboration rather than a performance on the firm's side. Tangentially, the State needs to trust that the lawyers care about the case and the State, which can be evidenced by maintaining a good client relationship and allowing State officials to practice drafting skills for instance. Finally, an ability to manage the costs and to keep the man-hours where the State actually needs it is also appreciated.

TUESDAY

"COMPLIANCE: CORRUPTION AND CLIMATE CHANGE – HOW DO LEGAL SYSTEMS ADAPT?"

Par Yasmine Gilbert-Sastre

On Tuesday 29th of March 2022, Jones Day hosted a seminar on "Compliance: Corruption and Climate Change – How do legal systems adapt?". The first panel, focused on corruption, was moderated by Claire Pauly, Counsel at Jones Day, and was composed of Professors Mathias Audit and Marie-Anne Frison Roche.

Professor Audit explained that there is a large consensus in the arbitration community to ban any criminal offense related to international commercial and investment arbitration. But a few decades ago, the international community didn't show concern for the issue. That changed after the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) and the United Nations Convention Against Corruption (Merida Convention), two conventions against corruption, were adopted, respectively in 1999 and 2003.

To fight against corruption, arbitrators had to create a new system. They are not prosecutors, so they based the proof system on red flags (ex. compensation, the proportion between the work and the compensation, the macro-economic red flags). New rules give tools to fight corruption, such as the International Chamber of Commerce Rules on Combating Corruption and the Practical Guide for Collective Action against Corruption by the Basel Institute of Governance. Thus, corruption is usually determined through a specific system based on red flags provided by institutions' guides.
The main issue lies in the proof of corruption, which is explained by the various legal systems and their different standards of proof. However, a qualification of "corruption" should not be taken lightly because it can cause serious repercussions following the rendering of the sentence.
The role of compliance's rules in the proceedings was also part of the discussion. Professor Audit added that the compliance obligation must be in the contract or in the law governing the obligations because it does not "come from the sky".

On this matter, Professor Frison-Roche clarified the difference between criminal law and compliance rules. Compliance law requires large companies to change, to update the economic system. It does not have the same purpose as criminal law, which is to prevent the crime of corruption and concerns everybody – not only large companies. Furthermore, Professor Frison-Roche explained that compliance is a new branch of law, with the purpose to protect the economic system. Also, due diligence is the central concept of compliance: companies have an obligation of means (*obligation de moyens*) to prove the efficacy of their actions.
Professor Frison-Roche concluded that corruption and climate change are in effect the same for compliance law, where the goal is to prevent systemic risks.

The second panel related to climate change was moderated by Michelle Bradfield, Partner at Jones Day in London and was composed of Ben Juratowich QC, Eliseo Castineira and Françoise Labrousse.

Ben Juratowich QC outlined the law of the sea and its importance for climate change, illustrating his statement with the twelfth part of the UN Convention of Montego Bay, which deals with the protection of the sea. This obligation is an obligation of result and not of means, differing greatly from compliance. There is a positive obligation to protect and prevent the pollution of the marine environment: States have the due diligence to avoid negatively impacting the sea. Although the rules exist, it still leaves gaps. He concluded his presentation with questions, which remain unanswered: What will happen if all the territory of a State is flooded? And without habitable territory, is the State still a State?

Then, Eliseo Castineira explained that we have an international norm of climate change with for instance the United Nations Framework Convention on Climate Change and the Paris Agreement, as well as the International Centre for Settlement of Investment Disputes (ICSID). Under French law, the vigilance law contains a provision protecting

climate. Also, arbitrators dealing with climate change must have the same posture as when they deal with corruption. For Eliseo Castineira, arbitrators must have some relevant scientific knowledge. If they are not familiar with basic science, it will be difficult to deal with climate change issues.

Finally, Françoise Labrousse presented climate change issues in domestic-court litigation. She revealed that there are several cases of climate change litigation in the United States but with little chance of success. In Europe however, there are fewer cases, but with a higher chance of success. She explained that these cases deal with, for example, duty of care, corporate security claims, and human rights with a role played by Non-Governmental Organizations. In many cases, environmental issues were taken into account through human rights. For example, in one case, *Electricité de France* has been sued in France for a project in Mexico for insufficiency of discussion with local population and compliance with local law. The claim was not based on climate impact, or the environmental damages done in the case, but on the rights of the local population.

"INTERNATIONAL ARBITRATION: THE MECHANICS OF PERSUASION AND HOW DECISIONS ARE MADE"

By Aysha Saleh and Ludovica Ludovici

On Tuesday March 29th, as part of the 2022 edition of Paris Arbitration Week, Hogan Lovells organised a hybrid in-person and virtual seminar entitled "International arbitration: the mechanics of persuasion and how decisions are made". The seminar's panel consisted of four speakers, two from a scientific background (Dr. Thomas BORAUD and Dr. Mihael JEKLIC), and two being leading arbitration practitioners (Dr. Wolfgang PETER and Prof. Maxi SCHERER). The event was introduced by Thomas KENDRA, partner, and moderated by Melissa ORDOÑEZ, Counsel, both part of Hogan Lovells' international arbitration team in Paris.

The first speaker, Dr Mihael JEKLIC, Director of Professional Skills at King's College London where he teaches strategic decision making and negotiations, explained how part of the process of decision making is unconscious, even when it came to making legal judgments. Dr JEKLIC began the discussion with an explanation of the extraneous factors that came into play in judicial decisions. He started by presenting a chart based on a study of judges' decision making on heavy offenders and whether they should be granted parole. The chart showed that the first offender being judged had a non-conviction rate estimated at around 64%. However, this percentage slowly decreased as time passed, until it reached 0%. Other conviction peaks could be noted, which would usually be preceded by breaks. Conviction rates could therefore be linked to the judges' eroding attention span, rather than the material elements of a case.

Dr JEKLIC then went on to explain the framework of decision making. He stated that the brain processes could be split into two systems (a theory developed by Kahneman): an automatic system (system 1) and a controlled one (system 2). He explained that the first system is a quick, effortless, and unconscious process that we are not aware of, save from the output. Examples include understanding a language or having visual perception. The second system is a slow, effortful, and conscious process. The second system requires us to become actively engaged and is therefore very exhausting, as such, the human brain can only support a limited capacity of it. He further stated that judgment is underpinned by both the controlled and automatic systems. However, it bore noting that system 2 could override system 1. As a result, to be persuasive at a system 2 level, one needs to be clear, concise and tell a story that is clear to understand. He revealed that system 2 often offered little guidance, especially in the face of two equally persuasive narratives. With system 1, however, there is often no introspective insight as it is very difficult to grasp and it cannot be controlled.

Dr JEKLIC then went on to explain the concept of epistemic trust, which is linked to the idea that knowledge is passed down from generation to generation. This notion is part of an evolutionary selected adaptive cognitive system. He explained that the brain places trust in information shared by another person. Examples include the action of shaking hands or toasting: we do not know why we do it, but the information has been passed on, and we recognise it as relevant. This behavior can be triggered by ostensive cues, which may make one feel that the person who is talking to you really understands you and feels what it means to be you. This trust can be artificially forged by calling someone by their name or looking them in their eyes.

Dr Thomas BORAUD, Director of the Institute of Neurodegenerative Diseases (CNRS) and author, further detailed what happened in the brain when decisions are made.

Dr BORAUD indicated that the three questions that neurologists tried to answer when analysing how the brain works during the decision-making process are: 1) the network of decisions 2) the origin of rationality and 3) identifying the underlying substrates of Kahneman's 2 systems. He stated that a so-called "actor-critic" model is used to analyse decision making.

Noting the several processes involved in decision making, the conversation went on to hear the views of the two arbitration specialists, who, as leading arbitrators, are very much involved in decision-making.

Dr Wolfgang PETER, Partner at Peter & Kim first shared his experience. He pointed out that it is common for the arbitrator to have already formed a view of a case before the arbitration process went to the post-hearing stage. During the main hearing, arbitrators usually discuss among themselves and develop their views: they have lunches, sometimes dinners, and can aside half a day or an evening to progress in an arbitration. These discussions consequently raise questions, which they normally would raise with the parties, and the answers could assist them in forming an opinion.

He stated that arbitrators are not necessarily fully rational, as they are not "machines" programmed to mechanically apply the law. In his observation, arbitrators may be influenced by education, background, opinions on political, economic, and social and financial issues. They sometimes are influenced by feelings of social responsibility. An important issue over the last year was corruption, and the very strong feeling that something ought to be done about it. In his understanding, a truly professional arbitrator will make great efforts to work objectively. He mentioned that one can always speculate about the arbitrator's consciousness, bias, or prejudice, and sometimes it may be possible to perceive how an arbitrator thinks, i.e. through the way questions are put forward and the timing of when those questions are asked. He also opined that as arbitrators are appointed by the parties, they could be tempted, in some degree, to give support or loyalty to the party which has appointed them. Nonetheless, the system creates checks and balances, which make an essential difference.

Moving forward, Professor Dr. Maxi SCHERER, Vice President of the London Court of International Arbitration and Professor of Law at Queen Mary, University of London, was asked about her views on cognitive balance in the arbitration process.

She mentioned that lawyers in general are very sceptical, and the legal training they have received is about rationality, certainty and predictability, therefore usually believing that system 2 is used when making decisions. The decision-making process, should, in theory, therefore, be rational, deliberate, and calculated. She elaborated that this thinking might entirely be flawed because lawyers also have their intuitive systems but are unaware of it as there is no cognitive control over it. She added that it is important to know how our brain functioned and how one's given biases could be counteracted. She gave an example of hindsight bias and pointed out that even if lawyers have information, i.e. certain facts in advance, this should not influence the decision and consequently any measures. Another form of bias she mentioned was that of confirmation bias. - stating that once we form a view on something, we might too often only read or access subsequent information in order to support the view that we have already formed. She therefore stressed the importance of keeping an open eye and mind whilst going through the proceedings and being mindful not to come to any conclusions when only half of the evidence is present, but to wait until the submission of both parties' pleadings. This is because once you have formed a decision, even if only tentatively, in discussing views amongst the tribunal members, it will be harder to deviate from that view because of this confirmation bias.

Turning now to effective persuasion strategies, Dr W. PETER was asked to give tips on what to do and not to do when it came to persuasion. He stated that advocacy skills make a difference in complex situations where a tribunal is facing a dilemma. He stated that cases must be presented with clarity and comprehensiveness and be persuasive enough to have a decision in your favour. Prof. Scherer agreed with this, further suggesting that, when structuring arguments, one should probably present the strongest argument first, before moving to a weaker one, and ending with a strong point.

WEDNESDAY

"CHINA, HONG KONG, SINGAPORE: WHAT'S NEW IN THE ASIAN ARBITRATION LANDSCAPE?"

By Léa Boudissa and Elisa-Marie Goubeau

On Wednesday 30th March 2022, DS Avocats hosted a seminar on the developments occurring in the Asian arbitration landscape as part of the Paris Arbitration Week 2022. Moderated by Alexis Mourre (Partner at Mourre Gutiérrez Chessa Arbitration), the panel, composed by Anne Severin (Partner at DS Avocats, Shanghai) and Olivier Monange (Partner at DS Avocats, Singapore) discussed about what the Asian continent holds for the future practice of international arbitration.

To set the stage, the moderator introduced some statistics reflecting Asia's thriving economic growth over the past few years, relying on the 2021 International Arbitration Survey published by White and Case and Queen Mary University of London. It appears that the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) stand out as the second and third most preferred arbitral institutions after the International Chamber of Commerce (ICC). By the same token, Singapore was selected along with London as the most preferred seats for arbitration followed by Hong Kong in second place.

