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BIBERON

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FOREWORD

Dear loyal Biberon readers and newcomers,

We have the great pleasure and honour to present the 2023 special edition of our "Biberon" focused on the Paris Arbitration Week (PAW). For the third year in a row, we have partnered with the PAW's Organising Committee to report and account for the many events of this year's edition.

In the same way that this year edition of the PAW was the largest since the beginning, this year special edition of the Biberon is also the biggest edited since the beginning of our partnership with the PAW. This year, our team of 32 reporters have covered more than 20 seminars, addressing the hot topics in arbitration and much more.

We would like to express our sincere thanks to all the members of the PAW's Organising Committee, with whom it has been a real pleasure to collaborate. We also wish to thank the firms and companies that have put their trust in us, as well as all our reporters for their outstanding work.

We sincerely hope you will enjoy reading this special edition of our newsletter. Do not hesitate to follow us our on social media platforms to keep updated with all of our lastest news.

Paris Baby Arbitration is a Parisian society and a networking group of students and young practitioners aiming the promotion of International Arbitration practice, as well as the accessibility of this field of law.

Each month, its team works on editing the Biberon, an English and French newsletter, intended to facilitate the understanding of the latest and the most prominent decisions given by states and international jurisdictions, and the arbitral awards. Since 2021, thanks to its partnership with the Paris Arbitration Week, it also publishes a special edition of this newsletter focused on this particular event.

By doing so, Paris Baby Arbitration hopes to encourage the contribution of students and junior lawyers to the arbitration community. The values that drive Paris Baby Arbitration are openness and goodwill, which is why we want to allow students and junior lawyers to express their passion for the practice of International Arbitration.

You can find all the previously published editions of the Biberon on our website: parisbabyarbitration.com/

We also invite you to follow us on LinkedIn.

Enjoy your reading!

Sincerely yours,

Théo Moreno

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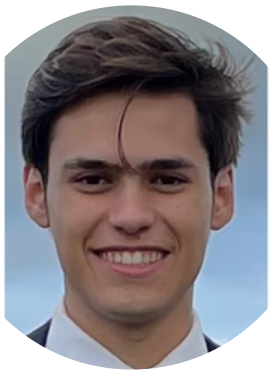

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MONDAY

"WHAT'S WRONG WITH ARBITRATION?"

By Elena Andary and Ishaan Bhardwaj

On Monday March 27, 2023, Elena Andary and Ishaan Bhardwaj attended a seminar entitled "What's wrong with Arbitration?" co-hosted by Teynier Pic, WilmerHale and the Queen Mary University. The panel was moderated by Prof. Maxi Scherer (Professor of International Arbitration at Queen Mary University of London, and Special Counsel at WilmerHale), and by Raphaël Kaminsky (Co-President of the Paris Arbitration Week, and Partner at Teynier Pic). This panel included Prof. Pierre Mayer (Professor emeritus at the University of Paris I Sorbonne and Founding Partner of Mayer Greenberg), Ms. Diamana Diawara (Vice-president of the Paris Arbitration Week, Director of Arbitration and ADR for Africa at the ICC), Mr. Karl Hennessee (Senior Vice-President at Airbus) and Mr. Ben Juratowitch KC (Barrister at Essex Court Chambers).

This "provocative topic" was introduced by moderators as such: even though arbitration is an effective mechanism in the international sphere, the best in class could and should always think of improvements.

The discussion began with the issues and solutions identified with respect to arbitrators' selection. Mr. Hennesse argued that all arbitrators and stake holders in the international arbitration community contributed to the problem. The key aim throughout the arbitral proceeding should be on achieving a fair result. However, this was often the last thing on the counsel's minds. He argued there was a toxic mix. If you are focused from the outset on selecting an arbitrator with an intellectual bias, you are not looking at the risk of finding a "wizard who speaks to the tribunal in a secret language". The parties' quest to somehow predict how arbitrators will react to certain factual and/or legal issues and the tendency for arbitrators to present themselves as seeing things from a particular perspective, is, according to Mr. Hennesse, one of the main reasons for the lack of diversity in arbitrations. In fact, attention will be put on those arbitrators who put forward their extensive track-record allowing a better scope of predictions for parties, to the detriment of arbitrators listing fewer appointments.

This often resulted in: tribunals which are over-qualified and too busy, or settlements that are less likely achieved, as parties remain attached to their "unique" perspective into the tribunal, hoping it will prevail. Meanwhile, institutions themselves came under pressure. They took the responsibility of trying to satisfy the demands of various parties: selecting a compromise candidate which satisfied nobody, someone "half goat, half pig, half unicorn, half swan, and half something else" as Mr. Hennesse provocatively put it. According to him, there are several ways to improve these issues i.e. the admission that cases are decided on their own merits, the setting aside of the idea that a particular nationality, for instance, handles procedural issues a certain way and thus taking that into account in the prediction "game". In his view, there is only one marker of success in all the experience he has had, one solid predictor of group performance: diversity. He did not simply argue that diverse backgrounds resulted in a better result but emphasized that it was truly "the only thing that worked" – the more diverse a group is, the better decisions and predictions it tends to make. Ms. Diawara expanded on precising why diversity mattered. In her view, international arbitration was "distorting". There was a mismatch between the background of arbitrators making decisions, versus the background of those who were principally affected by their decisions. Most of the cases in investment arbitration for instance will have an element of Latin America, Asia, Africa and yet most of the practitioners deciding those cases were from Western Europe.

The discussion continued with Mr. Juratowitch KC's arguing that one of arbitration's main problem was that it is often too voluminous, too long and too costly.

1) Time: The overload of documents makes it more difficult to focus on what really matters in the dispute and wastes time. If you tally written submissions, including the first round, second round and post-hearing in ordinary cases, these can reach more than 1000 pages to which are added witness statements and expert reports. This results in the stage where most counsel and arbitrators cannot absorb or understand the amount of information submitted

in most arbitrations and makes it harder to focus on the issues that actually matter. The time taken to prepare submissions and the time it takes for arbitrators to reach (overly cautious) decisions knowing there is a microscope on them in due process is all the greater. These were challenges for younger members of the profession but also problems with diversity, as those with caring responsibilities find it an unwelcome burden to deal with the volume of issues.

2) Perfectionism: There is substantial perfectionism imposed by counsel as junior lawyers are driving significant parts of the process and left by those with an economic interest in driving the process without the ability and confidence to make the necessary judgments.

3) Improvement: A recognition of the problem is necessary with more disciplined involvement of experienced counsel earlier in the process. More active case management is also needed from arbitrators, before and during the arbitration. The use of issues lists might be quite useful, including a settled common issue list that people need to stick to in terms of argument and evidence. Page limits - not just for submissions but also for annexes or exhibits - could be imposed.

Using his long experience, Prof. Mayer noted that 30 years ago the memorials were much shorter with fewer witnesses, and it is very difficult to put a halt to the current trend. He identified two reasons for this problem of "counsel pro-activism". The first was due to them sincerely believing more pages offered a better service, and the second was to maximise their fees.

Mr. Hennessee echoed this idea of accidental extortion. The people he is advising are happy to listen to their recommendation about reducing the volume of documents. His advice was clear - do not pay hourly fees and do not feed those perverse incentives! Those who focus on repeat business should recognise that the economic value of their relationship would be greater if they developed value service rather than a one-time economic service. Per Parkinson's law, he argued that work will fill the space you give it. He quoted George Bernard Shaw "I will write you a long letter as I didn't have time to write you a short one". He urged every arbitration practitioner to write the short letter! He argued we should follow state courts, with more robust preliminary dispute resolution procedures and that we should be more aggressive on what could be included in expedited proceedings.

The next topic discussed was "due process paranoia". Ms. Diawara talked about the problematic disease afflicting arbitrators with multiple fears to the root of that disease. It includes the fear of the award being challenged=and the fear of not being appointed in the future. Solutions include case management decisions to protect the interests of the respondent party like the arbitration guidelines of the ICC: the first duty being to render an enforceable award and conduct the procedure in an efficient and speedy manner. The truth is arbitrators might feel the need to please parties but also in pursuing a chance to be reappointed in a future case. It is difficult to "bite the hand that feeds you".

But as Mr. Juratowitch KC pointed out, wouldn't counsel much rather reappoint a strict arbitrator rather than an arbitrator who bent over backwards to accommodate absurd procedural demands?

The issue of excessive standardization of arbitral procedure was then addressed by Prof. Pierre Mayer. He argued that the task of arbitrating is difficult, and you must have authority and an open mind. He outlined the excessive standardization of the arbitral procedure with the same "model" followed in every arbitration proceeding. Furthermore, the model has burdened the procedure as the system borrows both from common law and civil law leading to duplication. This is because there are both long memorials in the civil law style, but also long hearings derived from common law influences. Yet he outlined how there were advantages to this model and standardisation as well. The parties need rules and certainty about procedure, especially when they come from diverse legal backgrounds. In his view there was a beneficial cross-fertilisation from both civil and common law systems, particularly when it came to issues such as cross-examination. Finally, Ms. Diawara stated that so long as parties have the opportunity to adapt the procedural needs to specific matters, standardisation cannot be seen as a bad thing.

The conference ended on a rather optimistic note. Something is wrong with arbitration, but arbitration is often right. With reform, it will retain the mantle of "best in class".

TUESDAY

"DAMAGES CLAIMS AGAINST RUSSIA, RESULTING FROM ITS INVASION OF UKRAINE"

By Mihaela Tarnovschi

Please note that the Chatham House Rule applied to this event. The Chatham House Rule reads as follows: "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed". The conference was covered in accordance with this rule.

On Tuesday, March 28, 2023, as part of the 2023 edition of Paris Arbitration Week, Addleshaw Goddard hosted a conference on the topic of "Damages claims against Russia, resulting from its invasion of Ukraine". The conference aimed to give an overview of the legal consequences of the Russian invasion and evaluate the possible approaches for holding Russia responsible for the damages inflicted in Ukraine.

The panellists opined that there are two ways of obtaining damages relief from Russia and making decisions in that respect. First, a diplomatic way where the political issues could be resolved through international agreement and second, a legal way, through which the Russian state will be held accountable for its breaches of international law. The panellists recounted that the invasion itself can be qualified as a breach of the UN Charter, and that the Russian armed forces were in breach of other international norms when they attacked civilians and civilian establishments.

One panellist noted that during war time, the aggressor state's assets can be seized from the territory which it attacks. However, in the case of the Ukrainian invasion, the panellist considered that these assets will not suffice to pay for all damages and reparations. Focus should rather be given to assets by the Russian Central Bank ("RCB"), which, while including a total of approximately EUR 300 billion, are the most well protected assets of the Russian state.

Inevitably, the question arising is what the legal basis for seizure of the RCB assets would be. The panellist further noted that the main issue in this respect is the concept of sovereign immunity, which is far too ingrained in the law to be disregarded, and that affects the jurisdiction of the courts that will enforce any decision regarding a potential seizure of assets. A panellist noted that Russia already broke the ICJ Court Order and not much can be done against this breach given that Russia is a member of the UN Security Council with a veto power.

It means that a potential solution can only include a special enforcement regime (including for the arbitration courts and tribunals) where domestic law will be key for enforcement. In that sense, a potential solution to executing the ICJ Court Order could be to receive assistance from the domestic courts when executing the ICJ decision. The panellists suggested that the states could also assist in this process by transferring assets to Ukraine or to a fund established for that purpose.

The discussion further touched upon the UK Bill, which contains proposals for the seizure of Russian assets to provide support for Ukraine. The panellists noted that the bill aims to embed an enforcement mechanism and aims to give the ministers investigative powers to find where all the relevant assets are located. It will also allow them to put all those assets in a trust fund, which the trustee will be able to manage as it sees fit. They compared the fund to a similar fund created with German assets and managed by the allies in the aftermath of the Second World War. They also mentioned that such a fund would not breach any sovereign immunity rules.

In addition, the discussion touched on the issue of causation, which involves proving that the assets of state-owned Russian companies can be seized as they are linked to the state, which would mean that those companies are the ones responsible for those damages. However, this argument might pose certain problems, as companies as legal entities are separated from their owners, and a state cannot be equated with a state-owned entity. Some panellists suggested that a special regulation regime should instead be created for the Ukrainian situation, which could also cover the wide variety and type of claims that are currently sought.

Another element discussed by the panel was the necessity of gathering evidence to be brought before the attention of any bodies involved in deciding on and enforcing any seizure orders. In that respect, the panellists noted that it would be preferable to start preparing such evidence already, and to that end there is also a need to gather funds to support such work.

Finally, the panellists noted that Ukraine needs to start its rebuilding process as soon as possible, as Ukrainian citizens need to at least have back their homes, so they could return to Ukraine if they are currently refugees abroad. They also remarked that various questions arise on where the funds that are gathered through the seizure of assets should be directed. Some of the options include using them to stop the conflict by helping Ukraine win the war, rebuilding civilian facilities, or rebuilding critical infrastructures and public properties, such as the electricity grids. They concluded that it remains to be seen which of these options will be ultimately prioritised, as the current efforts focus on gathering the necessary funds to help rebuild Ukraine.

"SPACE DISPUTES: WHY ARBITRATION IS THE NEXT/BEST FRONTIER"

By Michael Hingston and Théo Moreno

On Tuesday, March 28, 2023, as part of Paris Arbitration Week, Bird & Bird hosted a conference on the potential of arbitration as a means of resolving space-related disputes. The panel was moderated by partners from Bird & Bird, Jalal El Ahdab and Jean-Claude Vecchiatto, and featured Philippe Achilleas (University Paris Sud), Loïc Amiand (Airbus Space Systems), Marco Ferrazzani (European Space Agency), Francesco Giobbe, (FPG Consulting), James Plummer (Inmarsat) and Edouard Ricard (Thales).

The panel first provided a brief overview of the space sector. Mr. Ferrazzani noted that the limited amount of valuable orbit space risks creating tensions and potentially conflict. Effective regulation is therefore needed. More than 1,000 satellites are being launched each year, which provides an increasing number of services, making people more dependent on satellites. The new space economy is characterised by significant private investment in space technologies and cheaper access to space being provided both by private companies and nation states. These trends are in stark contrast to the space economy of the twentieth century, characterised primarily by state-sponsored military and scientific investments. The new space economy is expanding the role of governments from space operators to regulators of private space activity. Mr. Amiand identified two markets in the space sector: an upstream market and a downstream market. The downstream market shows several trends, such as the verticalization of offerings by companies offering only one specific space-related service; or consolidation through mergers to concentrate the ownership of valuable assets such as low Earth orbital slots. Both governments and lawyers need to be aware of and adapt to changes at every stage of the space sector value chain.

Mr. Ricard agreed that the entrance of new private actors is changing the space sector, particularly the space environment. Increased use of space will only make the preservation of the space environment a more pressing issue.

Mr. Plummer was asked by the moderators about the concentration of the space marketplace. He noted there could be up to 100,000 satellites in orbit by 2030. The large number of participants in the marketplace will inevitably result in concentration as participants merge. In addition, the drop in satellite costs has only increased the interest of private equity firms in space-related investments.

Mr. Vecchiatto then asked the panel whether the public international law framework was appropriately adapted to the changing nature of the space economy.

Prof. Achilleas summarised the development of space law. He recalled that the basic principles of space law were first set out in the Outer Space Treaty, in 1967, which includes the principles of freedom of outer space, non-appropriation of outer space, and peaceful use of outer space. The Liability Convention, adopted in 1972, then introduced the rules concerning responsibility and jurisdiction in outer space, which attribute direct responsibility to states for their activities of their nationals in space. There is also a set of non-binding resolutions on satellites and a set of technical regulations based on the best practices of the industry, such as guidelines on space debris mitigation. Today, most of the space activities are regulated through national space legislation. Space law, however, does not cover all legal issues regarding satellites, which are often covered by digital law.

Mr. Ferrazzani, while sceptical over whether jurisdiction in space is as uncertain as some might expect, cited the International Space Station ("ISS") as an example of national territorial jurisdiction being applied to space and acknowledged that the growing amount of space activity will increase the jurisdictional friction between space operators.

Mr. Vecchiatto then asked the panel whether changes need to be made to existing legal frameworks to accommodate the new space economy.

Mr. Amiand claimed that space law had adapted well to avoid satellite collisions. However, satellites are being launched in greater numbers and are occupying closer orbits than ever. Professor Achilleas agreed that space activities are moving beyond the international law framework, particularly as the mining of space resources and the militarisation of space become technologically viable. Mr. Giobbe said that as new ways of exploiting space are developed, new legal instruments are required to accommodate these activities. As disputes between commercial operators cannot be resolved through diplomatic channels, the development of soft law, such as codes of conduct or commercial contracts between operators in the space sector, is likely to result in the increase in the number of disputes (far more than those disputes resulting from treaties).

The panel acknowledged that there was a role for industry as well as intergovernmental bodies such as the UN in contributing to the development of norms in relation to conduct in space.

