PARISBABYARBITRATION

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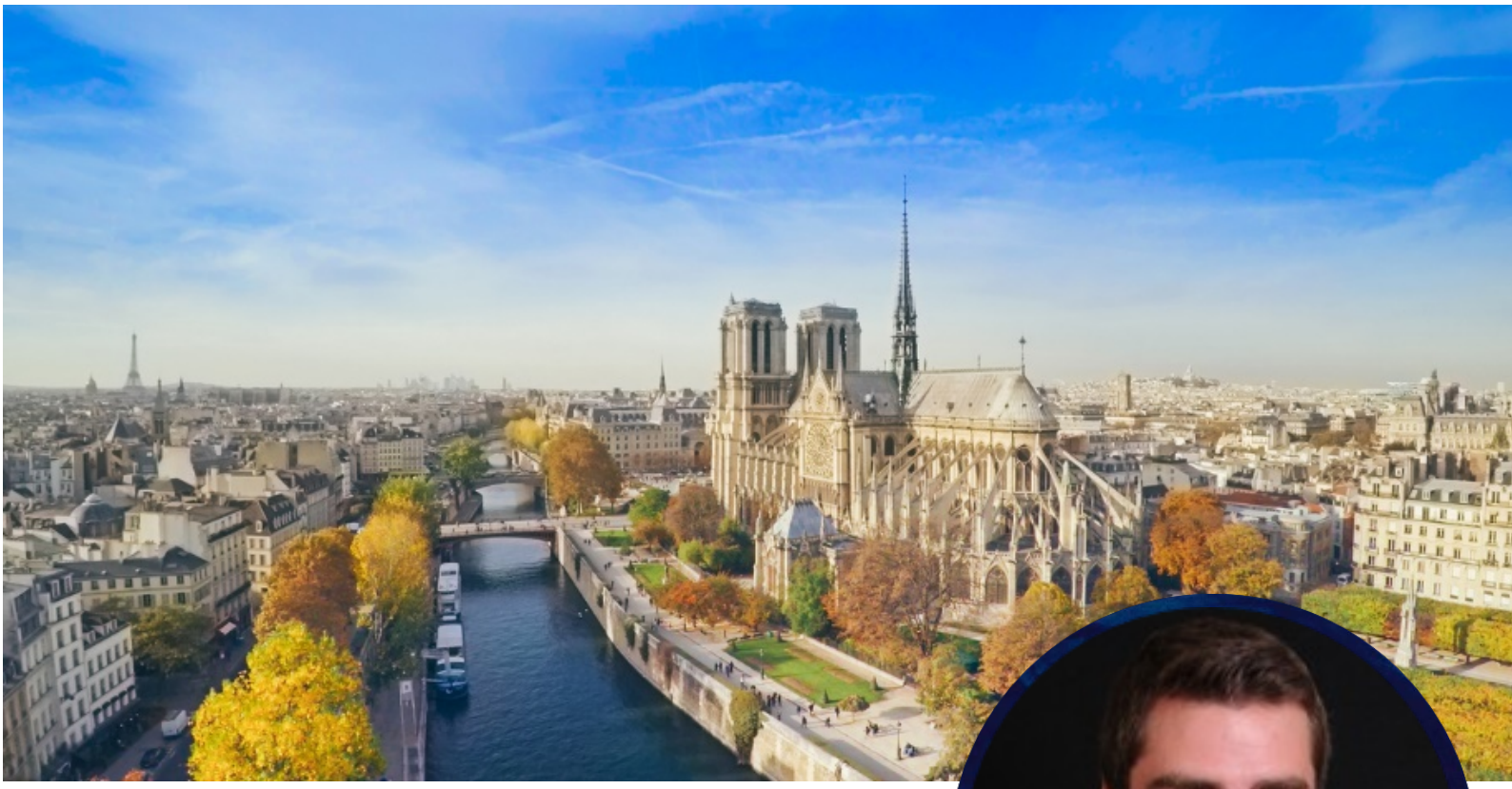

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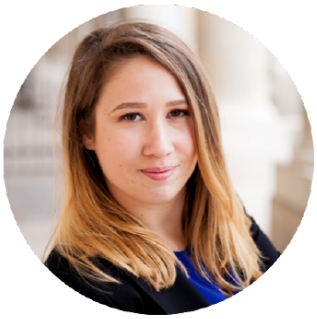

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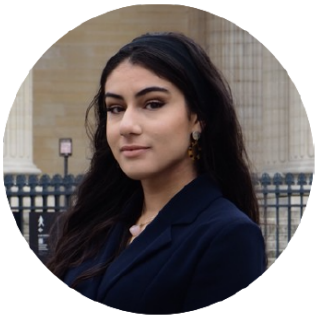

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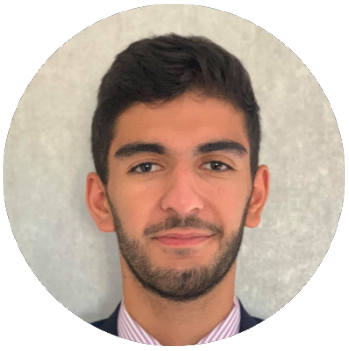

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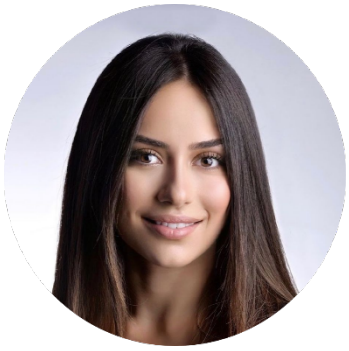