Alexis Mourre asked firstly about the impact of the Chinese culture on the arbitration process. According to Anne Severin and as a result of the deep-rooted influence of Confucianism, two key aspects must be kept in mind: harmony and confidentiality. As a matter of fact, resort to judicial or legal forums is not always the first option for Chinese people to solve their disputes. To demonstrate that legal proceedings are impacted by those features, Anne Severin highlighted the importance of mediation in China. She explained that not only the judge can, at all stages, ask for mediation proceedings but judicial mediation is also mandatorily included as part of the Chinese civil procedural law before going to trial. Additionally, as an incentive, the Chinese judge himself is evaluated through the number of cases resolved by mediation. This practice stands in sharp contrast with arbitrators and parties *ex parte* communications which are frowned upon in France.

The second question related to the Chinese arbitral institutional landscape. Anne Severin listed the four main institutions: the China International Economic and Trade Arbitration Commission (CIETAC), the Shanghai International Arbitration Center (SHIAC), the Shenzhen Court of International Arbitration (SCIA) and the Beijing International Arbitration Center (BIAC). She commented that the best choice remained the CIETAC to the extent that it is the oldest institution with the strongest experience and has the most sophisticated approach to administer international cases. For example, the CIETAC rules authorize to administer a single arbitration for multiple contracts.
To a question on the major drawbacks of such institutions, Anne Severin shared that, unlike other international institutions, where it is mandatory to choose arbitrators among the pool of the Chinese institutions, CIETAC arbitrations allow to select an international arbitrator outside of the CIETAC's pool. This appointment remains subject to the approval of the President. To avoid for a panel to be composed of only Chinese arbitrators, it is advised to indicate in the arbitration clause that the arbitration tribunal shall be constituted of three arbitrators from different nationalities. It is also strongly recommended to specify the language and the governing law of the arbitration if one wants to bypass the compulsory application of Chinese language and law.

The panel then focused more in detail on the future improvement of the Chinese's arbitral framework and the efforts made to align with international standards. Olivier Monange stressed out that there is still progress to be made even if positive efforts have been achieved on this matter. Indeed, for the time being, Chinese arbitration law provides that arbitration commissions must be approved by Chinese domestic authorities. Such approval has not been obtained for a foreign arbitral institution yet preventing the possibility for those institutions to arbitrate in Mainland China.

However, Olivier Monange added that some recent improvements have been reached. A Supreme Court decision of 2013 allowed for the first time an ICC arbitration in Shanghai as the dispute was between a domestic and foreign party. In any case, if one wants to conduct arbitration proceedings with a seat outside of China or under the auspices of an international institution, a foreign element is required. Similarly, two decisions handed down in 2020 by Shanghai and Guangzhou Intermediate People's Courts allowed the administration of SIAC and ICC arbitrations seated in China. The identification of a foreign element was determining. The facts need to be stressed out as in the case at hand both parties were foreign investment enterprises operating in a free trade zone of Shanghai. Such elements allowed the Court to confirm the dispute's foreign related nature of the dispute. It was also noted that most of the time in China, one must create a domestic subsidiary. Hence, this subsidiary as subjected to Chinese law often fails to qualify as a foreign element.
If current discussions are taking place at the Parliament to provide this possibility into the arbitration law, uncertainty remains as to the status of the award issued under foreign arbitration institution rules in China as the current legislation provides for three categories of awards: domestic, foreign-related and foreign. Olivier Monange also made a reference to the Hong Kong-Mainland China Arrangement on Interim Measures. Before the implementation of this arrangement, if an arbitration had a seat outside of China mainland, Chinese courts would have refused to issue and enforce interim measures. This is still the case at the exception of Hong Kong. The ICC was approved by the Supreme People's Court under this framework. This initiative is a step toward creating a more welcoming environment for non-Chinese arbitrations.

Alexis Mourre then asked Anne Severin whether Chinese law is a good choice as the governing law in the contract. She noted that it is often mandatory but Chinese courts have resorted to the principle of closest connection if conflict of laws occurred, aligning themselves with international practice. She also recalled that China ratified the Vienna Convention on Contracts for the International Sale of Goods (CISG), and as such, is subject to the treaty's substantive provisions among which major civil law principles. Anne Severin also made some remarks on the 2021 reform of Chinese contract law as recent evidence of improvement. Before this reform, the validity of contracts was still subject to Chinese authorities' approval. From now on, even if the approval has not been achieved, the contract can be valid.

Another topic on which the speakers focused was the influence of China over Hong Kong and the consequences of such situation on the HKIAC as an effective and independent seat of arbitration. Indeed, Hong Kong is losing not merely as a preferred seat of arbitration due to its strong judiciary system but also as international finance center. Both Singapore and Hong Kong led a healthy legislative competition to achieve the most arbitration- friendly framework but the panelists agreed on the fact that the SIAC could benefit from the decline of the HKIAC as it is expected to fall further under Chinese control.
Furthermore, the SIAC concluded various cooperation agreements with other institutions and hosted numerous webinars to increase its international exposure. Thus, Singapore is likely to appear as the safest seat in the region for the future. Nowadays, the SIAC is competing with the ICC by updating its arbitration rules (expedited procedure, early dismissal, emergency arbitrations…) to reflect the current trends and practice in the field. The speakers also elaborated on alternative forums in the region such as the Korean Commercial Arbitration Board, the Asian International Arbitration Centre or the Vietnam International Arbitration Centre, and explained that there is, for now, no emergent international institution that could compete with the HKIAC and the SIAC. For instance, the KCAB has the reputation of providing arbitration services of high quality, but its caseload remains for now primarily domestic.

The moderator then asked to discuss the enforcement of foreign arbitral awards in China and other Asian countries. Anne Severin replied that such process was secured by the establishment of a reporting system. This implies that if a lower court considers denying enforcement, such decision must be referred to a higher court. The refusal of enforcement will ultimately depend on and is centralized under the Supreme Court's ruling. As for other countries like Vietnam or Indonesia, Olivier Monange asserted that the rate of enforcement is low as those countries tend to raise frequently public order issues. Nonetheless, as India recently reformed and improved its legal framework, the country may be considered as a suitable forum for purposes of foreign awards' enforcement.

Lastly, the panelists were asked for tips when negotiating with Chinese parties. Anne Severin insisted on two points. First, one must be willing to spend time to listen, to examine short, mid-term and long-term solutions and to show understanding for the other party's position. Second, it is essential to give space for negotiation.

"THE FAIR AND EQUITABLE TREATMENT STANDARD: UPDATE AND PERSPECTIVES"

By Aurélien Weickert

On Wednesday 30th of March 2022, Jeantet organised a round table on "*The Fair and Equitable Treatment Standard: Update and Perspectives*". The panel was moderated by Dr. Ioana Knoll-Tudor (*Partner, Jeantet*) and was composed of Yuriy Pochtovyk (*Legal Official, Energy Charter Secretariat*), Prof. Kaj Hobér (*Associate Member, 3 Verulam Buildings*), Barton Legum (*Partner, Honlet Legum Arbitration*), Irena Alajbeg (*Croatian Ministry of Foreign and European Affairs*), Nir Deutsch (*Legal Adviser, Israeli Ministry of Justice*), and Lucia Raimanova (*Partner, Allen & Overy*).

There is a considerable evolution of the drafting of "Fair and Equitable Treatment" (FET) provisions in recent years, with more diverse and sophisticated clauses today. New BITs and the ongoing modernization process of the Energy Charter Treaty (ECT) illustrate this evolution. However, certainty regarding the method of interpretation by tribunals and the level of protection for investors has not been reached yet.

The ECT is the most frequently invoked investment agreement and in ECT-based cases, FET is the most litigated substantive protection standard. The current drafting of Article 10(1) of the ECT is open-ended and neither links the FET to international law nor to the minimum standard of international law. The Modernization Group, established in November 2019 by the Energy Charter Conference to start negotiations on the modernization of the ECT including the definition of FET, already held eleven rounds of negotiations (the definition of FET was discussed in seven of them) and two more rounds are scheduled for April and May 2022. At this stage, only the EU has made available its text proposal for Article 10 and the Contracting Parties keep negotiating the definition of FET.

The current evolution of the FET cannot be explained without looking at the history of the ECT. The intention of the parties during negotiations was to draft a *magna carta* for energy, covering not only investment protection but also trade, environment, and transit. As the treaty was concluded in a haste, many provisions remained unclear or lacked thorough legal analysis such as Article 10 on the FET. The panel voiced that there is no perfect treaty, and that the provisions of the ECT will continue to be interpreted on the basis of the Vienna Convention in conformity with Article 2 ECT.

Then, the panel moved onto the FET standard in light of the first NAFTA cases: *Loewen, Mondev* and *Methanex*.[1] Before these arbitrations, no formal position had been taken by the U.S. government on the content of NAFTA's Article 1105. The ordinary meaning approach of Article 31 of the Vienna Convention was used by each claimant in these arbitrations. Because there was no case law at the time, the arbitral tribunals' tasks were to assess the fairness of the incriminated measures.
To the extent that Article 1105 framed the FET as subordinate to international law and the international minimum standard, NAFTA parties used it as a basis for resisting the ordinary meaning approach that was not generally available for contemporaneous European investment treaties. The Notes of Interpretation of Article 1105 adopted by the NAFTA Free Trade Commission in 2001 confirmed this position in a binding instrument. This interpretation provided an analytically rigorous structure for debating the content of the FET.

The panel then discussed drafting formulations of FET clauses in Croatian and Israeli BITs.

[1] *Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, ICSID Case No. ARB(AF)/98/3; *Mondev International Ltd.* v. *United States of America*, ICSID Case No. ARB(AF)/99/2; *Methanex Corp.* v. *United States of America*, UNCITRAL, 3 August 2005

1. Drafting of FET clauses in Croatian BITs

The evolution of the drafting of the FET clauses since the mid 90's up to today had been discussed. In the mid 90's, there was no case law to clarify the meaning of FET or sufficient awareness of the content of the FET. Indeed, case law has led Croatia to notice that an open FET clause can be interpreted broadly.
Four different approaches to the FET were incorporated in Croatian BITs before Croatia's accession to the EU. Because of two arbitrations initiated against Croatia during the EU accession process, where a violation of the FET had been invoked, Croatia reconsidered its investment policy mainly aiming at clarifying existing standards.
The question remains as to how to deal with the FET clauses in the old BITs: amending these provisions to narrow their scope or adopting an interpretative statement.

2. Drafting of FET clauses in Israeli BITs

The Israeli position towards the FET had considerably evolved as illustrated by drafting technique from BITs concluded in the 90's to more recent ones. The panel examined the wording of the FET clause in relation to the interpretation that may have been given to it by arbitral tribunals. Several examples had been given.
The first example was the drafting of the FET clause of the Israel-Georgia BIT (1995) and its interpretation given by the arbitral tribunal in the *Fuchs v. Georgia* case.[2] The second example was a more modern version of a FET clause contained in the Israel-Guatemala BIT (2006) and the arbitral tribunal interpretation in the *IC Power v. Guatemala* award.[3]
Then, the panel had shown that the most recent Israeli BITs (concluded with Japan (2017), South-Korea (2020) and the UAE (2021)) contain different drafting formulations, which raises the question of whether (i) these drafting formulations differ from each other in the level of protection that they provide or (ii) if they mean the same and governments were just reacting to the interpretation of arbitral tribunals.
One possible answer may be found in treaty negotiations where international relations and cultural elements play a role and add a challenge for renegotiating treaties.

The final intervention aimed to consider the effects of three drafting formulations on the outcome of a mock scenario.

1. The first drafting formulation: "*Investments* (…) *shall be accorded fair and equitable treatment*" from the Albania-Israel BIT (1996) is an unqualified clause giving the tribunal some leeway to determine what is fair and equitable.
2. The second drafting formulation is the FET clause of the Canada-China BIT (2012) linked to the minimum standard of treatment. Arbitral tribunals ascribed a meaning to the minimum standard of treatment, but they have been inconsistent in their approach. As the panel pointed out, the interpretation of the minimum standard of treatment tends to be narrower and the liability threshold higher.
3. The third drafting formulation is Article 8.10 of the CETA, favoured by the EU, with a close list of possible behaviours. By such a clause, the aim is to limit the interpretation by arbitral tribunals.