Mr. Ahdab then asked the panel to provide an overview of current and future major projects in the space industry.

Mr. Giobbe pointed to the development of the EU constellation, jointly funded through both public and private sector means, which is a project aiming to launch a sovereign constellation of satellites to provide secure connectivity to EU member states. Mr. Ricard referenced efforts by firms to privatise the construction of pressurised space modules and space stations. Mr. Plummer mentioned the ESA's moonlight project, which aims to establish permanent communication infrastructure on the moon. Mr. Ferrazzani highlighted that these projects illustrate a trend of governments leveraging private sector expertise to develop the necessary technology and operational capacity, and then paying to use that technology as a service. These commercial arrangements will import commercial law and commercial dispute resolution into the space law arena.

The panel was then asked about whether specific features of space activities favour the use of arbitration. Mr. Plummer, again referring to private sector input into the moonlight project, suggested that in large-scale projects, all actors have a strong incentive to minimise delays resulting from disputes and to ensure confidentiality. Arbitration, traditionally a confidential and more streamlined process, favours both of these needs. Mr. Amiand highlighted that certainty was a key consideration for actors in complex commercial environments such as the space sector. As arbitration is designed to preserve commercial relationships, it represents a good option for space sector dispute resolution.

Mr. Vecchiatto also asked the panel if space could still be considered global commons. Prof. Achilleas believed that the public international law framework considers space global commons but that modern spacefaring nations are moving away from this view as they develop space capabilities. Mr. Ferrazzani agreed that there is a trend away from the global commons view as national space laws begin to contemplate the commercialisation and appropriation of space resources. Mr. Vecchiatto queried whether the inconsistent adoption of national space laws by different countries could lead to tensions over space resources. Mr. Ferrazzani replied that all states accept the principle of non-appropriation of space law but interpret it differently. The US, for instance, relies on the Artemis Accords to promote its approach to the commercialisation of space. Without a consistent approach from all states, Mr. Ferrazzani agreed that there would be a risk of forum shopping by firms.

The panel was briefly asked for their thoughts on the potential for mining space resources as a commercial activity. Mr. Amiand suggested that it was only a matter of time while Mr. Ferrazzani pointed out that a permanent base on the moon would require the exploitation of lunar resources to sustain a human presence there.

The panel then considered the sorts of legal disputes that might arise in the new space economy. The panellists suggested that collisions in space can create liability between space operators, as well as damage caused by debris or de-orbiting satellites. The panel also suggested that actors in the space economy may encounter legal issues if the satellite or launching services on which they rely are controlled by sanctioned states.

To conclude the conference, the panel was asked whether they were for or against the use of arbitration in space-related disputes. All panel members were for the use of arbitration. Mr. Amiand favoured the use of arbitration because of its speed and confidentiality whereas Mr. Ferrazzani pointed to the fact that arbitration is well suited to cross jurisdictional disputes. Professor Achilleas and Mr. Plummer were also both in favour of arbitration because of its confidentiality and its ability to preserve commercial relationships in what remains a very small field. Mr. Giobbe and Mr. Ricard stated that they prefer arbitration, failing amicable negotiation, because of its wide recognition as a mean of dispute resolution and because of the potential to include technical experts as witnesses or arbitrators.

"ESG, ENERGY TRANSITION AND THE DIFFICULT COMMERCIAL AND INVESTMENT DISPUTES OUR CLIENTS ARE FACING"

By Hristijan Zafirovski and Victoria Struys

On Tuesday, 28 of March 2023, Baker McKenzie organized a conference in the frame of the Paris Arbitration Week 2023 focused on the challenges faced by industries and states regarding the energy transition and the incorporation of environmental, social, and governmental criteria ("ESG"). Moderated by Katia Finkel (Senior Associate at Baker McKenzie) and Karim Boulmelh (Partner at Baker McKenzie), the panel was composed of Giorgia Sangiulo (Senior Legal Advisor, Department for International Trade, UK Government), Maria Irene Perruccio Lourie (Legal Counsel / Head of International Affairs Europe and Americas, Webuild Group SpA), Ravy Pich (Legal Manager, Westinghouse Electric Company), Patrick Baeten (Chief Legal Officer M&A, ENGIE), and Luka Kristovic-Blazevic (Partner, Baker McKenzie).

At the outset, the moderators set the stage to discuss the positive goals set by ESG norms and achieved by the energy transition. The first panelist Ms. Sangiulo described the United Kingdom's perspectives regarding the energy crisis and challenges faced by many European countries today due to the war in Ukraine. Ms. Sanguilo explained that energy security and net-zero objectives were going up in the agenda of the UK. She noted that the UK had three means to reach these goals. The first one is to encourage foreign and national investment and foster internal alliances to develop better technologies. The second is to reduce the reliance on fossil fuels imported into the UK. The last goal is to rely more on clean energy produced in the UK, more specifically, rely more on nuclear energy and wind power.

After this intervention, the moderators gave the floor to Ms. Irene Perruccio Lourie. The moderator inquired about the Italian government's plan to address the energy transition. Ms. Irene Perruccio Lourie started explaining that Italy launched a recovery plan intended to respond to the urgent need for fostering a strong recovery following the Covid-19 crisis and make Italy future-ready. One of the focuses of the Italian project is on transport infrastructure and high-speed rails. The Italian government is aware of the war in Ukraine and needs to reduce its reliance on other countries for energy. Therefore, the Italian government is developing infrastructure that pollutes less and is less dependent on fossil fuels.

After focusing on the actions taken both by the United Kingdom and Italian governments, the moderators turned to Mr. Baeten. On energy transition and ESG, Mr. Baeten emphasized ENGIE's effort to be at the forefront of these efforts, as demonstrated by the purpose of the firm, which is to "act to accelerate the transition to a carbon neutral economy through more energy efficient and environmentally friendly solutions." Moreover, he pointed out that ENGIE established a goal to reach net-zero emissions globally by 2045, with Brazil's ENGIE capacities outpacing and reaching this projected goal by 2030. This would be a major accomplishment, as ENGIE's installed capacities in Brazil are one of the biggest C02 polluters in the world.

The moderators turned to Mr. Kristovic-Blazevic and asked him what the role of lawyers in this climate of new regulations and changes was. Mr. Kristovic-Blazevic emphasized three missions he deemed important for lawyers to help their clients: preparedness, assistance, and tailored advice. He explains that it is key for lawyers to stay up to date with the changes that are happening and anticipate the potential problems that clients could be facing. The second mission is to assist clients by helping them navigate issues. He believes that can be done through publications as well as targeted training. Finally, Mr. Kristovic-Blazevic insisted that it is key for lawyers to give tailored advice and identify the problem sooner rather than later to avoid potential disputes. He further explained that disputes could be long and very costly. Therefore, lawyers shall anticipate and provide legal advice at the early stages to resolve the matter amicably rather than go to arbitration and be exposed to additional costs.

The moderators moved to the second topic and analysed whether the ESG goals are realistic. The discussion continued with Mr. Baeten, who stated that the previously discussed ENGIE goals were attainable.

He expressed his belief that the goals were achievable within the set targets, although by looking through the prism of today's circumstances, they are not ideal and do not help their realization.

He explained that the 2022 shock rippled the energy system, and the consequences of such shock can still be felt today. However, he expressed concerns about the shifting and poorly coordinated national policies around the phase-out saga, the nuclear energy, and deteriorated protection for cross-border investment. Recent case law related to the Energy Charter Treaty and countries pulling out from it, do not constitute a favourable climate to work on achieving the goals.

After this observation, the panel moved to address the challenges faced by different stakeholders while trying to achieve the ESG standards. Ms. Pich stressed the importance of having secure and stable supply chains, as well as sustainable sources of energy. To achieve this, States have renewed efforts to build nuclear power plants. The emergency situation in Eastern Europe was considered as an opportunity for Western investors to direct capital into building nuclear power plants across Europe.

Mr. Kristovic-Blazevic added that to attract investment and ensure the transition to renewable energy, governments created regimes providing incentives for foreign investors. When such incentives were reduced or cut back due to events such as Covid-19, many disputes arose. Investors turned against States, and States turned against investors for violation of Human Rights and breach of environmental regulations. Arbitral tribunals in recent decisions pointed to the right of the State to regulate, but the legislative process has to create a stable legal and commercial environment for investors, especially when specific commitments were made toward the investor.

The panel moved to the problems faced by energy and construction companies. Ms. Perruccio Lourie, Ms. Pich, and Mr. Baeten stated that these projects are facing great problems such as project delays, cost overruns, problems with licensing new technologies, market instability, and abuse of legal mechanisms by non-governmental organizations, which result in new disputes arising. To avoid potential disruptions, the speakers proposed implementation of protectionist mechanism to shelter construction and energy companies and ensure the construction and operation of infrastructure.

To conclude, the last topic was dedicated to providing proposals and potential solutions to all these different challenges, with special attention driven to international arbitration and its lasting importance. Ms. Pich emphasized the need to remain active and creative when disputes in the nuclear energy sector arise. She concluded her remarks by saying that when a parallel is drawn with past actions, States have been moving from adjudication and actively resorting to arbitration as a mean of dispute resolution.

Ms. Perruccio Lourie's last remark was that after facing challenges such as constant pressures from local communities and risks related to construction contracts, arbitration remain the preferable dispute resolution method to which construction companies resort. This is due to the neutrality of international arbitration compared with adjudication in front of national courts.

In his last note, Mr. Kristovic-Blazevic pointed to a recent Queen Mary University survey concluding that international arbitrations remain the main method for solving energy disputes. The popularity of international arbitration is explained due to its neutrality, the technical and legal expertise of arbitrators, and the ability of the arbitral tribunals to handle the proceedings diligently. Additionally, the system set with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ensures the enforceability of arbitral awards by a wide array of countries.

Then, Mr. Baeten stated that with the rising number of climate change litigation and strong public demands for transparency, arbitration and adjudication will become important tools to solve those disputes.

Finally, Ms. Sangiulo touched upon the rising demand for more transparency and estimate that the number of ESG arbitrations, both treaty-based and commercial, will grow in the future. Arbitration is suited and can further be improved, but that process is in the hands of all participating stakeholders. In some cases, litigation will be equally suited to resolve ESG disputes and rise up to the set standards.

"HOT TOPICS IN INTERNATIONAL ARBITRATION IN AFRICA"

By Nayla Baly

On Tuesday March 28, 2023, SOAS University of London hosted a webinar moderated by Mr. Tsegaye Laurendeau (Partner at Signature Litigation) on "Hot Topics in International Arbitration in Africa". The panel consisted of four guest speakers, each discussing recent topics of international arbitration on the African continent. Among the panelists were Dr. Chrispas Nyombi (Associate Professor of International Commercial Law at the University of Derby, United Kingdom), Prof. Emilia Onyema (Professor of International Commercial Law at SOAS University of London and Independent Arbitrator), Dr. Sally El Sawah (Partner at Junction), as well as Dr. Amel Makhlouf (Attorney at Law and Research Associate at SOAS University of London).

Dr. Chrispas Nyombi explained how the African Continental Free Trade Area ("AfCFTA") launched on the first of January 2021 is aimed at boosting trade and investments on the continent and promoting a single market for goods and services. The AfCTA has provided for a dispute resolution mechanism in a Protocol entitled "Rules and Procedures on the Settlement of Disputes". Dr. Chrispas Nyombi pointed out a specific issue that comes up when reading Article 1 of the aforementioned Protocol. The definition of "dispute" only refers to disputes between Member States thus leaving out the private sector from suing States in trade related disputes.

As for disputes in the investment sector, the Protocol on Investment establishing the AfCFTA provides for Investor-State dispute settlement ("ISDS") in the draft protocol ("Zero Draft"). The Protocol provides for the State's automatic consent to arbitration.

Overall, Dr. Chrispas Nyombi considers that the agreement establishing the AfCTA could have been bolder with regards to disputes with private parties.

Prof. Emilia Onyema bounced on the topic of trade disputes between States and private entities which is not covered by the AfCFTA. This leads to questioning how to resolve such disputes considering there is no continental Court for commercial cases. Prof. Onyema mentioned that there is a lack of familiarity in other States' jurisdiction system, their language as well as legal order that prevents a Nigerian business from safely going before the Ghanaian courts even when both are common law countries. Hence, alternatives to litigation could be explored, namely mediation. The only issue about mediation is the lack of enforceability considering some African countries are not signatories to the Singapore Convention (which has been signed by Benin, the Democratic Republic of the Congo, Gabon, Ghana, Ghinea-Bissau, Mauritius, Nigeria, Rwanda, Sierra Leone and Uganda). This leaves us with arbitration as another dispute resolution mechanism under which 42 out of 54 African States are Parties to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards.

In any event, according to Prof. Onyema, the AfCFTA has to create a distinction between private and public disputes and cover the issue of disputes between private entities. One possibility she mentioned could consist of creating a continental Court under the AfCFTA such as the OHADA Common Court of Justice and Arbitration ("CCJA") that would have continent-wide jurisdiction.

Moving on from this issue, Dr. Sally El Sawah intervened to address the intersection between human rights and arbitration in Africa. In the current context of corporate governance, many concepts have been developed such as corporate social responsibility ("CSR"), environment social and governance ("ESG") that gave rise to companies investing in social impact assessments, codes of conducts, and consequently respecting human rights. In terms of disputes, in the sector of mining arbitration for example, many issues in relation to human rights can come up, namely the impact on pollution of water, dispossession of indigenous people's lands, etc. Under the AfCFTA protocol on investment, an entire chapter has been dedicated to investors' obligations including prohibition of bribery, respect of indigenous communities, respect of the environment and many more. Moreover, the protocol grants the right to the

State to bring a counterclaim in this respect. This led to questioning whether other stakeholders such as the affected communities to bring a claim against the investors, and especially whether arbitration is suited to such disputes. This is still an open question, but what can be taken away from it is that corporations in general will want to push toward arbitration because of the confidentiality aspect, and that right holders have a lack of trust before Courts in Africa.

The floor was then given to Dr. Amel Makhlouf to introduce the last topic of FinTech and cryptocurrency disputes in Africa. She first defined the term FinTech which relates to any financial technology, financial services delivered for businesses and consumers using artificial intelligence ("AI"), softwares, blockchain applications and even online dispute-resolution platforms. The context of the COVID-19 pandemic and the will to provide payment solutions other than cash have fostered the use of FinTech in Africa, which was described by Dr. Makhlouf as the fastest growing startup industry in Africa. 11 countries are currently at the heart of the FinTech opportunity in Africa (Cameroon, Ivory Coast, Egypt, Ghana, Kenya, Morocco, Nigeria, Senegal, South Africa, Tanzania, and Uganda) which represent 70% of Africa's GDP (PiggyVest in Nigeria, EcoCash in Zimbabwe, etc).

During her oral presentation, Dr. Makhlouf also addressed the use of cryptocurrencies in Africa. She explained how cryptocurrencies have made their way in many different countries on the continent and how some States have even legislated on the matter to prohibit their use such as Algeria, Egypt, Libya, Ethiopia and Cameroon. Dr. Makhlouf also clarified the question of the use of FinTech and cryptocurrencies in the context of Islamic law. She explained that FinTech is per se neither ḥalāl (lawful) nor ḥarām (unlawful). As long as FinTech complies with Islamic principles and is beneficial to the Muslim community, FinTech is deemed permissible. As for cryptocurrencies, Dr Makhlouf stated that a blanket approach of calling all cryptos ḥalāl or ḥarām will not be practical. She explained the existing controversy in the crypto-assets industry although the concept of money was never defined directly in the Quran and Sunnah (the living tradition; the sayings and doings of the Prophet Muhammad).

When it comes to the resolution of disputes, due to the cross-jurisdictional nature of cryptocurrency disputes, investors are likely to have more confidence in the arbitration process. Many platforms' terms and conditions specifically designate arbitration rules and parties will be able to choose counsel and arbitrators that are specialists on the subject matter.

There can however be some issues regarding the enforcement of an arbitration award in countries that have a ban on cryptocurrency. It might be tempting to request an award in fiat currency to circumvent the prohibition on cryptocurrencies. In 2020, in China, an award was set aside on public policy grounds because the enforcement of such award would have facilitated circulation of bitcoin in China which is against the spirit of the law.

As a conclusion, Dr. Makhlouf reiterated that cryptocurrencies are still at an early stage of development in Africa.

"IA MEETS AI: INTERNATIONAL ARBITRATION IN THE ERA OF ARTIFICIAL INTELLIGENCE"

By Victoria Struys and Elisa-Marie Goubeau

On March 28, 2023, Forensic Risk Alliance and Freshfields Bruckhaus Deringer LLP co-hosted a seminar providing an overview of the potential uses and risks of artificial intelligence ('AI') in the field of international arbitration ('IA') as part of the Paris Arbitration Week 2023. Moderated by Yousr Khalil (Partner at Forensic Risk Alliance), the panel was composed of Noah Rubins KC (Partner at Freshfields Bruckhaus Deringer LLP), Kathryn Khamsi (Partner at Three Crowns LLP), Alexander Leventhal (Partner at Quinn Emmanuel Urquhart & Sullivan, LLP), José Feris (Partner at Squire Patton Boggs) and Laura Galindo (Global AI Policy Expert at Meta).