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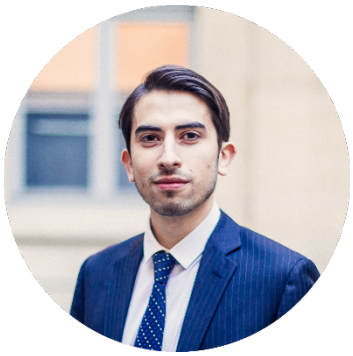

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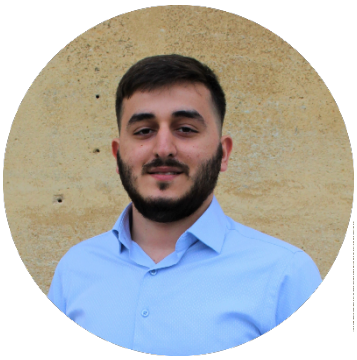

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FOREWORD

Paris Baby Arbitration is a Parisian association and an international forum aiming the promotion of young arbitration practice, as well as the accessibility and the popularizing of this field of law, still little known.

Each month, its team has the pleasure to present you the Biberon, an English and French newsletter, intended to facilitate the lecture of the latest and the most prominent decisions given by states and international jurisdictions, and the arbitral awards.

For this purpose, Paris Baby Arbitration encourages the collaboration and the contribution of the younger actors in arbitration.

Paris Baby Arbitration believes in work, goodwill and openness values, which explain its willingness to permit younger jurists and students, to express themselves and to communicate their passion for the arbitration.

Finally, you can find all the previously published editions of the Biberon and subscribe to receive a new issue each month on our website: babyarbitration.com.
We also kindly invite you to follow us in our LinkedIn and Facebook pages and to become a new member of our Facebook group.

Enjoy reading!

FRENCH COURTS

COURTS OF APPEAL

Paris Court of Appeal, 7 September 2021, No. 19/17531

Contributed by Idil Gizay Dogan

On the 7th of September 2021, the Paris Court of Appeal reiterates the legal independence of the arbitration clause from the main contract and that the applicability of a state law to the main contract is not applicable to the arbitration clause. The Court also recalls that the validity of the arbitration clause is assessed, subject to the mandatory rules of French law and international public order, according to the common will of the parties, without the reference to a specific state law. In addition, the Court clarifies that in order to be considered as a party to the arbitration proceedings, being mentioned as a party in an agreement is not essential, that a signature and/or an involvement in determining the content of the agreement is sufficient to be considered as a party. Finally, the Court recalls the missions of the arbitral tribunal.

The Guinea Post and Telecommunications Regulatory Authority (hereinafter "ARPT") and the company Global Voice Group SA (hereinafter "GVG") entered into a partnership agreement on 22 May 2009 with the aim of controlling telephone traffic in Guinea for a period of 60 months from its signature. This contract provided for renewal for successive periods of 2 years by tacit renewal, unless expressly terminated in writing by one or the other party within 12 months before the end of the contract. GVG and ARPT signed an addendum to the agreement in 2012. From May 2014, the invoices of GVG are no longer paid. As a result, in November 2014, ARPT informed GVG that the Partnership Agreement had ended on May 22, 2014, which it renewed by letter of May 15, 2015. After an attempted negotiation, GVG decided, under Article 17 of the contract providing for an ICC arbitration clause, to appeal to the ICC to start an arbitration procedure.

The arbitral tribunal judged that (i) the arbitration clause was valid, (ii) the State of Guinea was party to the Agreement and (iii) the arbitration procedure was validly constituted towards ARPT as well as the State. ARPT and the Republic of Guinea appealed for the annulment of this award to the Paris Court of Appeal.

On the one hand, ARPT and the State of Guinea believed that the tribunal wrongly declared itself competent ratione personae and ratione materiae under Article 1520 (1) of the French Code of Civil Procedure. According to ARPT and the State of Guinea, the dispute should have been resolved by the arbitration proceedings mentioned in Article 77 of the French Code of Public Procurement ("CPP") because the Agreement between the parties was a public procurement contract concluded by a Guinean public law entity and that Guinean law was chosen as substantive

law by the parties. Therefore, the ICC clause provided for in Article 17 of the contract should be null and void and deemed unwritten

Faced with these arguments, GVG considers that the existence and validity of an arbitration clause in French international arbitration law is assessed according to the will of the parties, without reference to a state law, subject only to French mandatory rules and French international public policy. GVG believes that in order for Guinean law to be applicable to the arbitration clause, it must be expressly submitted to Guinean law. That in this case, the absence of a choice in favor of Guinean law to govern the arbitration clause, makes the clause valid independently from any state law.

On this matter, the Paris Court of Appeal declares itself competent ratione materia and recalls that the arbitration clause is legally independent of the main contract and that its existence and validity are assessed, subject to the mandatory rules of French law and of international public order, according to the common will of the parties, without having to refer to a state law. The Court infers that the designation of a foreign law to govern the main contract is not applicable to the arbitration clause, which is independent of the main contract.

With regard to the incompetence ratione personae raised by ARPT and the State of Guinea, the latter consider that the State of Guinea did not consent to be party to the agreement between ARPT and GVG. The parties consider that the arbitration award was pronounced against the State of Guinea without an applicable arbitration clause. According to GVG, the consent of the Republic of Guinea to be party to the partnership agreement is inferred from the Minister's signature affixed to the partnership agreement.

On this point, the Paris Court of Appeal considers that even if the agreement only mentions ARPT and GVG as parties to the agreement, the Republic of Guinea has affixed its signature on the last page of the agreement. In addition, several paragraphs of the agreement expressly address the expectations of the Republic of Guinea. According to these provisions, the Court considers that the Republic of Guinea was directly involved in determining the content of the agreement. As a result, the Court considers that the arbitral tribunal was able to retain its jurisdiction also with regard to the State of Guinea.