The panel concluded this round table highlighting that the wording of FET clauses is, and will be, of utmost importance. To the last question, whether aiming for a uniform level of protection or a uniform method of interpretation, most of the panellists favoured a uniform method of interpretation with clearly identified criteria providing more predictability to interpret the FET standard.

[2] *Ron Fuchs* v. *Republic of Georgia*, ICSID Case No. ARB/07/15
[3] IC Power Asia Development Ltd. v. Republic of Guatemala, PCA Case No. 2019-43, §583.

"DUTY OF GOOD FAITH IN CONSTRUCTION CONTRACTS AND HOT TOPICS IN CONSTRUCTION ARBITRATION"

By Alice Astore and Gökberk Tekin

On Wednesday 30th March, Kroll hosted a seminar focusing on the scope of good faith in relation to construction contracts, followed by a discussion on the recent trends in the field of construction arbitration. Kroll's most well-known construction specialists had the opportunity to share their views on the aforementioned topics along with guests from leading Paris law firms.

As the title suggests, the seminar was divided into two sections. The first panel, made up of Christophe GUIBERT DE BRUET (counsel at Lalive), Annet VAN HOOFT (arbitrator), Benjamin FOWLER (Barrister at 4 New Square Chambers), Toshima ISSUR (partner at Pinsent Masons) and moderated by David FALKENSTERN (director at Kroll), began by providing different points of view concerning the notion of good faith. From a civil law perspective, good faith has a quite specific scope of application. A party cannot rely on good faith in an abstract way.

Taking Swiss law as an example, good faith is not directly applicable or invocable by parties. Instead, a contract which specifically refers to good faith is required. Article 2 of the Swiss Civil Code states that *'every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations'*. This principle is mandatory and cannot be waived. Yet, under Swiss law, the parties are free to weaken the duties that this obligation may entail. Furthermore, under Swiss law, the principle of good faith serves as a foundation for several principles. The main one is the rule of objective interpretation of contracts, which in practice is the primary rule for contract obligations' interpretation based on the subjective intent of the parties. Then, there are the rule of proportionality, duty of collaboration and usually duty of loyalty as well.

Shifting to the French perspective, good faith goes hand in hand with the legitimate expectations of the parties. Even the delay in certifying the payments is prejudicial to the contractor. Good faith in a certain way fills gaps, completes the contract and makes sure that it is executed in a reasonable manner. However, there is a sort of tension between the parties' freedom and the good faith principle. Such tension is usually the starting point of the dispute.

The speakers then moved to the Common law perspective. It has been argued that themes as the issuance of an IPC in a reasonable time fall more within the sphere of commercial common sense rather than of morality. It is illustrated by the fact that in a construction there is no reference to good faith, and it is preferable to use more concrete terms: i.e. collaboration, and mutual trust. Thus, in the Common law jurisdictions, the focus is put on specific clauses. The nature of good faith is inherently situational and, consequently, a lot of common lawyers are unfamiliar with the good faith obligation. Thus, the question of whether something is or is not outside the concept of reasonable contemplation of the parties when entering the contract will always remain.

A few caveats were also noted regarding the model contracts. A particular emphasis was placed on the FIDIC Red Book, which has undergone many additions over time. In the 1997 version, there is no reference to good faith. In order to come close with the notion of good faith, one must find a reference to equitable principles, in the context of employer liability for instance. In the 1999 edition, there is a reference to bad faith in the context of Dispute Adjudication Board (DAB) liability. On the contrary, in the 2017 version, there was a reference to good faith: in the context of dispute resolution, one has a duty to cooperate in good faith with the Dispute Avoidance/Adjudication Board (DAAB). It is interesting to note that in another article, there is a duty for the party to cooperate with the other party to form the DAAB, but no mention of good faith is made in that provision.

The panelists provided some illustrations. One of them dealt with the theme of contract management. In an ongoing arbitration case, the contractor started to perform the additional work and the employer failed altogether to instruct variations, but ended up approving the variation and paying the additional work, with significant delays however. The variation was about around 7 billion US dollars and the difficulty lied with the way to deal with the tension between conserving good relationships and doing what would make commercial sense. The contractor ended up self-funding the works. The good faith principle was advanced since such principle, and its corollary which is the duty of coherence, will mandate the employer to pay for the variations.

The second part of the panel consisted of three sub-sections (namely live construction phase, pre-arbitration/ post-construction phase, and lastly arbitration phase) in which the panelists shared their insights on certain topics introduced by the moderator Mr. Ewen MACLEAN.

Within this agenda, the discussion started with the insights of the panelists on the increasing material costs and their effects on the construction. Mr. David COYNE emphasized the effects of such an increase on disruption, and further pointed out the importance of record-keeping in the disruption claims. Then, Ms. Maude LEBOIS noted that the increase of material costs on the contract prices may vary from one jurisdiction to another, especially in the light of statutory hardship clauses with the instances from France case law. Later, Andrew ROBERTS, from a third-party funder perspective, noted that the referred increase in the costs primarily affects the financial situation of the parties which may be eased by the help of third-party funders. Lastly, Dr. Sally EL SAWAH emphasized further the importance of the applicable law and compared the applications from Egyptian law (which includes a statutory hardship clause for construction projects) and Moroccan law (which does not offer a statutory hardship clause). She further compared the public and private contracts in terms of price revision and concluded with the potential benefits of providing flexibility to public bodies through regulation.

Furthermore, Ms. Maude LEBOIS shared her arguments regarding the use of model forms of contracts in construction projects and whether such a contract may be effective in reducing the risk of conflicts. According to her, while using the model forms of contracts, three specific precautions should be taken to avoid disputes, which are: choosing the right model to meet the needs of the project, being cautious in amending the model forms of contracts, especially without the revision of a lawyer, and lastly not overseeing the effects of the applicable law to the specific model form chosen by the parties.

Following this topic, Mr. Andrew ROBERTS shared his insights on litigation/arbitration funding and pointed out that although in most cases third party funding involves the compensation of the raw costs of running a case, there is also a shift to consider claims as an asset and consider proportions for deciding the amount of investment. This led the funders in some cases to offer more capital than needed or carry out portfolio-based-funding for multiple claims.

As for the issues raised during the arbitration, the panelists firstly presented their insights regarding the comparison between the party-appointed experts and tribunal-appointed experts. Ms. LEBOIS, in this regard, noted that even if the tribunal appoints an independent expert, parties still tend to appoint their respective experts and in any case, tribunal-appointed independent experts tend to receive the preliminary draft reports from the parties. Therefore, she contended that the tribunal-appointed experts do not increase the effectiveness of the arbitration process. Following that, one of the trickiest issues regarding the party-appointed experts was pointed out by Mr. COYNE: the cases in which the party-appointed expert does not concur on the grounds of the case/facts. However, even in this case, Mr. COYNE asserted that the solution is not tribunal-appointed experts but rather solid communication between legal teams, clients, and experts.

In the session, the panelists also elaborated on the latest trends in construction projects, the stage of involvement of the experts in the construction projects, the appointment of technical (non-legal) arbitrators as well as the effects of the COVID-19 pandemic and climate change on construction disputes.

"FAST&FURIOUS: BEST PRACTICES IN ARBITRATION FROM A CORPORATE COUNSEL'S PERSPECTIVE"

By Marilena Tsiantou and Laura Coriddi

On Wednesday 30 March 2022, Patricia GARCIA (Senior Legal Counsel at VINCI Concessions / VINCI Airports), Maria Irene PERRUCCIO (Counsel for international disputes at Webuild) and Karl HENNESSEE (Senior Vice President, Litigation, Investigations & Regulatory Affairs at Airbus) were invited at the 4th edition of Freshfields fast-paced discussion on the best practices in arbitration from a corporate counsel's perspective. The session was introduced by Christophe SERAGLINI and the discussion was coordinated by Alexandra VAN DER MEULEN and Vasula SINHA (all of - Freshfields).

Panelists were given approximately one minute to respond to a series of questions on the following topics: the perspective of the in-house counsel as users of international arbitration, recent changes and future trends in both commercial and investment arbitration, the efficiency of arbitration, diversity and the push for greener arbitration.

To start, panelists were asked about notable developments or trend that they experienced in arbitration in the last 24 months. The panelists noted an increase in the use of online tools, the impact of the COVID-19 pandemic having contributed to this phenomenon. They acknowledged the growing prevalence of remote working tools in arbitration, but also expressed doubts about their effectiveness in certain aspects of practice, where personal relationships or interactions are important, such as cross-examination or contract negotiations. They also noted that unfettered use of online tools can, to some extent, discourage settlement between the parties. The panel thus did not endorse the idea that virtual hearings would or should develop as the procedural default in arbitration. As a procedural trend, the panelists mentioned the fast-track rules and highlighted the efficacy of those used by the ICC.
One of the speakers was asked to answer what she considered most important when negotiating the governing law and dispute resolution clauses of a contract. In her view, the most important element was the applicable law, the arbitral seat and then arbitral institution.

The discussion moved to the question of the advantages of arbitration over litigation. The panel noted the advantage of the final and binding decision of the arbitral tribunal and the ability to choose a "judge" with relevant technical and industry-specific knowledge.

As an add-on, the panelists were asked to identify the key issues they looked at when appointing an arbitrator. Apart from the general characteristics, the panelists highlighted the importance of subjective criteria such as an arbitrator's soft skills, and the need for diversity. As one panelist noted, diverse tribunals were desirables because they resulted better decisions. The panelist also confirmed that while databases such as Jus Mundi – offering comparative analysis and a lot of data – were useful in the arbitrator selection process, they ultimately relied on their own experience and that of their counsel.

The speakers were also requested to opine on the use of witness evidence in the context and noted that, although being a witness was a stressful and a time-consuming process, and that the witness evidence has its limits in terms of the limit of human memory, they did consider it an important part of the arbitral process. Turning to the topic of expert witnesses and the idea of limiting them to the tribunal-appointed experts, the speakers agreed that parties would always need their own experts (on an advisory basis even if they were not permitted to testify) such that such a procedural development would be unlikely to reduce the costs of arbitration. They also mentioned the so-called "Sachs protocol", which contemplates the parties drawing up a list of possible experts, from which the tribunal will appoint one. The panelists said that this practice is particularly effective when the parties trust that the tribunal will not outsource their decision to the expert and where the arbitrators have expertise and knowledge of the technicalities of the case.

The panelists also addressed the topic of "greener arbitration" and how the use of virtual hearings and reducing reliance on paper can assist with that goal. They also touched on the so-called Green Pledge and Green protocol for arbitral proceedings.

The discussion returned to the importance of diversity in arbitration and how the arbitral institutions have been contributing to this when appointing arbitrators, thus, also encouraging diversity in appointments made by counsel.

The conversation also tackled third-party funding and the efficiency of the arbitration proceedings and, specifically, concerns over a general sense of skepticism vis-à-vis fast-track rules and hope for an increase in the efficiency of emergency arbitration.

To conclude, the panelists were asked what they hoped for in the future of arbitration and they expressed their desire for more settlements, final decisions and increased costs and time efficiency in the whole procedure.

The discussion was followed by a brief Q&A session.

"ARBITRATION IN WESTERN AND NORTHERN AFRICA: INSTITUTIONAL PERSPECTIVES AND LEGAL DEVELOPMENTS"

By Nour El Ghadban and Júlia Puy i Canut

On Wednesday 30th of March, in the 2022 edition of the Paris Arbitration Week, Reed Smith hosted together with AfricaArb a bilingual webinar moderated by Athina Fouchard Papaefstratiou and Guillaume Aréou, on the topic of arbitration in Western and Northern Africa. The discussion included various panellists from across the continent possessing a wide array of institutional and independent experiences, in different jurisdictions. The webinar was divided into two panels: one discussing the leading arbitral institutions in the region, and one discussing recent substantive developments regarding arbitration in Africa.

In the first panel participated Bintou Boli (President of the Association of African Centres for Arbitration and Mediation (AMCO)); Diamana Diawara, (Regional Director of the African branch of the International Chamber of Commerce (ICC)); Ismail Selim (Director of the Cairo Regional Centre for International Commercial Arbitration (CRCICA)); and Oluwatosin Lewis (Executive Secretary of the Lagos Court of Arbitration (LCA)).