Ms. Khalil gave some introductory remarks by mentioning the European Union proposal for an AI act to better regulate and monitor new technologies. Then, the panellists were asked to deliver their thoughts on the impact of AI on the practice of law in IA as well as to share their insights on its consequences on the concepts of bias and decision-making.

The floor was first given to Mr. Rubins KC. He believes that AI will have a limited impact as it operates far away from the fundamental core of lawyers' task which is critical reasoning. If AI is able to replicate models and to predict outcomes, he stressed that AI lacks human creativity. Thus, he is not convinced by its ability to bring an about-turn in the way law is practiced. He explained that oral advocacy will likely not be taken away as a lawyers' job is not only about replicating patterns and is not only based on logic. In his view, teaching machines how to familiarize with emotions and oral advocacy falls under the realm of science fiction. Instead, AI should be embraced as a progress towards the automation of lawyers' tasks but should not be envisioned as a potential replacement. Moreover, Mr. Rubins KC also discussed the impact of AI for legal trainees. He recognized that AI can be used in the training of young professionals as it will help accomplish tasks faster. Therefore, giving more time for interns to work on more substantive matters.

The second speaker, Mr. Feris explained that such AI products are already guiding legal professionals when reviewing contracts. As such, he argued that AI is already assisting to conclude transactions at a faster pace. As for the impact of AI on decision-making, Mr. Feris pointed out that more considerations would need to be added into the model such as teaching the system how to evaluate a witness statement and apply law to certain facts. However, the panellist identified the lack of information available in international arbitration as an important obstacle for AI to successfully provide meaningful answers. Although Mr. Feris identifies the limitation of new technologies, he acknowledged that AI would facilitate the work and help to grant more accessibility to information in a more democratic way.

The moderator then asked Ms. Galindo to share her insights about the effects that AI might portend on the concept of bias. She started by explaining that AI presents some risks due to transparency and privacy concerns. Such considerations will call for regulatory requirements from governments, law firms and companies in the legal sector to mitigate those risks. The final upshot is to make AI reliable and trustworthy. She called for more diversity in the input of data, to consider all populations in order for no one to be left behind for decision-making purposes. Finally, she hinted that this AI era would require to think as problem creators, and not just problem solvers.

Mr. Leventhal contributed to the debate by explaining that the data the AI technology provides is as good as the data fed into the system. AI can predict outcomes on the basis of data but it is only a language tool able to generate humanlike text, it cannot analyse images the same way humans do. Alexander Leventhal emphasized that AI is unable to assess the truth of human beings and fairness. He also mentioned that the constant use of AI in IA would prevent the creation of new patterns as an additional setback.

Ms. Khamsi started her intervention by stating that AI tools need to be turned into something accountable. She illustrated her argument by sharing her experience in an infrastructure dispute in which the labour data collected did not mirror the workers' behaviour on the project. She listed three ways of correcting the data's' inconsistency. The first solution is to expand the data set to more years. The second one is to compare ways of measuring from different angles and to correct by analysing multiple data sets. The third solution to correct inaccuracies is to recognize them and think about it.

The moderator then asked the panellists how to adjust the data sets ethically referring to data disparity. Mr. Leventhal's answer was that there is a wide array of legal decisions coming from the US jurisdiction and other Western countries. However, the amount of data available in other jurisdictions is scarcer. Additionally, he noted that the salient issue in IA is that decisions are mostly confidential. In Investor-State Dispute Settlement, awards might be public but not binding. The risk of AI predicting outcomes is that it may end up setting up undesirable binding decisions.

After discussing data disparities, the discussion took a new turn. The panellists went on to address the use of AI tools by arbitral tribunals. Mr. Feris took the floor by giving the example of a Columbian judge who used ChatGPT for his judgment. While ChatGPT could be used for judgment, Mr. Feris insisted that if arbitral tribunals rely on AI to provide an answer, it must do so in a transparent way and communicate with the parties. In other words, arbitrators must reveal the sources that have not been provided by the parties. He concluded that AI would assist arbitral tribunals to work more quickly, thoroughly, and efficiently. On the same point, Laura Galindo shared that in a couple of months, the arbitration community may witness the release of new guidelines from arbitral institutions regarding the use of AI tools. Some of them might be addressed directly to arbitrators.

Afterwards, the moderator invited Ms. Khamsi to walk the attendees through her case study. She showed a spaghetti diagram of the factors influencing the US and NATO success in Afghanistan. She explained that this technology is the same that can be used to establish causation in complex IA matters. More specifically, she revealed that the type of AI purchased is one that builds a model robot to deal with the tremendous data involved. Unlike other typical models, the first step is rather to understand the system to be modelled. As such, it is imperative to come up with a sense of the basics of what is driving one's system. She further explained that if AI had been used as a predictive tool historically, in the field of IA, models can create alternative versions of both the future and the past. In each commercial case, for the assessment of damages, an alternative version of the past is necessary.

Last but not least, the panellists were asked about the type of issues that might change the face of IA. The first issue was that AI is a black box which creates transparency concerns. Another issue was about the lack of reliability, especially for software that generates diagrams such as the spaghetti diagram previously discussed because it is complex to include and represent all the dynamics at play in complex events. For example, the mention of 'outside support to insurgent factions' does not differentiate the type of outside support as no dynamic modelling of internal dynamics within the countries is apparent. All those issues challenge the possibility to deploy this kind of technology in IA. Finally, convincing arbitral tribunals to turn life into numbers may be a complicated exercise.

"DISPUTE RESOLUTION IN ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) MATTERS: HOW IS AFRICA LEADING THE WAY?"

By Chioma Menankiti and Rose Le Cornec

On Tuesday March 28, 2023, as part of the events organized by the Paris Arbitration Week, Reed Smith, in collaboration with AfricArb, hosted a conference entitled, "Dispute Resolution in Environmental, Social, and Governance (ESG) matters: How is Africa leading the way?". The panel, which was moderated by Clément Fouchard (Partner at Reed Smith), Guillaume Aréou (Senior Associate at Reed Smith) and Julie Spinelli (Partner at Le 16 Law and member of AfricArb), was composed of Prof. Sabrina Robert (Professor of Public Law at Le Mans University), Laurie Achtouk-Spivak (Partner at Cleary Gottlieb Steen and Hamilton), Guled Yusuf (Partner at Allen and Overy), and Obioma Ofoego (Senior Associate at Quinn Emmanuel Urquhart & Sullivan).

Mr. Aréou kicked off the conference by contextualizing the topic of Economic, Social and Governance ("ESG") values which are core values of institutions that cover the non-financial aspects of business and positively impact investments. He elaborated that the notion of ESG is linked to that of sustainable development and gave examples of how pollution and climate change claims can appear in the framework of business. In particular, he referenced the decision of French courts in the case between Total Energies and Ugandan NGOs on the application of France's due diligence law. There is no question that the topic of ESG has grown in importance over the last few years as is reflected in the 2022 EU - Angola Sustainable Facilitation Agreement which promotes investment while integrating environmental and labor rights.

Given the importance of ESG, Mr. Fouchard invited the panelists to highlight the relevant international instruments on the subject. Prof. Robert, taking the floor first, mentioned the Paris Agreement and the guiding principles of the United Nations, both of which require that investments be made with regard to sustainable development matters. However, the notion of 'sustainable investment' is vague and remains to be defined. On the African continent, several countries have signed ILO agreements and include sustainable development objectives in their investment laws, including obligations for investors to employ the local population and respect ISO environmental standards.

Ms. Achtouk-Spivak then discussed the legal instruments available in Europe on this topic. She first underlined that the EU regulatory context has repercussions on the African continent especially for companies that conduct business activities in Africa. Such ESG initiatives include the Non-Financial Reporting Directive of 2014, and the more recent Corporate Sustainability Reporting Directive of 2022 which expands existing non-financial reporting framework to include more comprehensive reporting requirements and requires companies to assess their impacts on sustainability matters and how sustainability related risks are affecting the environment. Moreover, the Taxonomy Regulation provides the standard vocabulary for corporates to use in fulfilling their reporting requirements. Finally, the Corporate Sustainability Due Diligence Directive, if adopted, would have even farther-reaching consequences than the afore-mentioned initiatives. Overall, these standards increasingly concern relations between professionals ("B to B"), thereby influencing the way through which they incorporate ESG risk into their contracts.

Upon Ms. Spinelli's guidance, the discussion shifted to how ESG provisions are included in such business contracts. On this topic, Mr. Ofoego confirmed that ESG provisions, apart from featuring in regional and national instruments, are indeed making their way into private contracts, especially given the non-financial benefits of ESG values. Indeed, private parties have started to recruit public law guidelines in their contracts and as such, ESG issues are starting to shape private contracts, a phenomenon which can occur vice-versa.

With regards to interpreting ESG provisions in private contracts, reference would be made to the different forms of law applicable and for enforcement, remedies offered by arbitration will be prioritized. Parties must also pay more attention to what is arbitrable under the relevant laws. Furthermore, Mr. Ofoego underscored that since arbitration may not always be the best route for resolving certain ESG disputes, ADR mechanisms may come into play.

Mr. Yusuf explained some advantages of ESG provisions in that they balance the interests of parties and stakeholders, enhance transparency and allow companies to evaluate the risks of their investments thus improving the quality of the latter. He also underlined that adopting ESG values drives investments in African countries by increasing the ease of doing business in these countries. As a result, several African countries have included ESG values in their investment policies by adopting regional frameworks, issuing sustainable green bonds, and adopting fiscal policies which render renewable energy projects more affordable. Notably, several recent investment treaties signed by African countries provide for the host state's right to regulate and require investors' engagement in human rights issues and their contribution to the host state's sustainable development. Finally, Mr. Yusuf observed a linguistic harmonization of ESG values in recent treaties signed by African countries.

Having recognized the frameworks developed on the continent to promote ESG values, Professor Robert was invited to explain the evolutions and innovations on the African continent in this regard. These evolutions can be observed through the investment treaty reform process which began in 2010 and is marked by the rewriting of standards, the insertion of flexibility clauses, increased protection for states, the inclusion of investors' obligations and the exclusion of arbitration for certain sectors and measures. Such evolutions entail consequences for future disputes and arbitration proceedings which must factor in the new standards of protection in recent investment treaties. An example is the recent and more restricted definition of legitimate expectations which would require investors to take ESG obligations into account in their expectations. In the same light, the panelists agreed that more counterclaims would be brought in future arbitration proceedings.

Ms. Achtouk-Spivak reinforced the discussion by providing examples of case law on the subject including OECD national contact point proceedings, commercial arbitration disputes premised on lack of remediation and failure to comply with Environmental Impact Assessment ("EIA") clauses. With respect to treaty disputes, African states have raised objections to tribunals' jurisdictions based on the alleged illegality of investments and arbitral tribunals have welcomed successful corruption claims in cases involving African countries. The impact of ESG provisions in international arbitration has also materialized in the quantum phase of proceedings where parties have argued that the notion of contributory fault be used to penalize failure to comply with ESG values.

The conference ended with the audience taking the floor to make additional comments and ask questions on the topic. The panelists responded to the audience's questions on stabilization clauses and the interpretation of ESG provisions. They also welcomed remarks on other innovative provisions in recent investment treaties such as clauses that preclude host states from lowering their standards on environmental matters in a bid to attract investments. Mr. Fouchard drew the curtains on the conference by encouraging the audience sign the Campaign for Greener Arbitration's Green Pledge, a step which Reed Smith has exemplarily taken.

"THE GLOBAL POLYCRISIS AND POLITICAL RISK INSURANCE: WHAT ARBITRATION PRACTITIONERS NEED TO KNOW"

By Hristijan Zafirovski and Samuel Davies

On Tuesday, 28 March 2023, Shearman & Sterling organised an event at Paris Arbitration Week 2023 on the global polycrisis, its risks to foreign direct investment, and the resulting growth in political risk insurance ("PRI") to manage investors' exposure. Introduced by Jennifer Younan (Partner, Shearman & Sterling), the panel was moderated by Elise Edson (Counsel, Shearman & Sterling) and composed of George Bellord (Director, BPL Global), Mark Kantor (Independent Arbitrator) and Anna Morgan (Legal Director, BPL Global).

In her opening remarks, Ms. Younan referred to the World Bank Multilateral Investment Guarantee Agency ("MIGA"), which defines political risks as government actions restricting the rights of investors to use assets or a subsequent reduction in their value. These risks include war, revolution, government seizure of property, and restrictions on the movement of profits or other revenues within a country. They also refer more broadly to changes in political or socio-economic conditions affecting an investment. Indeed, a broadening set of risks faced by investors in a highly interconnected global economy has increased both the frequency and proximity of these risks. The failure to address climate change, the Russian invasion of Ukraine, the global pandemic, supply chain disruptions, sovereign default, and rising inflation are just some examples indicating the likelihood of a continued increase in political risks in the near future. The World Economic Forum qualifies the intersection of these current risks and emerging crises as a "polycrisis". As managing political risks is crucial for long-term sustainability of a business, PRI is a unique product designed to promote and encourage investment in otherwise risky environments. While they are defined by their unpredictability, these policies can be designed around models based on historical data.

George Belford discussed the creation of PRI and its origins, the type of cover provided, the capacity of coverage as well as the additional role of MIGA as policy provider. Following WW2, the US government created a product to assist American investments globally, marking the first interaction between government entities. In 1988, MIGA was finally established. Following this development, the private market for PRI expanded with the entry of AIG and Lloyds though it remained quite limited. While it is currently difficult to estimate the market size due to the reluctance of insurers and brokers to share data, growth in demand and competition suggests the product has come of age and insurers have significant coverage capacity. Investors are the customers for this product, which covers the net investment. Mr. Belford went on to explain that MIGA is the largest client in the private insurance market and re-insures its exposures into the private market, paying a substantial premium. He also noted that, though MIGA's influence may be able to limit the likelihood of government expropriation (which may add to its appeal over a private market insurer), it does not have the ability to prevent other types of risk, such as preventing two parties from entering into war. Therefore, coverage needs to focus on political violence and war aspects. It is important to ensure that losses are recoverable from the host government as a breach of international law.

Ms. Morgan focused on disputes likely to arise from events said to incur loss, and the legal framework in which these matters are governed. She highlighted that political risk disputes are rarely disputed in a legal forum. Ms. Morgan described the claims process, noting that disputes may arise when a policy holder seeks to recover losses from an insured peril years after the incident. Insurers usually appoint loss adjusters to investigate the facts to make a coverage determination. On the issue of governing law in respect of PRI coverage disputes, any underlying contract must be considered and negotiations over the policy wording must safeguard the insurer's control and certainty over assets covered, as well as the dispute resolution mechanisms. In most cases, disputes are referred to arbitration due to confidentiality concerns. Key terms and principles come into question during a legal dispute, such as the duty of the insured party to provide an accurate presentation of the risk to the insurer, the allocation of responsibility under governing law, the onus of proof, and duties of disclosure. The policy wording must contain clear and precise definitions to determine whether the risk has occurred, but it is impossible to anticipate every possible claim scenario. Even after a claim has been paid, there may still be ongoing duties on the insured to obtain recoveries and share them

with the insurer, potentially leading to further disputes. Prof. Kantor concluded with a focus on issues of standing of the insured in investor-state dispute resolution within the context of the insurer's right of subrogation, and consequences for damages where the insured investor has already been covered by PRI. He added that policies usually cover expropriation, political violence, abandonment of operations, restrictions on transferability and convertibility of currency and sometimes breach of the host-State contract in the context of arbitration award default. Prof. Kantor noted that investor-state dispute resolution can take an average of 3.5 years from filing a claim with the International Centre for Settlement of Investment Disputes ("ICSID") to issuance of the final award, with additional time for annulment or enforcement proceedings. MIGA may make discretionary provisional payments of up to 50% of its cover while proceedings are ongoing. He then made a comparison between the different standards of protection and said that in contrast, investor-state dispute resolution covers more than the matters covered by PRI, for example, the fair and equitable standard, the international minimum standard is often expressed as a claim for legitimate expectations. PRI does not typically cover the most-favoured nation treatment breaches or national treatment breaches. Those are common investor-state claims that are outside of the world of PRI. He noted that a convenient aspect of PRI is that if these are negotiated with the issuing insurer, they can be considered. Regarding insurance pay-outs and damages, PRI usually pays out based on the net book value, which is calculated on accounting principles. On the other hand, international investment arbitration can provide compensation at market value and for diminution of market value. PRI also has ceilings on the amount that can be paid out, while investor-state dispute resolution does not have any limits. Another aspect of PRI is risk sharing, which means that the insurer and the insured share the risk of loss in a predetermined ratio.