ARPT and the State of Guinea also maintain that the arbitral tribunal was constituted in an irregular manner because it disregarded the application of Article 77 of the CPP. However, as explained above, this argument is ineffective since the arbitration clause is independent from the main contract, thus, the tribunal had to be constituted according to the rules of the ICC, and this is what has been done.

With regard to the argument based on corruption, the Court notes that the alleged indicators are not such as to lead to a violation of international public policy by this award. With regard to the "relevant" evidence, the Court specifies that it must constitute a body of serious, precise and concordant evidence, "which implies that they must be examined both in isolation and together, since proof of corruption may result from their accumulation". Having carried out this examination, the Court considers that "it thus emerges both from the review which the arbitral tribunal carried out, as it was rightly incumbent upon it to do, and from the analysis of each of the

indicators taken separately and as a whole, that the alleged acts do not characterize serious, precise and corroborative indicators likely to lead to an annulment of the award for disregard of international public policy. Therefore, the Court rejects this argument.

Finally, ARPT and the State of Guinea believe that the arbitral tribunal did not comply with its mission. According to the parties, the tribunal did not motivate its decision in light of the arguments relating to the ad hoc nature of the arbitration provided in Article 77 of the CPP. The parties also criticize the tribunal for failing to respond to several "arguments" to demonstrate the abnormal nature of the remuneration of GVG.

According to the Paris Court of Appeal, the arbitral tribunal must provide a motivated award. However, the arbitral tribunal does not have the duty to motivate its award based on Article 77 of the CPP, since this article is not applicable to the present case. The Court also clarified that the tribunal's mission is not to respond to all the arguments raised by each party. Consequently, the Court also rejects this argument.

The Court, under the terms of its judgment, orders ARPT and the Republic of Guinea to pay the costs and dismisses the action for annulment against the arbitral award and orders ARPT and the Republic of Guinea to pay GVG the sum of 200 000 euros.

Versailles Court of Appeal, 9 September 2021, No. 20/04611

Contributed by Manon Champignolle

By its decision of September 9, 2021, the Versailles Court of Appeal declared Naftogaz of Ukraine (hereinafter "Naftogaz" and a joint stock company under Ukrainian law) inadmissible in all its claims against the company A B C D'A' (hereinafter "company A" and a limited liability company under Hungarian law), which took over the rights of Italia Ukraina Gas SRL (hereinafter "Iugas" and a company under Italian law), and the professional civil law partnership of bailiffs Cap H-CHEENE X Y-Z (a company under French law).

On 2 March 2016, a gas sales contract entitled "general agreement concerning the delivery and acceptance of natural gas", was entered into by and between Iugas and the oil and gas company Naftogaz under which Naftogaz prepaid certain quantities of gas. On December 20 2017, the company Iugas ordered an attachment of tangible assets in the hands of Engie SA in France, which led to the attachment of 81,208 Mwh of natural gas prepaid by Naftogaz. As a result, Naftogaz suspended the delivery of the gas to Slovakia. On December 22 2017, Iugas served Naftogaz with a summons to pay the principal and interest. Then, on December 29, 2017, it served Naftogaz with a document converting the protective attachment into an attachment for sale, which was subsequently suspended. On August 6 2018, Iugas assigned its claim against Naftogaz to Hungarian company A. On March 24 2020, company A issued a new summons to pay for the purpose of attachment and sale for payment of updated amounts comprising a principal of EUR 11,4465,142.80 and interest of EUR 856,151.48. On June 24 2020, the gas volume was sold at an auction for the sum of EUR 460,000.

On 19 December 2012, the arbitral tribunal under the aegis of the Stockholm Chamber of Commerce ordered Naftogaz to pay the sum of US$12,718,486 to Iugas. In an order issued on 10 May 2015, the Paris High Court declared the award enforceable. In the context of payments made up to April 2020, Naftogaz summoned company A, in the presence of Cap H Cheene X Y Z, to have the claim under the arbitration award extinguished, to order the release of the attachment of assets converted into an attachment for sale, which it considered to be abusive, to annul the order to pay and finally to annul the auction sale. In an enforceable judgment dated September 24 2020, the enforcement judge of Nanterre Commercial Court dismissed all of Naftogaz's claims. The company appealed.

The Court recalled that the request to cancel the forced sale of the gas to ensure payment of the costs under the order to pay for the purposes of attachment and sale and the costs of the proceedings was rejected by the enforcement judge. On the merits, the appellant argued that the costs of virtual storage of the gas stemmed from the "natural gas handling agreement", which was null and void and could not be enforced against it on two grounds. First, it had been concluded in fraud of its rights between parties who had neither the capacity nor the right to enter into a contract for the storage of the seized gas. Second, it argues that the recourse to virtual storage violated, by its very nature, the principle of the unavailability of the seized goods, since these costs could not be classified as enforcement costs. The Court rejected its request to cancel or declare unenforceable the "natural gas handling agreement" concluded on 31 January 2018 and dismissed its claim for damages against company A.

With regard to the application for release of the attachments, the Court recalled that these applications were rejected on the grounds that the prosecuting company had a writ of execution that was not contested on the merits, that the claim had not been extinguished on the date of the attachment and that it did not correspond to any procedural act in the file. Naftogaz argued that Engie was not the owner of the property belonging to Naftogaz, as ownership was transferred at the delivery point in Slovakia. Therefore, Engie only owed Naftogaz a supply or return of prepaid gas.

