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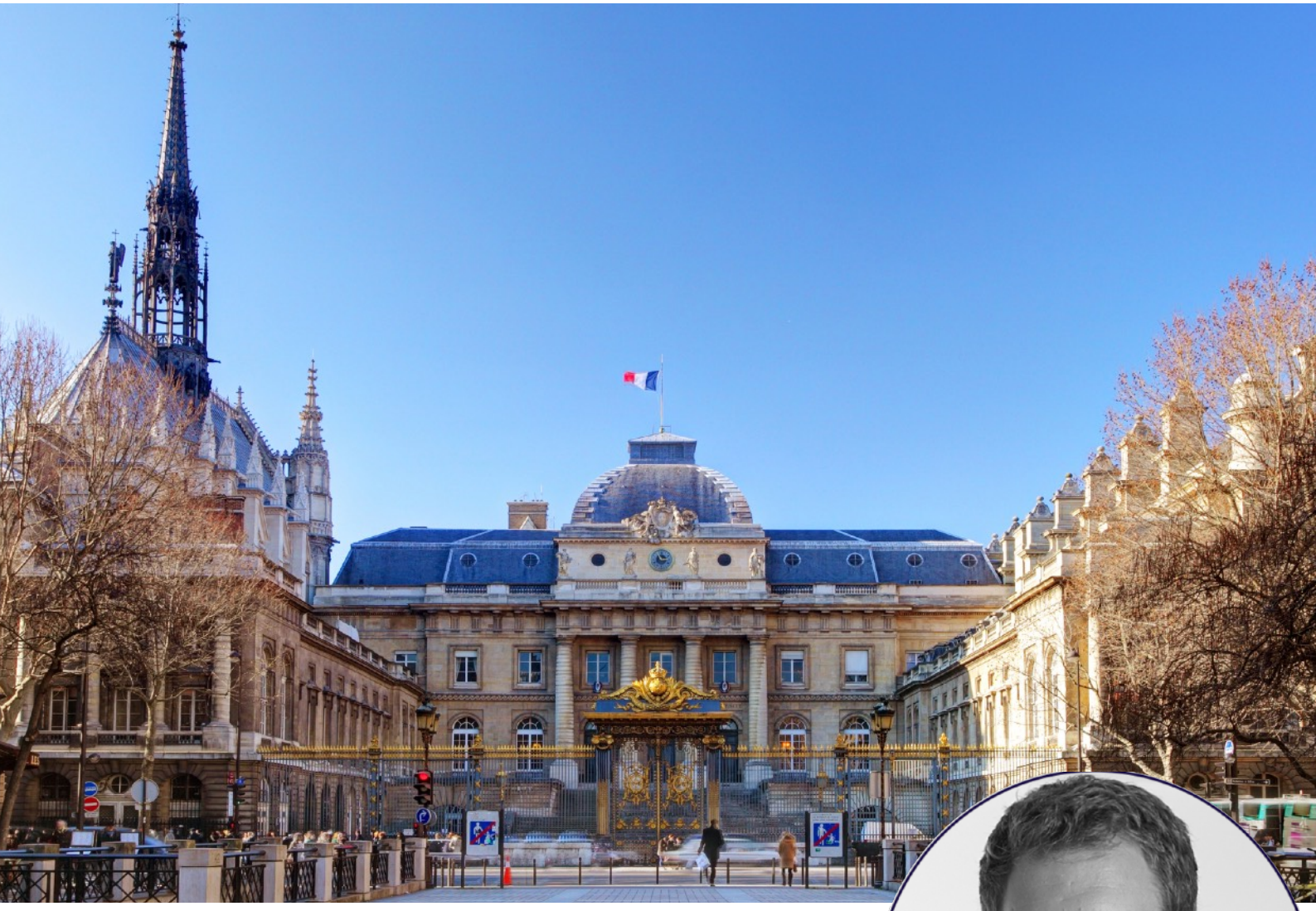

French and foreign courts decisions

Décisions des cours françaises et étrangères

Arbitral awards

Sentences arbitrales

PAW Highlights

PARISARBITRATIONWEEK

Interview with Greg Lourie

Interview de Greg Lourie

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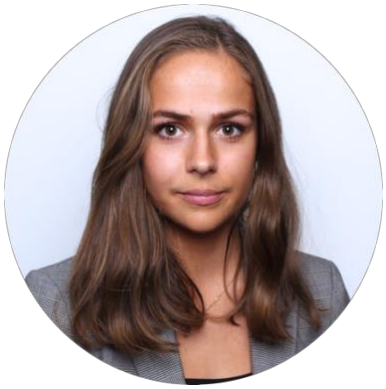

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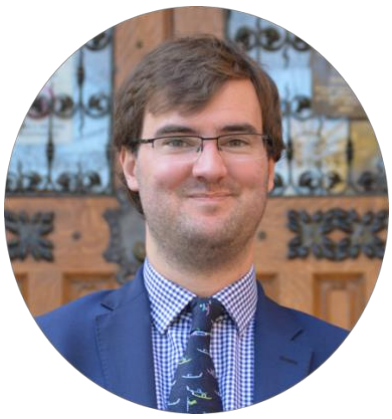

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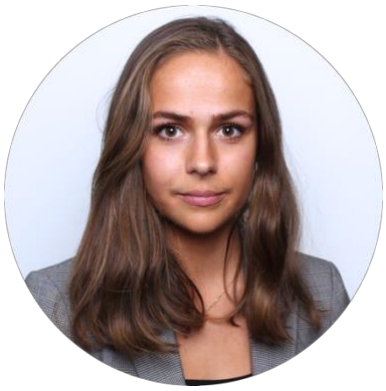

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INDEX

TABLE DES MATIERES

FOREWORD

Recently we witnessed huge movement against discrimination in the legal field. Whilst still present, discrimination is not only about origin or gender, but it is also about age.

Paris Baby Arbitration, an association of students and young professionals, has set itself the goal of presenting to the arbitration world its youngest members.

We are Baby Arbitration because we promote the contribution of the youngest.

We are also Baby Arbitration because we are trying to create a safe environment for the youngest. "Baby" is a sign of sense of humour and an open mind needed to reach our goal.

And last but not least, we are also Baby Arbitration because one's name, one's age one's position shall not prejudge the quality of one's work.

As a part of our engagement, we are honoured to present to your attention Biberon, a monthly arbitration newsletter in French and English, prepared by volunteer students and young professionals. You can find all the previously published editions of Biberon and subscribe to receive a new issue each month on our website: babyarbitration.com.

We also kindly invite you to follow our pages on LinkedIn and Facebook as well as to become a member of our Facebook group.

Have a good reading!

AVANT-PROPOS

Récemment nous avons assisté à un mouvement considérable contre la discrimination dans la profession juridique. Bien que toujours présente, la discrimination ne concerne pas seulement l'origine ou le sexe, mais aussi l'âge.

Paris Baby Arbitration, association d'étudiants et de jeunes professionnels, se fixe comme objectif de présenter au monde de l'arbitrage ses plus jeunes membres.

Nous sommes Baby arbitration parce que nous favorisons la contribution des plus jeunes.

Nous sommes également Baby arbitration parce que nous essayons de créer un environnement favorable aux plus jeunes. Baby est un filtre d'humour et d'ouverture d'esprit dont nous avons besoin pour atteindre notre objectif.

Et finalement, nous sommes également Baby arbitration parce que votre nom, votre âge et votre position ne doivent pas préjuger la qualité de votre travail.

Dans le cadre de notre engagement, nous sommes ravis de vous présenter Biberon, la revue d'arbitrage mensuelle en français et en anglais, préparée par des étudiants et des jeunes professionnels bénévoles. Vous pouvez trouver tous les Biberon publiés précédemment et vous y abonner sur notre site: babyarbitration.com. Nous vous invitons également à suivre nos pages LinkedIn et Facebook et à devenir membre de notre groupe Facebook. Bonne lecture !

Reims Court of Appeal, 5 March 2019, *Z v. Y*, no. 18/01905

Contributed by Virginie Chane-Meng-Hime

In 1995, Mr Y. joined Mr Z.'s osteopathic practice under a collaboration contract (the "Contract"). The Contract was renewed in 2010 and provided that Mr Z.'s equipment, installations and customers would be made available to Mr Y. In return, the latter would pay Mr Z. a monthly sum equal to 16% of his turnover, excluding tax.

In 2016, Mr Y. was given notice to pay Mr Z. the sum of 96,799.23 euros, excluding tax, for the retrocession arrears.

In accordance with Article 15 of the Contract, the dispute was brought before the conciliation commission of the French Osteopathic Union ("SFDO").

The mediation procedure having failed, Mr Z. sued Mr Y. before the Châlons-en-Champagne High Court, which declared it had no jurisdiction over the dispute and referred the parties to arbitration. Article 16 of the Contract contained an arbitration clause which provided that: "In the event of failure of the mediation, all disputes or controversies in relation to the validity, interpretation, performance or termination of this contract shall be submitted to arbitration by the SFDO conciliation commission, in accordance with the SFDO constitution. As of now,

Cour d'appel de Reims, 5 mars 2019, *Z c. Y*, no. 18/01905

Contribution de Virginie Chane-Meng-Hime

En 1995, M. Y. a rejoint le cabinet d'ostéopathie de M. Z. en tant que collaborateur. Le contrat de collaboration libérale (le « Contrat »), renouvelé en 2010, prévoyait la mise à disposition des équipements, installations et de la clientèle de M. Z., en contrepartie de laquelle son collaborateur lui verserait mensuellement une somme égale à 16% de son chiffre d'affaires hors taxes.

En 2016, M. Z. a mis demeure M. Y. de lui régler la somme de 96.799,23 euros HT au titre de l'arriéré de rétrocession d'honoraires.

Conformément à l'article 15 du Contrat, le différend a été porté devant la commission de conciliation du Syndicat Français Des Ostéopathes (« SFDO »).

La procédure de médiation ayant échoué, M. Z. a fait assigner M. Y. devant le tribunal de grande instance de Châlons-en-Champagne, lequel s'est déclaré incompétent pour connaître du litige et a renvoyé les parties à l'arbitrage. L'article 16 du Contrat prévoyait, en effet, une clause compromissoire aux termes de laquelle : « En cas d'échec de la médiation, tous les litiges ou différends relatifs à la validité, l'interprétation, l'exécution ou la résolution du présent contrat seront soumis à l'arbitrage de la commission de conciliation du SFDO, conformément aux statuts

the parties agree to submit their dispute to a sole arbitrator. The arbitral tribunal shall rule with the powers of amiable compositeur" (authors translation).

Mr Z. argued, in support of his appeal, that: (i) the arbitration procedure provided for in Article 16 of the Contract was invalid on the ground that it would amount to submitting the dispute to the same persons as those who have already heard it in mediation, i.e. the members of the conciliation commission of the SFDO, and (ii) the aforementioned Article 16 contradicted Article 13 of the Contract which provided that: "This contract is governed by French law, both for its performance and for its termination and any dispute relating thereto shall fall within the exclusive jurisdiction of the French tribunals" (authors translation).

The Reims Court of Appeal upheld the decision of the Châlons-en-Champagne High Court.

The Court indeed first held that, considering the changes in the composition of the conciliation commission of the SFDO in 2018, and since Article 16 of the Contract provides for a sole arbitrator, the arbitration could very well be conducted by a member who had not already heard the case as a mediator.

Then, it ruled that there is no contradiction between Articles 13 and 16 of the Contract since "the sole purpose of [Article 13] is clearly to designate the nationality of the applicable law and the competent jurisdictions in the event of a dispute, in other words to designate territorial jurisdiction and not substantive jurisdiction" (authors translation). The arbitral tribunal

du SFDO. Dès à présent, les parties conviennent de soumettre leur litige à un arbitre unique. Le tribunal arbitral statuera avec les pouvoirs d'amiable compositeur. »

M. Z. fait valoir, au soutien de son appel, que: (i) la procédure d'arbitrage prévue par l'article 16 du Contrat serait invalide au motif qu'elle reviendrait à soumettre le litige aux mêmes personnes que celles qui en ont déjà connu dans le cadre de la médiation, i.e. les membres de la commission de conciliation du SFDO, et (ii) l'article 16 précité entrerait en contradiction avec l'article 13 du Contrat prévoyant : « Le présent contrat est soumis à la loi française, tant pour son exécution que pour sa résiliation et tout litige s'y rapportant sera de la compétence exclusive des tribunaux français ».

La Cour d'appel de Reims confirme l'ordonnance déférée en ce qu'elle a déclaré le tribunal de grande instance de Châlons-en-Champagne incompétent, au profit du tribunal arbitral, pour connaître du litige entre les parties.

La Cour retient en effet que, compte tenu des changements intervenus dans la composition de la commission de conciliation du SFDO en 2018, et puisque l'article 16 du Contrat prévoit un arbitre unique, l'arbitrage pourrait très bien être rendu par un membre n'ayant pas déjà entendu l'affaire en qualité de médiateur.

Ensuite, elle décide qu'il n'existe aucune contradiction entre les articles 13 et 16 du Contrat puisque « [l'article 13] a manifestement pour unique objet de désigner la nationalité du droit applicable et des juridictions compétentes en cas de litige, autrement dit de désigner

composed by the SFDO being a French tribunal, the argument put forward by Mr Z. is unfounded.

une compétence territoriale et non une compétence matérielle ». Le tribunal arbitral composé par le SFDO étant bien un tribunal français, l'argument avancé par M. Z. est infondé.

Rennes Court of Appeal, 5 March 2019,
***Mr Christophe Z v. SAS Proxia Groupe, SARL Proxia Courtage & SARL Proxia Assurances Groupement* ("Proxia companies"), no. 18/04188**

Contributed by Virginie Brizon

Following a dispute between partners, Mr Z. was dismissed at the end of an executive committee. Challenging this decision, he wished to initiate arbitration proceedings in accordance with the arbitration clause contained in the company's bylaws and in the shareholders' agreement and appointed a first arbitrator in that regard. As Proxia companies refused to arbitrate the dispute, Mr Z. referred the matter to the President of the Commercial Court for the purpose of appointing this second arbitrator in accordance with the procedure provided for in the shareholders' agreement.

By order of 5 June 2018, the judge granted the request in part, appointing an arbitrator to settle the dispute arising from Mr Z. of his term of office as Chief Executive Officer of Proxia Groupe but refused to make the same appointment with regard to the dispute arising from the revocation of his other terms of Proxia Courtage and Proxia Assurances Groupement, considering that there was no arbitration clause in the bylaws of these two companies and that the matter of

Cour d'appel de Rennes, 5 mars 2019,
***M. Christophe Z c. SAS Proxia Groupe, SARL Proxia Courtage & SARL Proxia Assurances Groupement* (les « Sociétés Proxia »), no. 18/04188**

Contribution de Virginie Brizon

Suite à un différend entre associés, M. Z. a été révoqué des différentes fonctions qu'il exerçait par le comité de direction. Contestant cette décision, il a initié une procédure d'arbitrage conformément à la clause compromissoire contenue dans les statuts de la société et dans le pacte d'associés et a désigné un premier arbitre. Les sociétés Proxia refusant le principe de l'arbitrage, M. Z. a saisi le président du tribunal de commerce aux fins de désigner le second arbitre conformément à la procédure prévue dans le pacte d'associés.

Par ordonnance du 5 juin 2018, le magistrat a fait droit partiellement à la demande, en désignant un arbitre afin de trancher la contestation née de la révocation de M. Z. de son mandat de directeur général de la société Proxia Groupe mais a refusé de procéder à cette même désignation sur la contestation née de la révocation de ses autres mandats des sociétés Proxia Courtage et Proxia Assurances Groupement considérant qu'il n'y avait pas de clause compromissoire dans les statuts de ces deux dernières sociétés et que par ailleurs, la

dismissing the directors was not covered by the shareholders' agreement.

Mr Z. appealed partially against the order (the refusal to appoint an arbitrator on the second dispute). The Proxia Companies cross-appealed against the decision (the appointment of the arbitrator on the first dispute), considering that the referral to the judge had not been made under the conditions of the commercial emergency proceedings provided for in Articles 872 and 873 of the French Code of Civil Procedure and that the arbitration clause did not have to apply to the dispute concerning the revocation of the mandate.

According to the Court of Appeal, the clause provided for in the shareholders' agreement provided that: "For any dispute that may arise between the undersigned shareholders regarding the validity, interpretation or execution of the present contract and not settled by the conciliation procedure, the undersigned undertake to submit their dispute to arbitration" applies to both Mr Z.'s disputes.