All of this bears the following question: does the investor still have standing in investor-state dispute resolution if it is covered by an insurance policy, and what are the consequences for damages?

Reinsurers subrogate to the insured investor's rights and claims usually on the basis of three legal reasons: first, the wording of the insurance policy containing a right of subrogation, second, the applicable law providing for subrogation which can be very valuable for a private insurer who is seeking to bring a claim against a host State, and thirdly, agreements between the insurer and the host State that recognize this regime of subrogation. For example, if a political risk insurer pays a claim for expropriation, the insured party must then, as a condition to receiving payment, assign a percentage of cover of the holder's share of the project enterprise to MIGA, and transfer its ownership rights through the enterprise to MIGA. The issue of standing arises when a political risk insurer seeks to take the place of an investor in investor-state dispute resolution. BITs acknowledge subrogation, but it may not solve the nationality requirement in the ICSID convention, causing problems for PRI to step into the shoes of the investor in the pre-award period.

Finally, the "real party in interest" doctrine was reflected upon. It asserts that jurisdiction should be determined based on the actual party with an interest in the dispute, not just the named claimant. This creates a problem for PRIs seeking to step into the shoes of an investor in investor-state dispute resolution. It is safer for PRIs to rely on control rights in the insurance policy rather than waiting to take an assignment after the final award. Prepayment provisions require the insured to take all reasonable measures to obtain compensation and prohibit the insured from waiving any right or claim without the insurer's consent. The legal umbrella provided by MIGA makes purchasing PRI policies worthwhile for many investors.

"IS INVESTMENT ARBITRATION DEAD? EUROPEAN AND AFRICAN PERSPECTIVES"

By Michael Hingston and Chioma Menankiti

On Tuesday March 29, 2023 in the context of the conferences organized over the course of the Paris Arbitration Week, DLA Piper hosted a conference on the following theme: "Is Investment Arbitration Dead? European and African Perspectives." The conference was moderated by Michael Ostrove and Théobald Naud (Partners at DLA Piper France LLP) and the panel was composed of Claire Debourg (Professor at Université Paris Nanterre), Mouhamed Kebe (Managing Partner, GENI & KEBE (Member of DLA Piper Africa) and Flavia Marisi (Member of the Legal Service at the European Commission).

Following a brief introduction of the panelists by Mr. Ostrove, Ms. Marisi, upon Mr. Naud's invitation, outlined some observations of the current Investor-State Dispute System ("ISDS"). She underscored that just as "nobody is perfect", ISDS has been the subject of various comments both on procedural and substantive fronts. Regarding procedure first of all, the transparency, legitimacy and consistency afforded by the system are the most notable issues; concerning substantive issues, the wording of most investment treaties has been highlighted, in particular. Given these problems, three options are available to states: moving away from ISDS as Bolivia and Venezuela did in 2007 and 2012 respectively, maintaining the status quo, and reforming the system, which is the option chosen by the European Union ("EU").

With regards to the procedural issues, the proposed solutions include applying UNCITRAL rules on Transparency in Treaty-Based Investor-State arbitration and adopting an Investment Court System for bilateral disputes. The Investment Court System envisioned by the European Union will be a stand-alone investment tribunal consisting of 9 sitting judges and 5 judges in appeal proceedings. This court system has already been included in some agreements signed by the EU such as the EU-Vietnam Free Trade Agreement.

On the multilateral front, the EU proposes a Multilateral Investment Court ("MIC") where the appointment of adjudicators will work based on a roster reflecting broad geographical and gender representation. Concerning jurisdiction, an agreement referencing the MIC will not automatically grant the State's consent to bringing the case before the MIC so states must expressly agree to the authority of the MIC. The MIC will also have a Code of Conduct, inspired from the IBA Guidelines on Conflict of Interest, and a Multilateral Advisory Centre as it is the case at the World Trade Organization. Finally, an appeal system will be established and provisions will be made to guarantee security for costs and early dismissal of unfounded claims.

Ms. Marisi also outlined some proposed solutions for substantive issues in ISDS. For bilateral treaties, this includes the inclusion of new-generation treaty provisions, and for multilateral investment frameworks, she referenced the Energy Charter Treaty ("ECT") whose modernization was driven by the need to meet the Member States' commitments under the Paris Agreement. As such, the modernized ECT features an updated list of energy materials and products contained in an annex to the Treaty. For reasons of flexibility, there is a carve-out for fossil fuel investment protection, and lastly, the Treaty will be reviewed every five years in a bid to keep up to date with technological advances.

Prof. Debourg then proceeded on tackling the future of arbitration in the EU following the Achmea and Komstroy decisions which condemned the use of investment arbitration under intra-EU member state investment treaties. Prof. Debourg expressed her concerns related to these decisions in terms of their geographical scope and the ways they may limit the rights of EU companies. Regarding the geographical scope, Prof. Debourg noted that member states have been abiding by the Court of Justice of the European Union's ("CJEU") decisions and terminating intra-EU bilateral investment treaties.

However, some have raised concerns that this ban on investment arbitration could extend to commercial arbitration with the reasoning that since commercial arbitral tribunals, such as ISDS tribunals, could apply EU law but cannot bring questions for preliminary ruling to the CJEU, they may also be inconsistent with EU law. However, Prof. Debourg stated that the possibility of there being any impact on commercial arbitration has been rejected numerous times by courts.

Prof. Debourg also briefly discussed the potential procedural limitations raised by the CJEU decisions. Some commentators have suggested that the rejection of intra-EU ISDS could prevent parties to such disputes from having access to courts to review and enforce their arbitral awards. However, she was skeptical that these concerns would find much footing in the EU, noting that these limitations had been rejected in Komstroy. Finally, she noted that the CJEU's position regarding intra-EU investment arbitration was not universally followed. For example, ICSID tribunals have resisted disallowing this type of investment arbitration.
Mr. Kebe then addressed the reception of ISDS among African countries. He outlined three phases of ISDS in Africa: The "happy phase", the "gloomy phase", and the "reactionary phase". The "happy phase" was characterized by the early conclusion, by African countries, of investment treaties with ISDS clauses. This is evident as the first countries to sign (Tunisia) and ratify (Nigeria) the ICSID Convention were African countries. The "gloomy phase" which occurred during the last ten years, was marked by a strong frustration of African countries with ISDS, particularly as a result of the lack of transparency in arbitration proceedings, the under-representation of African arbitrators in tribunals, and by several awards unfavorable to African governments. Finally, the reaction phase refers to the response by African countries who seek to reduce their obligations under bilateral and multilateral investment treaties.

Mr. Kebe underlined that this reaction most commonly manifested through requirements for parties to exhaust local remedies before resorting to ISDS, or through the exclusion of ISDS altogether. Mr. Kebe provided as examples the South African Development Community ("SADC") Investment Protocol which was amended to exclude ISDS as an option in 2016, the Economic Community of West African States ("ECOWAS") Investment Act which requires the exhaustion of local remedies, and the COMESA Investment Agreement under which disputes can only be brought before the Common Market for Eastern and Southern Africa ("COMESA") Court of Justice. Other African countries have adopted measures such as amending BITs to require consultation and negotiation between the parties before resorting to investment arbitration.

While there is clearly a domestic outcry against ISDS in African states, Mr. Kebe insisted that there the bell is not tolling for ISDS in African countries. Instead, African countries are taking measures to adapt ISDS to their needs.

The exchange was then extended to the audience with various questions being put forward. The first question covered how counterparties viewed the trend towards clauses requiring the exhaustion of local remedies. Mr. Kebe answered that they had not had a large impact on negotiations in Southern Africa, and Ms. Marisi noted that the inclusion of policy goals in the latest generation of ISDS clauses may assist parties in reaching a balance. The second set of questions related to whether the EU's current approach to investment arbitration limits tribunal autonomy in the EU, and whether the EU had missed an opportunity to create an alternative forum. Ms. Marisi suggested that national courts were the appropriate forum in the EU and maintained that investment arbitration did not appear consistent with EU law and that she did not foresee any other life for intra-EU investment arbitration, whether created by the European Commission or the CJEU.

The conference ended with a question on whether the CJEU was the best forum to refer questions relating to investment and commercial arbitration. While Prof. Debourg and Mr. Kebe acknowledged that there is skepticism around using local courts for these questions, Mr. Kebe noted that strong judiciaries can offset at least some of investors' concerns. Ms. Marisi confirmed for the panel that the EU's reforms to ISDS do not have any consequences for commercial arbitration.

"STRIKING A SUSTAINABLE DEAL: BALANCING STATE RESPONSIBILITY & INVESTOR RIGHTS IN MINING"

By Maryam Gilmitdinova and Ilona Métais

On Tuesday March 28, 2023, Jus Mundi hosted a seminar at their Parisian office, entitled "Striking a sustainable deal: balancing state responsibility & investor rights in mining". The panel was moderated by Alexandre Vagenheim (VP Global Legal Data at Jus Mundi) and was composed of multiple lawyers and experts including Diora Ziyaeva (Partner at Dentons) William Kirtley (Managing Partner at Aceris Law), Mark Johns (Principal Scientist at Exponent, Inc.), and Funke Adekoya San (Independent Arbitrator & Litigation Consultant).

The session was introduced by Alexandre Vagenheim, VP Global Legal Data at Jus Mundi, a Legal Tech company that aim to provide access to global legal information worldwide. He explained that Jus Mundi provides annual reports on industries, in particular, Jus Mundi 2023 Mining Arbitration Report, which was the roadmap for the panel. He noted that there was a huge rise of mining arbitration globally in the last two decades and that Jus Mundi's search engine contained over 800 mining disputes - 500 commercial arbitration cases and 300 investment arbitrations. These cases raise one essential question: how to achieve a proper balance between the rights of investors, i.e., investment protection standards, and the rights of a host State to manage natural resources, i.e., to maximize the benefits of their exploitation.

Mark Johns (Office Director at Exponent, Inc.), proposed feasible solutions to the potential regulatory clash between Environmental, Social, Governance ("ESG") and investment protection standards. He addressed the issue of how mining companies impact local communities through the concept of a "social license to operate". He explained that the UN had started to look closely at the top ESG issues since 2015, especially, at the top 4: water management, decarbonization, climate change and green production. He stressed that mining could damage clean water, hence, directly affect local communities. Moving to solar energy, collecting and analyzing data, and developing environmentally friendly mines are feasible solutions.

Diora Ziyaeva then examined the relevant jurisprudence on investment arbitration in mining disputes and noted a remarkable shift in the arbitral tribunal's consideration of the impact on local communities. She referred to Case Gold Reserve v. Venezuela where the tribunal refused to revoke a mining license only based on its impact on local communities. She also noted Case Quiborax v. Bolivia, where the tribunal concluded that the impact on local communities does not affect an obligation to compensate. In the Case Bear Creek Mining v. Peru the tribunal took into consideration the impact on local communities and awarded damages correspondingly. Ms. Ziyaeva also discussed the practical aspect of civil society participation in arbitration and elaborated on how to prepare an amicus curiae brief that can be helpful in ESG and mining investment disputes. In her view, although there is no golden rule, the trend is towards increase of amicus curiae brief in investment arbitration according to the Mining Report.

She recalled that the global focus on ESG is not particularly new, however, internationally there is a growing pressure regarding those issues. Most frequently, the ESG issues arise as part of the State's defense or as a part of the State's counterclaim. One of the fundamental questions in ESG cases is the question of whether the State is the right party to assert an ESG counterclaim, particularly, an environmental violation. Guinea successfully defended a 5 billion dollar claim over revocation of mining rights in BSGR v. Guinea on grounds of corruption, i.e., governance issues. Another example would be Cortec Mining v. Kenya when Kenya successfully claimed that the investor failed to comply with the environmental requirements to raise a lack of jurisdiction. In Chevron v. Ecuador the tribunal rejected the counterclaim of Ecuador based on lack of standing. Similarly, in Tethyan Copper v. Pakistan environmental violation was part of a counterclaim, yet, was dismissed for lack of standing due to an asymmetry of attribution for non-treaty claims under domestic law. She stressed that the investment treaties are inherently one-sided.

Yet, tribunals tend to take it into account, while examining the counterclaims by awarding the monetary damages. For instance, awards in Burlington & Perenco involved environmental counterclaims, where Ecuador succeeded in raising environmental counterclaims based on investment agreements.

Mr. William Kirtley clarified the question on how to proceed when dispute arises. Mining disputes often arise before mining even started, i.e., at the stage of obtaining a permit. Another example is when the project was lodged, yet the local communities' protests blocked the ongoing project. An example of an award against Ecuador demonstrates the tribunal can find the investor is partially responsible for his loss. Yet, arbitration is possible during an ongoing project provided that investors manage to keep it technical, not emotional. Eventually, the statistics demonstrate a trend towards extension of the ESG obligation in new generation investment treaties.

Ms. Funke Adekoya noted that there are trends in Africa where timeframes of mining disputes have shifted because of climate change and those disputes will become more widespread in the future. She agreed that the investment treaties were initially one-sided. However, a new model African BIT was introduced. Besides that, the investment protocol provides the guidance for African investments in areas of environment, social and labor, by equalizing the inherent inequality of investment treaties.

In respect to stabilization clauses, Mr. Kirtley reminded that you can subject them to the domestic law of your choice. The stabilization clauses usually focus on fiscal regime. The freezing clauses fix the law for a certain time. The equilibrium clauses give the right to renegotiate in case the equilibrium has altered. Relatively few disputes involve environmental issues, mostly taxation or the scope of the clause. He suggested that more disputes on stabilization clauses would come in the future.

On allegations of corruption, Ms. Adekoya reminded the audience that the issue of corruption can be raised as a preliminary issue or as a defense on the merits. As an example of a preliminary issue, she referred to Case Metal-Tech v. Uzbekistan, when ICSID tribunal dismissed the claim at the jurisdictional level on grounds of corruption as the investments were procured through corruption. As an example of defense on the merits she referred to Case BSGR v. Guinea where the respondent alleged 4 instances of corruption. The third option would be to set aside the award on grounds of corruption. On standard of proof, Ms. Adekoya noted that the issue is still unsettled, yet repeatedly addressed by the tribunals as an international public policy issue. Is it a civil law standard - a balance of probabilities, or, a criminal law standard - beyond the reasonable doubt? It's a mixed standard, in case of red flags on corruption the burden shifts from the State to the investor to refute the claim.

Regarding specific factors driving the valuation of damages, Mr. Kirtley noted that it is more difficult to calculate the geological and physical properties of mines as opposed to oil and gas. For the early-stage mining projects this might have a certain impact limiting damages to costs. The operational stage of the project, on the contrary, allows the use of an income-based approach. He noted that 20 years ago ESG was largely irrelevant to the valuation of quantum. Even in 2015 in Case Quiborax v. Bolivia, when the concession was withdrawn on environmental grounds, the tribunal considered the discounted-cash flow methodology to award compensation to a foreign investor without diminishing damages. In 2016, on the other hand, in Case Copper Mesa Mining Corporation v. Republic of Ecuador, the tribunal assessed the investor's contribution to the damages. In Case Bear Creek Mining Corp v. Republic of Peru, the tribunal found that there was little prospect for the project to obtain the necessary social license, awarding sunk costs as damages.

In conclusion, Ms. Adekoya summarized that in order to strike a sustainable deal, investors need to act in the best interest of their investments and comply with ESG in good faith. Ms. Ziyaeva proposed to follow a nuanced context-based approach to balancing the rights. Yet, a sustainable mining sector is the ultimate goal to bear in mind. Mr. Kirtley advocated the drafting of the detailed stabilization clauses while acting in good faith. Mr. Johns reminded that a positive action, such as investments in ESG infrastructure, is crucial.

"A DECADE OF ARAB SPRING ARBITRATIONS: CLAIMS, DEFENCES, AND ENFORCEMENT CHALLENGES"

By Rola Makke and Marc Bassil

On Tuesday 28 March 2023, White & Case organized a conference dealing with the situation after "A decade of Arab Spring arbitrations: claims, defesces, and enforcement challenges". The Panel was moderated by Noor Davies (Partner at White & Case) and composed of Laurie Achtouk-Spivak (Partner at Cleary Gottlieb Steen & Hamilton), Bassam Mirza (Founding Partner at Pellerin Kecsmar Mirza), Najib Hage-Chahine (Managing Partner at Hage-Chahine Law Firm) and Rami Chahine (Partner at Meltem Avocats).

Samy Markbaoui (Partner at White & Case), welcomed the guests and set the pace for the discussion stating the International Centre for Settlement of Investment Disputes ("ICSID") statistics showing that the number of ICSID cases against Arab states grew in number between 2011 and 2021. The Paris White & Case team handled several cases that came out of the region and key issues in these cases included "force majeure", unforeseen circumstances, hardship, corruption, the scope of the Full Protection and Security ("FPS") standard, revision of awards for fraud, extension of arbitration agreement concluded by States, European Union and United States sanctions and others issues.