In the second panel participated: Prof. Dr. Mohamed Sameh Amr (Chair of the International Law Department at Cairo University); Clément Fouchard (International Arbitration Partner at Reed Smith, founding member of AfricArb); Affef Ben Mansour (Tunisian Arbitrator and Practitioner); and Tolu Obamuroh (Associate at White & Case, LCA expert).

In the first panel, the panellists gave a short statistical analysis of their respective institutions. They compared previous years, confirming that the number of cases under their auspices has reached a steady increase, with a huge volume relating to construction and energy contracts. The panellists also compared the situation of the legislation in Egypt, Burkina Faso, and Lagos.

A question was then asked concerning the presence and future of mediation in Africa, with the panellists agreeing that the arbitration route is the most commonly used in the region, with each remarking on the importance and rising nature of mediation in dispute settlements. When asked whether mediation was favoured due to a potentially difficult execution in the African country of choice, all panellists were in agreement that, according to the statistics, the parties with a tendency to favour mediation were non-African parties. Nonetheless, there is surely a willingness to go to less constricting alternative methods of dispute resolution, with a proportion of cases being settled, as well as with the development of expedited proceedings.

The moderator then switched the discussion to the expedited proceedings, where the panellists compared the different systems present. Mr. Ismail Selim stated that the CRCICA is currently in the process of adopting new Expedited Rules, using an opt-in system. That is different from the system adopted by the ICC, elaborated Ms. Diamana Diawara, where there is indeed an opt-in system as well, but also an automatic application of the Expedited Rules should all the criteria be met. Finally, Ms. Oluwatosin Lewis stated that in the LCA, similarly to the CRCICA, there is no automatic application, with an opt-in system in place.

To conclude the panel, Ms. Athina Fouchard Papaefstratiou asked the panellists to state their views on the future of arbitration in Africa is, with the biggest challenge that face the respective institutions and markets today. There was unanimity on the question of costs, specifically post-pandemic, where the percentage of parties who have opted to settle or negotiate is higher than that of the parties who didn't. Also, the diversification of the role of arbitration and the arbitrators, to promote the presence of more African arbitrators, and give them the opportunity to bridge the diversity gap: an "Hold the Door Open" like initiative.

To kick things off in the second panel, the issue discussed was that of the Kompetenz-Kompetenz principle, with light being shed on the tumultuous *SGS v. Benin* case by Mr. Clément Fouchard who made two observations: firstly, that the *res judicata* is now part of the public policy, which differs between countries, and secondly that the reasoning behind the judgement is faulty. Indeed, it fails to address the violation of the Kompetenz-Kompetenz principle established under various OHADA articles, as the arbitration had commenced before the filing of the case with state courts, with no waiver of the arbitration agreement by SGS. This intervention ended with a recollection of recent news where the French Court of Appeals upheld on 11 January 2022 the arbitral award rendered by the *SGS v. Benin* tribunal, ordering the exequatur in France. Bizarrely, in another case dated the same day, *Accor v. Togo*, the CCJA had stated that it was incompetent as the arbitration was already underway. Even though it was decided the same day as *SGS v. Benin,* the Courts reached a different conclusion, reaffirming the Kompetenz-Kompetenz principle.

This was used as a segway to give the floor to Mr. Tolu Obamuroh to discuss the specific developments that have arisen concerning Nigeria. In particular, was discussed the non-arbitrability of public policy matters, and how the Nigerian Court of Appeals recently ruled that disputes arising from tax matters are also not arbitrable as they are the exclusive jurisdiction of the Federal High Court on taxation.

A question was then asked concerning the practice and impact of arbitrators' challenges in Nigeria and in Egypt. Mr. Tolu Obamuroh answered stating that it is not unusual in Nigeria to see challenges to arbitrators based on the arbitrator's misconduct. Furthermore, the Lagos Court specified that said arbitrator must resign: the standard, therefore, being that the tribunal should have recused themselves, with nothing more required. Regarding Egypt, Dr. Mohamed Sameh Amr shed light on the recent Court of cassation judgement that addresses the impartiality and independence of arbitrators. The Court tackled the debate on which court or institution has the competence to address the challenges and finally stated that the internal mechanisms of arbitration centres are indeed competent, strengthening their role in arbitral proceedings. The court ruled that the parties' agreement entailed the application of the agreed-upon procedural rules, including challenges.

During the discussion, the moderator asked about the impending reform of Egyptian arbitration law. Dr. Mohamed Sameh Amr explained the current situation and the ongoing works that are taking place in order to reform the legal framework, pointing to relevant issues such as virtual hearings, enforcement of awards, and the prominence of third-party funders.

To conclude the event, the moderator asked a question in relation to recent developments in Tunisia. Ms. Affef Ben Masour focused on the relevance of the exequatur of arbitral awards. She pointed out the necessity of unifying the process and the requirements of exequatur in order to strengthen arbitration in Africa. Finally, she made a reference to the situation in Tunis and the importance of reciprocity in the exequatur procedure.

"DISPUTES IN THE CARIBBEAN ENERGY SECTOR: PAST, PRESENT AND FUTURE"

By Estelle Boucly and Jannis Tiede

On Wednesday 30 April 2022, the British Virgin Islands International Arbitration Centre (BVI IAC) held, in cooperation with the Energy Disputes Arbitration Center (EDAC), a conference on disputes in the Caribbean energy sector moderated by Hana DOUMAL (registrar, BVI IAC) and Elif DURANAY (vice secretary, EDAC). The speakers in this conference were: Shan GREER (independent arbitrator and mediator, Arbitra International), Calvin HAMILTON (independent arbitrator, Arbitra International), Dany KHAYAT (partner, Mayer Brown), Conway BLAKE (international counsel, Debevoise & Plimpton) and, Ayse LOWE (global head of origination, Bench Walk Advisors LLC).

First off, Calvin HAMILTON began by describing the Caribbean region. The region is essentially defined by its history and culture, which tied it significantly to countries such as England, Germany, France and Spain. Three main political systems can be observed: independent states, which are ancient colonies that have gained independent status; associated states, which are non-independent states that enjoy nevertheless the rights and privileges pertaining to states and their governments; and independent colonies, which are governed by other countries.

Shan GREER then gave a general overview of the situation in the Caribbean. It was explained that, in the region, the transition towards renewable energy was not considered as essential until a few years ago because of numerous petrol concessions granted by Venezuela and the regulatory framework constraining the islands in terms of renewable energies. Two factors are now pushing the Caribbean towards an improved regulatory framework: first, the crisis in Venezuela caused the petrol prices to rise and 'dried up' the petrol alliances. Secondly, climate change has brought disastrous consequences for the islands. For that reason, the Caribbean community (CARICOM) – an alliance of 20 countries of the Caribbean – has created a regional policy of making the energy framework more sustainable by fixing renewable energy objectives that are to be reached by 2030. Among the most ambitious States is Barbados, which is aiming for 100% renewable energy by 2030.

The panel was asked whether the Caribbean had convincing investment incentives. Conway BLAKE noted that it was essential for the survival of the Caribbean to attract foreign investors and to assure the energy transition in particular with regard to climate change. In doing so, the governments have committed to ambitious objectives, yet it is necessary that these are accompanied by reform proposals that will draw investors' attention. The countries must therefore find effective measures that render the energy sector an attractive investment opportunity. Another problem in this regard are monopolies. There must found a balance between private companies and the regulatory space of the governments.

Dany KHAYAT was asked to evaluate these regulatory approaches from an investor's point of view. He highlighted the importance of reliability when it comes to creating government-funded incentives. Drawing examples from the European Union (EU), it was explained how States need to be mindful of taking away those incentives at a later date, since this would give rise to 'legitimate expectation' claims by the investors who have been acting in reliance on the incentives. His key message was: "*as a government, do take into account international law to avoid disputes*".

Calvin HAMILTON was asked about the disputes that took place in the Caribbean over the last 20 years. Giving an overview of numerous purchase share agreement disputes, a notable gas arbitration case and a failed venture between a New York company subsidiary and the Petroleum Company of Trinidad and Tobago Ltd, Calvin HAMILTON carved out the need for a supranational institution that would be able to leverage the energy situation in the Caribbean effectively.

Adding to this, Conway BLAKE and Shan GREER described the balancing dynamic between the governments and the investors: effectively, there is a tension between the two as the regulatory regime is no longer up to date and too

restrictive for today's times. The investor, on the other hand, wants to obtain securities from the government before investing into a new region. To this end, both stressed the need for better transparency during the conclusion of public contracts to avoid a 'politicisation'. Calvin HAMILTON tied this need back to his proposition of a supranational institution that would be able to provide a coherent interpretation of contracts and support inexperienced governments in their investor negotiations.

As for the future of energy disputes in the Caribbean, Ayse LOWE recalled that most of the disputes until now have been construction disputes. She is convinced that there will be a growing number of them in the years to come as renewable energy is such a growing topic. She added that an issue that needs to be addressed is corruption, as it deters potential litigation funders. Shan GREER predicted a rise in disputes mainly in Guyana, Barbados and Jamaica, leaving the question open whether those countries are putting 'the horse before the cart' in terms of their energy transition. More generally, Calvin HAMILTON sees the future of conflicts in the gas and petrol sector, delays in construction contracts and service contracts.

Finally, the panellists agreed on the fact that the Caribbean States need to afford greater economic powers to the private energy sector, as the future lies in the energy transition. With respect to conflicts, the speakers seemed to be steering towards the main idea that it would be easy to implement effective instruments in the region to prevent a divergence between States and investors. This path would achieve what Ayse LOWE stressed towards the very end: "the best thing to do is to avoid a dispute."

"THE CONTROL OF ARBITRAL AWARDS BY THE INTERNATIONAL COMMERCIAL CHAMBER OF THE PARIS COURT OF APPEAL"

By Corentin Boyssou and Colombe Sée

On Wednesday 30 March 2022, Paris, Home of International Arbitration organized a conference under the control of arbitral awards operated by the International Commercial Chamber of the Paris Court of Appeal, (thereafter "ICCP-CA" or "Chamber"). Paris Place d'Arbitrage is a non-profit organization created in March 2009 by major actors of the arbitration community with the aim of promoting Paris as a leading place for international arbitration.

After a welcome speech delivered by Gaëlle Le Quillec (Eversheds Sutherland), newly elected President of Paris Place d'Arbitrage, the conference was inaugurated by a speech of President François Ancel (ICCP-CA). Then it was divided into three panels, respectively on the control of jurisdiction, independence, and the conformity of the award to international public policy, before Carine Dupeyron (Darrois Villey Maillot Brochier) closed the debates.

In his inaugural speech, President Ancel stated that the Chamber is a service provider, but also a value provider. This "duality of functions" can lead to conflict of interests. To put this into perspective, President Ancel advocated for the collaboration and flexibility of the Chamber for a tailor-made dialogue with French and foreign arbitration actors, notably through the use of its protocol. President Ancel recalled that the judge of annulment judges the validity of the award and not the merits. The Chamber adopts a more direct style and does not refrain from referring to the award, the guides of arbitration institutions and foreign decisions. As to the question of the porosity of annulment grounds, President Ancel proposed the introduction of the *electa una via* principle.

The first panel consisted of Elizabeth Oger-Gross (White & Case) and Elena Sevila Sánchez (Andersen) who discussed the review of the jurisdiction of the arbitral tribunal by the ICCP-CA. The discussion was divided into two parts. The first one was related to the control of jurisdiction when based on a bilateral investment treaty (1), and the second one dealt with the question of the extension of the arbitration agreement (2).