It considers that the bailiff acted wrongly and improperly in deciding to convert the attachment of tangible assets into an attachment for sale. Therefore, these claims must be declared inadmissible. The Court added that the claim for security costs could no longer be pursued insofar as the attachment procedure had ended with the sale of the seized gas, which had the effect of transferring ownership to the successful bidder. Consequently, Naftogaz is also inadmissible in its action for nullity and in its claim for restitution of the proceeds of the sale against company A, as well as in its claim for payment of damages against SCP Cap H Cheene.

Regarding the request for nullity of the order to pay for the purposes of attachment and sale of March 24 2020, the Court observed that this request, issued at the request of company A after assignment of the claim in question, was rejected by the enforcement judge : on the grounds that the claim was not extinguished on its date, as the Slovak procedure had only allowed the principal and interest to be settled, to the exclusion of the enforcement costs. Naftogaz relies on the irregularity of this document, relying on the Slovakian bailiff's statements of April 8 2020, which establish that the claim covered by the enforcement order had indeed been fully recovered

following the enforcement procedures carried out in Slovakia, and thus criticises Company A for having issued this summons despite this recovery. Nevertheless, the Court notes that this date is later than the date of delivery of the contested summons for an amount that does not extinguish the entire claim. Consequently, the Court again rejects this claim.

Concerning this time the claim for compensation of Naftogaz against company A, the Court explains that Naftogaz did not spontaneously pay the arbitration award for more than seven years nor did it make use of the possibility to sell the gas amicably, and thus was the cause of the need to incur storage costs. It adds that the latter cannot rely on the abuse that it denounces and cannot validly contest that these are costs of enforcement.

With regard to Naftogaz's claim for compensation against Company A, the Court explained that Naftogaz had not spontaneously paid the arbitration award for more than seven years, nor had it made use of the option to sell the gas amicably and had therefore had to incur storage costs. It adds that the latter cannot rely on the abuse that it denounces and cannot validly contest that these are costs of enforcement.

Finally, with regard to the summons for the purposes of attachments and sale issued on November 18, 2020, Naftogaz company maintains that this summons was issued to it for "guarding costs" for which it is not liable, and which do not fall within the scope of forced execution within the meaning of section L111-8 of French Civil Code of Enforcement Procedures. The Court decided to reject Naftogaz's request to cancel the order, as it had failed to demonstrate how the disputed storage costs incurred by Hycori were only "alleged" and set the amount of the residual claim for enforcement costs at the required sum of 703,558.40 euros.

The Court thus confirms the judgment of Nanterre Commercial Court and the completion of the natural gas auction.

In its judgment, the Court set the amount of the residual claim of company A against company Naftogaz at the sum of 703,558.40 euros, ordered company Naftogaz to pay SCP Cap H Chenne X Y Z the sum of 12,000 euros and company A the additional sum of 25,000 euros in respect of costs.

Paris Court of Appeal, 14 September 2021, No. 21/03556

Contributed by Louis Fer

In a decision dated 14 September 2021, the Paris Court of Appeal recognized the validity of an arbitration clause inserted in an agreement constituting a commercial act, considering it unnecessary to investigate whether this same agreement was concluded because of professional activity. It also proceeds to an extension of the arbitration clause ratione personae, because of the involvement of the non-signatory in the overall economic transaction.

Mr. Y ("promisor"), partner and manager of two companies: SARL Tropicayes ("Tropicaves") and SCI Les Lataniers ("Les Lataniers"), granted on 11 March 2008 a promise to transfer 50% of the

shares in these two companies to Mr. and Mrs. Y ("beneficiaries"), subject to the approval of the other partners. This promise provided for a 750,000 euros immobilization indemnity as well as an arbitration clause. A participation agreement was concluded between Mr. Z and BUILDINVEST S.A. ("BUILDINVEST"), the latter as manager, to implement the immobilization indemnity provided for in the promise to sell. Each of the parties had to contribute half of the 750,000 euros. The other partners of the two companies did not agree to the transfer of Mr. Y's shares. On 18 February 2009, Mr. Y brought an action before the arbitration tribunal ("tribunal") to obtain the payment of the transfer price by the beneficiaries, under the arbitration clause inserted in the promise to sell.

The Tribunal ordered the beneficiaries of the promise and BUILDINVEST to pay the sum of 375,000 euros. The beneficiaries brought an appeal, which was rejected by two decisions of the Paris Court of Appeal from 2012 and 2014. Yet, the Paris Court of Appeal annulled the award insofar as it declared the sum of 375,000 euros definitively acquired and as it ordered the beneficiaries and BUILDINVEST to pay the sum of 375,000 euros. After a formal notice sent to the beneficiaries which remained unsuccessful, BUILDINVEST referred the matter to the emergency judge, who ordered the beneficiaries to pay the provisional sum of 375,000 euros. Their request to stop the provisional execution was not granted. The beneficiaries brought an action against BUILDINVEST, claiming that the participation agreement had lapsed and, as a subsidiary request, that it could not be enforced against Mrs. Z. BUILDINVEST then argued that the Paris court did not have jurisdiction because of the arbitration clause contained in the 2008 promise. This reasoning was followed by the pre-trial counselor, who found that the Court did not have jurisdiction. The spouses ("Petitioners") brought an appeal against this decision. They based their request on Article 2061 of the French Civil Code as it stood prior to the reform, according to which an arbitration clause is only valid if it was concluded in connection with a professional activity. Therefore, they argued that there was no indication in the assignment deed that it was made in respect of their professional activity, preventing the use of arbitration. The appellants also argued that the clause could not be used against Mrs. Z, who had not signed the participation agreement, and thus against Mr. Z, because of the indivisibility of their marriage.