As regards the jurisdiction of the president of the commercial court to appoint an arbitrator in place of the parties in the event of failure to appoint arbitrators by the parties, this is expressly provided for in the shareholders' agreement, without this agreement having provided for the requirement of the emergency proceedings under Articles 872 and 873 of the Code of Civil Procedure.

Thus, the Court of Appeal confirmed the appointment of the arbitrator in the first dispute and reversed the order in the second dispute.

question de la révocation des dirigeants ne faisaient pas l'objet du pacte d'associés.

M. Z. a interjeté appel partiellement contre l'ordonnance (le refus de désignation d'un arbitre sur la seconde contestation). Les Sociétés Proxia ont formé appel incident de la décision (la désignation de l'arbitre sur la première contestation), considérant que la saisine du juge n'avait pas été réalisée selon les conditions du référé commercial prévues aux articles 872 et 873 du code de procédure civile et que la clause compromissoire n'avait pas à trouver application pour le litige concernant la révocation du mandat.

Selon la cour d'appel, la clause prévue dans le pacte d'associés, rédigée de la manière suivante « Pour toute contestation qui s'élèverait entre les associés soussignés relativement à la validité, l'interprétation ou l'exécution des présentes et non réglées par la procédure de conciliation, les soussignés s'engagent à soumettre leur différend à l'arbitrage », s'applique pour les deux contestations de M. Z.

S'agissant de la compétence du président du tribunal de commerce pour désigner un arbitre à la place des parties en cas de carence, celle-ci est expressément prévue par le pacte d'associé, sans que le pacte ait prévu de soumettre la saisine du juge aux conditions de la procédure de référé des articles 872 et 873 du code de procédure civile.

Ainsi la cour d'appel a confirmé la désignation de l'arbitre sur la première contestation et a infirmé l'ordonnance en ce qu'elle a dit n'y avoir lieu à désignation sur la seconde contestation.

Toulouse Court of Appeal, 7 March 2019, *FTO Limited company v. SAS Airbus*, no.18/03496

Contributed by Virginie Brizon

FTO Limited company and SAS Airbus entered into a consulting contract in 2009, which continued until 2017, when SAS Airbus terminated the relationship. Since FTO Limited company considered that SAS Airbus owed it a certain amount in respect of invoices, it had, after a formal notice, summoned SAS Airbus before the Commercial Court to pay this amount provisionally. SAS Airbus raised the lack of jurisdiction of the tribunal due to the existence of an arbitration clause in their contract.

The judge, in his order, dismissed the jurisdictional exception, ordered SAS Airbus to provisionally pay part of the amounts and dispensed FTO Limited from the other requirements.

The latter appealed the order in part, as did SAS Airbus.

Regarding the jurisdiction of the emergency judge, the Court of Appeal recalled that, under article 1449 of the French Code of Civil Procedure, "the existence of an arbitration agreement does not preclude, as long as the arbitral tribunal has not been constituted, a party from seizing a State court for the purpose of obtaining an investigation measure or an interim or protective measure."

Thus, the presence of an arbitration clause in the contract does not prevent the court from seizing the emergency judge to order a precautionary measure or a provision, as long as the matter has not been referred

Cour d'appel de Toulouse, 7 mars 2019, *Société FTO Limited c. SAS Airbus*, no. 18/03496,

Contribution de Virginie Brizon

La société FTO Limited et la SAS Airbus ont conclu un contrat de consultant en 2009 qui s'est suivi jusqu'en 2017, année à laquelle la SAS Airbus a mis terme à la relation. La société FTO Limited réclamant le paiement de factures a, après mise en demeure, assigné la SAS Airbus devant le tribunal de commerce en paiement de la somme à titre provisionnel. La SAS Airbus a soulevé une incompétence en raison de l'existence d'une clause compromissoire dans leur contrat.

Le juge, dans son ordonnance, a rejeté l'exception d'incompétence, a condamné Airbus à payer par provision une partie des sommes et a débouté la société FTO Limited du surplus.

Cette dernière a relevé appel partiel de l'ordonnance, de même que la SAS Airbus.

Sur la question de la compétence du juge des référés, la cour d'appel a rappelé qu'en vertu de l'article 1449 du code de procédure civile, « l'existence d'une convention d'arbitrage ne fait pas obstacle, tant que le tribunal arbitral n'est pas constitué, à ce qu'une partie saisisse une juridiction de l'État aux fins d'obtenir une mesure d'instruction ou une mesure provisoire ou conservatoire. »

Ainsi, la présence d'une clause d'arbitrage dans le contrat n'empêche pas de saisir le juge des référés afin d'ordonner une mesure à titre conservatoire ou à titre de provision, tant que le tribunal arbitral n'a pas été

to the arbitral tribunal and as long as the emergency requirement is duly respected under article 809 of the French Code of Civil Procedure.

The decision of the emergency judge to declare himself competent to rule on the request for a provision was confirmed by the Court of Appeal.

saisi et que la condition de l'urgence est bien respectée au titre de l'article 809 du code de procédure civile.

La décision du juge des référés de se déclarer compétent pour statuer sur la demande de provision est confirmée par la cour d'appel.

Paris Court of Appeal, 26 March 2019,
***Mr Dr Osama Z. v. Société Synthes GmbH*,**
no. 17/03739

Contributed by Virginie Brizon

Mr Z. (or the "Claimant") and Synthes company agreed to conclude a draft confidentiality agreement in 2008 containing an ICC arbitration clause.

In November 2008, the company informed Mr Z. that it would no longer pursue their relationship. Considering that Synthes company had breached the confidentiality agreement, Mr Z. filed a request for arbitration before the ICC in 2013. An award was rendered on 13 January 2017 in which the arbitral tribunal rejected the Claimant's various claims.

The Applicant brought an action for annulment before the Paris Court of Appeal on the basis of the violation of the adversarial principle in three circumstances.

First, the introduction by the court of an article of the Swiss Code of Obligations which was not invoked by the parties to support its reasoning.

Second, the fact that the court, in interpreting the notion of "Confidential Information" in the confidentiality agreement, used different sources for which it did not invite the parties to discuss them.

Cour d'appel de Paris, 26 mars 2019,
***M. Dr Osama Z. c. Société Synthes GmbH*,**
no. 17/03739

Contribution de Virginie Brizon

M. Z. (ou le « Demandeur ») et la société Synthes ont conclu un projet d'accord de confidentialité en 2008 contenant une clause d'arbitrage CCI.

En novembre 2008, la société a informé M. Z. qu'elle ne donnerait plus suite à leur relation. Estimant que la société Synthes a violé l'accord de confidentialité, M. Z. a introduit en 2013 une demande d'arbitrage devant la CCI. Une sentence a été rendue le 13 janvier 2017, dans laquelle le tribunal arbitral a rejeté les différentes demandes du Demandeur.

Le Demandeur a formé un recours en annulation devant la cour d'appel de Paris sur le fondement de la violation du principe du contradictoire, à l'appui de trois moyens, à savoir : (1) le recours par le tribunal à un article du code des obligations suisses qui n'était pas invoqué par les parties pour assoir son raisonnement ; (2) le fait que le tribunal ait, pour interpréter la notion d'informations confidentielles figurant dans l'accord de confidentialité, utilisé différentes sources sans inviter les parties à discuter de celles-ci ; et (3) la modification par le tribunal d'un fondement invoqué

Third, the modification by the Court of a basis invoked by the Claimant on the basis of a theory which has not been discussed by the parties and of which the Claimant has been deprived of the opportunity to discuss its application.

The Court of Appeal dismissed the action for annulment and answered all three grounds as follows.

The adversarial principle "only requires that the parties have been able to make known their claims of fact and law and to discuss those of their opponent in such a way that nothing that served as a basis for the arbitrators' decision has escaped their adversarial debate. The arbitrators are under no obligation to submit their reasons in advance to a contradictory discussion by the parties." Thus, noting the disagreement between the parties on the nature of the confidential information protected by the agreement, the court considered that it was necessary to define a methodology for the interpretation of this agreement by referring to the article of the Swiss Code of Obligations.

Due to the divergence on the notion of "confidential information", the court considered that the interpretation of the notion was fundamental. The court based its reasoning on the analysis of the provisions of the agreement by citing references to support the examination of the facts and rights submitted by the parties, as the court was not required to submit its reasons in advance for discussion by the parties.

The reference to the theory noted by the court cannot lead to the annulment of the award since the court has

par le Demandeur sur la base d'une théorie qui n'a pas été discutée par les parties, ce qui a privé le Demandeur de la possibilité de discuter de son application.

La cour d'appel a rejeté le recours en annulation et a répondu aux trois moyens de la manière suivante.

Le principe du contradictoire « exige seulement que les parties aient pu faire connaître leurs prétentions de fait et de droit et discuter celles de leur adversaire de telle sorte que rien de ce qui a servi à fonder la décision des arbitres n'ait échappé à leur débat contradictoire. Les arbitres n'ont aucune obligation de soumettre au préalable leur motivation à une discussion contradictoire des parties. » Ainsi, constatant le désaccord entre les parties sur la nature des informations confidentielles protégées par l'accord, le tribunal a considéré qu'il était nécessaire de définir une méthodologie propre à l'interprétation de cet accord en se référant à l'article du code des obligations suisses.

En raison de la divergence sur la notion d' informations confidentielles contenue de l'accord, le tribunal a considéré que l'interprétation de la notion était fondamentale. Le tribunal a fondé son raisonnement sur l'analyse des dispositions de l'accord en citant des références pour conforter l'examen des éléments de faits et de droits soumis par les parties, le tribunal n'ayant pas l'obligation de soumettre préalablement sa motivation à la discussion des parties.

La référence à la théorie relevée par le tribunal ne saurait conduire à l'annulation de la sentence étant donné que celui-ci a statué sur les moyens de droit et de faits invoqués et débattus par les parties.

ruled on the pleas in law and facts relied on and discussed by the parties.

FOREIGN COURTS

US Court of Appeal for the District of Columbia Circuit, 14 February 2019, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, no. 17-7068

Contributed by Dano Brossmann

Crystallex is a Canadian gold mining company that acquired rights to explore and develop gold deposits in the Las Carinas region of Venezuela. Crystallex invested 240 million US Dollars in the mining project. As a condition for beginning mining operations, Crystallex was asked to obtain permits from Venezuela's Environment Ministry. Venezuela made the issuance of permits conditional on the posting of a bond. Crystallex complied but after a year of waiting, the Ministry rejected Crystallex' request for permits on environmental grounds. Venezuela then nationalized the Las Cristinas Mine.

In 2011, Crystallex initiated an ICSID arbitration against Venezuela. The tribunal, having found that Venezuela's treatment was unfair and inequitable, awarded 1.2 Billion US Dollars plus interest to Crystallex in 2016. Crystallex then sought to enforce it before US courts under the NY Convention. The district court confirmed the order and denied the motion to vacate. Venezuela appealed this decision, but unsuccessfully. As stated by the Court t, "None of Venezuela's three arguments on appeal come close to

COURS ÉTRANGÈRES

Cour d'appel des États-Unis pour le circuit du district de Columbia, 14 février 2019, *Crystallex International Corporation c. République bolivarienne du Venezuela*, no. 17-7068

Contribution de Dano Brossmann

Crystallex est une société aurifère canadienne qui a acquis les droits d'exploration et de mise en valeur de gisements aurifères dans la région de Las Carinas au Venezuela. Crystallex a investi 240 millions de dollars américains dans le projet minier. Afin de commencer par l'exploitation minière proprement dite, Crystallex a été priée d'obtenir des permis du ministère de l'Environnement du Venezuela. Venezuela a conditionné l'émission des permis de l'exploitation par une obligation de paiement. Crystallex s'est conformée à cette exigence, mais après un an d'attente, le ministère a rejeté la demande de permis pour des raisons environnementales. Le Venezuela a ensuite nationalisé la mine de Las Cristinas.

En 2011, Crystallex a initié un arbitrage CIRDI contre Venezuela. Le tribunal, ayant conclu que le traitement du Venezuela était injuste et inéquitable, a accordé 1,2 milliard de dollars américains plus les intérêts à Crystallex en 2016. Crystallex a ensuite cherché à faire exécuter la sentence devant les tribunaux américains en application de la Convention de New York. Le tribunal de district confirme l'ordonnance et rejette la demande d'annulation. Le Venezuela fait appel de

securing a reversal." The Court of Appeal based its decision on the following reasons.

First, the court rejected Venezuela's arguments that the district court overlooked its arguments under the US Federal Arbitration Act.

Second, the court did not accept Venezuela's position that the district court erred in reviewing the tribunal's method of calculating damages.

And third, the court rejected Venezuela's contention that the district court misunderstood the arbitral tribunal's reasoning in relation to the valuation date to calculate Crystallex's investment.

To sum up, the US Court of Appeals rejected Venezuela's appeal and reaffirmed the judgment of the District court.

cette décision, mais sans succès. Comme l'a exprimé la Cour dans une déclaration plutôt stricte, « aucun des trois arguments du Venezuela en appel ne parvient à obtenir un renversement. » La Cour d'appel fonde sa décision sur les motifs suivants.

Premièrement, le tribunal rejette les arguments du Venezuela selon lesquels le tribunal de district a négligé ses arguments en vertu de la Federal Arbitration Act des États-Unis.

Deuxièmement, la Cour n'accepte pas la position du Venezuela selon laquelle la cour de district a commis une erreur en examinant la méthode de calcul des dommages-intérêts utilisée par le tribunal.

Troisièmement, le tribunal a rejeté l'argument du Venezuela selon lequel le tribunal de district avait mal compris le raisonnement du tribunal arbitral par rapport à la date d'évaluation pour calculer l'investissement de Crystallex.

En résumé, la Cour d'appel des États-Unis rejette l'appel du Venezuela et réaffirme le jugement du tribunal de district. (voir infra)

US Court of Appeals, 3rd Circuit, 1 March 2019, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, nos. 18-2797 and 18-3124, Venezuela's motion for leave to intervene and to stay proceedings

Contributed by Dano Brossmann

Two weeks later (see above), Venezuela submitted a motion for leave to intervene and also to stay proceedings. It claimed that the 120-day stay was necessary in order to "allow the newly installed

Cour d'appel des États-Unis, 3e Circuit, 1 mars 2019, *Crystallex International Corporation c. République bolivarienne du Venezuela*, nos. 18-2797 et 18-3124, requête en autorisation d'intervenir et de surseoir à statuer du Venezuela

Contribution de Dano Brossmann

Deux semaines plus tard (voir supra), le Venezuela présente une requête en autorisation d'intervenir et de suspendre les procédures. Elle affirme que la suspension de 120 jours est nécessaire pour « laisser le

government of Juan Guaido time to evaluate its position." Venezuela sought so this relief in light of the unprecedented political, economic and social turmoil that has been destabilizing the oil-rich and once prosperous country in recent years.

In September 2018, while appeal was pending, both parties decided to enter into a settlement agreement. Venezuela paid 425 million US Dollars to Crystallex and agreed on a temporary stay period until 10 January 2019. Subsequently the US President bindingly recognizes Gauido as an interim President of Venezuela. This is an important development because only representatives of a government that has been recognized by the US Executive Branch have standing in US courts (*Pfitzer v. Government of India*, 434 US 308, 319-20, 1978).

On the motion to intervene, Venezuela's legal team instructed by interim President Gauido asked the Court to grant the Republic's motion in order to Protect its assets and assert the interests of Venezuelans. Venezuela stated that the Court had discretion to do so in "exceptional circumstances" and for "imperative reasons." These conditions are in the Republic's view fulfilled for numerous reasons, among other because i.) the case concerns foreign relations of both States; ii.) the assets are not subject to sovereign immunity and play a key role in transition to democracy: iii.) new internal changes within Venezuela's national oil company have weight on District court's analysis and lastly, iv.) intervention should be granted due to exceptionally poor humanitarian situation as a form of international cooperation.

temps au gouvernement nouvellement installé de Juan Guaido d'évaluer sa position ». Le Venezuela justifie cette demande de délai par les troubles politiques, économiques et sociaux très importants qui surviennent dans le pays.