Ms. Davies then introduced the speakers. The floor was first given to Ms. Achtouk-Spivak who was asked about the landscape of investment treaties and regional agreements on protection of investments in the region. Laurie described the treaty landscape in the Middle East and North Africa ("MENA") region in one word: dense. It is a dense treaty network with about 640 Bilateral Investment Treaties ("BIT") in force. Most of these treaties have been entered into with OECD countries. Most BITs are extra-MENA and mostly old-generation BITs with standard Fair and Equitable Treatment ("FET") and FPS clauses. A couple of MENA countries are entering free trade agreements with the US. There is less coverage for intra-MENA investments: Intra-MENA BITs constitute only 15% of BITs and are relatively recent. To fill the gap, investors turn to regional agreements for the protection of investments. The two major ones are the Organisation of Islamic Cooperation ("OIC") and Arab Investment Agreements. They are fallback options because they tend to have stricter jurisdictional requirements, narrower substantive protections, and have been criticized as far as their dispute resolution mechanism is concerned.

When asked about the type of claims that have emerged after the Arab Spring, Mr. Chahine pointed out that political unrest generally has negative consequences on foreign investments, giving rise in turn to investment-arbitration claims. There are four typical factual scenarios which may give rise to such claims: (i) when a foreign investment suffers physical harm; (ii) when governments adopt general or targeted measures in reaction to civil unrest to safeguard allegedly the stability of the country, but which negatively impact a foreign investment; (iii) when new governments adopt measures that are specifically directed at a foreign investment or investor, with the clear intention of unwinding allegedly illegitimate actions from the previous government ; and finally (iv), situations where foreign investors are emboldened by the political change to complain about mistreatment by the previous government. Mr. Chahine pointed out that, even if politics is not the subject of this debate, these cases all tend to be somehow political. At the beginning, Arab-Spring upheavals were positively perceived by many people, including by the international arbitral community, because they aimed at securing more freedom and democracy. This circumstance must be taken into account when pursuing a claim against a State which has just experienced such an upheaval, especially in the first two factual patterns. In those cases, the foreign investor should be careful not to attack the legitimacy of the uprising and rather focus on its consequences on his investment and/or on the adequacy of States' responses. Otherwise, the foreign investor runs the risk of being accused of taking sides with the old regime or, depending on his nationality, of participating into the interference of "foreign powers". This could have a negative impact on his reputation, on the safety of his personnel still present in the host-State, as well as on settlement prospects.

Mr. Chahine then discussed some cases involving these factual patterns, the treaty-standards implicated, and how arbitral tribunals ultimately dealt with them.

On corruption defenses, whereby a State invokes alleged corrupt acts by the investor in the making of his investment, Mr. Chahine observed that, for various reasons, arbitral tribunals tend to approach these defenses with relative caution. To his knowledge, there is no publicly-available award related to the Arab Spring which upheld such a corruption defense raised by the host State. It has been rejected in two cases against Egypt. However, several Arab-Spring related cases where corruption defenses had been raised have settled. Settlement prospects are often linked to the evolution of the political landscape in the host-country, which history taught us could be quite eventful.

The next question concerned the accusations of corruption made by States, including the Libyan State, in connection with settlement agreements and awards by consent. Mr. Mirza answered by relying on three cases involving the Libyan State. The same feeling emerges from these three cases: neither settlement agreements nor the awards by consent have resolved the dispute in question. On the contrary, they have aggravated the disagreements between the parties. For example, in the first case, Sorelec v. Libya, under the terms of a settlement agreement signed by the parties, the Libyan State undertook to pay Sorelec 230 million euros, and if payment was not made within 45 days, the sum was increased to 452 million euros. The Libyan State argued that the settlement agreement was null and void because it was allegedly concluded by the wrong government, the Tobruk government instead of the Tripoli government. The arbitral tribunal considered that, according to the theory of appearance, Sorelec's belief in the quality of its co-contractor was legitimate irrespective of whether the Tobruk government is the right government or not. The settlement agreement having been validated, the arbitral tribunal issued a partial award condemning Libya to pay to Sorelec 230 million euros and then a final award condemning Libya to pay 452 million euros. The Libyan State launched an action to set aside against the partial and final awards before the Paris Court of Appeal on the ground that the settlement agreement was allegedly procured through corruption. The Paris Court of Appeal, relying on red flags approach, annulled the partial and final awards although the corruption argument was not raised before the arbitral tribunal.

Prof. Hage-Chahine spoke about other challenges arising out of the enforcement of arbitral awards against Arab States.

With regards to recognition of arbitral awards, he noted the emergence of two recent trends.

First, Arab States try to argue they were not properly served which prevented them from exercising timely reviews against the recognition of the award in spite of an acknowledgement of receipt of the papers by the Ministry of Foreign Affairs. Second, State entities that were not parties to the arbitration agreement have started to file challenges against recognition decisions by way of third-party opposition in the hopes of having the decision overturned.

With regards to the post-recognition stages, Prof. Hage-Chahine noted that creditors are faced with two main issues.

The first pertains to the situation where public assets are held by private entities owned by the State. In this situation, creditors will look to pierce the corporate veil by establishing the lack of independence of the private actor and a confusion of assets.

The second pertains to the issue of sovereign immunity. Prof. Hage-Chahine observes a tightening of sovereign immunity on diplomatic assets and a loosening of sovereign immunity on non-diplomatic ass Hage-Chahine observes a tightening of sovereign immunity on diplomatic assets and a loosening of sovereign immunity on non-diplomatic assets.ets.

Finally, the question has arisen of enforcement against frozen assets. A recent decision of the Court of Justice of the European Union ("CJUE") has made enforcement against frozen Iranian assets subject to an administrative authorization issued by the competent administrative authority. As such, the French "Cour de cassation", applying the CJUE decision to seizures made 10 years before the decision was handed down, concerning a case involving frozen assets of the Libyan State, declared that the absence of authorization invalidated the seizures made on Libyan assets.

WEDNESDAY

"ARBITRATING RENEWABLE ENERGY DISPUTES, WITH A SPECIAL FOCUS ON THE CEE REGION"

By Elena Andary and Tréphine Le Flohic

On Wednesday March 29, 2023, Jeantet hosted a seminar entitled "Arbitrating renewable energy disputes, with a special focus on the CEE region". The panel was moderated by Dr. Ioana Knoll-Tudor (Partner at Jeantet) and included Prof. Dr. Maxi Scherer (Professor in International Arbitration at Queen Mary University of London, and Special Counsel at Wilmer Cutler Pickering Hale and Dorr LLP), Luminita Popa (Managing Partner at Suciu Popa; Member of the ICC Court), Edoardo Marcenaro (Head of Legal & Corporate Affairs, Enel Grids srl), Caroline Falconer (Secretary General of the SCC Arbitration Institute) and Jurriaan Kien (Legal Director New Energies & Services, SBM Offshore).

The conference proceeded as follows: an introduction on the background and current state of this very technical sector, a presentation of the Eastern European region and its interests, the role and approach of investment arbitration on the issue, the contractual perspective of renewable energy disputes, the positioning of other alternative dispute resolution (ADR) methods, the procedural specificities of renewable energy disputes, and finally, the quantification of damages.

Mr. Marcenaro began by presenting the need for a flexible grid, noting that massive power plants are no longer constructed and used in the industry. Indeed, he explained that while everyone was focused on the exploitation of renewables, there was a need to focus on the distribution.

Ms. Popa then presented a very optimistic view of the CEE region and its position on renewable energy. For instance, Romania expects to reach 32% of renewable energy in 2030, up from 17% in 2022 – a very ambitious plan in an eight year-period. She pointed out the important progress in legislation and talked about Europe's biggest photovoltaic project being currently built in Romania.

The grid issue in renewable energy is also a recurrent problematic. How do we implement renewable energy? The first step is permitting. Ms. Popa talked about a love-hate relationship with governments. Despite obvious efforts across the region, this makes it very difficult to regulate and deal with disputes at present.

Prof. Dr. Maxi Scherer then focused on the Energy Charter Treaty (ECT) signed by fifty-three states. This treaty provides several investment protections but fails to answer the many questions that remain. Despite an effort to reform the treaty, many states have threatened to leave, and some have already formally notified their withdrawal. However, this treaty contains a sunset clause. It provides that investments made before withdrawal are protected for twenty years after the withdrawal of a party.

She highlighted some of the questions addressed by investment tribunals when considering renewable energy claims. Do we need specific insurance by the State? At what time was the investment made? What is the effect of changes when a Party withdraw from the treaty?

Ms. Falconer explained that about 50% of SCC's cases each year are international cases and 90% are considered large disputes. The SCC is involved in numerous investment treaty arbitrations based on the ECT. She noted that except for a specific appendix for investment arbitration, the SCC Rules are applied equally for investment as for commercial arbitration.

Mr. Kien went on discussing contract negotiation with a focus on offshore wind. The issues encountered in this sector are complex due to both the large number of parties involved and contracts that vary from traditional construction contracts to take account of the offshore nature of the projects. The parties must be aware that the principle of "back-to-back" responsibilities never really exists. Finally, supply chains involve parties from all over the world, so the success of a project depends on multiple factors including the internal situation in each country.

The question that arises today is therefore to know the object of the dispute. Mr. Marcenaro spoke about the digitalisation of the whole industry which changed not only the technology, the skills, the expertise, but also the kind of disputes the sector is facing today. More time is spent on studying intellectual property related issues.

The next topic focused on whether arbitration is the most appropriate dispute resolution method for resolving renewable energy disputes as well as the main issues in these disputes. According to Mr. Marcenaro, for some kind of contract, the best way of solving dispute is not necessarily arbitration. Parties should consider in their contract negotiation other ADR methods.

On the different issues that are facing disputes, Mr. Kien underlined the main topics as being delay, cost overrun, design, interface between contractors, and unforeseeable conditions. According to him, renegotiation should be used in the common interest of the parties, with a change of mindset in the relationship since it focuses on keeping the project going.

Ms. Falconer then suggested another method: the SCC Express Dispute Assessment. It is a method where the parties refer their dispute to a neutral legal expert for a set fee, who gives an opinion on the merits of the case within three weeks which can be enforced. However, the parties can choose to make it a non-binding or a contractually binding decision. This process was launched one year and a half ago in reaction to parties wanting to keep their relationship and not wanting to go in a judicial dispute or to arbitration.

Mr. Marcenaro shared his experience in avoiding disputes. He stated that nowadays, the disputes are mainly technical with a focus on the role of experts. For Mr. Kien, Dispute Avoidance or Adjudication Board (DAAB) standing or not can be used as a mean to avoid arbitration.

The next topic discussed was the specificities of renewable energy disputes. Ms. Popa explained that the complexity of the sector requires multiple contracts, resulting in lots of extremely difficult issues, lots of players with interests not always aligned. She referred to a report of the Queen Mary University and Pinsent Masons which provides a focus on DAABs and alternative to arbitration but underlines that sometimes the escalation clauses can work against the parties leading to huge arbitration at the end of procedure. Process should be thought on a case-by-case basis not "one size fits all". Other aspects considered are the amount of players and contracts which are not aligned with one another, leading to parallel proceedings, and the fact that such projects also involve authorisations and permitting from public authorities which are not always arbitrable. Parties should therefore take more time in drafting their contracts, aligning them and avoiding or minimising potential heavy proceedings. Ms. Popa's last comment addressed the worldwide scale of renewables projects, which can threaten the efficient collection of data and documentation to build a party's case.

Finally, there has been an increase of renewable energy disputes over the years. The phase leading to dispute is mainly the construction phase, connection to the grid and delivery.

The last point addressed by Prof. Dr. Maxi Scherer was the quantification of damages. Her study addressed two criticisms related to arbitral awards. The first one being that arbitrators tend to "split the baby" and the second one being that arbitrators do not provide sufficient reasoning on the quantification. Regarding the first assumption, in two thirds of the cases studied, arbitrators do not "split the baby" but grant either almost everything or nothing. Regarding the second assumption, over 221 awards compared, there is an average of 25% of awards providing quantum reasoning. There is no indication as to a potential evolution over time. Regarding the use of joint expert report, it was shown that the amount of quantum reasoning goes slightly higher and the same can be seen regarding tribunal appointed experts.

"REMARKS ON THE HAGUE COURT OF ARBITRATION FOR AVIATION"

By Susanna Shepherd and Rose Le Cornec

On Wednesday 29 March 2023, as part of the 2023 edition of Paris Arbitration Week, Jones Day hosted a seminar on the Hague Court of Arbitration for Aviation ("Hague CAA"). Welcoming remarks were provided by Gary Birnberg (Hague CAA Advisory Board Chair / Arbitrator / Mediator) and Johannes Willheim (JonesDay Partner / Hague CAA Arbitrator). The event then brought together various aviation and arbitration professionals to discuss the evolving future of aviation dispute resolution.

By way of introduction, Mr. Birnberg quickly presented the Hague CAA. This project was launched in July 2022 by Paul Jebely and Gary Birnberg, along with the Netherlands Arbitration Institute and numerous other individual contributors, with the objective to create a centralised and specialised mediation and arbitration centre for the aviation industry. What is fundamental is that it is an institution of the industry. The founders had spoken with the industry and did their due diligence in order to figure out what is needed and how the institution can best respond to that. Over the course of the discussions, the attendees will learn how the Hague CAA is responding to those stated needs.

The floor was then given to Mr. Willheim who explained why an institution specialised in aviation disputes is really needed. He began by stating that arbitral institutions are service professionals who compete with one another on several layers, namely on price, geographic segmentation, and quality; the main tools of quality being the efficiency of services and the rules. He pointed out that in the existing transparent market, every institution copies one another. However, copying is difficult on niche markets which require highly specialised expertise, as is the case for the aviation industry.

Mr. Willheim mentioned another specialised aviation arbitration institution, the Shanghai International Court for Aviation Court of Arbitration ("SIACA"). According to him, it is merely found in literature but not in the real world anymore as this institution has one flaw: it is organised by the International Air Transport Association ("IATA"). Therefore, the dispute mechanism services provided by them may help to resolve their inner disputes but may not be so attractive for other parties, such as the airframe manufacturers or the suppliers of parts.

Mr. Willheim explained there is a need for specialised arbitral tribunals as some industries are so complex it is hard for general arbitral institution to put their effort on one particular type of dispute which may be very special. He believes two considerations justify the creation of specialised institution. First, there must be an industry which is prone to disputes. Second, the industry must be special, i.e., either highly technical, highly regulated or usages known to the participants of the industry. The aviation industry ticks all of these boxes: it is full of disputes, undergoing innovation, highly regulated and clearly international.

To resolve these disputes, you need a clear understanding of the regulations, technicality, and operation of these aircraft to cater the needs and demands of the users who need the disputes to be resolved. The Hague CAA tailored rules which understand what it takes to administer a case in this industry and to have vetted neutrals who are capable of understanding what is going on without needing to be educated. Most importantly, it is the creation of a hub of knowledge, expertise and jurisprudence emerging on specific issues which make Mr. Willheim believes that this industry will take off.

Mr. Birnberg then presented the five topics which will be discussed between the attendees.

The first topic was: What is expected from a specialised institution, such as an institution for aviation?

First, the people appointed need industry specific knowledge and both legal and technical expertise. As there are not enough people that possesses both these qualities, the institution can provide training. Second, it is expected to have smooth communication between the institution and counsel, to make the user feel heard. Finally, users expect the award to be enforceable.

The second topic was: What distinguishes specialised institutions that have been successful from ones that have not been successful?

The group first identified other institutions, with the exclusion of typical commodities institutions. The Hague CAA does not want to go via this commodity institution route as they work primarily with people of the industry rather than lawyers. The institutions cited were: London Maritime Arbitrators Association ("LMAA"), the Court of Arbitration for Art ("CAfA"), Organization for the harmonisation of Business Law in Africa ("OHADA"), The Court of Innovative Arbitration ("COIA"), Independent Film & Television Alliance ("IFTA Arbitration"), International Online Dispute Resolution Centre Limited ("eBRAM"), Russian Arbitration Centre which has a division for Nuclear disputes and the Court of Arbitration for Sport ("CAS"). Regarding CAS, it is successful as they have a monopoly.

The group identified two main problems. First, a marketing problem; you have to get into the arbitration clauses in contract. This cannot be expected in two or three years. Second, many institutions mentioned have lists of arbitrators. This is a hot topic and tricky question for the institution. On one hand, you want to present yourself as having specialists who show their knowledge with their CV. On the other hand, the reputation of institutions with lists and roasters has decreased. If the Hague CAA were to establish a roaster, it should be foreseen that someone else can be appointed by a party.

The third topic was the following: Which case management tools should one consider crucial in expedited proceedings?

First, everybody agreed that there should be an administrator of the institution who is controlling the process in order to ensure a strong case management. Second, there should be incentives and disincentives for both the parties and arbitrators. For arbitrators, the incentive is more money the faster you are. For the parties, the disincentive is that if you are procrastinating by not being a team player, you should be paying for the delays. Third, there should be information before the case management conference which allows for the informed drafting of PO1 and limited briefs. Finally, some participants said there should be only witness statements but no oral pleadings.