The Court noted, however, that Article 2061 of the Civil Code is applicable subject to specific legislative provisions, and that Article 721-3 of the Commercial Code authorizes to insert an arbitration clause in commercial operations concluded between all persons, without limiting this possibility to traders in the meaning of the French Commercial Code. The participation agreement was meant to take control of Tropicaves, and therefore constituted a commercial act falling within the scope of Article 721-3. The Court considers that this has the consequence of making the arbitration clause valid, confirming the lack of jurisdiction of the Paris Court. Regarding the argument that the clause is not enforceable against Mrs. Z, the Court notes that although Mrs. Z did not sign the participation agreement, the said agreement stipulated that the company was set up between BUILDINVEST and the spouses and that the spouses took steps to obtain the promise to sell that had been granted to them. The Court deduced from Mrs. Z's involvement in the promise to sell, which contributed to the same economic transaction as the participation agreement, her involvement in this transaction, and held that the arbitration clause could be invoked against her.

Accordingly, the Paris Court of Appeal confirms the order of the pre-trial counselor.

Paris Court of Appeal, 14 September 2021, No. 19/16071

Contributed by Khalil Chlaifa

A contract was concluded by the National Highway Authority ("NHA"), a Pakistani company and the China International Water and Electric Corporation ("CWE"), a Chinese company for the construction of a highway road in Pakistan which was supervised by the CWE.

A dispute arose between the two companies related to a claim made by NHA related to the costs generated by the delay in the work and the contractual liability of the NHA. After an unsuccessful attempt of the Dispute Resolution committee ("Dispute A") to solve the dispute, the NHA company filed a request for arbitration with the International Court of Arbitration of the International Chamber of Commerce in accordance with article 20.6 of the general conditions of the contract.

A provisional award was issued on the 6th of July 2O16 and confirmed by a final award on the 30th of June 2019 that was issued by an only arbitrator. In fact, the arbitral tribunal confirms the binding force of the decision issued by the Dispute A committee condemning the NHA company to pay 3,435,255,571.32 Rupees and 10,703.88 Dollars.

NHA filed for annulment with the Paris Court of Appeal by challenging the independence and impartiality of the arbitrator. In fact, the plaintiff argues that the arbitrator has also been appointed as a member of the Dispute A committee related to Sinohydro, a Chinese company which is also a subcontractor of WCO. Therefore, according to NHA, the arbitrator should have informed the companies of the link with Sinohydro in accordance with article 456 of the civil procedure code, article 11 of the 2012 CCI arbitration rules and the guidelines of the IBA of the 23rd of October 2014. As a result, this lack of information may constitute a reasonable doubt that challenges the independence and impartiality of the arbitrator. In addition, NHA also relies on the attitude of the arbitrator during hearings which constitute a circumstance likely to constitute a reasonable doubt compromising the arbitrator's a and impartiality. For its part, CWE asks for the dismissal of the claim. As regards the existence of an undisclosed link between the arbitrator and Sinohydro, CWE maintains that no contract has been concluded with Sinohydo, in addition to the lack of any capitalistic or financial link with it. In response, there is no violation of the arbitrator's disclosure obligation and thus, no reasonable doubt compromising the arbitrator's independence and impartiality. Besides, it finally recalls that the tribunal justified its decision on the basis of the relevant and credible elements reported in the case.

The Court of Appeal, in accordance with Article 1456 §2 and article 1506 of the Civil Procedure Code and with reference to the recommendations issued by the ICC on February 12, 2016, considers that it is possible to challenge the lack of independence and impartiality by characterizing the arbitrator's non-disclosure of one of the circumstances that are likely to affect its independence and impartiality. These circumstances must create a reasonable doubt as to its independence and impartiality, generated by a conflict of interest. The latter could be direct if there is a link between the arbitrator and one of the parties or indirect, depending on the intensity and proximity of the

link between the arbitrator, the interested third party which is less directly involved and one of the parties.

The Court of Appeal points out that there is no element that can highlight any existing link between CWE and Sinohydro. It also recalls that the Tribunal rejected the existence of a subcontracting link because of the lack of proof. As a result, Sinohydro company cannot be qualified as an interested third party involved and therefore, the arbitrator's lack of disclosure does not constitute a reasonable doubt that can challenge his independence and impartiality.

Finally, concerning the award's lack of partiality in favor of CWE, the Court recognizes that a reasonable doubt related to the arbitrator's impartiality may arise from the content of the award. However, the Court sets conditions: this reasonable doubt must rely on precise and objective elements of the award or its wording, demonstrating a partial attitude of the judge. The Court of Appeal rejects once again the arguments of NHA, qualified as irrelevant since the control of the content would constitute a review of the award that is fully prohibited.

The court rejects the action for the annulment and orders the NHA company to pay the costs.

Paris Court of Appeal, 14 September 2021, No. 19/23063

Contributed by Juan Diego Niño-Vargas

On 14 September 2021, the Paris Court of Appeal dismissed the application to set aside an award rendered on 17 October 2019 under the aegis of the International Arbitration Chamber of Paris ("CAIP") by an arbitral tribunal composed of Eric Loquin (President) and Jean-Claude Magendie and Sylvain Bollée (co-arbitrators).

In this case, bank Delubac had entered into two factoring agreements with two companies which transferred ownership by way of subrogation of invoices issued by these two companies to the company Freudenberger. Some of the invoices contained general terms and conditions which included an arbitration clause which read as follows: "Any dispute arising in connection with this contract shall be settled by the Arbitration Chamber of Paris in accordance with the ISF rules", "ISF" standing for International Seed Federation.

The dispute between Freudenberger and bank Delubac arose from Freudenberger's refusal to pay bank Delubac on the grounds that the underlying contracts had not been fulfilled and that the debts had been offset with the original creditors.