En septembre 2018, alors que l'appel était en instance, les deux parties se sont accordées pour transiger. Le Venezuela a payé 425 millions de dollars à Crystallex et a convenu d'une suspension temporaire jusqu'au 10 janvier 2019. Au même moment, le Président américain a reconnu Gauido comme étant le Président par intérim du Venezuela. Il s'agit là d'une évolution importante car seuls les représentants d'un gouvernement reconnu par le pouvoir exécutif américain ont qualité pour agir devant les tribunaux américains (*Pfitzer c. Gouvernement de l'Inde*, 434 US 308, 319-20, 1978).

Au sujet de la requête en intervention, l'équipe juridique vénézuélienne chargée par le Président par intérim Gauido demande à la Cour d'accueillir la requête de la République afin de protéger ses avoirs et de défendre les intérêts des Vénézuéliens. Le Venezuela déclare que la Cour a le pouvoir discrétionnaire de le faire dans des « circonstances exceptionnelles » et pour les « raisons impératives ». Ces conditions sont, de l'avis de la République, remplies pour de nombreuses raisons, notamment parce que (1) l'affaire concerne les relations extérieures des deux États ; (2) les actifs ne sont pas soumis à l'immunité souveraine et jouent un rôle clé dans la transition vers la démocratie ; (3) les nouveaux changements internes de la société pétrolière nationale ont l'influence dans l'analyse appliquée par les cours

The payment of 425 million payment demonstrated that Venezuela has proven its good faith to resolve the dispute with Crystallex, claimed the South American state. 120-Day stay is necessary to allow interim President Guaido to adopt fully informed decision in the Republic's interests.

Le Venezuela estime que son paiement de 425 millions de dollars démontre sa bonne foi dans la résolution du différend avec Crystallex,. Un séjour de 120 jours est nécessaire pour permettre au Président par intérim Guaido d'adopter une décision en toute connaissance de cause dans l'intérêt de la République.

US Court of Appeals, 3rd Circuit, 11 March 2019, *Crystallex International Corporation v. Bolivarian Republic of Venezuela and Petroleos de Venezuela S.A.*, nos. 18-2797 and 18-3124, Crystallex's Opposition to Motion for Leave to intervene and Stay Proceedings

Contributed by Dano Brossmann

Ten days after Venezuela's motion (see above) Crystallex filed an opposition. Crystallex maintained that Venezuela continued to owe nearly 1 billion US Dollars. "Nothing in Venezuela's belated motion justifies staying this appeal on the eve of oral argument."

The mere fact that Venezuela was experiencing political changes does not free the debtor from its obligations. PDVSA's (hence Venezuela's) assets have nothing to do with political situation in the country. For Crystallex, the simple circumstance that the Republic has a new government does not avail Venezuela's of its obligations. It refers to *Republic of Iraq v ABB AG*, 768 F.3d 145, 164 (2nd Cir. 2014) in which the court opined that "the obligations of a

Cour d'appel des États-Unis, 3e Circuit, 11 mars 2019, *Crystallex International Corporation c. République bolivarienne du Venezuela et Petroleos de Venezuela S.A.*, nos. 18-2797 et 18-3124, opposition de Crystallex à la requête en autorisation d'intervenir et arrêt des procédures

Contribution de Dano Brossmann

Dix jours après le mouvement du Venezuela (voir supra), Crystallex a déposé une opposition à la motion du Venezuela. Crystallex maintient que le Venezuela doit toujours une somme équivalente à un milliard de dollars et que « rien dans la motion tardive du Venezuela ne justifie de suspendre cet appel à la veille des plaidoiries. » Le simple fait que le Venezuela se trouve dans une période de changements politiques ne libère pas le débiteur de ses obligations. Les actifs de la société pétrolière nationale (et donc du Venezuela) n'ont rien à voir avec la situation politique du pays.

Pour Crystallex, la simple circonstance que la République a un nouveau gouvernement ne permet pas au Venezuela de se prévaloir de ses obligations. Il se réfère à l'affaire *République d'Irak c. ABB AG*, 768

foreign state are unimpaired by a change in that state's government." Moreover, under international law, a change of government does not erase the ICSID award which held that Venezuela expropriated Crystallex's assets.

As regards the third ground, Crystallex argues that even if the Court permits Venezuela to intervene on appeal, the stay of proceedings should not be granted without a supersedeas bond as a form of security. Referring to public reports by Bloomberg, Crystallex alleges Venezuela's real intention is to evade paying the sum owed, no to merely gain time to evaluate the case.

A decision on Venezuela's motion has not yet been rendered. It is important to note that Crystallex is not the only case in which Venezuela adopted this strategy before the US courts.

F.3d 145, 164 (2e Cir. 2014) dans laquelle la Cour a estimé que « l'obligation d'un État étranger n'est pas affectée par un changement de gouvernement dans cet État ». De plus, en vertu du droit international, un changement de gouvernement n'affecte pas la sentence du CIRDI selon laquelle le Venezuela a exproprié les actifs de Crystallex.

En outre, Crystallex soutient que même si la Cour permet au Venezuela d'intervenir en appel, la suspension de la procédure ne devrait pas être accordée sans une caution de substitution à titre de garantie. Se référant aux rapports publics de Bloomberg, Crystallex allègue que l'intention réelle du Venezuela est d'éviter de payer la somme due, et non de simplement gagner du temps pour évaluer le cas.

Une décision sur la requête du Venezuela n'a pas encore été rendue. Il faut mentionner que Crystallex ne constitue pas le seul cas dans lequel ce pays a adopté une stratégie similaire devant les tribunaux américains.

Rome Court of Appeal, First Civil Section, 1 March 2019, *Republic of Kazakhstan v. Stati Anatolie, Statie Gabril, Ascom Group SA and Tera Raf Trans Traiding Ltd*, no. 1490/2019

Contributed by Alice Clavière-Schiele

Rome Court of Appeal rejects an appeal over a leave to enforce an arbitral award rendered under ECT.

By an arbitral award rendered in 2013, an arbitral tribunal constituted under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce ordered Kazakhstan to pay two Moldovan nationals, the Stati, and their companies an amount of

Cour d'appel de Rome, Première Chambre civile, 1 mars 2019, *République du Kazakhstan c. Stati Anatolie, Statie Gabril, Ascom Group SA et Tera Raf Trans Traiding Ltd*, no. 1490/2019

Contribution de Alice Clavière-Schiele

La Cour d'appel de Rome rejette un appel contre un exequatur accordé à une sentence arbitrale rendue sur le fondement du TCE.

Une sentence arbitrale rendue le 2013 par un tribunal arbitral constitué sous l'égide de la Chambre de commerce de Stockholm avait condamné le Kazakhstan à indemniser deux ressortissants

USD 530 million. The arbitral tribunal concluded that the conduct of the Kazakh authorities had resulted in the seizure of the companies' oil and gas activities, in violation of the obligation of fair and equitable treatment under Article 10 of the Energy Charter Treaty.

After the award was rendered, Kazakhstan started to pretend to have discovered documents proving that the Stati had committed fraud during the arbitration by submitting falsified documents attesting the construction costs of the seized plant. The Stati denied these allegations.

In 2016, the Svea Court of Appeal (Sweden), hearing an application to set aside the award, confirmed it but did not rule on the fraud allegations. It found that it had not been established that the alleged fraud had affected the arbitral tribunal's decision (Svea Court of Appeal, 9 December 2016, Case No. T 2675-14). This decision had also been approved by the Swedish Supreme Court in 2017.

On the other hand, in the same year, the High Court of England and Wales, hearing an application for enforcement of the award, held that the interests of justice required it to examine the fraud allegations. It then held that Kazakhstan had sufficiently established the alleged fraud and refused to enforce the award (High Court of Justice, Commercial Court, 6 June 2017, Case No. CL-2014-000070).

In Italy, in January 2018, the Stati obtained a leave authorising the enforcement of the award. Kazakhstan appealed the leave, but the appeal is rejected by the Rome Court of Appeal in the present decision.

moldaves, les Stati, et leurs sociétés à hauteur de 530 millions de dollars. Le tribunal arbitral avait conclu que le comportement des autorités kazakhes avait abouti à une saisie des activités pétrolières et gazières des sociétés, en violation de l'obligation de traitement juste et équitable figurant dans le Traité sur la Charte de l'Énergie (Article 10).

Après que la sentence ait été rendue, le Kazakhstan avait affirmé avoir découvert des documents prouvant que les Stati avaient commis une fraude lors de l'arbitrage en soumettant de faux documents attestant des coûts de construction d'une usine. Les Stati avaient nié ces allégations.

En 2016, la Cour d'appel de Svea (Suède), saisie d'une demande en annulation de la sentence, avait confirmé cette dernière mais ne s'était pas prononcé sur la véracité des allégations de fraude. Elle avait estimé qu'il n'était pas établi que la fraude alléguée avait eu une incidence sur la décision du tribunal arbitral (Cour d'appel de Svea, 9 décembre 2016, no. T 2675-14). Cette décision avait également été validée par la Cour suprême suédoise en 2017.

En revanche, la même année, la Haute Cour de justice d'Angleterre saisie d'une demande d'exécution de la sentence avait estimé que l'intérêt de la justice lui imposait d'examiner les allégations de fraude soulevées. Elle avait alors retenu que le Kazakhstan avait établi de manière suffisante la fraude alléguée et refusé l'exécution de la sentence (Haute Cour de Justice, division commerciale, 6 juin 2017, no. CL-2014-000070).

Kazakhstan advanced three arguments: the award contained provisions that were contrary to Italian public policy, the arbitral tribunal had no jurisdiction, and the arbitral tribunal was irregularly constituted. Only the first ground is reviewed by the Rome Court of Appeal.

The Court points out that the review of an arbitral award does not concern the accuracy of the decision but rather consists in an examination of the compatibility of the effects of the decision with the Italian legal system. It is therefore necessary to decide whether the effects of the decision are in flagrant contradiction with the Italian values and laws.

The Court considers that there is no contradiction with procedural public policy, as there is no evidence of a manifest or excessive violation of the rights of the parties to a fair trial and to a defence.

It also notes that, with regard to the allegations of fraud, the arguments put forward have already been examined by the Swedish courts in the application for annulment of the award. The Court states that the fraud arguments submitted before it were substantially the same as the grounds having been rejected by the Swedish courts.

In any event, the Court notes that the fraud allegations are not recognised in any decision having the res judicata effect and binding upon the Court. The Court therefore rejects Kazakhstan's appeal.

En Italie, les Stati avaient obtenu en janvier 2018 un décret autorisant l'exécution de la sentence. Le Kazakhstan a fait appel de ce décret, appel rejeté par la Cour d'appel de Rome dans la présente décision.

Le Kazakhstan avançait trois arguments : la sentence contenait des dispositions contraires à l'ordre public italien, le tribunal arbitral n'était pas compétent et enfin, le tribunal arbitral avait été irrégulièrement constitué. Seul le premier argument sera examiné.

La Cour rappelle que le contrôle d'une sentence arbitrale ne concerne pas l'exactitude de la décision mais consiste plutôt en une vérification de la compatibilité des effets de la décision avec le système juridique italien. Il est donc nécessaire de décider si les effets de la décision sont en contradiction flagrante avec les valeurs et lois italiennes en la matière.

En l'espèce, la Cour estime qu'il n'y a pas de contradiction avec l'ordre public procédural, rien ne permettant de constater une violation manifeste ou excessive des droits des parties à un procès équitable et à la défense. Elle retient également que, s'agissant des allégations de fraude, les arguments avancés ont déjà été examinés par les cours suédoises dans la demande d'annulation de la sentence.

En tout état de cause, la Cour relève que ces allégations de fraude, sur laquelle serait basée la sentence arbitrale, ne sont reconnues dans aucune décision ayant autorité de la chose jugée qui s'imposerait à elle. La Cour rejette en conséquence les demandes du Kazakhstan.

ICSID, 6 March 2019, *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, decision on the challenge

Contributed by Alice Clavière-Schiele

ICSID administrative council rejected the challenge against the Vattenfall arbitrators.

Germany applied to disqualify all three arbitrators in November 2018 after they posed additional questions to the parties. Germany said that such questions raised doubt about their impartiality. The proposal was submitted pursuant to Article 14 and 57 of the ICSID Convention.

According to Germany, these questions constituted an "illicit attempt by the tribunal to assist the claimants", as it offered them an opportunity to address gaps in its evidentiary record that would have compelled the arbitrators to deny jurisdiction over claims by Vattenfall. In particular, Germany argued that an invitation for the parties to provide further submissions on a potential ex ante evaluation date favoured the claimants. This therefore expanded the scope of Vattenfall's claim and exceed the tribunal's mandate.

The secretary general of the Permanent Court of Arbitration issued a recommendation in which he stated that as the questions were addressed to both parties, there was no basis to suggest that the tribunal would preferer one approach over another.

Germany's proposal was declined in a decision on 6 March 2019, in which Kristalina Gueorguieva, the

CIRDI, 6 mars 2019, *Vattenfall AB et autres c. République Fédérale d'Allemagne*, ICSID Case No. ARB/12/12, décision sur la récusation

Contribution de Alice Clavière-Schiele

Le Conseil administratif du CIRDI a rejeté la demande de récusation des arbitres dans l'affaire Vattenfall.

L'Allemagne avait soumis une demande de récusation des trois membres du tribunal arbitral en novembre 2018, après que ces derniers aient posé des questions additionnelles aux parties. L'Allemagne estimait que ces questions soulevaient des doutes quant à leur impartialité. La demande a été soumise en vertu des articles 14 et 57 de la Convention CIRDI.

Selon l'Allemagne, ces questions constituaient une tentative illicite du tribunal arbitral d'aider les demandeurs, en ce qu'elles leur offraient la possibilité de combler les lacunes de leurs soumissions, qui auraient sinon obligé les arbitres à décliner leur compétence pour statuer sur les demandes de Vattenfall. L'Allemagne faisait également valoir que l'invitation du tribunal aux parties de fournir de nouvelles observations sur une potentielle date d'évaluation ex ante était favorable aux demandeurs. Ces questions ont élargi la portée de la demande de Vattenfall et dépassé la mission du tribunal arbitral.

Le secrétaire général de la Cour permanente d'arbitrage a déposé une recommandation, dans laquelle il déclare que, les questions ayant été adressées aux deux parties, rien ne permettait de penser que le

acting chair of the ICSID administrative council, concluded that "the Proposal does not meet the standard set forth in Article 57 of the ICSID Convention for the disqualification of an arbitrator".

tribunal arbitral avait une préférence pour l'une des approches, au détriment de l'autre.

La demande de l'Allemagne est donc rejetée par une décision du 6 mars 2019, dans laquelle le président du Conseil d'administration du CIRDI, Kristalina Gueorguieva, conclut que la demande ne répond pas au critère fixé par l'article 57 de la Convention CIRDI pour la récusation d'un arbitre.

ICC, 18 March 2019, *Conecta SA v. The Oriental Republic of Uruguay*, no. 22753/ASM/JPA, Final Award

Contributed by Dano Brossmann

Conecta is a company which distributes and sells natural gas in Uruguay. It operates in the whole of Uruguay except Montevideo, the capital, on the basis of a Concession agreement that began in 2002. The enterprise is controlled through a local subsidiary of Petrobras, the Brazilian energy firm and Uruguay's state oil company.

In April 2017 Conecta submitted a Request for Arbitration pursuant to article 16 of Concession Agreement concluded between Uruguay and Conecta in 1999. Alleged breaches and interpretation of this Concession Agreement are at the core of the dispute. Following Conecta's Request, an arbitral tribunal seated in Buenos Aires, presided by Yves Derains was consequently constituted.

In December 1999 the two parties signed a Concession Agreement for construction and use of gas distribution infrastructure in Uruguay. In 2002 the first part of pipeline project was constructed and in

ICC, 18 mars 2019, *Conecta SA c. La République orientale de l'Uruguay*, no. 22753/ASM/JPA, Sentence finale

Contribution de Dano Brossmann

Conecta est une entreprise qui distribue et vend du gaz naturel en Uruguay. Elle opère sur l'ensemble du territoire uruguayen, à l'exception de Montevideo, la capitale, sur la base d'un accord de concession qui a débuté en 2002. L'entreprise est contrôlée par une filiale locale de Petrobras qui est la société brésilienne d'énergie et la compagnie pétrolière nationale uruguayenne.

En avril 2017, Conecta a soumis une demande d'arbitrage conformément à l'article 16 de la convention de concession conclue entre l'Uruguay et Conecta en 1999. Des violations alléguées et l'interprétation de cet accord de concession sont au cœur du différend. Suite à la demande de Conecta, un tribunal arbitral, présidé par Yves Derains, siégeant à Buenos Aires, a été constitué.