The fourth topic is the following: What is the value in having the tribunal being assisted by an expert who has not been formally appointed as an expert?

Throughout the conversations, everyone concluded that party appointed experts is the preferable way of appointing experts rather than tribunal appointed experts. Also, there was an idea of making a technical expert a compulsory part of the arbitral tribunal.

The group came to three conclusions that are important for assembling experts. First, it must be established what are type of experts necessary for certain disputes. Second, transparent selection criteria must be available. Finally, experts need to be approved by the industry.

The fifth topic is the following: What is the utility of having "friendly experts", i.e., experts in situations other than arbitration (such as mediation)?

The group discussed amical expertise, which relates to the idea that the parties appoint the experts themselves, pay jointly the cost, draft the mission of the expert in four or five clear points and ask him/her to send a confidential report to the parties after a contradictory process.

The group concluded it could be an interesting process having "friendly experts". There is a lot of technical problems in the area of aviation and that is why some people think we need a solution that is solely technical in order to help the parties finding a solution.

Also, the group pointed out that a panel of experts is required, which is not so easy to find, and must be trained with these particular proceedings of amical expertise.

"ECONOMIC HARM: ADVANCED TOPICS FOR LOST PROFIT AND LOST BUSINESS VALUE"

By Elena Andary

On Wednesday March 29, 2023, in the frame of the Paris Arbitration Week 2023, NERA Economic Consulting held a seminar on "Economic Harm: Advanced Topics for Lost Profit and Lost Business Value". The panelists discussed hot topics for damages assessment, and procedural matters on the different ways of working with the damage experts. As the seminar was held under the Chatham House Rule, we will not reveal the identity of the speakers.

The discussion opened on the definition of damages. The panel started by stating that it was probably the only thing experts could agree upon. Indeed, the disagreement is not on what are damages rather than on how we measure them. Broadly speaking, two general frameworks exist: the Loss-Profit (LP) and the Loss of Enterprise Value (LEV). The speakers explained that, from a legal point of view, both models are alternatives and not mutually exclusive. They addressed the two issues that arise. Firstly, what damages does the law allow you to seek? The LP tool is generally used for commercial arbitrations and the LEV for investment arbitrations. In both, we look for an expectation and not a restitution. Secondly - and this is a key question -, over what factual period do you calculate damages? Once again, a distinction is made between the LP model, which is based on a finite period (used mainly for contracts), and the LEV model, which is based on an infinite period (used for joint venture agreements as a matter of example).

Then, the panel raised the issue of ex-post and ex-ante approach and which is the most appropriate, depending on a number of factors such as how risk is shared among the parties. The speakers argued that the causality was being missed in some damages experts reports. Before crunching numbers, information must be understood from a legal and an economic perspective and tested against real world evidence in order to explain causality.

The panel went on to outline the purpose of damages to compensate what was actually lost and to bring back the claimant in the position where he should be without the damage occurrence. It is important for arbitrators and judges to apply common sense. They illustrated their argument with a case in which the defendant was allegedly responsible for the impact of the Covid crisis on the claimant's finances, and not only responsible for the liable action. Experts need to test the information they are provided with.

The panel was asked how they make sense of the results provided by the experts. One of the speakers presented the external validity testing as extremely useful as it gives meaning to calculations. Again, the result has to be tied with causation. Another speaker emphasised the importance of common sense. This raises a question: who should bear the risk in case of lack of evidence and what would happen? Arbitrators look at two things: on the one hand, they look at the parties to articulate what the purpose of the interest is. On the other hand, they look at the involvement of experts. The panel also noted that one of the very few issues addressed in arbitrations is the appropriate pre-judgment interest rate.

The next topic discussed was the advantages and disadvantages of bifurcating damages. The panel expressed the will of claimants to go fast and not wanting to bifurcate. Tribunals are usually not ready to think about damages. The speakers mentioned cases where claimants wanted to trifurcate and concluded it really depend on the specificities of each case. In any case, it seems that bifurcation - from the point of view of efficiency and equity - really makes sense.

Maximising efficiency is important as arbitrations are lengthy. Tribunals should really consider whether the use of expert is necessary. If so, parties should involve experts as early as possible and try to work hand in hand with them. Lawyers tend to limit the interaction and underestimate the impact that experts can have. The panel stressed the importance of letting experts do their jobs and working with them to really understand the meaning of their expert report. It is important to make sure experts are also talking to each other. Some also questioned the process of "cramming" all the procedure in one week or two until the last team standing wins.

Having the expert testimony remotely might be a better option. Tribunals - mostly composed of lawyers and therefore not necessarily at ease with numbers - need to recognise the role of experts. Tribunals must acknowledge the role of experts. We can no longer spend our time talking only about law!

The panel also emphasized the advantages of having a better document production by sharing them before the hearing to directly start the arbitration with the right tools. Moreover, it made it clear that the way we assess damages had changed. Indeed, they talked about the economic tools that have been used for decades and about the abundant writing and advancement on the subject. The final word was that making things simpler just for the sake of making them simpler was not enough, a real reflection on the issue had to be done.

"CONSTRUCTION ENERGY DISPUTES: WHAT WENT WRONG?"

By Marina Konstantinidi and Raphaelle Marie

On Wednesday March 29, 2023, Fieldfisher and Kroll hosted an interactive discussion entitled 'Construction energy disputes: what went wrong?'. The panelists, representing diverse backgrounds, offered insights on how to best manage construction projects and resolve disputes from the contract stage to dispute resolution. The host speakers of the event were: Marily Paralika (Partner at Fieldfisher) and Dan Preston (Head of Construction at Fieldfisher). The participating guest speakers were: Francoise Lefevre (Partner at Francoise Lefevre SRL), Mrs. Maria Irene Perrucio-Lourie (Head of International Affairs for Europe and Americas at WeBuild group) and Mr. Louk Korovesis (Senior Director at Kroll).

The discussion started with a focus on the approach to a construction project from the beginning, examining the negotiations and pitfalls.

Mr. Dan Preston examined the contractual clauses that most commonly arise in disputes. He referred to the difficulty of understanding the complex technical aspects of a project and mentioned the existence of the lists of technical documentation bringing attention to the contractual terms, sometimes conflicting with the technical parts.

Ms. Francoise Lefevre pointed out the lack of attention in the drafting of dispute resolution clauses, which may often be incompatible at different levels or too simple for a multi-contract project. As a solution, she suggested the drafting of separate arbitration agreements to which the parties of the different projects could refer. With regard to the concept of force majeure, Ms. Francoise Lefevre brought up the pandemic as a representative example of an unforeseeable event.

During the second part of the conference, the speakers dealt with specific issues during the monitoring phase of an energy construction project.

Mr. Louk Korovesis identified, amongst other common issues, the need to take into account and keep a record of time, budget, and specific qualifications of the project, the need for proper interaction coordination between the different actors, and the importance of making the deadlines more feasible.

Ms. Maria Irene Perrucio-Lourie, when asked about the most common issues that cause delay, addressed as the main factors of delay and additional cost: geological risk, financial risk, political risk, and climate change impact.
Both speakers stressed the problem of the lack of legal background of parties to the contract, which often results in them not paying enough attention to the clauses of the contract they have to perform, and the obligations which are incumbent on them.

As mentioned, contractual terms do not always reflect the reality of energy construction projects. Indeed, there are so many differences between what is contractually provided and what happens. For instance, some contracts establish unrealistic planning to give satisfaction to employers' expectations. To avoid such situations, it was recommended to anticipate all reasonably unexpected events that could arise during an energy construction project. In addition to delays, supplementary costs are also common during these projects. Indeed, especially regarding complex environments and countries with political instabilities, the projects are exposed to contingencies and therefore, employers must be reasonable, less strict, and act in good faith both at the conclusion phase and during the performance of the contract.

Unexpected events generate disputes. As indicated by Ms. Marily Paralika, the main question is how to resolve these disputes in the best way: litigation, arbitration, negotiation, or mediation.

During the discussion, the speakers stressed the risky and expensive character of litigation. Thus, the aim is to reduce the amounts of claims and costs of arbitration. Nonetheless, arbitration, in the presence of energy construction issues, seems to be the best way to resolve a dispute, since the parties can choose the arbitrators in light of their background, their technical knowledge, as well as for political reasons, and confidentiality concerns.

Negotiations would be another means of resolving disputes. Mrs. Francoise Lefevre would not consider it a waste of time, even though parties do not usually agree. In reality, as stated, if the parties are not able to manage negotiations, they cannot manage the construction project.

Regarding mediation, as observed by Ms. Francoise Lefevre, there is often a reluctance to its use, accompanied by a total misperception of what it is and how it works. As a result, parties do not opt for a conciliation approach, even if, according to the speakers, it would be less expensive and more efficient. As Ms. Maria Irene Perrucio-Lourie mentioned, if mediation was compulsory, it would be much easier to have parties choose it as an option. To sum-up, it is complex to resolve a dispute in an energy construction project, especially because of market pressure.

The discussion carried on and was concluded with questions from the audience addressing issues such as dispute prevention, ESG, and the specificity of hydrogen projects.

"A NEW LANDSCAPE, ARBITRATING INTERNATIONAL DISPUTES IN INDIA"

By Kopal Sharraf

On Wednesday March 29, 2023, as a part of the 2023 edition of Paris Arbitration Week, Pinsent Masons organised a hybrid in-person and virtual presentation on "A new landscape, arbitrating international disputes in India", which was the first ever India-focused event to be conducted during the Paris Arbitration Week. The event's host speaker was Florian Quintard (Partner at Pinsent Masons), and the speakers included Charles Marquand (Barrister at 4 Stone Buildings), Tom Glasgow (Managing Director at Omni Bridgeway), Neeti Sachdeva (Secretary General of the Mumbai Centre for International Arbitration ("MCIA")), Sudip Mullick (Partner at Khaitan & Co.), Siddhartha Datta (Partner at Shardul Amarchand Mangaldas & Co.), and Shwetha Bidhuri, (Director and Head (South Asia) of the Singapore International Arbitration Centre ("SIAC")).

Mr. Marquand began the discussion by noting that there had been a large Indian absence in Paris Arbitration Week thus far, and this discussion was necessitated by the new developments in the arbitration landscape in India. He introduced three broad themes for discussion amongst the speakers: the landscape of energy, construction and commodity sectors in India, the landscape of arbitration in India and the general legal landscape in India.

Mr. Mullick started the discussion by providing an outline of the construction and energy sectors in India, explaining that India has introduced a National Monetization policy which seeks to monetise assets worth $80 billion dollars over the next 4 years, which thereby creates great promise for upcoming activity in these sectors. Further, smart cities in India are updating their infrastructure such as national corridors, and the disputes between contractors has contributed to the increasing scope for arbitration. In the energy sector, he stated that India is the world's 3rd largest energy consumer, and the developments in the sector such as the subsidies being granted for renewable energy works, also contribute to the opportunities for arbitration.

Mr. Datta spoke about the diversification in the renewable energy sector, the modernisation of traditional industries, and the increase of exports in commodity industries, as recent developments in India. He highlighted that in the construction sector, the disputes are time-related rather than quality-related. He also spoke of the several projects being undertaken by the Government in India, including for the construction of airports, roads, metro and high-speed trains. When questioned as to whether the Central Government in India is a party to these contracts, Mr. Datta clarified that India follows a tender-based system, and the Central Government is a party to such contracts through its agencies.

Thereafter, the discussion shifted towards the changing landscape of arbitration in India. Mr. Glasgow provided his perspective on the Indian market in the context of studying the opportunities for funding arbitrations in India. He spoke of the several steps that India has been taking to ensure that it is a more arbitration friendly jurisdiction, including limited interference from national courts, increasing party autonomy, diversification of arbitral appointments, growing support for institutional arbitrations and improvements in the enforcement of domestic awards. He concluded by stating that the major challenge for international users is the duration of arbitrations and delays at the enforcement stage, which in his experience, can take anywhere from 3 to 6 years.

Ms. Sachdeva seconded his views and elaborated that there have also been improvements in the speed of the arbitral process itself due to the implementation of an 18-month timeline, and that India is one of the only countries to have codified the IBA Guidelines in its regulations. She highlighted that the timelines from post-award to enforcement are also dependent on whether it is an ad-hoc or institutional arbitration, and whether it is a domestic or foreign arbitration. Ms. Sachdeva also stressed that while drafting arbitration clauses for use in commercial contracts, parties should be mindful of not only choosing India as a seat, but should specify a city, preferably one with commercially savvy courts (ie, Delhi or Mumbai), as the seat of the arbitration.

Ms. Bidhuri contributed her perspective on the ease of enforceability of institutional arbitration awards in India. She highlighted that no SIAC award has been set aside or refused enforcement by Indian Courts during 2011-2021, thereby providing evidence to the speakers' views that Indian courts recognise institutionally-backed awards and are hesitant to interfere with such awards. The speakers thereafter discussed the gradual move towards the use of institutional arbitration in India, noting that certain state governments in India have now mandated the use of institutional arbitration in their government contracts.

Thereafter, the discussion shifted towards the general legal landscape in India. The general consensus between the speakers was that the White Industries v. India and Vodafone v. India cases triggered the trend of India terminating its Bilateral Investment Treaties ("BITs"). The speakers from India added that the earlier BITs had been entered into when India was a capital importing country, and the changing landscape in this regard had required renegotiation of the BITs as well.

Mr. Datta thereafter provided an overview of the changes to India's Arbitration Act, 1996, as amended in 2015 and 2019 ("Act"). He stressed that the amendments had implemented stricter timelines for the completion of the arbitral process, mandating a 12-month timeline for the completion of the arbitration and a 6-month extension by the consent of the parties, after which the parties would need to approach Indian courts for a further extension if necessary. Further, the amendments introduced necessary disclosures by arbitrators, and restricted opportunities to set aside awards. He highlighted the changes to Section 34 of the Act and the restrictive definitions of "public policy" and "patent illegality", which permits review of arbitral awards only in matters affecting national interest and does not permit a review of the award on its merits. Mr. Mullick clarified that whilst international commercial arbitration should be completed expeditiously and there should be an endeavour to dispose of the matter within a period of 12 months from the date of completion of pleadings, the prescribed timeline for disposal of arbitration does not apply to international commercial in India, and it is therefore advisable to have arbitrations administered by an institution.

Finally, Mr. Glasgow contributed that from a funder's perspective, there is an increasing demand for third-party funding of arbitrations in India, and India has the most funding applications. He added that funders are also cautiously exploring the domestic arbitration market in India, as billions of dollars are tied up in unpaid claims at the post-award enforcement stage.

The discussion concluded with the host speaker, Mr. Quintard, thanking the speakers and noting that there is an ever-growing space for India-seated arbitrations considering its changing and growing landscape.

"ARE ARBITRATION COSTS MAKING IT PROHIBITIVE (AND UNRULY)?"

By Maryam Gilmitdinova and Maxime Villeneuve

On Wednesday March 29, 2023, as part of the 2023 edition of Paris Arbitration Week, Deminor Litigation Funding and Baker McKenzie hosted a conference discussing the following question : "Are arbitration costs making it prohibitive (and unruly)?". The panel, which was moderated by Karim Boulmelh and Katia Finkel (respectively Partner and Senior Associate at Baker McKenzie), was comprised of Christophe Lobier (Senior Litigation Counsel at GE Renewable Energy), Živa Filipič (Acting Deputy Secretary General at the ICC International Court of Arbitration), Maximin de Fontmichel (Professor of Law at Paris-Saclay University, Arbitrator and Legal Expert) and Olivia de Patoul (General Counsel Belgium & France at Deminor Litigation Funding).

The moderators, Mr. Boulmelh and Ms. Finkel, outlined the current state of affairs of costs in arbitration. Arbitration costs remain a critical point both for clients and lawyers, yet, this practical and crucial aspect of arbitration is rarely openly discussed. In order to address the issue of disproportionate costs from different angles, they suggested that the conference follow a three-fold structure: current state of affairs - solutions - tips.

Christophe Lobier started by addressing the question of arbitration costs from the parties' perspective and stressed the disproportionate nature of counsel fees in both boutique structures as well as in larger law firms. For companies, finding a cost-effective firm with a solid reputation is easier for the cases with a higher amount in controversy. Hence, the problem manifests particularly in small cases below 1 million euros and medium cases with claims up to 4 million euros. Mr. Lobier then went on to analyze the shortcomings of the hourly billing rate model, especially, when no cap is applied. The absence of cap is mostly viewed negatively, since financial predictability is a "must" for a client. In his view, the worst scenario is to put forward a financial cap and yet to exceed it halfway through the arbitration process. This undesirable "surprise effect" would presumably amount to the end of their business relationship. In addition, while it is unlikely that high arbitration costs are deterring clients from relying on this dispute resolution procedure in favor of national courts, Mr. Lobier believes that mediation is a method that is increasingly popular due to its cost-efficiency.