Bank Delubac therefore sued Freudenerger before the Paris Commercial Court for payment of these invoices. The Commercial Court dismissed the arbitration clause and declared it had jurisdiction, but the Paris Court of Appeal overturned this judgment, considering that the Commercial Court did not have jurisdiction.

Bank Delubac therefore filed a request for arbitration against Freudenberger before the CAIP based on the aforementioned arbitration clause. Freudenberger objected that the CAIP did not

have jurisdiction because the CAIP was no longer a member of the International Seed Federation since 2014.

The arbitral tribunal constituted under CAIP rules, issued an award on jurisdiction in which it was, inter alia, held that (i) the tribunal was improperly constituted and could not arbitrate disputes concerning contracts in which it is stipulated that the lSF rules of procedure are applicable without further specification; but (ii) declared it had jurisdiction to arbitrate disputes resulting from contracts in which it is stipulated that the disputes will be settled by the CAIP according to lSF rules.

Freudenberger then filed an application for partial set aside of this award insofar as it retained CAIP jurisdiction over certain disputes. In the meantime, the arbitral tribunal rendered its decision on the merits by which it dismissed bank Delubac's claim for compensation. As a result, bank Delubac also filed an action to aside this award which is currently pending before the Paris Court of Appeal.

Freudenberger raised two grounds for setting aside the award rendered on jurisdiction by the arbitral tribunal.

The first ground was that the arbitral tribunal lacked jurisdiction pursuant to Article 1520°1 of the French Code of Civil Procedure. Freudenberger alleged that if the CAIP was indeed designated in the arbitration clause, it could no longer be entrusted in 2019, date on which the dispute arose, with the organization of the arbitration since it was no longer a member of the ISF since 2014.

The Court of Appeal rejected this first ground, considering that the reference to the CAIP in the arbitration clause made by the parties, when they were not required to do so and without any other indication, resulted in their acceptance to submit to its rules. The Court emphasized, in line with the challenged award, the difference between clauses that have made a simple reference to the ISF rules which do not provide jurisdictional basis for the arbitral tribunal and those that have referred to the CAIP pursuant to ISF rules which effectively give jurisdiction to the arbitral tribunal. Moreover, the Court reminded that the arbitration clause is autonomous from the underlying contracts which were governed by the ISF rules.

The second ground was the irregularity of the constitution of the arbitral tribunal pursuant to article 1520 °2 of the Code of Civil Procedure. Freudenberger, relying on the same arguments set out above, stated that the tribunal had been improperly constituted since the CAIP had applied its own rules for the constitution of the tribunal, thus dismissing the ISF rules.

Similarly, the Court of Appeal rejected this second ground, stating that, insofar as the complaint of lack of jurisdiction had been rejected, the constitution of the arbitral tribunal under the CAIP rules was not irregular.

Consequently, the Court of Appeal dismissed the appeal for partial annulment of the award issued by the arbitral tribunal on 17 October 2019 under the CAIP rules.

FOREIGN COURTS

Singapore International Commercial Court, Sanum Investments v. Lao People's Democratic Republic (I), 10 September 2021, PCA Case No. 2013-13

Contributed by Dani El Habel

On 10 September 2021, the Singapore Court of International Trade dismissed the applications of Sanum Investments Limited (Claimant) to set aside an arbitral award made in a bilateral investment treaty arbitration with the Lao People's Democratic Republic (Respondent).

The above decision marks the end of a saga involving several decisions, both arbitral awards and judgments of the Singapore courts. Initially, the case concerned a Macau incorporated subsidiary, Sanum, wholly owned by a Dutch registered company, Lao Holdings NV. These two legal entities had joined forces with a Lao conglomerate, ST Group Co Ltd, in 2007 to conduct business related to the gaming and hospitality industry in Lao.

Successive actions by the Lao government against Sanum prompted Sanum to initiate arbitration proceedings against the State of Lao under the auspices of the Permanent Court of Arbitration (PCA), pursuant to the bilateral investment treaty between Lao and Macao (now the People's Republic of China). At the same time, the parent company Lao Holdings NV initiated ICSID arbitration proceedings against the State of Lao, pursuant to the bilateral investment treaty between the latter and the Netherlands. The two ICSID and PCA arbitrations were separate and distinct proceedings and not consolidated. However, they ran largely in parallel and were the subject of joint hearings. The final awards in both cases were made equally on the same date, 6 August 2019. In this regard, the arbitral tribunal in Sanum v. Lao decided to dismiss Sanum's claims, and to order it to pay the respondent's legal costs.

As Singapore was designated as the seat of both the ICSID and PCA arbitrations, the applications to set aside the two awards were brought under the Singapore International Arbitration Act and the UNCITRAL Model Law before the Singapore Court of International Trade. The claimants thus allege that the awards should be set aside. As the two cases were closely related, the grounds presented by the claimants were the same with few exceptions. In this regard, the court identified four issues to be addressed, only one of which concerned the ICSID award. The issues common to both the PCA and ICSID arbitration were: whether the arbitral tribunals exceeded the scope of the submission to arbitration by admitting additional evidence; whether there is a material breach of the arbitral procedures; and whether the claimants were reasonably heard.

On the latter issue, the court found that the parties were given the opportunity to make their respective submissions, and did so. On the issue of exceeding the scope of the submission to arbitration, the court found firstly that the additional allegations of corruption and fraud forming the basis of the claimants' challenge to the arbitral awards were not new claims as they formed part of the Lao State's existing defense; and secondly, that the claimants waived any jurisdictional challenge by not raising any objection at the time of the Lao State's request to admit additional

evidence. Finally, on the question of whether there is any substantive violation of the arbitral procedure, the court found that arbitral tribunals retain the power to admit additional evidence in exceptional circumstances, without this constituting a violation.