1. Regarding the control of jurisdiction based on a bilateral investment treaty, Ms. Elena Sevila Sánchez based her reflection on two recent decisions on that matter (*Libya v. Sté Cengiz*, May 25th, 2021; and *Libya v. Sté Nurol*, September 28th, 2021). After recalling the complaints raised in each of these decisions, Ms Elena Sevila Sánchez drew several lessons from them. On the one hand, the allegations of corruption – whether circumstantial or more specific – that would vitiate the investment and, therefore, the jurisdiction of the arbitral tribunal, fall within the scope of the merits of the dispute and cannot be reviewed on the basis of Article 1520(1) of the Code of Civil Procedure. On the other hand, the standing offer of arbitration contained in the bilateral investment treaty enjoys a material autonomy which makes it independent of any state law or customary international law. Jurisdiction must therefore be assessed solely in the light of all the provisions of the bilateral investment treaty. Furthermore, Ms. Sevila Sánchez deplored the lack of clarification on the scope of the *Schooner* decision (Cass, Civ. 1st, December 2nd, 2020) concerning the invocation of new grounds of jurisdiction before the judge of annulment.

2. In a second part, the emphasis was on the control of the extension of the arbitration agreement. On the one hand, Ms. Elizabeth Oger-Gross recalled that consent can be deduced from the existence of a "common will" (Paris CA, *Dow Chemical*, October 21st, 1983), i.e., a subjective situation. This consent is presumed as soon as a party is aware of the existence and scope of the arbitration clause (Paris CA, 1st Pole – 1st Ch, *Koot Food*, June 23rd, 2020). A question remains as to the degree of knowledge necessary to retain this presumption. On the other hand, direct involvement in the negotiations and performance of the contract – an objective situation – as well as an interest in the benefits may also justify the extension of the arbitration agreement (*Republic of Guinea v. Sté Global Voice*, September 7th, 2021; and *DIPCO and KGL v. Doussan*, November 23rd,2021).

Then the second panel was composed by Philippe Pinsolle (Quinn Emanuel) and Professor Thomas Clay (Clay Arbitration). They discussed the topic of the control of the independence of the arbitral tribunal by the International Commercial Chamber. The debates were divided into four topics, the source of independence review (1), its purpose (2), and the exonerating elements of review (3).

1. Concerning the source of review, Professor Clay referred to a recent decision of the Chamber on this subject (*Sté Chantier Naval Couach*, February 22nd, 2022), deploring the worrying peregrinations concerning the complaints presented to the annulment judge, and proposed the sole use of a special complaint – according to the *electa una via principle* – that of Article 1520(2) of the Code of Civil Procedure.

2. Regarding the subject matter of the review, Mr. Philippe Pinsolle and Professor Clay questioned the scope of the duty of information. The ICCP-CA adopts a casuistic approach about temporal considerations, according to the *Volkswagen* decision (Paris CA, 1st Pole – 1st Ch, *Sté Saad v. Sté Audi Volkswagen Middle East*, March 27th, 2018), and geographical considerations, according to the *Vitadel* (January 26th, 2021) and *Dommo* (February 25th, 2020) decisions. The notion of "known fact" and the scope of the standard of "reasonable doubt in the minds of the parties" operate a paradigm shift. Professor Clay questioned whether the duty of curiosity could be reactivated in case of new elements.

3. On the issue of exemptions from review, the debate centered on the value of a procedural agreement exempting an arbitrator from his duty to inform (*Rio Tinto*, January 11th, 2022). The panelists also recalled that it is necessary to dissociate the person of the arbitrator from the structure in which he or she operates.

Finally, the third panel, consisting of Alexis Mourre (MGC Arbitration) and Ina Popova (Debevoise & Plimpton) discussed the topic of the control of the conformity of the award with international public policy by the ICCP-CA. On the one hand was discussed the scope of the review of compliance with international public policy (1). On the other hand, the panelists focused on the issue of the violation of economic sanctions from the perspective of international public policy (2).

1. On the scope of review, Mr. Mourre recalled the restricted review of the *Thalès* decision (Paris CA, November 18th, 2004, n°2002/19606), which he considered excessive, then the steps leading to the *Belokon* decision (Cass, Civ. 1st Ch, March 23rd, 2022), confirming the choice of a full review (*de novo*), before comparing the French and English approaches through the *Alstom*case (EWHC 1584, June 18th, 2020). The panelists discussed the possibility of modulating control according to the intensity of the breach of international public policy.

2. With regards to international sanctions, the Chamber distinguishes between unilateral sanctions and UN and European sanctions (*Sofregaz*, June 3rd, 2020), which for the latter two, fall under French international public policy. The ICCP-CA also considers a temporal element (*A.D.-Trade*, April 13th, 2021; and *YOGC* October 5th, 2021). In the end, the panelists questioned the links between unilateral sanction, extraterritoriality, and denial of justice.

In her closing speech, Ms. Carine Dupeyron considered the compatibility of French case law related to renunciation and notoriety with the *Beg S.p.A. v. Italy* decision by the European Court of Human Rights, as well as the impact of international sanctions against the Russian Federation on future arbitral awards.

Additional information: The proceedings of this conference will soon be published in *The Paris Journal of International Arbitration* (Lextenso).

THURSDAY

"CHALLENGES IN FUNDING INVESTMENT TREATY ARBITRATIONS"

By Eden Chua and Yanina Vlasenko

On Thursday 31 March 2022, Fieldfisher Paris hosted the seminar "Challenges in funding Investment Treaty Arbitrations", with the panel discussion led by Alexandra UNDERWOOD, Partner in Fieldfisher's London office. The speakers included Christopher BOGART, Chief Executive Officer of Burford Capital, Pelin BAYSAL, Founding Partner of Baysal & Demir, and Sebastian NEAVE, Director of Disputes at GPW.

The topics included:

- How to provide a third-party funder with comfort that an Award will be enforceable;
- Perspectives on third party funding across different jurisdictions and arbitral institutions;
- The approach of arbitral institutions to ordering parties to disclose their funding arrangements; and
- How third-party funders manage risks in relation to funding investment treaty arbitrations.

The panel discussed how a party seeking funding can provide potential funders with comfort that an Award will be enforceable. The panel considered the difficulty of identifying assets at the outset of a dispute, which may or may not be available for enforcement by the time an Award is rendered. The panel considered the fact that it takes on average, more than four years to obtain an Award in an investment treaty arbitration, the reasons that the process has become so lengthy and the associated costs pressure that this places on claimants. The panel highlighted the importance of updating the research on assets available for enforcement as a case progresses and the legal tools available to convert assets into cash to pay the claimant, the funder and the costs. Mr. NEAVE emphasized the need for investigators to employ concrete and realistic strategies to identify assets for enforcement.

The panel discussed the future of third-party funding and the role it has to play in providing claimants with access to justice, particularly against States who are repeat transgressors. Ms. BAYSAL noted that in her jurisdiction clients have good access to third party funding and her view is that it was here to stay. Claimants who have had their assets expropriated, and may even be insolvent as a result, face particular difficulties in funding their own cases. The availability of capital from third party funders is one way that impecunious claimants can access the compensation they are entitled to. The panel noted that third party funders will need to be satisfied that potential insolvency proceedings will not affect their ability to obtain a return on their investment. Not all funded claimants are impecunious however, and Mr. BOGART pointed out that many businesses are unwilling to use their own capital to pursue claims, preferring instead to use the capital available to them to grow their business. The panel discussed attempts by some arbitral institutions to limit access to third party funding. Mr. BOGART observed that the demand for third party capital remains strong and that like water, capital flows to where there is demand.

The panel explored the differing attitudes of arbitral institutions towards third party funding. Ms. UNDERWOOD raised the United Nations Commission on International Trade Law (UNCITRAL)'s draft proposals on the regulation of third-party funding in Investor-State Dispute Settlement. In particular, she noted that the UNCITRAL Working Group has proposed standard wording for an investment treaty arbitration clause that aims to prohibit third party funded claims. The panel then expressed their perspectives on the proposals and discussed whether any clause seeking to limit access to third party capital could be effective in practice. The panel noted that states are not required to introduce these amendments and were not aware of any states that have introduced such wording to date. UNCITRAL's proposals appeared to arise from a concern that third party funding increases the likelihood of frivolous claims. The panel noted that the business model of third-party funders is to fund claims they consider likely to succeed and which therefore represent a good investment opportunity for their investors. Mr. BOGART noted that it would make no sense for a third party to fund a claim that it considered frivolous and highlighted the extensive due diligence carried out by funders before agreeing to fund a case.

The panel considered whether the fact that a party is funded or the terms of the funding arrangement should be disclosed in investment treaty arbitrations. The panel discussed recent case law and the rules of various arbitral institutions on the topic. The panel debated how the identity of a funder might be relevant to the tribunal's identification of any conflicts of interest. Mr. BOGART noted the practical difficulties that arbitrators would face when trying to identify existing relationships between a funder and their firm. The panel discussed various concerns about the disclosure of a funding agreement, which may contain privileged information on strategy, information that is commercially confidential to either the claimant or the funder and, in the case of portfolio funding arrangements, information that is confidential to other arbitrations and other parties. Overall, the panel highlighted that case law is veering towards minimal disclosure.

Next, the panel discussed the impact of a security for costs order on a funding arrangement and the likelihood of a funded claimant being ordered to pay security. Mr. BOGART said that the parties should consider how such an order will be satisfied at the outset because it is a tactical device commonly used by respondents. If the funded party would need funding to satisfy such an order it will come at a cost that will change the economic proposal of the case for both the claimant and the funder and the parties to the funding arrangement should consider whether they wish to proceed in light of the changed economics.

The panel discussed the variety of funding arrangements in the market. Ms. UNDERWOOD mentioned that Fieldfisher can provide funding for cases between $5m - $20m in value in return for a percentage of the damages on success. Many funders in the market would not be interested in funding claims of this size. Law firms can also offer full or partial Conditional Fee Arrangements to share in the risk of the claim and many funders are looking for lawyers who will share in the risk of the claim.

The panel considered common pitfalls in estimating costs and damages in investment treaty arbitration. Mr. BOGART mentioned his experience that experts' costs are often underestimated. Further, he noted that the quantum of damages claims based on a Discounted Cash Flow should be compared to the sunk costs of the investment. Where the DCF analysis results in a claim to damages vastly in excess of the sunk costs, funders will factor in the likelihood of a tribunal awarding the sums claimed.

The panel also discussed the importance of funders, lawyers and investigators communicating with each other regularly as the case progresses.

"RENEWABLE ENERGIES AND ARBITRATION"

By Marilena Tsiantou and Aysha Saleh

On 31 March, as part of the Paris Arbitration Week 2022, Shaparak Saleh (Partner at Three Crowns LLP) invited Dr. Fabien Roques (Executive Vice President and Head of the European Energy practice at Compass Lexecon), Marc Peresse (Head of Legal Offshore Wind at EDF Renouvelables) and Kathryn Khamsi (Partner at Three Crowns LLP) to present their views on the types of conflicts that may arise during the life-cycle of a renewable energy project and the role of arbitration in resolving such disputes, particularly when projects include a cross-border element.

Shaparak Saleh introduced the panel discussion by noting that renewable energy is a growing area of focus for arbitration and pointed out that the transition to renewable energy is not a recent concern. In contrast, the persistent energy crisis, which is manifest in the increase in the price of fossil energies, and concerns about climate change, predate the Russian-Ukraine conflict. This has prompted many governments to increase their renewable energy development ambitions. Lastly, she briefly mentioned the three main topics that would be covered during the conference, namely (i) Financing and Construction in the Renewable Energy Sector, (ii) Off-take arrangements and Economic fundamentals and (iii) Regulation by the States.

Marc Peresse initiated the discussion by demonstrating two crucial elements in financing and construction in the renewable energy sector. First, arbitration will continue to play an increasingly important role in the future as a result of the projects that tend to be bigger and more complex from a technical point of view, including contractors from various jurisdictions. Second, taking an example from his expertise in the construction of offshore wind projects, he referred to the different interfaces one has to deal with when there are multiple contractors. He also stressed that project finance accounts for a significant share of the market, which means that the project must be bankable, whereas the risk allocation in the contract is another key element for the lenders and in addition to this lenders value arbitration.