En décembre 1999, les deux parties ont signé un accord de concession pour la construction et l'utilisation des infrastructures de distribution de gaz

2004, Argentina, the supplier of natural gas to Uruguay adopted measures that restricted export of natural gas and use of Argentinian infrastructure. In 2013 the Third Addendum was signed, transferring effects of incremental royalties to tariffs under certain conditions.

Connecta alleged that its rights were violated on multiple grounds.

First, Conecta was entitled under the Contract and Uruguayan law to the economic-financial equilibrium of the concession.

Second, the measures adopted in Argentina since 2004 broke this economic-financial balance.

Moreover, third, that state aid to other energy suppliers operating on the same market hampered competition.

Finally, Uruguay accepted Conecta's request for revision of the contract. However, the State breached its obligation to renegotiate what gave Conecta the right to renounce the Concession Agreement and to be compensated for the resulting financial loss.

The tribunal considers that obligation to renegotiate in order to re-establish the economic-financial equation is breached when reasonable proposals are rejected without foundation and without counterproposals. Or, when the debtor's actions demonstrate a lack of interest in re-establishing the initial economic-financial equation.

Conecta alleged that the consequences of the Argentine measures on the Concession forced the State to accept a full review of its terms, but the Tribunal concluded that clause 4.5 of the Contract

en Uruguay. En 2002, la première partie du projet de gazoduc a été construite et en 2004, l'Argentine, fournisseur de gaz naturel de l'Uruguay, a adopté des mesures qui limitent les exportations de gaz naturel et l'utilisation des infrastructures argentines. En 2013, le troisième addendum a été signé, transférant les effets des redevances supplémentaires aux tarifs sous certaines conditions.

Connecta allègue que ses droits ont été violés pour de multiples motifs.

Premièrement, Conecta avait droit, en vertu du contrat et de la loi uruguayenne, à l'équilibre économique et financier de la concession.

Deuxièmement, les mesures adoptées en Argentine depuis 2004 ont rompu cet équilibre économique et financier.

En outre, l'aide d'État accordée à d'autres fournisseurs d'énergie opérant sur le même marché a entravé la concurrence.

Enfin, l'Uruguay a accepté la demande de révision du contrat présentée par Conecta. Toutefois, l'État a manqué à son obligation de renégocier ce qui donnait à Conecta le droit de renoncer au contrat de concession et d'être indemnisée pour le préjudice financier en résultant.

Le tribunal considère que l'obligation de renégocier afin de rétablir l'équation économico-financière est violée lorsque des propositions raisonnables sont rejetées sans fondement et sans contre-propositions. Ou, lorsque les actions du débiteur démontrent un manque d'intérêt à rétablir l'équation économico-financière initiale.

relating to the Change of Law did not apply to the change of foreign law, in this case Argentinian law.

The Tribunal then considered whether the State had seriously and repeatedly breached its obligation to renegotiate in good faith. The tribunal reasoned that Uruguay never refused to renegotiate and Claimant deduced such a refusal from its necessarily subjective interpretation of the conduct of the Minister of Industry, Energy and Mines at a meeting. On the basis of the foregoing, the Tribunal found that Respondent did not commit a serious and repeated breach of the Contract and that Claimant is therefore not authorized to apply clause 11.2 relating to the waiver and is not entitled to monetary compensation for the alleged breaches.

Regarding Conecta's state aid argument, the Tribunal did not find Conecta's argumentation convincing and holds that the Uruguayan State, like every State, is free to organize its energy policy as it sees fit. (para. 572) In addition, the Tribunal did not identify in the Contract any obligation not to harm Conecta with measures to promote competitive energy. (para. 573) or an obligation not to take measures in subsidizing LPG that would harm the Concession with Conecta.

The tribunal dismissed Conecta's claim on nine grounds out of ten, except for one in which it declared that Uruguay had an obligation to renegotiate the adjustments corresponding to reassessment of economic-financial equation of the concession.

The author invites readers to have a closer look at the decision (published in Spanish) where the tribunal elaborates numerous other technical points of the

Conecta allègue que les conséquences des mesures argentines sur la concession ont forcé l'État à accepter une révision complète de ses termes, mais le tribunal conclut que la clause 4.5 du contrat relative au changement de loi ne s'applique pas au changement du droit étranger, en l'occurrence du droit argentin.

Le tribunal examine ensuite si l'État a manqué de manière grave et répétée à son obligation de renégocier de bonne foi. Il estime que l'Uruguay n'a jamais refusé de renégocier et le demandeur déduit un tel refus de son interprétation nécessairement subjective du comportement du ministre de l'Industrie, de l'Énergie et des Mines à une réunion. Compte tenu de ce qui précède, le tribunal conclut que l'Uruguay n'a pas commis de manquement grave et répété au contrat et que Conecta ne peut se prévaloir de l'application de la clause 11.2 relative à la renonciation et n'a pas droit à une compensation monétaire pour les violations alléguées.

En ce qui concerne l'argument de Conecta sur les aides d'État, le tribunal ne trouve pas convaincante l'argumentation de Conecta et soutient que l'État uruguayen, comme tout État, est libre d'organiser sa politique énergétique comme bon lui semble (§ 572) En outre, le tribunal n'identifie dans le contrat aucune obligation de ne pas nuire à Conecta par des mesures visant à promouvoir une énergie compétitive (§ 573) ou l'obligation de ne pas prendre de mesures pour subventionner le GPL qui porteraient préjudice à la Concession avec Conecta.

Le tribunal rejette la demande de Conecta pour neuf motifs sur dix, à l'exception d'un dans lequel il déclare que l'Uruguay a l'obligation de renégocier les

Concession Agreement which are not described in detail in this article.

ajustements correspondant à la réévaluation de l'équation économique et financière de la concession.

L'auteur invite les lecteurs à examiner de plus près la décision (publiée en espagnol) dans laquelle le tribunal élabore de nombreux autres points techniques du contrat de concession qui ne sont pas décrits en détail dans cet article.

ICSID, 22 March 2019, *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9

Contributed by Ekaterina Grivnova

Italba Corporation ("Italba") was created on 10 May 1982, under the laws of the State of Florida, United States of America. It was founded by Dr. Gustavo Alberelli (Italian citizen, permanent resident of the United States of America since 1 August 1977), owner of 50 shares and Ms. Beatriz Alberelli, (who was born in Cuba and who has held American citizenship since 1967), owner of the remaining 50 shares.

In preparation for the investment to be made in Uruguay, in late 1996 Dr. Alberelli, together with his mother, Ms. Carmela Caravetta, acquired a local company. The company soon changed its name to Trigosul.

In 1997, the Uruguay authorities granted Dr. Alberelli a right to provide wireless services in Uruguay and allocated to him the radio channels of some frequencies. These rights, at the request of Dr. Alberelli, were transferred to Trigosul.

The dispute arose out of Uruguay's revocation of Trigosul's license to provide wireless data services in

CIRDI, 22 March 2019, *Italba Corporation c. La République Orientale d'Uruguay*, ICSID Case No. ARB/16/9

Contribution d'Ekaterina Grivnova

Italba Corporation (« Italba ») a été créée le 10 mai 1982, en vertu des lois de l'Etat de Floride, Etats-Unis d'Amérique. Elle a été fondée par M. Gustavo Alberelli (citoyen italien, résident permanent des États-Unis d'Amérique depuis le 1 août 1977), propriétaire de 50 actions, et par Mme Beatriz Alberelli (née à Cuba et de nationalité américaine depuis 1967), propriétaire des 50 actions restantes.

Alberelli, avec sa mère, Mme Carmela Caravetta, ont fait l'acquisition d'une entreprise locale à la fin de 1996. L'entreprise change rapidement de nom pour devenir Trigosul.

En 1997, les autorités uruguayennes ont accordé à M. Alberelli le droit de fournir des services sans fil en Uruguay et lui ont attribué les canaux radio de certaines fréquences. Ces droits, à la demande de M. Alberelli, ont été transférés à Trigosul.

Le différend découle de la révocation par l'Uruguay de la licence accordée à Trigosul pour la fourniture de services de données sans fil en Uruguay. En raison des

Uruguay. On account of Trigosul's various problems with the Uruguayan telecommunications authorities, in February 2016, Italba filed its claim for arbitration against Uruguay before ICSID under the Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment ("BIT").

Uruguay raised jurisdictional objections and defenses on the merits. It considered that the Tribunal had no jurisdiction because Italba neither owned nor controlled Trigosul and therefore cannot rely on the protection of the Treaty or the ICSID Convention.

The tribunal agreed with Uruguay. It concluded that Dr. Abelli and his family appeared as the sole owners of Trigosul's shares, no matter how much the corporate veil could be pierced or Trigosul's legal personality be disregarded. Italba therefore cannot qualify as investor under BIT.

Neither can Dr. Alberelli as he is a national of Italy, not the United States, nor Trigosul being a Uruguayan company.

Consequently, the tribunal upholds Uruguay's objection on jurisdiction and rejects its jurisdiction over Italba's claims.

divers problèmes de Trigosul avec les autorités uruguayennes des télécommunications, en février 2016, Italba a déposé sa demande d'arbitrage contre l'Uruguay devant le CIRDI en vertu du Traité entre les États-Unis d'Amérique et la République Orientale de l'Uruguay concernant l'encouragement et la protection réciproque des investissements (le « TBI »).

L'Uruguay a soulevé des exceptions de compétence et des défenses sur le fond. Elle considère que le tribunal n'est pas compétent parce qu'Italba ne possède ni ne contrôle de Trigosul et ne peut donc se prévaloir de la protection du Traité ou de la Convention CIRDI.

Le tribunal est d'accord avec l'Uruguay. Alberelli et sa famille apparaissent comme les seuls propriétaires des actions de Trigosul, quel que soit le degré auquel le voile corporatif pourrait être percé ou la personnalité juridique de Trigosul ignorée. Italba ne peut donc pas être qualifié d'investisseur au titre du TBI.

M. Alberelli ne peut pas non plus s'en prévaloir en ce qu'il ne répond pas à la condition de nationalité, puisqu'il est ressortissant de l'Italie, il en va de même pour Trigosul qui est une société uruguayenne. En conséquence, le tribunal confirme l'exception d'incompétence soulevée l'Uruguay et rejette sa compétence à l'égard des demandes d'Italba.

PCA, 1 March 2019, *NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation*, PCA Case No. 2017-16, Naftogaz Group Press Report

Contributed by
Serhiy Yaroshenko and
Valeriia Shablii,
Evris law firm, Ukraine

According to a Naftogaz Group report available online and dated 1 March 2019 ("report"), the Permanent Court of Arbitration in The Hague ("PCA") has rendered an award in favour of NJSC Naftogaz of Ukraine ("Naftogaz") and six of its subsidiaries ("Claimant") in the pending case NJSC Naftogaz of Ukraine (Ukraine) et al. v. The Russian Federation, PCA Case No. 2017-16. According to the report, Russian Federation ("Respondent") is allegedly "liable for seizing Claimant's assets located in Crimea" under the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, dated 27 November 1998 ("BIT"). However, as of the date of this brief, the PCA website is silent on this point.

The proceedings commenced on 17 October 2016. In its letter to the PCA, dated 19 January 2017, Respondent contested the jurisdiction of the PCA. The hearing on jurisdiction and liability took place in May 2018.

CPA, 1 mars 2019, *NJSC Naftogaz (Ukraine) et al. c. la Fédération de Russie*, PCA Case No. 2017-16, communiqué de presse de Naftogaz Group

Contribution de
Serhiy Yaroshenko et
Valeriia Shablii,
cabinet d'avocats Evris, Ukraine

Selon le communiqué de presse de Naftogaz Group du 1 mars 2019 disponible en ligne (« communiqué »), la Cour permanente d'arbitrage de La Haye (« CPA ») a rendu une sentence en faveur de NJSC Naftogaz, société ukrainienne (« Naftogaz ») et de six de ses filiales (« Demanderesse ») dans l'affaire NJSC Naftogaz et autres contre la Fédération de Russie, affaire no. 2017-16. Selon le communiqué, la Fédération de Russie (la « Défenderesse ») serait « responsable de la saisie des biens de la Demanderesse situés en Crimée » sur le fondement de l'Accord entre le Gouvernement de la Fédération de Russie et le Cabinet des ministres de l'Ukraine sur l'encouragement et la protection mutuelle des investissements, en date du 27 novembre 1998 (« TBI »). Toutefois, à l'heure actuelle, le site de la CPA est muet sur ce point.

La procédure a été entamée le 17 octobre 2016. Dans sa lettre à la CPA, datée du 19 janvier 2017, la Défenderesse a contesté la compétence de la CPA. L'audience sur la compétence et la responsabilité a eu lieu en mai 2018.

The tribunal will calculate the amount of expropriated assets as a result of BIT violation in a second stage of arbitration proceedings. According to Naftogaz Group, approximate investment losses are USD 5 billion.

Once the award is officially confirmed on PCA website, Claimant would need to enforce it. If this is the case, then it may be a good addition to the developing positive investment arbitration jurisprudence for Ukrainian entities, with the earlier successful case be Everest Estate LLC et al. v. The Russian Federation, PCA Case No. 2015-36. In the latter, the arbitral tribunal also satisfied the Ukrainian entities' claims and granted significant compensation for unlawful expropriation of their assets in Crimea by the Russian Government [see Biberon No. 21 for more details on the case].

Also, Naftogaz has been involved in two arbitrations against Russian gas company Gazprom. The disputes concern the sale of Russian gas to Naftogaz and its transit to Europe. On 22 December 2017, Naftogaz received an arbitration award in its favour, which lowered future obligatory annual gas import volume. On 28 February 2017, an arbitral tribunal constituted under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce satisfied Naftogaz claims to Gazprom in gas transit suit in the amount of USD 4.6 billion. As a result of two arbitral awards, Gazprom must compensate USD 2.56 billion plus damages to Naftogaz. Currently, the arbitral awards are challenged before Swedish courts.

Le tribunal évaluera le montant de la compensation dans la deuxième étape de la procédure arbitrale. Selon Naftogaz Group, les pertes de leurs investissements s'élèvent à environ 5 milliards de dollars.

Une fois que la sentence arbitrale est officiellement confirmée sur le site la CPA, la Demanderesse devra l'exécuter. Si tel est le cas, il pourrait s'agir d'un nouvel élément de jurisprudence positif en matière d'investissement pour les entités ukrainiennes, l'affaire Everest Estate LLC et al. c. la Fédération de Russie, (l'affaire no. 2015-36) ayant déjà connu du succès. Dans ce dernier cas, le tribunal arbitral a également satisfait les demandes des entités ukrainiennes et a accordé une indemnisation importante pour l'expropriation illégale de leurs actifs en Crimée par le gouvernement russe [voir Biberon no. 21 pour plus de détails sur cette affaire].

Naftogaz a également été impliqué dans deux arbitrages contre la société de gaz russe Gazprom. Les litiges concernent la vente de gaz russe à Naftogaz et son transit vers l'Europe. Le 22 décembre 2017, Naftogaz a reçu une sentence arbitrale en sa faveur, qui a réduit le futur volume annuel obligatoire des importations de gaz. Le 28 février 2017, un tribunal arbitral constitué sous les auspices de l'Institut d'arbitrage de la Chambre de commerce de Stockholm a satisfait les demandes de Naftogaz à l'encontre de Gazprom pour un montant de 4,6 milliards de dollars. A la suite de deux sentences arbitrales, Gazprom doit indemniser Naftogaz pour un montant de 2,56 milliards de dollars plus les dommages et intérêts. Actuellement, les sentences arbitrales sont contestées devant les tribunaux suédois.

The Singapore International Arbitration Centre has released its Annual Report (caseload statistics) for 2018

Contributed by Alice Clavière-Schiele

In 2018, SIAC received 402 new cases from parties in 65 jurisdictions. SIAC administered 93% (375) of these new cases, with the remaining 7% (27) being ad hoc appointments. In comparison, SIAC received 452 new cases in 2017 (SIAC administered 421), 343 in 2016 (307 administered) and 271 in 2015 (244 administered).

Total sum in dispute for all new case filings amounts to USD 7.06 billion. The average value for new cases filed is USD 24.02 million. The highest sum in dispute for a single administered case is USD 2.38 billion.

84% (337) of new cases filed were international cases. Top ten foreign users at SIAC are as follows: USA (topped the rankings for the first time), India, Malaysia, China, Indonesia, Cayman Islands, UAE, South Korea, Hong Kong and Japan. The Annual Report notes that foreign users "were from a mix of common and civil law jurisdictions".