For all these reasons, the court rejected the claimants' arguments to set aside the arbitral awards.

Singapore International Commercial Court, 10 September 2021, ICSID Case No. ARB(AF)/12/6

Contributed by Victoria Muntean

On September the 10th, 2010 the Singapore International Commercial Court dismissed two applications made by Lao Holdings NV and its wholly owned subsidiary, Sanum Investment Limited, to set aside investor-sate arbitral awards previously issued by ICSID and a PCA tribunals as a result of arbitral proceedings conducted under bilateral investment treaties with Lao's People's Democratic Republic.

The holding company was incorporated in the Netherlands and raised an ICSID arbitral proceedings under the Agreement on encouragement and reciprocal protection of investments between the Lao People's Democratic Republic and the Kingdom of the Netherlands (16 May 2003), (in force as of 1 May 2005). Sanum, incorporated in Macau, brought separate PCA arbitration proceeding under the Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments (31 January 1993), (in force as of 1 June 1993) (§2).

The dispute concerned expropriation and other BIT related claims raised by the plaintiffs in relation to several investments made by way of partnering with the Laotian conglomerate, ST Group Co Ltd ("ST Group") in the Laotian gaming and hospitality industry (§3) in the period between 2007 to 2013 (§5). Both arbitration proceedings were brought in August 2012. Proceedings were not consolidated but were conducted largely in parallel as the disputed facts substantively overlapped and were subject of joint hearing by the PCA and ICSID Tribunals as the constituted tribunals shared common party-appointed arbitrators, albeit presided by different individuals (§10).

ICSID and PCA Arbitrations have been suspended before the merits hearing, when in June 2014, the parties concluded a Deed of Settlement. Per Sections 32 and 34, plaintiffs were allowed to revive the BIT Arbitrations provided that the Laotian Government breached any of the substantive provisions found therein, so long as neither party could bring novel evidence, claim new reliefs or seek to introduce additional evidence (§16-19). Followingly, in April 2016 and February 2017 were successful in reviving BIT Arbitration, the Tribunal having found material breach of the Settlement Deed (§23). In turn, the respondents were successful in having the Tribunals admit novel evidence discovered after the execution of the Settlement Deed; plaintiffs' objections were thus dismissed by Tribunals in holding that disregarding the provisions in the Settlement Deed, they retained residuary discretion to admit the evidence as it fulfilled the requirement of "compelling

circumstances" (§25-29). Plaintiffs' additional evidence was not admitted on grounds of irrelevancy (§31).

The merits hearing having concluded in July 2019, the Tribunals dismissed all claims and awarded the respondents the costs. Respondents' defences based on fraud, bribery and corruption were upheld on balance of probabilities (§35) as the plaintiffs were found to have been dealing in bad faith and, thus, disentitled to claim the reliefs sought (§36). Subsequently, the holding company and its subsidiary proceeded with their applications to set aside the awards under Section 24 of the International Arbitration Act and/or Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration and the cases have been ultimately transferred to this forum (to the Singapore International Commercial Court) (§36), with Singapore being chosen as the seat of Arbitration in both the ICSID and the PCA Arbitrations (§37-40).

The applications were based on three grounds, namely that the BIT Tribunals exceeded their jurisdiction and dealt with matters beyond the express scope of the parties' submission to arbitration, under Art 34(2)(a)(iii) of the Model Law, that arbitral procedure was not in accordance with the parties' express agreement, under Art 34(2)(a)(iv) of the Model Law, and that plaintiffs were not afforded a reasonable opportunity to be heard on determinations made in the BIT Awards, under Art 34(2)(a)(ii) of the Model Law and/or s 24(b) of the IAA (§48).

The court found four issues for determination (§51). In considering the scope of Section 34 of the Settlement Deed, the court found that the BIT Tribunals did not exceed its jurisdiction in admitting new evidence in so far as the provision, for purposes of challenge, concerned issues of claims and reliefs and the parties' agreement as to evidence did not go to jurisdiction (§68). Moreover, the admitted evidence touched on bribery and fraud allegations which were already part of the initial proceedings, and the plaintiff waived any jurisdictional challenge by failing to object upon respondents' submission of their Application to Admit Additional Evidence (§70-73).

The Court held in negative on the question whether ICSID Tribunal made a finding on expropriation. Albeit such claims had only been made in the PCA Arbitration, given the nature of the parallel proceedings, ICSID tribunal was entitled to consider and make findings on issues of illegality and bad faith (§104-108).

Further, in considering whether the admission of new evidence constituted material breach if the agreed arbitration agreement, the court held that the parties having referred the interpretation of the disputed provision to the BIT Tribunals, this was no longer a matter that it could consider de novo, even more so as it involved findings of fact as to foreign law (§130, §142). Prejudice on the circumstances was not suffered as the BIT Tribunals, in the absence of the admitted new evidence, could not have made different findings on the plaintiffs' alleged conduct of illegality, bribery, corruption and fraud (§235, §262, §276-8). The court ruled that in the circumstances it would not set aside the awards (§285).

Finally, the court rejected all of the four grounds that the plaintiffs had submitted in support of their claim as to the reasonable opportunity to be heard. The court ruled that the new evidence adduced by the respondents was admitted as it dealt with allegations of bribery and corruption of which the plaintiffs had intimated of (§312). Specifically, the court held that the Tribunals had not

violated the plaintiffs' right to be heard by virtue of not admitting their additional evidence as that offered general evidence which would have made no difference to the final outcome (§322-3).

Consequently, the court rejected the plaintiffs' applications to set aside the arbitral awards and allowed the parties to agree on costs (§403-4).