The expert Fabien Roques, in his turn, added two essential characteristics. First, he stated that the renewable energy sector is a relatively young industry compared to some of the other sources of energy, noting that this may have implications for financing and contracting structures. Secondly, renewables use technologies that have one thing in common, namely a fixed cost heavy on CAPEX and relatively low on running cost, the cost that will be incurred during the life of the project. Finally, he stated that project finance is the dominating approach in the renewable industry.

Additionally, Kathryn Khamsi highlighted that what distinguishes renewable fields from other energy sectors is that they are projects financed by third parties. Thus, in her opinion, since financing is dependent on other contracts and vice versa, disputes might arise relating to financing and the timing of securing financing vis-à-vis the other project contracts e.g., a license, an engineering procurement and construction contract or a power purchase agreement. Thereby, she stressed the importance of attention while drafting the contract, as well as conditions in the contract, identified through her experience, that could help the project company to secure financing through i) conditions precedents, ii) contractual adjustments and iii) allocation of risks.

Marc Peresse pointed out that one impact that can be seen in renewable energy sectors coming with project finance or non-recourse project finance is that of disagreements between the parties. He explained that contracts that are usually negotiated and then approved by lenders before having the financing lead to disputes as "room exists to adjust and take into consideration events which are accrued during the construction phase".

Here, Fabien Roques added that even though renewable projects are highly leveraged and implication exists in their ability to repay the debt, with the evolution in the past twenty years in the banking industry, project financing of renewables has grown leading to sophisticated financing structures offering greater flexibility.

Later in the discussion, the panelists were asked to give their views on off-take arrangements and economic fundamentals, including those of corporate power purchase agreements. In response, Marc Peresse stated that, as there is more and more total or partial market exposure, a way to mitigate or modify the risks on projects as an employer or sponsor is to secure off-take arrangements with big industrial off-takers. What is challenging is that corporate power purchase agreements tend to be limited in time for a few (six or seven) years and such contracts need to take into consideration that there might be market distributions. With the present crisis of electricity and gas, he was of no doubt that this should lead to arbitration proceedings.

Moving forward, Fabien Roques emphasized that in the past renewables were more costly than the alternatives and states had to provide support in the form of a guaranteed buyback at a different price than the market. Now, there has been a move away from a contract backed up by the state to a range of private contracts with some involvement of the state as renewables are becoming competitive with fossil fuels. As such there is a growing role for offtake contracts with large offtakers, which limits counterparty risk. Since the renewable offtake energy contracts are often defined in relation to a market price with often indexation and/or a range of reopening clauses, there appears to be a chance of contractual discussions and possible disputes. As such, these changes in prices are likely to trigger a need for arbitration.

Subsequently, Kathryn Khamsi based on her experience explained what principles will govern these disputes in the future. For her, the two key points in arbitration and contract drafting are a) what are the triggers in remedies under these clauses and b) what is the remedy. In explaining this, she considered a trigger to have various facets. This could either be a change in actual legislation or could be of a substantial one i.e. in a monetary nature. It could also be triggered by changes in non-fiscal laws that may have economic implications like environmental laws. Whereas, for remedies, she stated, it depends on what the type of contract is. In this context, there are a few overarching points that she offered. First, since all parties have an interest in clarity, the contract should set out when a change in law triggers a remedy and what that remedy is. Secondly, in certain circumstances one may need to specifically empower an arbitral tribunal to enforce the remedy in particular re-negotiation clauses combined with certain applicable laws and thirdly, if one is a party to multiple contacts, it must be ensured that remedies in one contract have back to back equivalence in the other contract.

The panelist discussion carried forward by looking at the “Regulation by the States.” Marc Peresse shared his view by taking the example of Spain, where there were profound arbitration cases in response to a change in tariffs by its government, he stated that an evolution in this sector will continue to develop with the rise of renewable energies across various jurisdictions.

Fabien Roques further explained the types of changes in the regulatory framework that can affect the players in the renewable energy sector and lead to disputes. According to him, cases are not confined to retroactive changes to support mechanisms and may include a range of other changes affecting the broader regulatory framework. Concerning the role of regulatory or economic experts, it is not limited to quantum. The nature of regulation and what could be a part of interpretation-legitimate expectations needs to be established. He explained that there are different kinds of economic regulations: ex *ante* and *ex post* regulation are examples of fundamentally different approaches.

Ex ante regulation is essentially setting out from the onset the revenues and risks allocation, and project developers are at risk to under/over perform; whereas *ex post* regulation is where, depending on circumstances that take place, there exists an agreement of state and counterparties to revisit periodically based on a set of criteria the costs incurred and readjust remuneration to achieve a target level of return. These approaches entail a fundamentally different allocation of risks. In *ex ante* regulation one invests at his/her own risk, whilst in *ex post* a chance exists to adjust remuneration ex post depending on how one actually performed, but in exchange for a lower expected return.

Kathryn Khamsi continued the discussion and explained what she learned from her involvement in investment and commercial arbitration, notably in investment restructuring. She stated that with the divergence of interpretations, a decree needs to be read probably, the drafting needs to be relevant, and due diligence should be undertaken to benefit the investors.

In conclusion, Shaparak Saleh noted that renewable energy projects are capital intensive, that they span years from the pre-construction to the end of the operational phase; they involve multiple actors, have a complex contractual structure, are affected by market changes and take place in a changing regulatory framework. She noted that it should not come as a surprise if renewable energy projects provide a fertile ground for disputes and arbitration. Shaparak Saleh then quoted Ernest Hemingway and observed that perhaps we took him too literally when he said "The Earth is a fine place and worth fighting for." She ended the discussion by saying that the other speakers had shown that there are ways to avoid a fight or at least ways to effectively manage disputes, such as contract drafting and rigorous record-keeping.

"THE NEW NORM: HOW TO BUILD A SUCCESSFUL ARBITRATION CAREER?"

By Utkarsha Srivastava and Elisa-Marie Goubeau

As part of the 6th edition of Paris Arbitration Week, 2022, on the 31st of March 2022, Obeid & Partners along with Delos Dispute Resolution hosted a seminar entitled "*The new norm: how to build a successful arbitration career?"* The panel discussion was moderated by Dr. Zeina OBEID (Partner at Obeid & Partners) who was joined by distinguished speakers:

- Dr. Florian Grisel (Associate Professor at the University of Oxford).
- Hafez VIRJEE (President & Co-Founder of Delos Dispute Resolution).
- Amany CHAMIEH (Associate at Darrois Villey Maillot Brochier).
- Sara KOLEITAT - ARANJO (Partner in Al Tamimi & Company).
- Stella LEPTOURGOU (Counsel in ICC Court of Arbitration).

In her opening speech, Dr. Zeina OBEID briefly described the subject of the seminar by stating that many students or young professionals wonder whether specific paths, either educational or professional, shall be followed to become an arbitration counsel or an arbitrator. She also mentioned that there are recurrent questions on how to build trust in one's profile, how to overcome gender discrimination and challenges, and lastly on how to find new professional opportunities.

The first segment of the discussion was related to the importance of an academic career in building arbitration practice. The floor was opened by Prof. Florian GRISEL, wherein he shared a glimpse of his personal background which led him from attorney in an arbitration firm based in Paris and Geneva to a position of Associate Professor at the University of Oxford. He emphasized on collecting experiences in different professional and national fields. For instance, he pointed out that he greatly benefitted from being registered at two bars, Paris and New York.
Further, he added that within the field of arbitration, the intersection between different experiences such as having an academic profile (teaching, research, doctrinal debates) and having experience as a counsel at different firms was very helpful. Moreover, working with arbitrators exposed him to what happens behind the closed doors of deliberations of an arbitral tribunal.
In response to a follow-up question on how an arbitration career could profit from an academic status, he answered that looking through the profile of leading practitioners one feature stood out which is a strong involvement in academic circles. From holding a permanent position in a university, or writing leading textbooks in the field, to participating actively in academic settings, those activities help in developing the acumen.

The next part dealt with building a successful counsel and arbitrator career. Dr. Zeina OBEID asked Amany CHAMIEH what led her to switch from being a counsel to join the institutional side. She said that she started hearing about arbitration during her studies and had her first experience in a boutique firm focusing solely on arbitration. After an intense experience, she chose another law firm composed of other departments than arbitration. This helped her to develop new insights on cases and to establish strategies.
Answering under the same segment, Sara KOLEITAT-ARANJO mentioned that every experience matters. As an illustration, she explained that she did not start her career in arbitration as a counsel. Instead, she commenced with transactions as part of an M&A team, experiencing different legal traditions, finding strategies, researching, and convincing people. According to her, all roads led to arbitration. As to pursuing a successful career, she noted that the notion of success depends on each person's perspective.

The third segment focused on the institutional perspective. On sharing her journey to ICC, Stella LEPTOURGOU said that after passing Paris Bar exam, she began a long journey of internships. She also stated that initially, she never thought of pursuing a career in arbitration. Even though this was not an easy experience, it was worth doing it because it is enriching and she has been involved in many projects.

While giving an overview about working at ICC, Stella LEPTOURGOU elaborated about the institution's organization which is divided into geographical regions wherein there are case management teams. Cases are allotted to each team, and they are around 100 or more cases per year. They oversee the application of ICC rules, the fees of arbitrators, scrutiny of awards, etc. Further, she said that her overall experience at the institution was constructive and immensely valuable. She felt that she had the privilege to have an overview of the business and markets around the globe and to become an expert in a geographical region.
In addition, she shared that this career choice gave her great exposure by being in direct contact with arbitrators and participating in events and conferences. She then moved on to a question about whether there are any specific criteria to become an arbitration counsel, to which she responded that it is a mix of criteria. One will look at the candidates' language skills, knowledge of applicable law and their field of expertise depending on the case at hand, etc.

The fourth segment of the seminar considered the switch of careers from counsel to working in an arbitral institution. Hafez VIRJEE answered this question by saying that there are many challenges that one experiences in a career such as boredom, routine and always thinking about the next. Therefore, he shared that he needed to step back and search for a different experience to continue his learning journey and get out of his comfort zone. Another challenge that he came across was trying to do everything and overcome the difficulty to say no when confronted to an overwhelming workload. He insisted on finding balance as being essential. Speaking about initiatives at Delos, he mentioned that the institute regularly organizes events and creates accessible content, videos and catalogues for young professionals and students.

To conclude, the last topic of discussion concerned the impact of Covid-19 on career development in arbitration. Most panelists agreed that remote advocacy was likely to remain and affirmed that one must adapt to new norms, to a new online environment and embrace the new reality. Dr. Florian GRISEL claimed that even if practices have changed, social realities are sticky. He added that things will return more or less quickly to what they looked like before the pandemic.

"THE NEW SPACE RACE: RISKS AND OPPORTUNITIES"

By Estelle Boucly and Jannis Tiede

On Thursday 31st March 2022 Debevoise & Plimpton hosted a webinar entitled "The New Space Race: Risks and Opportunities" as part of the Paris Arbitration Week 2022. Catherine AMIRFAR, partner at Debevoise & Plimpton and moderator of the event, introduced the four speakers of the panel:

- David BERTOLOTTI, Director for Institutional & International Affairs at Eutelsat.
- Julien CANTEGREIL, CEO of SpaceAble.
- Chris KUNSTADTER, Global Head of Space at AXA XL.
- Lynn ZOENEN, Principal & Managing Director of the Venture Capital Fund at Alpine Space Ventures.

The webinar began with a quick outline of the topic: the new space race of the 21st century is characterised by the large-scale participation and development of private commercial companies rather than state action. The legal landscape governing behaviour in space is constituted mainly of treaties from older times, most notably by the Outer Space Treaty of 1967, the Liability Convention of 1972, and the Moon Treaty of 1985. These treaties propound only basic norms that apply primarily to the actions of states in space and therefore leave significant gaps in governance over private actors dominating the new space race.