Trade was the most common industry sector giving rise to disputes. Filed claims involved a host of sectors: trade (27%), commercial (19%), maritime or shipping (18%), corporate (15%) and construction or engineering (11%).

There were 333 arbitrator appointments to SIAC cases in 2018. SIAC made 175 appointments, of which 34% were women (an increase on the figure of 30% for 2017).

Le Centre d'arbitrage international de Singapour (SIAC) a publié son Rapport annuel (statistiques sur les affaires) pour 2018

Contribution de Alice Clavière-Schiele

En 2018, le SIAC a reçu 402 nouvelles affaires de parties, de parties de 65 nationalités. Le SIAC a administré 93 (375) de ces affaires, les 7% restants (27) étant des procédures ad hoc. En comparaison, le SIAC a reçu 452 nouvelles affaires en 2017 (dont 421 étaient administrées par le SIAC), 343 en 2016 (307 administrées) et 271 en 2015 (244 administrées).

Le montant total en litige s'élève à 7,06 milliards de dollars. Le montant moyen pour les nouvelles affaires s'élève à 24,02 millions de dollars. Le montant en litige le plus élevé dans une affaire s'élève à 2,38 milliards de dollars.

84% (337) des nouvelles affaires sont des arbitrages internationaux. Les dix principaux utilisateurs étrangers de l'arbitrage SIAC sont de nationalités suivantes : USA (en tête du classement pour la première fois), Inde, Malaisie, Chine, Indonésie, Iles Caïmans, Emirats arabes unis, Corée du sud, Hong-Kong et Japon. Le Rapport annuel note que les utilisateurs étrangers appartiennent à tant à des systèmes juridiques de common law qu'à des systèmes de droit civil.

Le commerce international est le secteur donnant lieu à le plus de litiges. Les requêtes déposées concernent de nombreux secteurs : commerce international (27% des affaires), contrats commerciaux (19%), maritime et

transport (18%), société (15%) et construction et ingénierie (11%).

Il y a 333 nominations d'arbitres dans les affaires administrées par le SIAC en 2018. L'organisation a fait 175 nominations directes, dont 34% de femmes (ce qui constitue une augmentation de 30% par rapport aux nominations faites en 2017).

PBA EXPERIENCE

INTERVIEWS WITH YOUNG ARBITRATION PRACTITIONERS

ENTRETIENS AVEC DE JEUNES PROFESSIONNELS EN ARBITRAGE

INTERVIEW DE GREG LOURIE, ASSOCIATE AT CLEARY GOTTLIEB STEEN & HAMILTON

Interview taken and translated by Ekaterina Grivnova

L'interview réalisé et traduit par Ekaterina Grivnova

1. Hi Greg, would you mind recalling us briefly your background?

I was born and raised in Moscow, and when I was around the age of 8, my parents decided to relocate to Germany, so I was fortunate to grow up bilingual. I received most of my school and university education in Germany, where I am also admitted to the bar.

After studying law at the Universities of Frankfurt and Mainz, I did a PhD under the supervision of Professor Rainer Hofmann in Frankfurt. I was also, in parallel, working as a teaching assistant at Professor Hofmann's chair and as Research Associate for WilmerHale in the Frankfurt and London offices. Finally, after completing the clerkship with stages as WilmerHale in Washington D.C. and the Permanent Court of Arbitration in the Hague, I was admitted to the bar in Frankfurt and moved to Paris to work as an associate in the Public International Law practice of Cleary Gottlieb Steen & Hamilton.

1. Bonjour Greg, peux-tu nous rappeler brièvement ton parcours ?

Je suis né et j'ai grandi à Moscou. Quand j'avais environ 8 ans, mes parents ont décidé de déménager en Allemagne, j'ai eu la chance de grandir dans un environnement bilingue. J'ai fait la plupart de mes études scolaires et universitaires en Allemagne, où je suis également admis au barreau.

Après des études de droit aux universités de Francfort et de Mayence, j'ai fait un doctorat sous la direction du professeur Rainer Hofmann à Francfort. J'ai également travaillé en parallèle en tant que chargé d'enseignement à la faculté sous la supervision du Professeur Hofmann et chercheur aux bureaux de Francfort et de Londres de WilmerHale. Enfin, après avoir effectué des stages chez WilmerHale à Washington DC et à la Cour permanente d'arbitrage de la Haye, j'ai passé le barreau à Francfort et déménagé à Paris pour devenir collaborateur au sein du département du droit international public du cabinet Cleary Gottlieb Steen & Hamilton.

2. You did your *Refendariat* in Frankfurt Regional Court. Could you please explain what your missions consisted in and how it impacted your career in arbitration?

German law graduates have to undergo a two-year-long clerkship at the end of which they sit the bar exam. The clerkship is divided in five stages. Clerks start by clerking for a civil law judge, followed by a clerkship with a criminal prosecutor or a criminal judge, a governmental agency, a law firm and, ultimately, an elective stage, which can be done in any legal profession or institution under the supervision of a lawyer.

The German system is based on the concept of a "*Volljurist*", meaning that after the bar, you are qualified to exercise any legal profession in Germany, including that of a judge, a prosecutor or a lawyer.

While the system is helpful to get a broad overview over the different opportunities of the legal profession in Germany, it does not by and in itself contain any arbitration elements. However, it is still possible to

2. Tu as fait ton *Refendariat* au tribunal régional de Francfort. Pourrais-tu nous expliquer en quoi consistaient tes missions et comment elles ont influencé ta carrière en arbitrage ?

Pour être admissible à l'examen du barreau, les diplômés en droit allemands doivent préalablement effectuer un *Refendariat*, il s'agit d'une période de deux ans divisée en cinq stages différents. Elle commence par un stage auprès d'un juge civil, suivi d'un stage auprès d'un procureur ou d'un juge pénal, d'un organisme gouvernemental, d'un cabinet d'avocats et, finalement, d'un stage de spécialité, pour lequel le choix de la structure est libre mais qui doit être réalisé sous la supervision d'un avocat.

Le système allemand est basé sur le concept de « *volljuriste* », ce qui signifie qu'une fois inscrit au barreau, vous êtes qualifié pour exercer toute profession juridique en Allemagne, y compris celle de juge, de procureur ou d'avocat.

Bien que le système soit très pratique pour avoir une vision d'ensemble des opportunités de la profession

learn some meaningful features for the arbitration practice, for example when attending deliberations of judges. With a bit of planning, the clerkship also offers sufficient flexibility to incorporate arbitration elements: For instance, I could spend 4 months of my lawyer stage with WilmerHale in Washington DC and my elective stage at the Permanent Court of Arbitration in The Hague.

juridique en Allemagne, il ne contient pas en soi d'enseignements spécifiques à l'arbitrage. Cependant, il est toujours utile pour le métier d'arbitragiste, par exemple, d'assister aux délibérations des juges. Il est également possible, avec de l'organisation, d'intégrer des éléments d'arbitrage dans son parcours. Par exemple, j'ai pu faire un stage de 4 mois chez WilmerHale à Washington DC et un stage à la Cour permanente d'arbitrage à La Haye, au cours desquels j'ai travaillé en arbitrage.

3. You were a Research assistant at WilmerHale. What do such research positions give young practitioners and how they help in work?

I assume that depends very much on the jurisdiction. In Germany, research assistant positions at law firms are usually part-time positions offered to law graduates, while they are separately pursuing a PhD. Depending on the law firm and team, research assistants can do anything from basic legal and factual research to the tasks of a (junior) associate. When at WilmerHale, I had the chance to be deeply involved in a number of large arbitration cases; I was drafting submissions, communicating directly with clients and, ultimately, participated in the hearings, the highlight of every arbitration. I also had the opportunity to work in several offices of the firm around the globe which is certainly one of the advantages of an international law firm.

3. Tu as travaillé en tant que chercheur chez WilmerHale. Que peuvent apporter de tels postes de recherche aux jeunes praticiens ? Cela aide-t-il dans le travail ?

Je suppose que cela dépend beaucoup du pays. En Allemagne, les postes de chercheurs dans les cabinets d'avocats sont généralement des postes à temps partiel pour les diplômés en droit, qui font un doctorat à côté. Selon le cabinet et l'équipe, les tâches des chercheurs varient, de recherches juridiques et factuelles basiques aux tâches d'un collaborateur junior. Avec WilmerHale, j'ai eu de la chance de participer activement à plusieurs arbitrages importants, y compris en ce qui concerne la rédaction des mémoires, la communication directe avec des clients et, finalement, la participation aux audiences, ce qui est, bien sûr, le point saillant de chaque arbitrage. J'ai également eu l'occasion de travailler dans plusieurs bureaux étrangers du cabinet, ce qui est certainement un avantage d'un cabinet d'avocats international.

4. You give classes on International Arbitration and International Public Law. What are, from your prospective, the most important things for you to do/to keep in mind when deliver classes?

Know your audience, *i.e.* take the time to enquire, at the beginning of the class, what prior knowledge the students have and adapt the class accordingly. And, whenever possible, make the class interactive, prepare exercises the students can do individually or in groups and give examples from real-life practice. Luckily, arbitration and specifically public international law offer many opportunities to demonstrate the application of legal theory in practice.

Also - and it will sound self-evident - it is absolutely essential to leave sufficient time for breaks and for the students to discuss and ask questions. When you're standing in front of a large crowd and teaching, you know your subject and the excitement and adrenalin keep you focused. Whereas for the students, who are learning a new subject, it is much more difficult to stay focused for an entire day and a good lecturer needs to pay close attention to whether students are still able to follow.

4. Tu donnes des cours d'arbitrage international et de droit international public. Quelles sont, selon toi, les éléments clés pour dispenser un cours intéressant ?

Connaissez votre public, c'est-à-dire prenez le temps de vous renseigner au début du cours sur les connaissances de vos élèves et adaptez votre cours en conséquence. Dans la mesure du possible, faîtes un cours interactif, préparez des exercices que les élèves peuvent faire individuellement ou en groupe et donnez des exemples tirés de la pratique réelle. Heureusement, l'arbitrage et le droit international public offrent de nombreuses possibilités pour démontrer l'application de la théorie du droit à la pratique.

De plus, cela semble évident, il est absolument essentiel de laisser suffisamment de temps de pause pour que les élèves puissent discuter et poser des questions. Lorsque vous dispensez un cours devant une large audience et que vous connaissez votre sujet, l'excitation et adrénaline vous permettent de rester concentré. Mais pour les élèves qui apprennent une nouvelle matière, il est beaucoup plus difficile de rester concentré pendant une journée entière, un bon chargé de cours magistraux doit faire très attention aux élèves, s'ils sont toujours capables de suivre ou s'ils ont besoin d'une pause.

5. Can you say that you prefer investor-state arbitration over commercial arbitration and why?

This is a difficult one, as I really enjoy practicing both. Commercial arbitration cases can be just as complex on the law as investor-state disputes and, *vice versa*,

5. Peux-tu dire si tu préfères l'arbitrage d'investissement à l'arbitrage commercial et pourquoi ?

C'est une question difficile, puisque j'aime faire les deux. Les dossiers d'arbitrage commercial peuvent être tout aussi complexes sur les aspects juridiques que

some investor-state disputes may involve extremely complex factual matrices. The one key difference, in my opinion, is that investor-state arbitration is strongly influenced by academia and practicing investment arbitration involves developing highly complex, downright academic, questions of international law. One of the main reasons for me to move to Cleary Gottlieb's Public International Law practice was to be able to combine my academic interest in public international law with practical work on real cases.

ceux d'arbitrage d'investissement et, inversement, certains arbitrages d'investissement peuvent comporter des matrices factuelles extrêmement complexes. La principale différence, à mon avis, réside dans le fait que l'arbitrage d'investissement est fortement influencé par le milieu universitaire et que la pratique soulève des questions de droit international très complexes et académiques. L'une des raisons principales pour lesquelles j'ai décidé de rejoindre le département de droit international public de Cleary Gottlieb est la possibilité de combiner mon intérêt académique pour le droit international public avec le travail pratique sur des affaires réels.

6. Do you have any tips for young people who want to start their arbitration career?

First, the obvious points: work hard, stay focused on your aim and don't let setbacks discourage you. The field is becoming very competitive and even if you give your very best, there are too many factors outside of your control, so setbacks may happen. But at the end, there will always be an interesting opportunity and position for dedicated hard-working junior associates. If you have an academic interest in the field - publish, alone or with others, to increase awareness for your profile.

Also, start early to expand your network – never neglect this part of our profession. While at conferences, don't pitch yourself only to the most senior person in the room, but instead, network with your peers that are at the same stage of their career as you are. Arbitration is a small circle, but building a

6. As-tu des conseils pour les jeunes qui souhaitent débuter une carrière en arbitrage international ?

Tout d'abord, les conseils évidents : travaillez dur, restez concentré sur votre objectif et ne vous laissez pas décourager par les échecs. Le milieu devient de plus en plus compétitif, mais gardez à l'esprit que même si vous avez donné le meilleur de vous-même, il y a beaucoup de facteurs indépendants de votre volonté, il peut donc arriver d'échouer mais en fin de compte, pour les juristes juniors passionnées qui travaillent dur, il y aura toujours des opportunités et des postes intéressants. Si vous êtes intéressé par le côté académique de la profession, publiez, seul ou avec d'autres juristes, pour vous faire connaître dans le milieu.

Commencez le plus tôt possible à construire votre réseau – ne négligez jamais cet aspect de la profession. Lorsque vous participez à des conférences, ne vous

network is a long-term project. Your current peers are your future colleagues, opposing counsel and, eventually, those who will appoint you as an arbitrator one day.

adressez pas uniquement à la personne la plus senior de la salle mais networkez également avec vos pairs qui sont au même stade que vous dans leur carrière. L'arbitrage est un milieu restreint, la création du réseau est un projet à long terme. Vos pairs actuels sont vos futurs collègues, les représentants de la partie adverse dans un dossier ou, éventuellement, ceux qui vous désigneront en tant qu'arbitre.

PARIS ARBITRATION WEEK

SEMAINE D'ARBITRAGE DE PARIS

Paris Arbitration Week (PAW) each year brings together the international arbitration community during a dynamic week of academic debate and professional exchange.

The third edition of PAW took place on 1-5 April 2019. PAW Organising Committee has kindly granted Paris Baby Arbitration the right to republish the coverages of the events made by the Student Press Team.

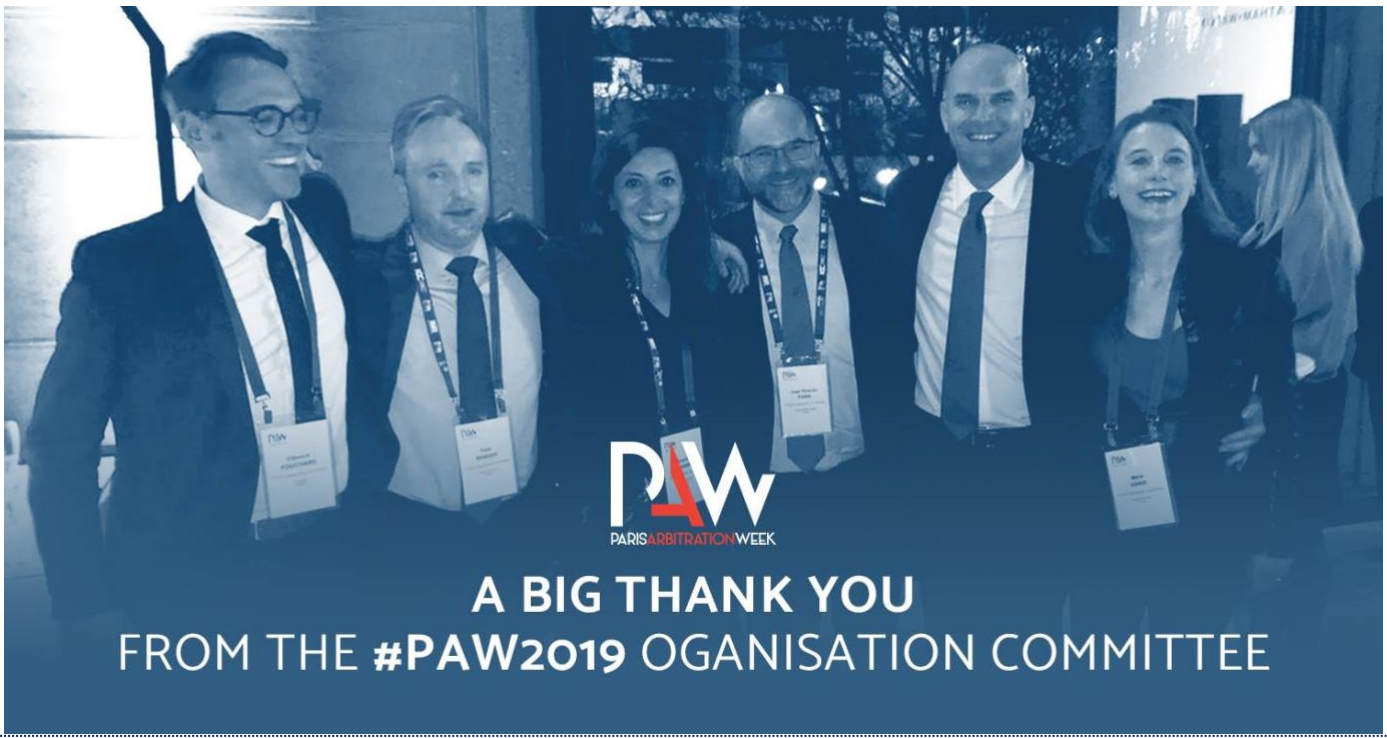
PARISARBITRATIONWEEK

ORGANISING COMMITTEE, HOSTS AND STUDENT PRESS

Organising Committee: Clément Fouchard (Linklaters), Peter Rosher (Reedsmith), Yasmin Mohammad (Vannin Capital), José Ricardo Feris (Squire Patton Boggs), Alexander Fessas (ICC Arbitration) and Marie Danis (August Debouzy).