Živa Filipič continued by discussing the topic of costs from the ICC's standpoint, explaining how the institution's and arbitrators' fees are calculated on an ad valorem system (based on the amount in dispute) as opposed to an hourly rate. The ICC's model is still adapting to the needs of smaller cases by introducing the Expedited Procedure Provisions and the establishment of a Working Group exploring other feasible alternatives. However, Ms. Filipič stressed that the bulk of costs in arbitration proceedings - generally around 80% - result from counsel fees. Reducing the administration fees of the institution and of the arbitrators, therefore, only has a limited impact. Nevertheless, parties are presented with certain options to spread the financial burden of initiating arbitration proceedings. They may, for instance, pay in installments or substitute the opposing party's advance on costs. Still, the ICC will always remain vigilant about receiving these payments in order to remunerate arbitrators.

Prof. Maximin de Fontmichel asserted that the costs' concerns, lead arbitration practitioners to ask themselves whether they are merely service providers or also actors in the interests of justice, bound by the principle of accountability. Prof. de Fontmichel brought up a first decision from the French Cour de cassation, dated 28 September 2022 (Civ. 1re, 28 sept. 2022, FS-D, n° 21-21.738), which calls on arbitrators' and institutions' duty to be more flexible when it comes to costs. In this decision the Court admitted that the national judge may be competent to hear a dispute between a franchisor and a franchisee, despite the presence of an arbitration clause in their contract, when the costs of initiating an arbitration proceeding would bankrupt the franchisee, provided that there was evidence that the financial remedies were sought, yet none were granted. Prof. de Fontmichel also mentioned the "Tagli'apau" decision (Civ. 1re, 9 févr. 2022, n° 21-11.253) in which the French Cour de cassation, having in mind the need for access to justice, recognized a new principle of "procedural fairness" which granted the French courts jurisdiction, in spite of a valid arbitration agreement established between the parties.

Accordingly, the respondent could not invoke the French courts' lack of jurisdiction while also refusing to pay the advance costs required by the ICC. In light of this jurisprudential trend, Prof. de Fontmichel believes institutions and arbitrators should find the solution to make up for a party's impecuniosity, such as placing a security in rem on one of the assets of a party at the beginning of the proceeding. Proof of the delicate financial situation / the risk of insolvency will nevertheless be required. Flat fees in spite of a risk of a bifurcation might be an additional solution to the problem.

Olivia de Patoul tackled the subject of arbitration costs through the prism of third-party funders and agreed with the previously stated need for a cap on counsel costs as a requirement for the evaluation of the potential investment. Ms. de Patoul nevertheless recognized the need for flexibility in order to keep the drive to win the case, despite the cap being reached. In order to attain this goal, in her opinion, a trust among a counsel, a client and a third-party funder is crucial. Ms. de Patoul also addressed the costs of the third-party funding itself. Taking into account the recent English and Singaporean jurisprudential trend requiring the losing party to cover the costs, she urged to distinguish the funding given to parties who truly needed it - which should indeed be included in the covered costs - from the funding used by the parties solely as a financial tool - which, in her opinion, should not.

The panelists were asked to share practical tips for reducing the costs of arbitral proceedings. Christophe Lobier stressed the need to remain honest about prospect costs and the case's winning chances and to avoid "overselling practices". He advised to keep in mind mediation as an alternative and more cost-efficient solution. Živa Filipič suggested thinking in terms of solving a dispute instead of fighting it. A dispute over the costs should never prevail over the interest to resolve the dispute. Prof. Maximin de Fontmichel recommended the parties to remain flexible and eager to reach an agreement with the opposing party and the arbitrators to comply with a duty to secure access to justice. Olivia de Patoul concluded by pointing out the importance of choosing the "diligent" arbitrators, adopting a pragmatic approach to costs, yet, respecting a third-party funding solution.

THURSDAY

"OLYMPIC GAMES & ARBITRATION: RESOLVING SPORTS AND RELATED COMMERCIAL DISPUTES"

By Ailin Chen

On Thursday March 30, 2023, as part of the 2023 edition of Paris Arbitration Week, the CIETAC Hong Kong Arbitration Center hosted a webinar on sports and related commercial disputes. The panel, which was moderated by Jintao Ou (Counsel at the CIETAC Hong Kong Arbitration Center), brought together six experts in sports arbitration, all of whom have participated in the Beijing Winter Olympic Games. The panel included Chengjie Wang (Vice-Chairman and Secretary General of the CIETAC, Xianyue Bai (Managing Partner of Grandall Law Firm in Tianjin), Song Lu (Professor at China Foreign Affairs University), Guo Cai (Partner of Jin Mao Law Firm), Raphaëlle Favre Schnyder (Partner of Barandun AG in Zurich) and Jeffrey Benz (JAMS Neutral).

Mr. Jintao Ou opened the webinar with a welcoming remark from Mr. Chengjie Wang. Mr. Wang introduced the CIETAC as a diverse body, with arbitrators from all over the world and has played a vital role in the previous Beijing Winter Olympics. He highlighted the tremendous economic implications of sports in China and beyond, and that such economic importance will bring numerous opportunities for practitioners in sports-related commercial arbitration. Finally, Mr. Wang sent his warm welcome to all attendants and best wishes for the upcoming Asian Games, which will be held in Hangzhou, China in September.

Then, Mr. Xianyue Bai introduced the "genesis" of sports arbitration. In the 1980s, many sports-related disputes were raised; meanwhile, there was an absence of independent authorities capable of dealing with these issues. In 1981, the International Olympics Committee ("IOC") President, HE Juan Antonio Samaranch, got the idea of establishing an international body for sports-related dispute resolution. In 1984, the Court of Arbitration for Sport ("CAS") was established to provide flexible, efficient, and inexpensive settlements for sports and related commercial disputes.

Mr. Bai went on to explain the structure of the CAS. The International Council of Arbitration for Sports consists of 22 members from different countries. Among the 22 members, 5 are board members. The CAS Court Office takes care of the day-to-day work of the court. Meanwhile, the CAS has three divisions for dispute resolution: Ordinary Arbitration Division, Appeal Arbitration Division, and CAS ADD (Anti-Doping Division) starting in 2019.

The Ordinary Arbitration Division deals with commercial sports-related disputes. The Appeal Arbitration Division accepts cases forwarded by sports organisations and acts as the final appeal body. The CAS ADD looks exclusively at doping cases. Also, there is the CAS AHD (Ad-Hoc), which is set-up every time during a winter or summer Olympic Games. Each Division has its own procedures and closed-list arbitrators, i.e., arbitrators of one Division cannot act in another. Lastly, Bai mentioned that the arbitrators at the CAS can have three specialisations: general, football, and ADD. Arbitrators specialising in ADD cannot act on other cases.

Next, Bai talked about the CAS's evolution. The CAS, he highlighted, evolves through real cases, including the landmark event—the Gundel case. In 1992, a jockey player, Elmar Gundel, appealed with the Swiss Federal Tribunal, challenging the impartiality and independence of the CAS. The CAS, Gundel claimed, was financed almost entirely by the IOC, which had the power to modify the CAS Statute, and the IOC President had considerable power in appointing members of the CAS.

The Gundel case was a chance for the CAS to reflect on its independence, for which it has made notable changes. The International Council of Arbitration for Sports ("ICAS") was established as the supreme organ of the CAS. Since the Paris Agreement in 1994, all Olympic International Sports Federations ("IFs"), and many National Olympic Committees, ("NOCs") have recognised the jurisdiction of the CAS, adding to its credibility. Moreover, since 2003, the Olympic Movement and numerous governments have promulgated the World Anti-Doping Code, with the CAS being the appeal body.

Bai then explored the functions of the ICAS. According to the ICAS Statute, the purpose of the ICAS is to "facilitate the resolution of sports-related disputes through arbitration or mediation" and to "safeguard the independence of the CAS and the rights of the parties." To keep their objectivity and independence, all ICAS members exercise their function in a personal capacity. Moreover, the ICAS is also the administrative and financial body of the CAS.

During the 1996 Summer Olympics in Atlanta, the ICAS created the CAS AHD, aiming to settle all disputes from the Olympic Games within 24 hours. As many games take place simultaneously, and time is essential for both the players and the game, the CAS AHD has a unique procedural code targeted at being simple, flexible, and free. Since then, CAS AHD is set up for every edition of the Olympic Games. It consists of 2 co-presidents and 12 arbitrators, living in the Olympic City during the game. Due to its independence from any national jurisdictions and bodies, ADH has been introduced to many other sports events, including the Commonwealth Games, the FIFA World Cup, the Asian Games, the European Championship, etc.

After Mr. Bai, Prof. Song Lu elaborated on the jurisdiction of the CAS. Like any arbitration, the CAS is also based on the parties' agreements. The Olympics Charter states that the CAS has jurisdiction over disputes arising from the Olympics, and all participants—athletes and coaches—of the Olympic Games have to consent to this arbitration agreement through their entry forms. This practice is not without criticisms regarding its authoritarian nature; still, the jurisdiction is considered to be rooted in the parties' agreements.

Prof. Lu noted that there are two types of disputes during the Olympics, the first category is referred to as the "eligibility and selection" dispute, meaning some athletes, disqualified during the first phase of the competition, claim that they should have been qualified. During the later phase of the Game, the majority of the disputes will be the "futile player" disputes. These disputes challenge unfair decisions during competitions. The most unique feature of the CAS AHD, Lu reinforced, is its timeliness: normally, the award will be communicated back to the parties within 24 hours.

Then, Ms. Guo Cai took the floor. What distinguishes sports arbitration, Cai believed, is that it evolved through practice. The current practice of the CAS - including its establishment in the first place - has been promoted through actual cases, the most prominent one being the 1994 Gundel case which promoted the true independence of the CAS. Therefore, the development of the CAS is strongly correlated with society's participation in the sports industry. Particularly, Cai mentioned the pro bono services in Beijing Olympic Games as an example of active participation by lawyers' associations. Cai also mentioned that China established its China Commission on Arbitration of Sports ("CCAS") on January 1, 2023.

Cai talked about one type of dispute worth special attention: employment disputes involving foreign players or coaches with their employers, especially in football. These disputes are unique because they are employment disputes and are non-arbitrable under many national laws. Some organisations, e.g., FIFA, include such arbitration clauses for their participants.

Ms. Raphaëlle Favre Schnyder explored the advantages of resolving sports disputes using arbitration. Sports have an inherent international nature, while arbitration is highly suitable for international disputes. First of all, compared to a national court, arbitration is a better option for foreign parties to seek a fair settlement.

Secondly, an arbitral award can be enforced almost anywhere under the New York Convention, though some countries may not accept awards related to employment, all commercial-related awards can be readily enforced. Moreover, the awards are final and binding, saving the lengthy litigation procedures. Overall, arbitration provides a safeguard for foreign parties in disputes.

Finally, Mr. Jeffrey Benz led the Q&As focusing on sports-related arbitration in China. Sponsored by the state, sports in China tend to have fewer commercial elements. Therefore, sports in China do not come to public attention as often. The newly-established CCAS, he commented, is not only a new area of practice for lawyers and arbitrators but would also attract public attention and involvement.

In conclusion, the webinar provided valuable insight into the world of sports-related commercial arbitration. The panellists provided a comprehensive overview of the structure and procedures of the CAS, as well as the challenges and opportunities in the sports industry. The discussion also highlighted the importance of sports arbitration with a specific focus on China. Overall, the webinar served as a useful introduction for students and practitioners interested in sports arbitration.

"RECENT FRENCH LAW DEVELOPMENTS ON SOVEREIGN IMMUNITIES FROM ENFORCEMENT"

By Corentin Boyssou and Florence Nivelle

On Thursday, March 30, 2023, in the frame of the Paris Arbitration Week, Jones Day organized a conference on the topic of immunities, sanctions and asset-freezing measures before French courts.

The panel of speakers, moderated by Claire Pauly (Of Counsel at Jones Day), was composed of Kamalia Mehtiyeva (Professor at the University of Paris XII Créteil and lawyer at Barbier Mehtiyeva Law), Jérôme Ortscheidt (Partner at SARL Jérôme Ortscheidt), and Jacques-Alexandre Genet (Partner at Archipel).

The speakers focused, first, on the issue of jurisdictional and enforcement immunities raised before French courts, and second, on the impact of asset-freezing measures on enforcement measures carried out on assets located in France.

Prof. Mehtiyeva began by defining the concept of immunity, which is a privilege enjoyed by certain legal subjects, including States. There are two types of immunities: immunity of jurisdiction and immunity of execution, both of which are based on the principles of sovereignty and independence of the State. The concepts are similar but serve different purposes: immunity from jurisdiction protects the sovereign acts of the State, while immunity from execution protects certain property of the State. Neither immunity is absolute.

The floor was then given to Mr. Ortscheidt who spoke about the possibilities of seizing in France tax claims which were constituted abroad. Mr. Ortscheidt then explained two fundamental principles: the principle of territoriality of taxation and the principle of territoriality of enforcement.

On one hand, the principle of territoriality of taxation implies that a State cannot collect its tax on another State territory. This principle cannot be applied in this case because the tax claimed which was constituted abroad would be assimilated, under French law, to a foreign claim of a civil nature.

On the other hand, the principle of territoriality of enforcement implies that the State's power of coercion applies only on its territory and according to its own laws. Therefore, Mr. Ortscheidt stated his disagreement with the current jurisprudence of the Cour de cassation which provides for the necessity to demonstrate a special waiver of the State's immunity from execution in order to seize protected property of a State. The special waiver consists in the establishment by the State of a list of property for which it expressly waives its immunity from execution.

Indeed, neither article 19 of the United Nations Convention of December 2, 2004, which reflects the current state of customary international law, nor article L.111-1-2 of the French code of civil enforcement procedures introduced by "Sapin II" law, provide for the necessity of a special waiver.

Then, Mr. Genet gave an overview of the way the Cour de cassation considered the question of the State's waiver of its immunity from execution over the last two decades.

First of all, in a "Creighton" decision (Cass., civ. 1st, July 6, 2000, n°98-19.068), the Court held that the acceptance by the State to submit its dispute to arbitration in accordance with the rules of the ICC International Court of Arbitration entails a waiver of its immunity from execution, according to article 24 of these arbitration rules which stated that the parties undertake to execute the award without delay.

Then, in a "NML Capital Ltd." decision (Cass., civ. 1st, September 28, 2011, n°09-72.057), the Court held that if the Argentine State has not "expressly and specifically" waived immunity from execution on its diplomatic property, then

this property is protected. The Court extended this reasoning to all State property (Cass., civ. 1st, March 28, 2013, n°11-13.323). Those decisions were rendered, for the first one, under customary international law as reflected by the United Nations Convention of December 2, 2004, and the Vienna Convention of April 18, 1961, and for the second one, under customary international law exclusively. However, Mr. Genet reminded that neither of these texts requires a special waiver by the State.

The Court then made a volte-face in "Commisimpex" decision (Cass., civ. 1st, May 13, 2015, n° 13-17.751), in which it finally considered that there was no requirement of special waiver and that an express waiver was sufficient.

Then, in a second "Commisimpex" decision (Cass., civ. 1st, January 10, 2018, n° 16-22.494), the Court made a new reversal, based on the Vienna Convention of April 18, 1961, once again enshrining the requirement of an "express and special" waiver.

However, the next day, the Second Civil Chamber issued a decision based on international custom, thus creating a discrepancy between the First and Second Civil Chambers of the Court (Cass., civ. 2nd, January 11, 2018, n°16-10.661).

In a third "Commisimpex" decision, the First Civil Chamber reaffirmed the requirement of an "express and special" waiver, but only on the basis of customary international law (Cass, civ. 1st, February 3, 2021, n°19-10.669).

Thus, appeals were filed with the European Court of Human Rights ("ECHR") by the creditors, the ECHR asked several questions to France on June 15, 2022, and February 13, 2023.

The position of the ECHR on immunities is as follows: Article 6§1, which protects the right of access to a judge, includes the right to the enforcement of a court decision. Otherwise, it would impede access to the judge. However, the system of immunities, which does constitute a restriction on the right of access to the courts, can exist if it remains proportionate. We can expect some clarifications from the ECHR.

Furthermore, on the question of the identification of a protected property of a State, Mr. Ortscheidt recalled that the International Court of Justice assesses the nature of a property according to a system of assignment of the property and not of declaration (ICJ, 11 December 2020, Equatorial Guinea v. France). In this sense, the French Administrative Supreme Court considered, on one hand, that the Ministry of Foreign Affairs could communicate a list of a State's diplomatic property to a creditor who requests it, but on the other hand, that the aforementioned Ministry was under no obligation to draw up such a list (Conseil d'État, 15 March 2023, Commissions Import Export). Therefore, the identification of the State's protected assets remains a thorny issue for the creditor.