The panel discussed the role of national regulation in filling the gaps left by the international regulatory scheme, highlighting the time it has taken even space-faring nations to pass national legislation to address these gaps. France, for example, only in 2008 adopted a national space law to address space activities by private actors. This law also provides for a licensing and registration system to limit the creation of debris and ensure sustainability. This national framework, with specific obligations, therefore creates a 'completely different world' for a private satellite operator than the very general obligations created for states by the treaties.

Next, the panel addressed the role of capacity building for the creation of norms both on a national and international level. In terms of the space race, the traditional production of norms has changed. Nowadays, capacities are built first, only to then evolve into standards, and, finally, into norms. Instead of a top-down approach, regulations are developed based on the capacities that are developed by the private companies.

Further, the panel discussed the risk of overregulation stifling innovation and investment. To combat this, the panel stressed the need for an exchange between the private sector and states. For example, in Luxembourg, the government and agencies worked hand in hand with commercial companies to create a national legal framework to govern private activity in space, one which appropriately considered the constraints and challenges of the private sector – a vital factor in preventing overregulation.

The panel also reflected on the role of insurance companies as quasi-regulators, stressing that they could do more on the policy side to establish responsible behaviour in the space community.

Transitioning away from the topic of regulation, the panel went on to describe new opportunities that characterize the new space race. Companies operating in space now receive less state funding and support, which means that in order to survive, they must focus on efficiency and innovation. For example, private space actors are increasingly using lightweight parts, serial production, and focusing on reusability. In this area, start-ups play an important role: there is a significant opportunity for agile and fast-acting start-ups that are driving the industry to its projected US$1.4 trillion-dollar value. Space is also becoming increasingly important in addressing consumer needs. For instance, companies focusing on increasing data utilization and broadband connectivity – growing priorities at both an economic and political level – will have a particularly bright future.

The panel also discussed new risks arising from increased activity in space. Most crucially, while low-Earth orbit is already crowded, thousands more satellites are set to be launched in the coming years, making collision or satellite failure a catastrophic and real possibility. The risk is a financial one as well as a physical one, particularly given that of the US$24 billion assets currently in orbit, only about 5% are insured, according to the panel. The goal that the sector must be striving towards, therefore, is a 0% risk of space collision or failure.

One panellist suggested three steps to address and reduce collision risk while sustainably growing the commercial use of space: first, space actors need to build a pool of data on the position of space objects; second, this raw data must be rendered accessible and useable; third, actors must build scalable business models capable of assessing and handling calculated risks.

The goal of collision risk reduction, however, is made increasingly more difficult as state military activity in space has contributed to the intentional creation of debris. There is a rising number of military doctrines that recognise space as an operational domain, and the role of satellite operators is becoming increasingly dual: governments have started looking to the private sector for additional resources to support their military operations. Other threats such as jamming or cyber-attacks further contribute to the risk of collision or failure and need to be countered by “beefing up” cyber defences for in-orbit assets as well as ground segments that are liable to attacks due to their broadband connections.

Finally, panellists outlined the future of disputes in space with regard to the challenges of assigning liability. So far there have been few arbitration cases related to space. As utilization of space continues to increase exponentially, it is likely that so too will related disputes. Among the most interesting issues likely will be the attribution of responsibility in the case of a collision, especially when the damage is caused by small debris difficult to identify and to trace back to a specific actor.

"COMPARISON OF DAMAGE ASSESSMENT METHODS"

By Fayez Hallani

As part of the 6th edition of Paris Arbitration Week, on March 31st 2022, the Arbitration & ADR section of the Society of Comparative Legislation (SLC) hosted a seminar titled Comparison of damage assessment issues. The panel was moderated by Kate GONZALEZ (Senior Legal Counsel, Commercial Disputes, at Airbus SAS), who was joined by distinguished speakers: Béatrice CASTELLANE (International Arbitrator, qualified French lawyer and President of the Arbitration & ADR Section of the Society of Comparative Legislation), Juliette FORTIN (Senior Managing Director at FTI Consulting), Tsegaye LAURENDEAU (Partner at Gaillard Banifatemi Shelbaya Disputes) and Catherine KESSEDJIAN (Professor emerita at University Panthéon- Assas).

The session was first introduced by Béatrice CASTELLANE, who summarized the event's premise in comparing the various methods that experts, counsels and arbitrators are using to evaluate damages, in light of the interactions with the arbitral tribunals.

The first segment of the session was devoted to the comparison of the different methods of damage assessment used in order to be able to reach full compensation, which is the universal standard for compensation.

In this respect, Juliette FORTIN evoked on the one hand the standard framework for the evaluation of damages by an expert which consists in comparing the financial situation of the injured party, and on the other hand the legal considerations to be considered such as the establishment of a causal link between the damage suffered by the injured party and the breach of contract (or treaty).

First, she indicated the importance of exploring the links between different actions open to claim compensation and different approaches used to determine the amount of compensation to be awarded to the injured party.

The two actions open to claim compensation are:

- the claim of expectation damages (most frequently used), which aims at putting the injured party in the same position it would have been in had the contract properly performed in commercial arbitration, or had the BIT not been breached in investment arbitration,
- and the claim of reliance damages, at putting the injured party back in the position it would have been in had it not entered into the contract in commercial arbitration, or had it not invested in the project/company covered by the BIT in investment arbitration.

As for the different approaches used to determine the amount of compensation to be awarded to the injured party, these are firstly the forward-looking approach, which determines the value of the business based on its expected performance, and secondly the backward-looking approach, based on the costs lost in the investment/business.

As a result, it noted that, contrary to popular belief, prospective approaches are not the only possible approaches to assess expectation damages and to meet the full compensation standard. Indeed, prospective approaches may be inappropriate for assessing damages in certain circumstances, with retrospective approaches being more appropriate, and vice versa.

In response to the question of whether both prospective and retrospective approaches can be used to assess expectation losses, Juliette FORTIN replied that while the assessment of damages resulting from expectation losses using retrospective approaches may not always correspond to the fair market value of the damages, not fully compensating the injured party for its damages, tribunals may also reject prospective approaches for reasons of uncertainty, being too speculative.

Both approaches can thus ensure full compensation, the choice must be made according to the situation and circumstances of the case. The appropriateness of each approach depends in fact on the ability of the claimant to demonstrate that the contract/investment overcompensates him/her for the residual risk borne at the valuation date.

During the second segment, Tsegaye LAURENDEAU presented the subject matter from a legal counsel's point of view as well as from a technical standing point. He started by noting that legal counsel have allowed the assessment of damages increasingly to become a question of facts and a field left to experts, with limited involvement of legal counsel. But in reality, once liability has been established and before passing to the assessment of the value of these damages, lots of points should be considered and proven, including, the existence of a loss, the type of loss and recoverable losses, which is the role of a legal counsel.

He then proceeded to note that some variables could affect the damages granted, such as the type of arbitration —being contract-based or treaty-based— or the legal system under which the arbitration is being held (civil law or common law). Therefore, it is important to properly frame the damages that will be claimed.

Mr. LAURENDEAU concluded that treating the assessment of damages no differently than issues relating to liability would go a long way towards allaying concerns that international arbitration facilitates disproportionate damages awards. He also expressed the view that there does not seem to be convincing justification for the introduction of an element of reasonableness in the damages assessment process, as proposed by certain critics, in respect of properly assessed damages.

In the last segment of the event, Catherine KESSEDJIAN discussed the arbitral tribunal's attitude towards the expert's reports. First she identified the culture of each arbitrator parties, counsels and experts must factor in the expert report. That culture may have a fairly big influence on the manner in which each arbitrator will read the reports. From her point of view, the task of the tribunal to decide what is a "just" compensation must be helped by the reports so that the tribunal is not presented with the only choice to approve or disapprove the estimations given by the experts. In order to reach a fair result, an assessment dialog must be put in place.

In order to do that, all experts must be given the same mandate, even if they continue to work independently. First it is assumed that the facts have been ascertained in the first phase of the proceedings. Parties must not try to discuss the facts again via the evaluation exercise. Second, liability was established at the end of the first phase (this is the advantage of a bifurcation) and experts must have this in mind when they prepare their report. Third, the tribunal and the parties/counsels will work together to establish the list of questions experts will have to answer. Among the questions to be answered, one could be the culture of the parties themselves in terms of business management. Numbers are not always giving the whole story. Faced with the same situation, companies may act differently depending on their risk assessment. This is a factor that may be important when looking at actual damages and the mitigation obligation.

She then insisted on the necessity for every dime claimed to be proven thoroughly, especially because, for an arbitrator, the task of damage assessment may be the least comfortable one. Therefore, there is a need for counsels, experts and parties to be as clear, methodical and pedagogic as possible.

Throughout the seminar Kate GONZALEZ shared the point of view of the arbitration user, noting in particular that many companies want, and indeed need, their experts to be truly independent and to present expert evidence in an objective and didactic manner, without the use of conjecture, to allow arbitration users to better understand their position and any potential exposure or likely award of damages. Ms Gonzalez commented that the role of experts is crucial and should not result in counsel seeking the use of 'hired guns,' leading to parties becoming too entrenched in their positions due to unwieldy, intangible academic debates, and unable to fathom a settlement which could be in the best interests of the arbitration users.

Ms GONZALEZ concluded by reminding attendees that arbitration must remain driven by the arbitration users themselves, with parties constantly evaluating throughout the arbitration what they want from the dispute, and working constructively with the tribunal, taking careful account of the cultural differences between arbitrators, counsels and parties in the arbitration, to attain that goal.

FRIDAY

"TIME BARS IN CONSTRUCTION CONTRACTS: CIVIL LAW / COMMON LAW COMPARISON"

By Seda Dundar and Arubalueze Elizabeth Elechukwu

In honor of the 2022 Paris Arbitration Week, AFDCI International Chapter (*Association Française pour le Droit de la Construction et de l'Immobilier*) organized on Friday, April 1st, a webinar moderated by Peter ROSHER (Partner and Global Head of international arbitration at Reed Smith LLP). The purpose of the discussion was the time bars in construction contracts. This was done by drawing a comparison between the approach adopted in civil law jurisdictions and common law jurisdictions.

The panel was composed of eminent speakers: James BREMEN (Partner and Chair of construction and engineering practice at Quinn Emanuel Urquhart & Sullivan), Anne-Sophie GOAPPER (Partner at Aliénor Avocats), Douglas JONES AO (International Judge at the Singapore International Commercial Court) and Anne-Véronique SCHLAEPFER (Partner at White & Case LLP).

In this webinar, speakers presented different approaches adopted in several country, namely in Australia, England, France, Switzerland and the United Arab Emirates, regarding time bars in construction contracts.

First, Douglas JONES discussed the issues emerging in Australia with time bars in construction contracts. He explained that the Australian approach overlapped with English law as there is a strong tradition to adopt English law in Australia. Under Australian law, the statutory limitation period is six years from « the date of the breach ». As a general rule, time limitations will be upheld as long as they are clear. The main consideration as time bars are concerned is whether there is a mandatory condition precedent to be fulfilled for a party to exercise its right, which goes alongside with an obligation to give notice. In some cases, there is no obligation to give notice e.g. when there is a waiver or estoppel because the party is misled by the representation and the time bar provision will not be enforced.

Then, Anne-Sophie GOAPPER exposed the French approach to time bars in construction contracts. She reminded core principles of French contract law such as the freedom of contract subject to public policy, the binding force of a legally formed contract, the good faith in the negotiation, formation and execution of contracts, and the principle according to which the contract must be clear, unambiguous and not subject to interpretation.
For claims arising under a construction contract, there is an obligation to give notice to the client with a description of the relevant facts and intended measures, as soon as practicable but within fourteen days of the start of the event giving rise to the claim.

Under French law, the general statute of limitations for making a claim or invoking a right is five years « from the day on which the party knew or should have been aware of the facts enabling the exercise of its right ». For legal construction guarantees, French law provides for three different types of guarantees: of one year - guarantee of perfect completion which extends to the repairs of minor defects notified after taking over; of two years - guarantee of proper functioning related to the other equipment elements of a structure; and ten years - guarantee of strict liability.