Co-hosts: ICC Arbitration - Paris Place d'Arbitrage - CFA40 (Comité français de l'arbitrage) - Association Française d'Arbitrage.

Student Press Team: Gulirano Abdullajonova, Paola Damé, Léa Déroche, Nathan Gervais, Ekaterina Grivnova, Nicoleta Iftodi, Victoria Martynkova, Houda Naji, Stéphanie Pereira, Loïc Rakotoarisoa, Yuri Ryu, Clémence Segura Saignac and Annaelle Touffait.



DAY 1

Third ICC European Conference

The first event "**Breakfast session: Euro-vision: a year in review**" concerned the key trends developed in national jurisdictions around Europe during the last year. The panel was composed of Marcos Draco, Pierre Pic, Anna Masser, Patricia Saiz and chaired by Maria Hauser-Morel.

The first subject discussed by the panel was the disclosure obligation, with an example of the Halliburton case in England.

The second topic was the public order from the angle of several Spanish cases where awards were annulled for violation of the Spanish constitution and the MK case of the Paris Court of Appeal. Finally, the panel approached investment arbitration through the prism of Micula and Crimea-related cases.

The **Welcome Word** by Alexis Mourre and Alexander Fessas addressed ICC Arbitration in Europe of today and tomorrow. The speech concerned the challenges faced by ICC since its creation. Now, the ICC aims to make arbitration more transparent, among other means, by the publication of awards with the consent of parties.

The **Keynote speech** was delivered by Abdulqawi Ahmed Yusuf on the future of investment arbitration.

First, the speaker presented the current backlash against investment arbitration, and the reasons underlining this backlash. A survey shows that people consider investment arbitration as a threat to democracy and state sovereignty. Moreover, when the majority of BITs were concluded, developed States expected these treaties to only serve their interests, and not the interests of developing countries.

The solutions given for these issues imply an equal application of the BIT's mechanisms to any user of investment arbitration, multilateralisation and institutionnalisation of investment arbitration.

The first roundtable concerned **Intra-European vs Extra-European means for the settlement of investor-State disputes**. The panel was composed of Richard Kreindler, Luigi Malferrari, Patricia Nacimiento chaired by Bartosz Kruzewski.

A presentation of decisions rendered in the aftermath of Achmea was first made. The panel debated on the available means to settle dispute in a post-Achmea world. Then it discussed the potential impact of Achmea on ECT arbitration, and in a more general way, on the future of investment arbitration after the Achmea decision.

The panel was asked if arbitrator-counsel "double hatting" had to be forbidden. The panel agreed on the fact that this practice had to be stopped, but it would not change the effects of Achmea.

The panel was also asked if the creation of a permanent investment arbitration court was a good idea. On this question, the panel expressed different opinions.

After lunch, the Conference welcomed Jan Kleinheisterkamp, Melissa Magliana, Paschalis Paschalidis for an **Oxford style debate**, chaired by Massimo Benedettelli, **on the safeguard of international, European and domestic mandatory rules by arbitral tribunals and its practical implications**.

The audience seemed convinced (65%) that arbitral tribunals should not apply EU law overriding mandatory rules when assessing their own jurisdiction or deciding the merits of the dispute. The main issues at stake were: (i) how to apply EU law overriding mandatory rules when there is no clear definition of what constitutes such rules?; (ii) to what extent can the parties avoid mandatory rules of the EU market regulation by choosing a non-EU law and a non-EU seat for arbitration? Won't it lead to a backlash?.

The parties' autonomy does not exist in vacuum and needs to be implemented within public policies. After a strong debate between Jan Kleinheisterkamp and Melissa Magliana, a tiny majority of the audience (51%) was still against the idea of the application of EU law overriding mandatory rules by Arbitral Tribunals.

For the last event of the 3rd ICC Arbitration European Conference, the panel composed by with Anne-Karin Grill, Fernando Mantilla-Serrano, Eric Schwartz and chaired by Maria Kostytska dealt with the **management of documentary evidence obtained through a State's special powers and more especially evidence obtained in parallel proceedings and via inter-States assistance**. The panel shared their ICC experience, reviewing (i) the use of evidence obtained by the State through its special investigatory powers, e.g. to investigate potential breaches of tax, crime, antitrust legislation allegedly committed by the counterparty in the arbitration, (ii) the use of evidence obtained by the State through domestic judicial/administrative proceedings initiated by the State against the counterparty in the arbitration and (iii) the use of evidence obtained by a party through its participation in domestic proceedings, initiated by the State.

In the two cases described during the debate, arbitral tribunals finally admit evidence obtained by States in parallel criminal proceedings but after deciding that all documents should be made available to the counter-party. In the end, arbitral tribunals take into account several elements to decide on the admissibility of evidence: (i) were evidence unlawfully obtained?; (ii) Or obtained in bad faith?; (iii) Had the counter-party access to evidence ?; (iv) But also, is the State relying only on this particular document?; (v) And, is the State willing to produce the entire file obtained in parallel proceedings or through inter- State assistance? The panel stressed that it should be borne in mind that the State did not always have a dominant position in proceedings, and for exampel in the *Chevron v. Ecuador* case, it was quite the opposite.

Closing remarks were done by Ziva Filipic and Laetitia de Montalivet.

Breakfast Conference "Public tenders and arbitration: the African experience", by AfricArb and Hogan Lovells

The discussion with Thomas Kendra, Sabrina Aïnouz, Joachim BILE-AKA and Ndanga Kamau.

What is the African experience in disputes arising in relation to public tenders in Africa? Being a challenging sector that involves states, the discussion required thorough considering questions of the arbitral process and to the enforcement of the arbitral awards. A great number of practical issues was discussed, such as arbitrability of such type of disputes in public law, challenges of the arbitration clauses drafting with the African states that usually insist on domestic institutions, an option of a joinder and consolidation of arbitrations, as well as treatment of the corruption issue by the arbitral tribunals. Particular attention was devoted to the question of the execution immunity of the awards in the OHADA.

AfricArb's founders and co-presidents, Athina Papaefstratiou Fouchard (Eversheds Sutherland) and Capucine du Pac de Marsoulies (Jeantet) shared their ideas with regard to the public tenders arbitration in Africa.

- PAW: What was the reason for choosing this topic for this year's PAW?
- Athina: First, it is a topic of current practical interest to many practitioners handling arbitrations related to the African continent. Statistically, many such arbitrations emanate from contracts with State-owned enterprises, often concluded following public tenders. Secondly, one can identify several issues particular to arbitrations relating to public tender projects.
- PAW: Which are these issues?
- Capucine: Just to give you a couple of examples, the participation of States or Statee ntities in the projects raises specific issues of arbitrability, enforcement, State immunity (in particular for OHADA countries), etc. Moreover, these projects may give rise to multi-party arbitrations, or at least to requests for joinder or consolidation. Particular attention should be paid by African States to negotiation stage of public tenders, and have to anticipate dispute resolution in advance.

Catching up with recent French trends on enforcement of awards and the International Commercial Courts, by Darrois Villey Maillot Brochier

Darrois Villey Maillot Brochier had the pleasure to inaugurate the first debate regarding recent French trends on enforcement of awards. The panel composed of Carine Dupeyron, Laurent Aynes, Emilie Vasseur, Julia Papadopoulos, Michela Laviani Mancinelli, Amany Chamieh, Marcos Barradas held an enlightening insight regarding the change of attitude of Paris Court of Appeal when it comes to enforcement of arbitration awards.

Following this line of thought, the speakers mentioned that Paris Court of Appeal, went from a minimalistic 2004 Thales to an maximalist 2018 Alstom control of arbitral awards. Hence, the question was whether Paris

was still preserving its trademark as arbitration friendly? The speakers confirmed that the answer was YES without any doubt. Furthermore, it is noted that more than ever the French Courts we engaged in the fight against corruption and violations of French and international public policy.

A special presentation was dedicated to the new courts specialised in international disputes, launched almos simultaneously in Paris, Dublin, Amsterdam, Brussels and Frankfurt.

In France, the International Chamber of the Commercial Court of Paris (ICCP) was established in 1995. In addition to it, the International Chamber of the Court of Appeals of Paris (ICCAP) was recently created. This is a part of a general process aiming to increase the attractiveness of Paris as a seat and jurisdiction and promoting French law as a governing law of international contracts worldwide.

Without any doubt, the market of commercial litigation and legal services is shifting because of Brexit. This is why it is suggested that the ICCP will become more popular as it offers the ultimate alternative to English courts.

French state courts took tremendous steps to remedy their deficiencies by adjusting their procedures to suit international commercial disputes. The use of foreign languages and the appointment of specialised judges are no longer an exclusive advantage of international arbitration.

The speakers expressed their concerns about this new form of competition from the International Chambers for arbitration. However, it was concluded that ICCP is completing rather than competing the available services, making Paris the most attractive place when it comes to international dispute resolution.

Opening Cocktail

The Opening Cocktail of the Paris Arbitration Week took place at the prestigious Economic, Social, and Environmental Council (ESEC) building. More than 1500 arbitration professionals were gathered to discuss and debate on arbitration, and its development across the world.

The international chambers of Paris Commercial Courts: a new playground for arbitration practitioners, by Paris Bar Association

The panel was composed of eminent speakers: Valence Borgia, Ioana Knoll-Tudor, Laurence Kiffer, Antoine Kirry and François Ancel.

The ICCAP shall be viewed as an exciting path for arbitration practitioners. An emphasis was made on the underlying ideas behind the creation of the ICCAP: new takings of evidence based on the Civil Code of Proceedings, hearings conducted in English and cost efficiency. Regarding ICCAP's interaction with arbitration,

it was stated that the goal was to create a competitive public service of justice operating in the field of international trade alongside with arbitration.

DAY 2

Corruption in arbitration: how much is too much?, by Clyde&Co

The panel was composed of eminent speakers: Dr. Mohamed Abdel Wahab, Dr. Jacomijn van Haersolte-van Hof, Jérôme Ortscheid, David Méheut and Nadia Darwazeh.

Multiple issues were raised: the standard of proof, the duty on arbitrators to report corruption, the impact of parallel criminal proceedings, the role of arbitral institutions.

Dealing with cultural and practice differences between counsels, Sports Arbitration Breakfast by Brown Rudnick

The panel was chaired by Hervé Le Lay and composed of François Klein, Clifford J. Hendel and William Sternheimer.

First, the panel discussed the Court of Arbitration for Sports (CAS) and its role in the sports dispute resolution. Deontological issues can raise in relation to the fact that a CAS arbitrator and the counsel of one of the parties could come from the same law firm.

The speakers highlighted that the creation of the CAS Anti-Doping Division had been done in order to hear and decide anti-doping cases as a first-instance authority.

Finally, the panellists debated about the cultural issues in Sports arbitration. The diversity is stronger than the one in commercial arbitration. The parties represented before CAS are very diverse. They come from FIFA, UEFA, other international federations, small clubs and national teams. The professionals attending the event expressed its hope that an International Court for Sport disputes will be created in the following years.

Approaches to Witness Evidence in International Arbitration, YCAP 2019 Spring Symposium, by ICDR Y&I, CFA 40 and Shearman & Sterling

The discussion was moderated by Margaret Clare Ryan (Sherman & Sterling, London) and animated by the talented panellists Eleonore Caroit (Lalive, Geneva), Sarah Ganz (WilmerHale, London) and Philippe Boisvert (White & Case, Paris).

The approaches to witness evidence in international arbitration were discussed from the viewpoint of different jurisdictions. The debate was launched by the comparison of the IBA Rules on the Taking of Evidence in International Commercial Arbitration and the Prague Rules, that could not be better evidence of the opposite

approaches of the civil and common law jurisdictions. Such differences were further discussed through the criticism of witness evidence, possibility for a party to witness, preparation of the witnesses before the hearing as well as practical issues of the cross-examination.

Dentons – Achmea, et après…? Discussion with Professors Geneviève Bastid-Burdeau and Yves Nouvel, by Dentons

After the presentation made by Jean Christophe Honlet (partner, Dentons), professors Geneviève Bastid-Burdeau and Yves Nouvel discussed the consequences of the Achmea decision.

The discussion was held on how the decision will impact the pending proceedings. The approach of the ICSID arbitral tribunals was conservative as the ICSID Convention must be respected despite the membership in the EU.

Some questions remained unsolved, for example those concerning the applicable law to the arbitration agreement, or the exit from the BITs concluded between Member States. The question of the conformity of treaties concluded with other States (e.g. CETA) also give rise to some concerns.

Arbitration in Europe, by Paris Place d'Arbitrage

Afternoon of highly qualitative debates on the state of arbitration in Europe. The panel was composed of Elie Kleiman, Thomas Clay, Ioana Knoll-Tudor, Emilie Gonin, Eduardo Silva-Romero, Emmanuel Gaillard, Sylvain Bollée, Jacques-Alexandre Genet, Anne Véronique Schlaepfer, Andrew McDougall and Peter Rosher. The introductory remarks highlighted that arbitration and Europe were facing painful hours.

The panel started with the consequences of the Brexit on arbitration. Starting from the assumption of a "hard" brexit, two opposite positions were defended. The issue of arbitration under CETA and TTIP treaties was also invoked, as well as the reactions caused by Achmea: indifference, deference and fascination. The session ended with a discussion on the Brussels 1 bis Regulation and arbitration, enforcement of arbitral awards in Europe, and fundamental rights in arbitration as well as on the European constraints of arbitration in sports matters.

The Creation of State Courts Specialized in International Business Disputes a Renewed Competition for arbitration, by CMS Francis Lefebvre Avocats

The panel, composed of Christian Wiest, Dr Dorothee Ruckteschler and Edouard Vieille, shared their opinion on the assets and drawbacks of litigation clauses giving jurisdiction to international commercial courts.

The International Chambers of the Paris Commercial Court and Court of Appeal aim to facilitate access to French commercial courts for transnational commercial disputes involving large international groups and to enhance the attractiveness of Paris in the choice of jurisdiction. French commercial courts could be an

interesting choice of jurisdiction as they are fast, effective and inexpensive. However, counsels should consider several factors when advising their clients on the clause's choice. The most important factor being judgement's enforcement, arbitration stays ahead for now as the New York Convention facilitates significantly awards' enforcement. Moreover, international commercial courts being state courts, cannot provide as much confidentiality as provided in international arbitration.

Parallel Domestic Proceedings in Investor-State arbitration, by Debevoise & Plimpton

The fascinating panel was composed of Professor Laurence Boisson de Chazournes, Karl Hennessee, Ndanga Kamau and Laurence Kiffer.

The panel discussions were moderated by Romain Zamour and held in the form of a moderator-driven rapid response. This event was practically distinguished by the presentation of practical solutions to each of the issues threatening investment arbitration.

During the event, the speakers had the opportunity to frame the issues resulting from multiples proceedings in international investment arbitration. That set the perfect ground to provide the participants with definitive answers and practical advices when facing parallel proceeding whether initiated by the state or by the investor.