Finally, Prof. Mehtiyeva recalled that the notification of the exequatur decision is a central step in the implementation of enforcement measures against a State. On this point, a recent decision of the Cour de cassation holds that the delivery to the prosecutor's office of the decision to be served by diplomatic channel does not constitute the proof of the delivery of the document to its addressee and cannot be considered as notification. It is up to the applicants to justify the steps taken with the authorities in charge of the notification of the document in the foreign State (Cass., civ. 2nd, March 24, 2022, n°20-17.394).

In the second part, the panelists discussed the notion of asset freezing and its apprehension by the French courts, as well as the impact of such freezing measures on the enforcement measures practiced in France.

On one hand, Prof. Mehtiyeva noted that international sanctions have a direct impact on the sovereignty of a State, an attribute from which the principle of immunity derives. Prof. Mehtiyeva cited a recent decision of the Russian Supreme Court in which that Court hold the fact that sanctions which have been imposed on a Russian entity by a foreign public authority will automatically lead to the Russian courts assuming that that entity will not be treated equally, fairly or impartially in court or arbitral proceedings ongoing in the state which imposed the aforementioned

sanctions. Consequently, the Russian courts should have exclusive jurisdiction over the dispute. (Supreme Court of Russia, December 9, 2021, PESA v. UralTransMash).

The Russian courts are thus adopting a similar approach to one of the Cour de cassation ones in a decision of July 15, 1999, in which the Court considered, with reference to resolution 687 of the United Nations Security Council, that the Iraqi State was no longer in a position to raise its immunity from execution before the French courts since it was subject to international sanctions (Cass., civ. 1st, July 15, 1999, n°97-19.742).

On the other hand, Mr. Genet explained the scope of a recent decision of the Court of Justice of the European Union by which the Court of Luxembourg now requires that a party wishing to seize frozen assets in a Member State must first seek the authorization of the competent national authority (CJEU, November 11, 2021, Bank Sepah, aff. C-340/20).

According to Mr. Genet, this decision raises several practical issues to which no court has yet responded, such as the establishment of the ranking of creditors or the possibility of being aware of unfreezing requests already made. These are all issues that could, in the long run, lead to a new issue of State liability for opacity of its procedure.

"BELOKON, SORELEC AND CO - WHAT TO DO NOW ? THE NEW FRENCH APPROACH TO INTERNTIONAL PUBLIC POLICY VIOLATIONS FROM THE PERSPECTIVES OF ARBITRATORS, COUNSEL AND INSTITUTIONS"

By Lina Ettabouti and Silke Schusser

On Thursday March 30, 2023, Three Crowns hosted a panel discussion on the topic of "Belokon, Sorelec and co – What to do now? The new French approach to international public policy violations from the perspectives of arbitrators, counsel and institutions". Etienne Vimal du Monteil (Associate at Three Crowns LLP) moderated a panel consisting of Shaparak Saleh (Partner at Three Crowns LLP) as host speakers and Prof. Sylvain Bollée (Université Paris 1 Panthéon-Sorbonne), Jérôme Ortscheidt (Partner at SARL Jérôme Ortscheidt) and Eléonore Toupart (Counsel at ICC International Court of Arbitration) as guest speakers.

The conference was divided into two main parts: first, a critical review of the French case law on international public policy, starting with the intensity of the review of arbitral awards by the French courts, followed by the evidentiary and procedural issues raised by the new French approach; and second, a discussion on the impact of the case law on the respective roles of arbitrators and arbitral institutions.

Etienne Vimal du Monteil opened the discussion by introducing the two most recent cases concerning the aspect of international public policy and corruption in France Belokon v. Kyrgyzstan and Libya v. Sorelec and the question of the scope of review of arbitral awards done by state courts.

The debate opened with the topic of the intensity of the control of the conformity of arbitral awards with international public policy.

Prof. Sylvain Bollée briefly recalled the state of the law on the subject. French law has gone through three jurisprudential phases. In the first phase, marked by the Thales and Cytec cases, the practice of the French courts was that of a minimalist control characterized by the requirement of a "flagrant" violation of international public policy. In a second phase, starting in 2014, a series of decisions by the Paris Court of Appeals appeared, particularly in the area of corruption, in which it took the opposite approach to the previous case law and conducted a more thorough review of compliance with international public policy. This raised a number of questions, including whether this new orientation extended to the entirety of international public policy, or whether it was limited to specific situations of corruption or money laundering, for example. The culmination of this development is reached with the 2018 MK Group decision, which affirms the absence of a limit to the annulment judge's power to research the law and facts relevant to annulment cases. Finally, recently, with the Belokon and Sorelec cases, the Court of Cassation took a position in the wake of the Paris Court of Appeal regarding the intensity of review: the annulment judge may examine in law and in fact the issue that is of interest to international public policy and he is not bound by the arbitrators' assessment.

Jérôme Ortscheidt then offered a critical analysis of this new development in the jurisprudence. In his view, it is difficult to determine whether control should be "full" or not, as it depends on the definition of the term and the situations in which control is applied. In particular, he referred to the Belokon case, in which the work of the arbitrator was considerable, and he believes that in this case it is curious that the judge should do the same work again without considering the decisions of the arbitrator. Furthermore, he believes that the control should be different depending on whether it is about the anti-corruption objective or a corrupt pact. Finally, he considers that there should be two different types of control, depending on whether the arbitrator has dealt with the issue before or not: in the first case, his work should be taken into account; in the other, the problem is more complicated to solve.

Shaparak Saleh then suggested that this jurisprudential development could ultimately be beneficial to the attractiveness of Paris as a place of arbitration. In a world where companies increasingly want to comply with the rules, the filtering of awards that could be said to be "clean and sound" could make arbitration in France more attractive to operators who want to ensure that their arbitration awards are free of any compliance problems. However, in order for this hypothesis to remain, the control operated must remain well-balanced and not tip over into a complete revision.

For his part, Prof. Sylvain Bollée considers that considerations on the attractiveness of the Paris market place should not hinder the effective control of public policy by the French courts. He added that the former Thales/Cytec case law did not comply with the provisions of the Code of civil procedure since the article 1520 of the same code does not require, as does article 1514, that the award be manifestly contrary to public policy in order to be set aside. He then addressed the principle of non-review of the merits of the award, which was one of the foundations of the Thales/Cytec case law. He explained that this principle emerged in the field of recognition and enforcement of foreign judgments and argued that arbitration case law has misinterpreted this principle and wrongly considered that it constrains the power of the judge. In conclusion, he stated that, in his opinion, there are no difficulties in the new case law and that the intensity of control is worthy of approval.

Eléonore Toupart then highlighted the neutrality that her function imposes on her and thought that it would be interesting to see how the question of the intensity of control would evolve in the future in France, given that other jurisdictions, such as those of The Hague for example, adopt a radically opposite position.

Moving on to the evidentiary issues raised by the new approach adopted by the French courts, Etienne Vimal du Monteil brought up the question of proof of the violation of international public policy.

Jérôme Ortscheidt touched on several points, but above all he pointed out that the change in recent years has been mainly in the modes of proof. The Belokon and Sorelec rulings have broadened them so that the judge can examine all relevant evidence, even if it has not been presented by the parties before the arbitrators. However, this expansion is limited by the adversarial principle and the principle equality of arms, as well as, to a lesser extent, by the principle of loyalty of the evidence. Finally, the speaker indicated that the modes of proof exist mainly before the Court of Appeal, with judges relying on a series of clues when it comes to characterising the breach of public policy.

For Prof. Sylvain Bollée, this evidence by clues is indirect evidence. In particular, he believes that there is a standard, which is that of "serious, precise and concordant evidence", which seems to correspond to the idea of the requirement of a certain level of proof. Indeed, he felt that it was important to maintain a high standard of proof in order to be careful and reasonable in the administration and assessment of evidence.

Shaparak Saleh and Jérôme Ortscheidt emphasised the difficulty of exercising full control in view of the judge's means. This would imply a high standard of proof and has a weakness: it requires substantial resources and time, two elements that are not always available to French magistrates.

Concluding the critical review of the French case law on international public policy, Shaparak Saleh focused on the Sorelec case, which enshrines the possibility for the parties to an annulment action to invoke new evidence relating to international public policy, even though this evidence was not raised before the arbitral tribunal. She also wished to refer, in parallel, to the Schooner case, which deals with a similar subject, although it does not concern public policy. According to her, the Schooner case law would be even more questionable because it allows the parties, in matters of the arbitral tribunal's jurisdiction, to raise, before the judge reviewing the award, new arguments that would not have been raised before the arbitrator. In the speaker's view, the Sorelec and Shooner judgments are similar inasmuch as they create legal uncertainty, since they encourage the parties to reserve arguments for themselves and to raise them only before the annulment judge. Such uncertainty would be detrimental to a place of arbitration. It therefore seems desirable to her that the French courts re-examine the principles laid down by the above-mentioned judgments.

Prof. Sylvain Bollée distinguished between the issue of new evidence and the situation where public policy was not pleaded before the arbitral tribunal. With regard to the former, he considers that it is legitimate for the annulment judge to examine all the evidence presented by the parties, even if some of it is new. With regard to the latter, however, he considers that it is difficult to decide between the need to control compliance with public policy and the risk of violating the principle of fairness of the parties.

In the second part of the conference, Etienne Vimal du Monteil asked the speakers about the impact of the Belokon and Sorelec cases on the role of counsels, arbitrators and arbitral institutions.

Eléonore Toupart responded to this last question by providing the perspective of arbitration institutions. She recalled that the ICC has been working for many years on the issue of corruption. It has a task force on this subject and is currently considering the provision of a kind of "toolkit" to help arbitral tribunals analyse indications of corruption. In reviewing awards, the ICC is also particularly attentive to the issue of enforcement of awards, as the ICC Secretariat has an obligation of means to ensure that ICC awards are enforceable and seeks to guard against any means of setting them aside. Thus, in its view, the recent decisions of the French courts provide ICC with additional arguments to convince arbitral tribunals to ensure the enforcement and non-annulment of arbitral awards based in Paris.

Shaparak Saleh continued from the perspective of the arbitrators. She believes that when the seat of the arbitration is in France, the arbitrators will obviously have to ask questions about possible corruption if they are not asked by the parties. She also introduced the idea that it might be appropriate to include a clause in the procedural orders requiring the parties to raise before the arbitrators any grounds relating to international public policy. Thus, bad faith or disloyalty of a party could be thwarted upstream.

Prof. Sylvain Bollée closed the discussion by saying that he believes that many arbitrators are now very aware of the issue of corruption. He believes that arbitrators should be driven more by the concern to perform the arbitral function well, which also consists of taking into account public policy considerations, rather than by the fear of having their award set aside.

"BLOCKCHAIN, CRYPTO, SMART CONTRACT AND METAVERSE, AN OPPORTUNITY TO TAKE FOR INTERNATIONAL ARBITRATION ?"

By Elisa-Marie Goubeau

On March 30, 2023, on the occasion of the Paris Arbitration Week 2023, CMAP hosted a seminar entitled 'Blockchain, crypto, smart contract and metaverse, an opportunity to take for international arbitration?'. The panel was composed of Sabine Van Haecke-Lepic (Doctor in law and arbitrator), Jacques Levy-Vehel (CEO at Case Law Analytics), Federico Ast (CEO at Kleros), Christophe Dugue (Lawyer, Paris Bar) and Louis Degos (Managing Partner at K&L Gates).

The floor was first given to Dr. Van Haecke-Lepic who highlighted that this new numeric space gathering momentum is paving the way to new opportunities for dispute settlement as it affects every field of human endeavour. In her introductory remarks, she pointed out the disruptive potential of blockchain technology, which is already ubiquitous and is able to destabilize the current social and economic institutions. Leading to the creation of new companies and new cases, the blockchain establishes a profound shift of paradigm in relation to the collection, sharing and the processing of data. Its promise, as evidenced by the success of Bitcoin and Ethereum, is an increase in efficiency and transparency with fewer intermediaries. The panellist suggested that such context invites to rethink and remodel the social contract to the extent that artificial intelligence ('AI') embodies a fourth industrial and legal revolution inviting legal professionals to seize this movement and embrace it.

In this respect, Dr. Van Haecke-Lepic made a distinction between durable innovations and disruptive technologies. Concerning the latter category, she alleged that there was no certainty as to their impact as most of them seem inefficient to cater for our expectations. In her view, the governance aspect remains an essential question because those technologies not only impact our perception of the world and of others but also challenge the administration of justice. She continued her comments with the emergence of blockchain arbitration or decentralized justice due to the limits of traditional dispute resolution methods for dealing with blockchain transactions. So-called on-chain transactions are difficult to relate to a particular juridical order because of their multi-jurisdictional nature.

The second theme of the colloque on the mathematical modelling of the decision-making process was addressed by Dr. Levy-Vehel. He detailed Case Law Analytics protocol which aim is to understand the judges' reasoning. The first step boils down to establish a list of criteria considered by the judges in making their decision. The second step is to conduct a case law analysis in a specific sector from which a database will be created. Finally, the bottom line is the AI modelling to present the range of judicial decisions that could be rendered in a specific case by a specific jurisdiction.

The third part of the conference aimed at introducing decentralized justice to the participants through a presentation of Kleros by its CEO, Mr. Ast. The disputes generated by the use of non-fungible token ("NFTs") and cryptocurrency can be resolved through this platform which acts as arbitrator. The money will circulate through a smart contract. Kleros promises to offer a transparent selection of arbitrators. To be eligible, the jury is drawn among a panel of candidates who must collect tokens named 'PNK' to manifest their interest to become jury in a dispute. Once selected, the jury is blocked until the settlement of a given dispute. The decision-making process relies on the game theory of Thomas Schelling. Thus, arbitrators are encouraged to vote coherently towards the majority to determine the truth in a specific situation. According to Mr. Ast, small and inter-jurisdictional disputes can be perfectly resolved through Kleros.

The discussion continued with the intervention of Mr. Dugue. As part of his introductory remarks, he stated that the Dubai International Arbitration Center launched its own metaverse platform. Mr. Dugue declared that this virtual world shall become a valuable tool serving international arbitration ('IA'). About the classification of blockchain

disputes, he explained it was possible to classify them based on their complexity and what is at stake: the simple questions calling a uniform and fast answer; those requiring a basic examination and the complex questions demanding a thorough review and imperatively calling for a legal reasoning.

The panellist considered whether AI was an ally of IA and observed that arbitration was already the dispute resolution method chosen for disputes emerging from blockchain. He stressed that some platforms, notably Binance, FTX or HUOBI, already included AI as part of their general conditions. Mr. Dugue added that IA remains a natural fit for administering disputes arising out of this field as it presents several advantages as a decentralized method without any national attachment, accepted by parties' consent and flexible. Such characteristics correspond to the ecosystem of blockchain and cryptocurrency.

The panelist then moved forward with the resolution of blockchain related disputes by blockchain. By referring to Kleros, Mr. Dugue argued that the Kleros clause enshrined is not a compromissory clause but rather a mere modality of the contract performance. Consequently, Kleros should not be considered when it comes down to arbitration proceedings as well as the decision generated by the platform which is not an award. Nevertheless, it is possible to witness a convergence of Kleros with arbitration. The panelist is of the view that if new methods will be developed, for international commercial disputes of high value, IA will remain because only human justice can be accepted and understood by the parties. However, it was suggested that AI could be used as a tool to make arbitration more efficient, reducing both time and costs.

To conclude the seminar, Mr. Degos shared his synthesis report by noting the following points. To start with, about the different technologies mentioned, he underscored that several arbitral institutions, including the ICC and CMAP, had already implemented virtual rooms for the parties and that their function was not a complete departure from their initial function. On the contrary, the panellist emphasized the innovation offered by automated mechanisms which aim is to eliminate the need for a trusted third-party and to strive towards a system operating immutably the transfer of assets or data without any human intervention. This represents a significant shift in the way dispute resolution is approached.

About the classification of disputes, he noted that it would operate in accordance with the objectivity of the disputes. The more objective the dispute is, the more it could be submitted to AI to be entirely automated. The more subjective the dispute is, the more it requires human intervention. According to Mr. Degos, the increased use of AI reflects more replication than invention and innovation as such practice tends to replicate something that already pre-exist, past case-law. This predictive justice does not predict anything as it relies heavily on past case-law and probability-based statistical approaches.

To wind up his report, Mr. Degos raised the question on whether technologies like Kleros and Case Law Analytics offered 'justice'. He answered by the negative stating that instead, they offered some kind of regulation and uniformization reducing the risk of segregated and innovative decisions, giving more importance to past standards. The panelist then expressed his concerns as to the notation system of Kleros arbitrators because they do possess a financial interest to be selected in a particular case. Additionally, no motivation of the decisions is shared to the parties in order to understand it. For Mr. Degos, Case Analytics mainly works with objective criteria but left aside one essential subjective criterion which is the selection of arbitrators. He concluded his report by recalling the adage 'the arbitration is as good as the arbitrator' to reflect the idea that the quality of an arbitrator is crucial in ensuring the effectiveness of arbitration.