Anne-Véronique SCHLAEPFER presented the Swiss position. She exposed three main issues as regards time bars in construction contracts:
1) Whether or not the time limitation is provided under Swiss law;
2) Whether or not there is a provision in the contract that can be construed as creating a time limitation;
3) Whether or not there is a condition precedent that needs to be fulfilled by a party to exercise its right.

Under the Swiss law, time limitations periods refer to the merits of the case and to substantive rules - it is not a procedural issue. Thus, the Swiss Code of Obligations stipulates that the time limitation for bringing a claim is ten years. However, for construction contracts, the parties must sue within five years.
Parties may amend time limitations in the contract, however, there is a debate since the last revision of the rules because even though the latter provide that time limitations cannot be amended, there is a tendency to give freedom and autonomy to parties to adopt time limitations. When the contract is clear about the time limitations set forth, there is no room for interpretation for the judge or arbitrator.

Lastly, when there is a condition precedent, the party bringing the claim must first comply with the condition precedent under the law or the contract. Swiss law provides an obligation to notify the defect. If the defect is obvious, the party must notify immediately i.e. within 14 days. If the defect is not obvious, the party must notify as soon as the defect is discovered. If there is a condition precedent under the contract, the wording of the contract will prevail.

Finally, James BREMEN discussed the English approach and the position adopted in the United Arab Emirates. He started off with the following question: "what is the relevant governing law as regards to time bars in construction contracts?" and answered by saying that the governing law is the law of the contract.
He further explained that there are two basic issues regarding time bars, namely:
1. Contractual time bars - which are effectively put in place as a requirement to provide a notice and certain consequences will follow if such notice is not given.
2. Common defenses to time bars - for example when a contract is written ambiguously, it might be departed from, and courts will look at how the contract is performed and not what its terms are.

Under English law, the statutory time bar is six years. As Doug JONES said, the English position is very similar to the Australian one. As such, a time bar provision is held as long as it is clear i.e. there is a clear language and conditionality. In practice, English courts apply the law literally and there is a reluctance to enforce time bars. As it comes to the United Arab Emirates, the Civil Code provides a statute of limitations of fifteen years.
He rounded off his presentation by giving his opinion that the contract should be applied according to its terms, for it would end up bringing more difficulties.

"BLOCKCHAIN ARBITRATION AND THE RESOLUTION OF CRYPTOCURRENCY DISPUTES"

BY Utkarsha Srivastava and Fayez Hallani

As part of the 6th edition of Paris Arbitration Week, on April 1st 2022, Brown Rudnick hosted a seminar titled *Blockchain Arbitration and the Resolution of Cryptocurrency Disputes.* The panel discussion was moderated by Associate David WEINSTEIN, who was joined by distinguished speakers: Gerard COMIZIO (Professor and Associate Director of the Business Law Program at American University Washington College of Law), Tonya EVANS (Professor at Pennsylvania State University), Jessica LEE (Brown Rudnick Litigation Associate) and Clara KRIVOY (Head of Brown Rudnick's Digital Commerce Practice Group and Ibero-America Private Client Practice Group).

In his opening speech, Mr. WEINSTEIN insisted on the importance of the subject matter, since we're experiencing a boom of crypto and blockchain-based products, yet a huge number of people in the legal field do not understand the technology and its intricacies, nor its legal reverberations.

The first segment of the discussion was opened by Prof. COMIZIO, who gave an introduction and overview over blockchain and cryptocurrency law. He described the blockchain as a public, decentralized online ledger of all transactions across a peer-to-peer network. He further added that by using the technology, participants can confirm transactions without a need for a central clearing authority. Describing its importance, he said that it is the only official ownership record of crypto transactions.

He then remarked that this technology is a double-edged sword. On one hand, crypto poses exciting possibilities in payment systems, money transmissions, mobile payments, finance, potential for increasing financial inclusion, and increasing investment possibilities. On the other hand, it raises legal and technical concerns: these technologies can be exploited for illegal activities (such as illegal trading & ransomware), and crypto wallets can be hacked. That's why the regulation of crypto and the blockchain is now high up on the public policy agenda in several countries, after it was discarded as a private contractual issue.

Therefore, he noted that we stand before four different systems, depending on the status of crypto: some countries (like China) chose to forbid it; others chose to permit its usage but consider it as capitalized assets (like the USA); a third category of countries chose to recognize it as an optional but legal currency; and the last category (like El Salvador) made the use of crypto in payments mandatory.

Prof. COMIZIO then concluded by mentioning some arbitration issues that could arise from crypto activities, such as issues related to smart contracts, crypto customer account hacks and the legal nature of crypto assets before the arbitral courts.

In the second segment, Prof. Tonya EVANS chose to deliberate on the role of international rules and blockchain-based cross-border commercial disputes. She invited the attendees to a high-level analysis of the issues posed by these disputes, then focusing on the opportunities for technology to fill in the gaps, especially with the low value — but numerous — claims that come up with micro-transaction at the hands of small businesses.

She pointed to the conflicts happening between the multitude of regulatory and legislative bodies in countries over the rules and regulations that will govern the development and the impact, but also the effects, of transnational and disruptive technologies —like blockchain technology— and the rules that should be applied when regulated industries are disrupted, noting that some self-regulatory behavior has been —gladly— emerging.

One solution to fill the gaps is the adoption of smart contracts whose coding should consider every conceivable outcome and situation that could happen (which is obviously hard to achieve, but would provide critical de-risking the area, facilitating efficiency of market and commercial agreements). Another solution is decentralized justice, which relies on crowd souring a jury on a blockchain-based platform, for timely, cost efficient, and more just solutions.

Prof. EVANS also noted that uniform laws could be ideal solutions in order to avoid jurisdictional conflict when settling cross-border disputes, pushing the importance of laws brought forward by international bodies, such as United Nations Commission on International Trade Law (UNCITRAL).

She then concluded by affirming that successful blockchain-based alternative dispute resolution projects will fill in the gaps where existing laws and technological expansiveness create limitations and concerns.

The next part dealt with the English Law approach to resolving blockchain and crypto-related disputes. While giving an overview of Digital Dispute Resolution Rules, Prof. Jessica LEE stated that a lot of developments in the English legal system can be seen.

There is real encouragement by the English judiciary system towards blockchain and resolving blockchain disputes. According to Sir Geoffrey Vos (head of civil justice in the UK), blockchain is something that all lawyers need to eventually be familiar with.

The "UK jurisdiction taskforce", established to transform legal services, published a legal statement on crypto assets and smart contracts, which confirmed that crypto assets should be treated as property under English law.

She added that the English judiciary has already gone openly and flexibly applying existing legal mechanisms and principles such as freezing orders and proprietary injunctions to cryptocurrency disputes, therefore accepting jurisdiction over such matters on different bases.

In the last segment, Clara KRIVOY presented her perspective by focusing on regulatory aspects related to blockchain platforms. She mentioned that such platforms only interact with arbitration at three moments. The first is when they are being built, the second is when they face challenges, and therefore are at a crossroad, and the third is when legacy companies want to come into the world of blockchain to increase revenues or have any interactive community to create loyalty.

She also focused on the definition of smart contracts while mentioning the points where conflict arises.

"THE EUROPEAN COMMISSION'S PROPOSAL FOR A DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE: AN EVER-EXPANDING HORIZON FOR DISPUTES?"

By Anna Isernia Dahlgren, and Yanina Vlasenko

On the last day of Paris Arbitration Week, Eliseo CASTINEIRA of Castineira Law hosted an event with the distinguished speaker Noëlle LENOIR, discussing the European Commission's new proposal for a Directive on corporate sustainability due diligence. Among many of her notable positions, Mrs. LENOIR was the first woman and the youngest judge appointed to the French Constitutional Council, the French Minister of European Affairs, the President of the EU Group of Ethics for Science and New Technologies, the Vice-President of the French National Committee of the International Chamber of Commerce (ICC). The presentation covered the origin of the Proposal, its content, and its implications.

Origins of the Proposal

Mrs. LENOIR explained that the work on the Proposal began in 2005, with the launch of the 2011 United Nations Guiding Principles on Business and Human Rights, as well as with the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. While those policies treated companies as responsible for the links in their supply chain, they were not binding. This led the European Union (EU) to transition towards more mandatory provisions.

Further, the tragedy of the 2013 Rana Plazza factory collapse in Bangladesh's garment industry, in which 1100 people died, has prompted some EU countries to make changes to their related policies. In 2017, France adopted the first due diligence law, requiring companies to ensure that their subsidiaries and suppliers around the world respect both human and environmental rights. Next came the EU Green Deal, which demanded carbon-neutrality by 2050 through a variety of regulatory mechanisms.

On February 23, 2022, the European Commission's Justice and Consumers Department published the "Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937". The Proposal aims to promote sustainable and responsible behavior of companies operating in the European Union by implementing duty of vigilance, among other things. It applies to entire global value chains and aims to identify, prevent, mitigate, and remedy the adverse impacts of business activities on human rights and the environment. If the Directive advances to its final form, it will likely give birth to a plethora of disputes regarding its scope and obligations. Accordingly, the arbitration community should pay attention to this upcoming material development.

Duty of Vigilance - Who Would it Apply to?

Due Diligence is becoming the norm for assessing potential negative impacts on human rights and the environment. Under the Directive, companies would need to carry out due diligence prior to any activity, decision, or business relationship every twelve months. Due diligence is applied to companies with more than 500 employees and more than €150 million in worldwide net turnover – about 13,000 EU companies are estimated to be affected. In particular, the Proposal targets three sectors: textiles/clothing, agriculture/food, and extraction of mineral resources. This would give a new breath of compliance to companies and would ensure that all entities on the value chain would be subject to higher environmental and human rights standards.

Pillars of the Proposal

The first pillar of the Proposal enshrines transparency and accountability. The Proposal includes measures that companies should take to fight against climate change and human rights violations. However, companies must indicate how the measures are implemented and what remedies they provide for breaches by their subsidiaries/suppliers. Greenwashing, however, incurs criminal liability.

The second pillar provides for a universal potential liability of unprecedented scope. The Proposal provides for civil liability for failure to comply with the duty of vigilance in case of damages caused by a subsidiary or any direct and indirect business partners in the value chain. Importantly, the Proposal would apply the laws of the country of registration and would allow the judiciary to play an extensive and unprecedented role in the enforcement of the Proposal.

The Role of Arbitration

With an expected rise in litigation related to violations of the duty of vigilance, Mrs. LENOIR believes that arbitration will play a major role in the wake of the directive. In particular, if civilly condemned companies turn against their suppliers, or if suppliers challenge a breach of commercial relations, arbitration clauses could provide an avenue for dispute resolution away from public forums. Similarly, Mrs. LENOIR foresees an increase in post-M&A arbitration if acquired companies prove to be non-compliant with human rights or environmental protection in its value chain.

Potential Uncertainty and Distortion

The Proposal depends on its incorporation into EU member-State's domestic law. The civil liability regime is left to the discretion of Member States. Mrs. LENOIR foresees a piecemeal application of the civil liability regime and a distortion of the internal EU market. Added to this a modicum of legal uncertainty due to the presumption that judges, and experts will be able to assess the climate strategy of companies in the function of the thirty-year objection of Article 15 of the Paris Agreement.

Mrs. LENOIR is concerned that limited extraterritoriality is likely to generate competition distortion. In fact, the harmonization of the duties of directors is limited to EU companies, and the non-EU companies will have more restricted obligations. In addition, the U.S. Supreme Court has already indicated that it will not adopt the same path as the EU regarding the duty of vigilance.

Finally, Mrs. LENOIR fears that the focus on company compliance indicates a weakening of the nation-state and geopolitics. Yet, she acknowledges that the fight against climate change requires a whole-world effort, including from companies.

Final Thoughts

The drafting of the Proposal has already been extremely controversial. Mrs. LENOIR expects a lot of political debate in its finalization, particularly because several EU members are not yet satisfied with the draft and because the EU is currently facing more immediate concerns. Regardless, the introduction of the Proposal indicates an awareness of the role of civil society in the fight against climate change.