Parallel proceedings became a common feature of investment arbitration. Consequently, this situation can put arbitrators and counsels in a difficult position. The speakers shared generously the tools to avoid a parallel proceeding or at least to minimize their negative effects.

Contribution of Brazilian caselaw to international arbitration, by ICC arbitration

ICC arbitration involves a lot of Brazilian parties. In 2018, 5% of the appointed arbitrators were Brazilian. The development of arbitration in Brazil is impressive.

The first panel discussed specificities of Brazilian arbitration practice. The second presented these the specificities from a foreign practitioner's point of view. The flexibility of the procedural rules and soft deadlines were invoked.

As the Brazilian arbitration community is small, the appointments of the same arbitrators are quire frequent. Therefore, there is a risk of impartiality or independence.

Expedited proceedings and summary disposal, Clifford Chance

The panel comprised Karolina Rozycka-Dublanc (Clifford Chance), Jason Fry (Clifford Chance), Simon Greenberg (Clifford Chance), Alexis Foucard (Clifford Chance), Jackie van Haersolte-van Hof (Director

General of the London Court of International Arbitration) and Alexander Fessas (Secretary General of the ICC Court and Director of ICC Dispute Resolution Services).

In 2018, expedited proceedings represented 5% of the ICC cases but this number is expected to increase over time. The ultimate purpose of these procedures is to tackle the cost and the time issues in arbitration, and the main question was whether it was relevant to incorporate expedited proceedings and summary disposal in arbitration rules. It was underlined that this incorporation could give an extra notch to arbitrators to manage their cases. However, some concerns were raised about the superficity of such general rules and the importance of their definitions.

Alternatives to intra-EU ISDS in the aftermath of Achmea and the Member States' Declaration of 15 January 2019, by ESSEC Business School

The speakers were: Jadranka Osrečak, Thomas Wiedmann, Ioannis Natsinas, Wojciech Sadowski.

The panel started by analysing Achmea judgement made by the EU Court of Justice, when the Court considered that investor-State arbitration clauses in bilateral investment treaties were not compatible with EU law and that they did not have legal effect. It was mentioned that the judgement was also relevant for the application of the Energy Charter Treaty between EU Member States and the Treaty could not be used as a basis for dispute settlement between EU investors and EU Member States.

National administrations and courts were discussed under angle of protection of investors' rights. Other mechanisms, as complaint before the European Commission by the means of infringement procedure, based on the Article 258 TFEU, were invoked. Also, a hypothetical case was studied to evaluate these different mechanisms. Speaking about the protection of the investors under EU law, the speakers also pointed out that the European Commission has started to organise workshops on investment protection topics.

Maternity/paternity in international arbitration, by Winston & Strawn

The panel comprised of Jennifer Younan (Shearman & Sterling), Gisela Knuts (Roschier, Attorneys Ltd.), Alison Pearsall (Veolia), José Ricardo Feris (Squire Patton Boggs) and moderated by Maria Kostytska (Winston & Strawn) replied to all sensitive questions based on their own experience.

Arbitral mothers and fathers being partners at the same time shared their views. They answered to some philosophical, practical and personal questions about parenting while developing a career in international arbitration. In particular, the light was spread over the parental leave, childcare emergency situations, sharing responsibility. It was pointed out that discipline and anticipation were crucial. Importance of work-life balance was invoked.

Enforcement of arbitral awards in France and third parties, by Fierville Ziadé

The speakers on the panel were Karl Hennessee, Professor Christophe Seraglini, Marie-Aude ZIADÉ and Jérémie Fierville.

The speakers stressed that attachment is a powerful tool of the winning party to an arbitration, who seeks enforcement of an arbitral award against the losing party. The attachment results in imposing severe duties on third party debtors and leads to undeniable disruptive effects.

The panel observed that France was a frienfly place for the winning party, because the award can be enforced even if the it was annulled in the country of its seat. However, it was pointed out that the third party debtors had rights and should not hesitate to challenge attachments made against them. If properly prepared, companies subject to such attachments might use several practical tools and raise various legal arguments to efficiently contest the attachments.

Conference on Artificial Intelligence and International arbitration, by DWF

It was the opportunity for arbitration professionals to understand what AI can offer to the international arbitration. As an example, AI may help to clean the data, and help practitioners quickly and easily find legal sources corresponding to their research.

Third Party Funding already uses BigData to assess the risks of the case. The arbitration professionals understand both the potential benefits and risks from applying AI in international arbitration. Machines have better capacity than humans in reading emotions, but opinions still differ concerning the fact that a machine could replace a human as a judge in the future.

DAY 3

Second biennial France-United Arab Emirates Conference, by McDermott Will & Emery, LexisNexis, Al Tamimi & Company and Sharjah International Commercial arbitration Centre (Tahkeem)

The conference began with introductory remarks by HH Tareq Alshehhi and Keynote Addresses by Alexis Moore and Professor Emmanuel Gaillard.

The first panel was composed of Mohamed Al Marzouqi, Professor Mohamed S. Abdel Wahab, Jacob Grierson, Roland Ziadé, Professor Hugo Barbier and chaired by Sara Koleilat-Aranjo. The panel discussed the recent legislative developments in the UAE, for example: the amendment of Article 257 UAE Penal Code which exposed arbitrators to criminal liability for breach of the independence and impartiality obligation.

The second panel was composed of Ahmed Al-Echlah, Sami Houerbi, Yasmin Mohammad, Professor Marie-Elodie Ancel, Mirèze Philippe and chaired by Victor P. Leginsky. The panel discussed diversity, and how to have a better gender equality and world representation in arbitration. The panel also talked about third party funding in UAE.

The Online Arbitration Commission, by Le Club des jurists

Chaired by Professor Thomas Clay, the commission presented its report on online arbitration. The commission's members (Sophie Sontag-Koenig, Patrice Spinosi, Elie Kleiman, Christiane Féral-Schuhl, Louis Degos, Jean-Yves Garaud, Jean-Pierre Grandjean and Tristan Azzi, with Bernard Cazeneuve) outlined the highlights of the study. The report was concluded with 12 recommendations. The two phases of the report are the deceptive inventory of existing practices and a pleasing list of likely uses.

Arbitration is a flexible justice and has already integrated digital tools. Open data, algorithms, artificial intelligence and legal tech are being increasingly incorporated into the judicial system. Yes – to the assistance by the artificial intelligence, no – to the replacement of the human being by robots.

ICC Report on Emergency Arbitrator Proceedings, by ICC and Latham & Watkins

The analysis was evaluated by different panels, each providing a better understanding of the various concerns that arose among international arbitration practitioners, since emergency arbitration provisions gained in popularity. The first panel was composed of Cecilia Carrara, James Hosking and moderated by James Hosking. The speakers clarified the threshold issues, beginning with applicability of the new rules established by the ICC in 2012, specifically those set in Article 29(5) and (6). It then discussed the issues of jurisdiction of the emergency arbitrators and, finally, a problematic of admissibility under Article 29(1).

The second panel was composed of Marnix Leijten, Fernando Mantilla-Serrano and moderated by Ziva Filipic.

The issue of Conduct and Strategy was addressed by Diana Paraguacuto-Maheo and Juan Pablo Argentato. Among other things, counsels must think about the enforceability of the emergency order.

Reception to celebrate diversity in international arbitration, by Squire Patton Boggs and ArbitralWomen

The reception began by welcome remarks from Asoid Lagesse, Vice-President of ArbitralWomen and José Ricardo Feris, partner at Squire Patton Boggs. Special guests joined the floor, Deva Villanua, Vice-President of the ICC and Alexander Fessas, Secretary General of the ICC.

Each guest had the opportunity to say a few words on the subject of diversity. However, the meaning and the content of each speech goes beyond what words can describe. The reception was inspirational.

Squire Patton Boggs together with official speakers of the ICC were happy to announce that they are proud to be part of entities that have reached full parity between female and male partners or members of the Court.

Diversity must know no ownership. To be realized and achieved, diversity needs to be free from agendas. We will need to work together to get overcome this challenge, that has an expiry date.

Construction Delays and Technology: An Expert Analysis, by Blackrock Expert Services

Ewen Maclean (Construction and Delay Expert) and Tony Sykes (IT, Telecommunications and Electrical Engineering Expert) shared their insights with the audience.

In construction business, technology is moving from science fiction to reality with robots, 3D printers, BIM, drones… The technology will provide the construction business with the means to reduce the delays by increasing the efficiency and the safety of constructions. It will also help to determine what went wrong and when. However, some concerns were raised, such as the risk of the system failure or simply the difficulty to implement the technology.

International arbitration in Latin America, by Dechert

The panel consisted of Yves Derains (Derains & Gharavi International), Fernando Mantilla-Serrano (Latham & Watkins), Noiana Marigo (Freshfields Paris), Ina Popova (Debevoise & Plimpton), Eduardo S. Silva (Dechert). Alexis Mourre (ICC Arbitration) gave some closing comments.

Times has changed in Latin America. Many issues were discussed by the tribunals for the first time with respect to this region. The distinguished panel shared with the audience particularities of such arbitrations based on their own experience, such as the states counterclaims, the participation of the non-disputing parties and amicus curiae, the interpretation of the contracts based on the law chosen by the parties, the common aspect of the good faith issue and closed with the discussion of the role of the arbitration institutions in such disputes.

Africa Rising: key trends in arbitration involving Africa, by Freshfields Bruckhaus Deringer

Speakers included Mohamed Abdel Wahab, Ndanga Kamau, Hamid Abdulkareem and Marie-Andrée Ngwe. The panel was moderated by Gisele Stephens-Chu QC and Ben Juratowitch QC.

The debate focused on the orientation of arbitration in Africa: myriad of arbitral institutions, relations between arbitration and national jurisdictions, criticism against investment arbitration, evolution of the arbitration-friendly legislation and appointment of African arbitrators.

The participants learnt in this debate that African countries were the first to participate in investment arbitration. African States are adapting their legislation know. The BITs newly signed by African countries aim at protecting human rights and social interests.

There was also a hot debate on the lack of nomination of African arbitrators in cases not involving African parties.

ICC Russia Commission on arbitration: Arbitration Debates & Russian Pancake Party, by ICC Russia

The event was comprised of three debate sessions concerning the validity presumption of arbitration clause (Evgeny Raschevsky, Natalia Gulyaeva and Yulia Zagonek), friendliness of Russia as a seat (Artem Doudko, Ilia V. Rachkov and Dmitry Dyakin) and transparency in arbitration (David Goldberg, Tatiana Minaeva and Anna Grischenkova).

Politics and international arbitration, by Mayer Brown

Speakers included Xavier Boucobza, Mohamed Abdel Wahab, Bart Legum, Javier Robalino Orellana, Maria Fanou, Lluís Paradell Trius, Can Yeginsu. The panel displayed the influence of politics on international arbitration in different regions.

Depending on the case, politics can be a tool to facilitate arbitration or, on the contrary, a way to restrain it. Politics have an influence on the overall process from the appointment of arbitrators to the enforcement of the award. In some regions investment arbitration is challenged because it is accused of advantaging foreign investors to the detriment of nationals. Also, some States want to recover strategical sectors such as oil & gas or energy and in order to do so they need to denounce international arbitration.

International arbitration is the best guarantee of the States' engagement. Foreign Direct Investments will keep spreading and they will always need protection.

Hot topics from Ukraine: Crimea arbitrations and gas pricing review disputes, by Shearman & Sterling and Ukrainian Arbitration Association

The first panel was animated by Maria Kostytska, Sergiy Gryshko, Leon Ioannou and Olena Perepelynska, FCIArb.

It started with the general introduction to the Crimea-related disputes. Whereas Russian control over the peninsula was established, the opinion of the arbitral tribunals differed on the jurisdictional issue. The analysis was made from the territorial and temporal standpoint. The panel finished by the issue of the enforcement of the awards before the Ukrainian courts.

The second panel was comprised of Yaroslav Petrov, Rytis Valunas, Anna Crevon-Tarassova and Anthony Way.

The panel was supported by the splendid presentations on the matters related to the gas price review arbitrations, including the European regulation, and followed by the presentation on the Asian LNG market. Then, an insight was given on the Naftogaz & Gazprom cases. The cases also evidenced the political agenda of both States.

The Conduct of the Proceedings and Case Management – The Arbitrator's Perspective, by the ICC Arbitration Institute of World Business Law

The panels were composed by Pierre Mayer, Niuscha Bassiri, Diamana Diawara, Janet Walker and Philippe Cavalieros.

The debates focused on 5 main issues: (i) active case management techniques, (ii) effective management of arbitration under the ICC perspective, (iii) the scope and limits of the arbitrators' authority, (iv) allowing additional claims and (v) parties managing the exchange of information.

Participants have learned how arbitrators should deal with issues such as management of electronically stored information, preservation of the confidentiality of information and related issues of applicable law, protection of technological and commercial secrets, arbitral proceedings privacy and ethical conduct of the parties.

The Rules of engagement in arbitration – The IBA and Prague Rules: Is change coming or needed?, by Reed Smith

The differences between Prague Rules and IBA Rules were addressed. From one point of view, IBA Rules are flexible, depending of interpretation. From another point of view, IBA Rules cannot answer to every question, because it is limited to the admissibility of evidence. The opinions were also divergent on the role of expert under both sets of rules.

It seems clear that opinions are contradictory about the fact that Prague Rules could be an alternative to IBA Rules. Prague Rules are nothing revolutionary, and are close to IBA Rules. However Prague rules have good aspects and could be the answer to significant costs and inefficiencies of modern arbitral process.

Arbitration and Competition Law: Follow-on Damages and State Aid Actions, by Cleary Gottlieb Steen & Hamilton

The panel was composed by Jean-Yves Garaud, Séverine Schrameck, Delphine Michot, Aren Goldsmith, Antoine Chapsal, Laurie Achtouk-Spivak, François-Charles Laprévote, Claudia Annacker and Christiane Deniger.

Debate between Professors Maxi Sherer and Thomas Clay, by the Casablanca International Mediation and Arbitration Center and McDermott

The debate was moderated by Jacob Grierson.

In front of multiple representatives of arbitral institutions, various questions were raised and addressed: can we trust arbitral institutions? Are there any innovative ways to appoint arbitrators? Furthermore, the implication of arbitral institutions into the proceedings and the development of arbitral centres were discussed.

Damages valuation in construction disputes, by FTI Consulting

This complex subject was debated by a panel composed of Juliette Fortin, Thierry Linares, Todd Wetmore, Maude Lebois with James Nicholson, as moderator.

Hot topics and Construction disputes, are they an oxymoron? The panellists had a lively discussion on the familiar and less familiar issues that arise when calculating damages in construction disputes. Issues of quantum and delay often arise in this sector. The parties, their counsel, courts and tribunals seek clear and reliable advice on these issues. The panel also debated on the contractual provisions in construction sector, contract liquidated damages for delay, damage assessment methods, FIDIC system.

Two main points about FIDIC: (i) it is a multi-decision process (requiring 3 steps of decision-making process: examination by engineers, dispute adjudication board by construction experts, and international arbitration), and (ii) the prescriptive aspect of this process – there are 28 days to raise claim, otherwise the claim would be time-bared.

Opening ceremony of Tashkent International Arbitration Centre, by White & Case

Speakers included Diana Bayzakova Hamwi, Sardor Rustambaev, PhD, Carolyn B Lamm, Prof. Attila M. Tanzi, Joseph Tirado and Wei Sun.

Diana Bayzakova started with a presentation of TIAC, mentioning the questions of the development of international arbitration in Uzbekistan and CIS Region and focusing on TIAC's three paradigms of success, which are cost efficiency, compliance with international best practices and top class arbitrators. She was

followed by professor of the Bologna University Attila Tanzi, who presented main points of TIAC arbitration rules, with an emphasize on innovative character of the rules. TIAC's opening ceremony was also an opportunity for the speakers to present the operational framework as well as to the roadmap of TIAC for the upcoming year. After a questions-answers session the event was concluded by announcing the launch of the TIAC and followed by a cocktail. Participants were able to exchange opinions and talk while enjoying Uzbek food and drinks.

Disruptive times in energy – what's next for disputes?, by Linklaters

The perspective of lawyers specialised in Energy law, an economist and the experts in the sector were given. The panel consisted of Kash Burchett, Dr. Nikolas Hübschen, Christoph Riechmann, Ben Carrol, Pierre Duprey and Alexandros Chatzinerantzis. The panel addressed key trends in the energy sector.

Panel started with a brief introduction on the key trends in the Energy Sector and the future of Energy Disputes. Then it followed with an analysis of the scenarios for the future of Global Energy. The speakers highlighted a need for a global coordination about costs in Energy Sector. Main challenges of Energy Transition were invoked and it was stated that historically every Energy Transition lead to the multiplication of the disputes. The panel also discussed the diversity of energy disputes in the times of disruption renewable energy and digitization as well as environmental issues. It was stated that the role of the regulation is growing and the governments of non-OECD countries should take the action too.

Arbitration in India in a Global Economy, by Diales - Expert Witness services

The panel consisted of Hiroo Advani (Advani & Co), Pierrick Le Goff (Alstom), Ziva Filipic (ICC International Court of Arbitration), Thomas Harrison (Diales) and was moderated by Marine Maucour (Driver Trett).

After describing the huge potential market of India, especially in construction, energy and technology fields, the speakers shared their experiences about arbitration in India. It was empathized that the new amendment (2016) aimed to tackle the time issue which was one of the weak point of arbitration in India. Furthermore, public and private Indian companies are willing to put arbitration clause in their contracts. If India has become a friendlier arbitration place, about 85% of the awards rendered in India are still challenged.

Exchange with the State Secretary for the Economy - Attractiveness of the economy and ongoing reforms, by DWF and JUREM

The practitioners were invited to discuss with Agnès Pannier-Runacher, the French State Secretary for the Economy. It was advanced that France had never attracted so much foreign investments.

The discussion was the opportunity to speak about the strategy of French Ministry of Economy as to how to make France even more attractive. This strategy requires several reforms in order to simplify the law (complete overhaul of public procurement law) and the bureaucracy. The PACTE law, which may come into force in the nearest future, has the ambition to simplify the creation of business and to promote its growth.

DAY 4

Lusophones' arbitration Meeting – The New Digital Economy and Arbitration, by Derains & Gharavi

The Portuguese-speaking arbitration community discussed the issues related to the new digital economy.

Exceptional presentations were made by José-Miguel Júdice, Ana Serra e Moura, Leonardo Viveiros de Castro, Patrícia Garcia, Eduardo Silva da Silva, Catarina Monteiro Pires, Giovanni Nanni, José Ricardo Feris, Marcelo Ferro, Pedro Batista Martins, Selma Lemes and Valeria Galíndez, but also by Yves Derains and Ana Gerdau de Borja Mercereau from Derains & Gharavi.

The panel shared its opinion on the resolution of disputes related to the new digital economy, blockchain and smart contracts, as well as the expectations, possibilities and limits of arbitration involving BigData.

GDPR and arbitration, by DLA Piper

The expert panel discussed how GDPR impacted international arbitration.

GDPR has an extremely large territorial scope, it aims to protect personal data of individuals and applies to data controllers and data processors situated in the EU, but also to those located abroad when they process data related to the EU.

GDPR applies to data used in arbitral proceedings at every stage. The earlier a counsel is involved in the proceeding, the bigger is his/her responsibility. It is the reason why counsel have to notify clients of their rights and comply with the GDPR.

Enforcement and annulment of the awards in Arab countries, by La Société de Législation Comparée

Speakers included Béatrice de Castellane, Zeina Obeid and Roland Ziadé. Conclusion remarks were made by Professor Ibrahim Fadlallah.

After introduction, a global presentation of enforcement and annulment of awards in Arab countries was made.

Two groups of grounds for annulment were presented. First, the classical grounds, including public order, which can be an issue when it comes to its interpretation in some Arabic countries where there is an obligation to respect good moral standards.

The second group was composed of specific grounds as non-compliance with the obligation to take an oath for witnesses, or the interdiction for arbitrators to allocate the costs in some countries.

Recently, there have been a lot of legislative arbitration reforms in Arabic countries. The dynamic is positive, but one must still bear in mind some particular approaches of Arab countries towards sensitive questions.

Games of Seats: Arbitral institutions in Africa and the quest for ascendancy, by White & Case

The event began with a welcome speech by Christophe von Krause, highlighting the emergence of reputable arbitral practices in the African region.

Discussions were held by a multicultural panel composed by Narcisse Aka, Yemi Candide-Johnson, Ndanga Kamau, Dr Mohamed Hafez, Leyou Tameru and moderated by Elizabeth Oger-Gross. The speakers carrying the flags of several pro-arbitration African entities, joined the discussion to debate on the thought of Games of Seats.

In fact, Africa's legal landscape for resolution of commercial disputes involves a myriad of various arbitral institutions or centres. Each of the guests presented a different arbitration tradition. Nevertheless, the ambition to promote a sustainable culture of arbitration across the continent in all its forms was a common interest.

The focus now is on the laws of the seats that are still holding down arbitration in Africa.

The key is to attract more international and local parties by promoting not only the arbitration entities, but also an efficient judicial system.

The influence of French legal thinking on the development of arbitration law, by IAI

The discussion was animated by judge Dominique Hascher, French Cour de cassation, judge Quentin Loh, Supreme Court of Singapore, Professor Emmanuel Gaillard, Chair at International Arbitration Institute (IAI), and Ms. Marie-Aimee Peyron, President (Bâtonnier) of the Paris Bar.

The panel explained how arbitration law evolved in France. Particular attention was paid to the evolution of the civil code and engagement of the judges in promotion of arbitration. France has a very arbitration-friendly legal thinking and this spirit have influenced arbitration law in multiple countries in Europe, Americas, Africa and Asia.

The state of arbitration in Singapore was presented. Singapore was said to be the country that had updated and reshaped its legislation in order to become a new arbitration hub in Asia, and a potential rival of Paris as a seat.

Second Annual GAR Live on Construction Disputes, by Global Arbitration Review

Peter Rosher (Reed Smith) welcomed the audience and Michael E. Schneider (Lalive) addressed the keynotes of the event divided into 4 sessions.

The First Session, composed of Kim Franklin QC, Richard Harding QC, Christopher Lau, Aisha Nadar, Roland Ziadé, focused on how tribunals dealt with the challenges arising when sitting as an arbitrator from both a common and civil law perspective, highlighting corruption or forgery concerns. They pointed out that an arbitrator had to be willing and able to understand the technical issues.

The Second Session was composed of Simon Braithwaite, François Doré, Thomas Hofbauer, Lindy Patterson QC and James Perry. It stressed that construction arbitration was still thriving, with some of the biggest projects in the world ending up in arbitration. These projects are facing technical problems. The dispute board members shall understand these technical particularities. Therefore, the question: which solution for a successful composition of the dispute board? There is no absolute rule.

The Third Session was conducted as a mock hearing on construction and investment treaty arbitrations and lively presented by leading practitioners Zoya G. Bozhko (Vinson & Elkins), Emma Kratochvilova (Herbert Smith Freehills), Gillian Carmichael Lemaire (Pinsent Masons), Iain C. McKenny (Profile Investments), Lee Rovinescu (Freshfields Paris) and Jane Davies Evans (3 Verulam Buildings) as a moderator. The panellists were discussing whether the involvement in a construction project, a dispute board decision or an arbitration award based on a construction contract may be considered as an investment.

The Fourth Session was devoted to the Construction and diversity in arbitration. It was animated by the outstanding panel composed by Mohamed Abdel Wahab, Jacomijn van Haersolte-van Hof, Maria Hauser-Morel, Christopher Seppälä moderated by Jane Davies Evans. The discussion concerned mostly the topic of gender diversity, but also touched upon the issue of cultural diversity and the solutions to fight against the lack of diversity in construction arbitration.

Defending Investments in Times of Armed Conflicts, by Teynier Pic

The panel comprised Arianna Rafiq, Matthias Cazier-Darmois, Dr. Anyssa Bellal and Alban Lo Gatto and was moderated by Pierre Pic. It elaborated on the war clauses, full protection and security standard, and how those could be articulated with international humanitarian law. For example, it was discussed that the occupying State is not allowed to change the legislation of the occupied State. This means that BIT's signed by the occupied country can still be used and the respondent would be the occupying State.

The issue of the compensation for losses in times of armed conflicts by the application of the war clause was also addressed taking into account macroeconomic elements such as the inflation or the GDP of the host country. The valuation of losses remains difficult, experts do not necessarily know which standards to apply.

Provisional Measures in International arbitration, by Queen Mary University of London and RDAI/IBLJ

The first panel was composed by Laurie Achtouk-Spivak, Diana Akikol, Coralie Darrigade, Elizabeth Oger-Gross and moderated by Aren Goldsmith. The second panel was composed by Sébastien Besson, Jean-André Diaz, Kathleen Paisley, Marina Weiss and moderated by Benoit Le Bars.

Speakers advanced that, nowadays, the legal system required new procedural measures not only to preserve the fundamental rights of the parties to a legal dispute, but also to protect the arbitration.

Global Pound Conference on the new horizons for arbitration and ADR, by National Bar Council

At first, the expectations concerning the development and the ways of improvement of ADR were discussed. The speakers noted a clear need for more education and information about ADR.

Workshops were also organised about the possible development of ADR in different areas, such as financial disputes, disputes in large public contracts and e-sports.

A discussion was also held on the use of ADR and about their limits. It was advised to pay more attention to Online Arbitration Centres.

A Round-table discussion on Arbitrating in CEE and CIS: Transparency, accountability and choice of arbitrators, by Jeantet

The panel consisted of Ivana Blagojević, Beka Injia, Anja Håvedal IPP, Rinaldo Sali, Catherine Rogers and Ioana Knoll-Tudor as a moderator.

In the first part, the speakers, representatives of different arbitration institutions, including ICC Arbitration, SCC Arbitration Institute, Georgian International Arbitration Centre and Milan Chamber of Arbitration, shared their views about appointment of arbitrators, the principles they are guided by and transparency and confidentiality balance, as well as main challenges and solutions to them.

In the second part, Catherine Rogers, founder of Arbitrator Intelligence, presented her tool destined at helping the parties, counsels and arbitration institutions to choose an arbitrator. She explained how it evaluated the arbitrators and what its practical use was. GDPR issues were invoked.

During the third part, a deputy counsel at the ICC International Court of Arbitration, Ivana Blagojević, presented an ICC project on the publication of arbitral awards.

Hardship, Interpretation of contracts and Confidentiality issues in international arbitration, by ICC YAF and ICC Arbitration

The first panel, consisted of Claire Pauly, Claire Debourg and Ema Vidak Gojkovic, discussed how arbitrators dealt with hardship issues arising in certain sectors of industry, applying different laws and notably French law.

The second panel, consisting of Sebastien Pepin, Marie-Isabelle Barretto Delleur and Ahmed Habib, discussed different approaches to interpretation of contracts under common law and civil law, as well as to the confidentiality issues under different applicable laws, rules, contracts and arbitration rules. While speaking about confidentiality, the speakers mentioned importance of transparency and the requirements of international law in this regard, notably under the UNCITRAL Convention.

Afterwards, a presentation of the ICC project on the publication of arbitral awards was made.

Impact on confidentiality of criminal and regulatory authorities probing through arbitral proceedings, by Le 16

The panel was animated by Emmanuel Jolivet (ICC Arbitration) and Elie Kleiman (Jones Day) and moderated by Julie Spinelli and Jean-Luc Larribau.

After reminding the audience that confidentiality in arbitration is not absolute and that for instance the ICC Arbitration Rules do not provide for default confidentiality (Article 22.3 of the 2017 ICC Arbitration Rules), the members of the panel outlined that the parties and the tribunal should communicate with the institution to avoid difficult situations. For example, the simple mention of the name of a sanctioned entity in the request for arbitration triggers notification requirements and blocks the case. Hence, it is advised to file the case before paying the filing fee and to contact ICC if there is any doubt about a sanctioned entity.

When arbitration and criminal law collide: Common law and civil law questions and answers, by Herbert Smith Freehills

Speakers included Alexander Gunning QC (One Essex Court), José Rosell (Independent International arbitrator), Ana Serra e Mourra (Deputy Secretary general of the ICC Arbitration) and Emily Fox (Herbert Smith Freehills). The panel was moderated by Thierry Tomasi (Herbert Smith Freehills).

The debate was focused on the comparison between civil law and common law regarding criminal matters in arbitration. The panel presented the convergent topics under each system, including public policy, burden of proof and scrutiny.

The arbitral institutions also have a role to play in this debate. ICC for instance has a department dedicated to criminal matters in arbitrations.

Another sensitive topic was the processing of illegally obtained evidence.

DAY 5

International arbitration by 2025: Technology innovations and Belt & Road Initiative, by Deloitte

The session was moderated by Jana Jandova and the panel was composed of Sophie Nappert, Karl Hennessee, Steven Finizio, Maxi Scherer, Anthony Charlton and Battine Edwards. The session was divided in two parts: on the impact of technology innovations on dispute resolutions and on the Belt and Road Initiative.

Technology has limited impact when it comes to arbitrators who still prefer the current way of working, but hopefully proceedings will be totally paperless in the near future.

Arbitrators will only have more complex cases to deal with as technology will be able to filter less complicated cases by predicting the result of the disputes.

The Belt and Road Initiative is yet less discussed in Europe, but the attention should be paid more on the topic. China has been modernizing its arbitration law, but there is still no clear answer whether arbitral awards that were rendered overseas can easily be enforced in China mainland or not. But it is clear that China is making an effort to be more arbitration-friendly.

International arbitration in a not-so-distant future: what AI and Blockchain can bring to the field, by Hogan Lovells

The panel was composed of eminent speakers: Diana Bowman, Daniel E. González, Clément Lesaege, Winston Maxwell, David Restrepo Amariles and Gauthier Vannieuwenhuyse.

During this roundtable, multiple issues were discussed: the future role of AI in international arbitration and the specificities of blockchain and smarts contracts.

Annulment and enforcement of arbitral awards against States, by Winston & Strawn

The panel of the distinguished practitioners, composed by Ginta Ahrel (Westerberg & Partners Advokatbyrå AB), Maria Kostytska (Winston & Strawn), Rogier Schellaars (Simmons & Simmons), Dr. Manuel Arroyo

(Nater Dallafior Rechtsanwälte AG) and Markiyan Kliuchkovskyi (Asters) and moderated by Salah Mattoo (Winston & Strawn), was discussing annulment and enforcement proceedings in their jurisdictions.

The panellists gave a deep insight into the particularities of the legal regimes for annulment of arbitral awards in Sweden, France, the Netherlands and Switzerland and provided to the audience the brightest examples of the recent court decisions in the respective jurisdictions. The discussion was concluded by a presentation of the 2017 legal reform for recognition and enforcement of arbitral awards in Ukraine with a focus on the court decision in Everest Estate case, the first of the kind.

The rise of procedural paranoia in international arbitration and how to address it – comparing the parties', users' and arbitrators' perspective, by Pinsent Masons

The panel consisted of Christine Artero (Fountain Court Chambers), Hervé Chambon (VINCI Construction Grands Projets), Diamana Diawara (ICC Arbitration), Mark Gordon (Blackrock Expert Services) and Pierrick Le Goff (Alstom).

The panel discussed the origin of this paranoia occurring in the arbitration process and tried to determine who was responsible for it: arbitrators, arbitral institutions, experts or the parties. It was suggested that the disease originated from the parties, but then became contagious, making each actor in the arbitration process responsible for spreading the frustration. The panel also discussed the necessity of some flexibility in certain part of the process in order to make arbitration healthier.

UPCOMING ARBITRATION EVENTS IN PARIS IN APRIL	LES EVENEMENTS EN ARBITRAGE A PARIS EN AVRIL
8-9 April 2019 – Training on interactive participation to the AFA international arbitration proceedings and drafting of essential documents, by AFA	**8-9 avril 2019** – Cas pratique sur la participation à l'arbitrage AFA et la rédaction des documents principaux, par l'AFA
11 April 2019 – Understanding Chinese State-Owned Entities - Doing Business and Resolving Disputes with Chinese State-Owned Entities, by HKIAC, Hong Kong Department of Justice and ICC	**11 April 2019** – Comprendre le fonctionnement des entités étatiques chinoises - les affaires et les différends avec les entités étatiques chinoises, par HKIAC, Ministère de la Justice de Hong Kong et CCI
15 April 2019 – Conference on innovations of the new OHADA arbitration law, by Société de législation comparée	**15 April 2019** – Conférence sur les innovations contenues dans le nouveau droit OHADA de l'arbitrage, par la Société de législation comparée