ARBITRAL AWARDS

ICSID, Decision of Jurisdiction, Liability and Directions on Quantum, 9 September 2021, Eco Oro Minerals Corp. v. Republic of Colombia

Contributed by Tuğçe Ergüden

The decision discussed is an arbitration award made by the International Centre for Settlement of Investment Disputes (ICSID), Case No. ARB/16/41, on 9 September 2021. The award was made under the auspices of the ICSID on the basis of Section B of Chapter Eight of the Free Trade Agreement between Canada and Colombia, which entered into force on 15 August 2011 (the "FTA") and the Convention on the Settlement of Investment Disputes between States and National of Other States (the "ICSID Convention"). The case is between Eco Oro Mineral Corporation ("Claimant" and "Eco Oro") and the Republic of Colombia (the "Respondent" and "Eco Oro").

This dispute relates to measures adopted by the Respondent in connection with the páramo ecosystem in Santurbán, which allegedly have deprived Claimant of its mining rights under a concession contract for the exploration and exploitation of a deposit of gold, silver, chromium, zinc, copper, tin, lead, manganese, precious metals and associated minerals entered into on 8 February 2007 between Claimant and INGEOMINAS. The Claimant alleges that Colombia has breached Article 811 of the Treaty ("Article 811") relating to expropriation, as well as multiple aspects of Article 805 of the Treaty ("Article 805") relating to the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

Eco Oro is a Canadian publicly-traded precious metals exploration and mining development company. It first arrived in Colombia in 1994 with the purpose to undertake the exploration and exploitation of gold-silver in a project called Angustura located near a moorland ecosystem known as Santurban (north-eastern Colombia). Eco Oro has legally developed mining exploration activities in the area as the holder of the mining title contained in the concession contract 3452 signed with the Colombian government in 2007, which had an original duration of 20 years. Its regulatory framework consisted of: (i) the exclusive right to explore and exploit mineral resources in the entirety of the Concession area; (ii) the right to a stabilised mining legal framework such that only those new, more favourable mining laws enacted after the execution of Concession 3452 in February 2007 would apply to its Concession; and (iii) the right to renew the Concession for an additional 30 years upon fulfilling the requisite conditions. From 1997, Eco Oro carried out its

mining activities in the area covered by Permit 3452 pursuant to an approved PMA. The mining titles that Eco Oro obtained had no existing environmental restrictions and two of the licences obtained (granted pursuant to the 1988 Mining Code) were converted into exploitation licences shortly after being acquired by Eco Oro. rmit 3452 was not within a prohibited area and therefore Eco Oro had acquired rights to explore and exploit pursuant to Permit 3452 and its other exploration and exploitation licences over 92% of the Angostura deposit.

In 2010, the law seeking to restrict mining activities in páramo ecosystems, Law 1382, was enacted as an amendment to the Mining Code. At first, the Claimant and other companies found ways to get exemptions from the laws, advancing their mines in what had by then become environmental preservation zones. But in 2016, the Constitutional Court struck down all exemptions to the ban on mining in protected areas. At the time, Eco Oro had not received all required permits for its operations, let alone started exploiting the gold. Moreover in 2011 Colombia's Ministry of Environment had even rejected the company's impact assessment.

The Constitutional Court issued a decision that no extractive activities could take place in the high-mountain ecosystems known as páramos, including the Santurban páramo where Eco Oro had its project. Less than a month later, Eco Oro filed its Request for Arbitration with ICSID on December 9, 2016 pursuant to the FTA after having invested in the Angostura Project.

On 8 December 2016, the ICSID received a request for arbitration. The Claimant claimed US$764 million for the alleged expropriation of its Angostura gold exploration property in Colombia's Santander region, which is unique for its high-altitude páramo (moorland) ecosystems.

The International Centre for Settlement of Investment Disputes tribunal found that even though the country had a legitimate interest in protecting its high-altitude wetlands, known as páramos, which are an important source of freshwater for the country's population, it had nevertheless violated a provision in an underlying treaty requiring it to treat Eco Oro Minerals Corp. fairly. The tribunal noted that Colombia had known about the importance of protecting these environmentally sensitive areas for years when the underlying concession was granted to Eco Oro in 2007, and that various government officials had encouraged the company to proceed with the project until its rights to the site were fixed in 2016. The arbitrators criticized the fact that the government dragged its feet when mapping out the exact boundaries of the páramos, noting that it was made clear that no environmental licenses could be issued for mining projects in the vicinity of the Santurbán Páramo until the new delimitation had been completed.

To conclude, the Tribunal found that (I) it has jurisdiction over the claims raised, (ii) Colombia is not in breach of Article 811 the FTA, (iii) Colombia breached Article 805 of the FTA by failing to give fair and equitable treatment to Claimant's investment in Colombia relating to the Angostura Project. The Tribunal rendered certain findings with respect to damages, but has not yet determined what compensation will be awarded to Eco Oro as a result of Colombia's breach of the Treaty. The Tribunal has requested from the parties further submissions on damages on specific questions arising from its findings.

INTERVIEW WITH LUKAS PALECEK

1. Hi Lukas, thank you for agreeing to be featured in the 2021 summer edition of the Biberon. Would you mind presenting yourself and recalling briefly your background to our readers?

Thank you for having me! I currently have the honour of being part of the ICC Court's Secretariat, working as a Deputy Counsel on cases as part of the MENA and East Mediterranean team (ICA5).
My path to the institution was relatively long and prepared me well for my current role. Having grown up in Slovakia in a small town surrounded by mountains, I moved to our sister country, the Czech Republic, at the age of 19 to study law in the magic city of Prague. However, after the first two years of studies, my increasing desire to enter the professional world (the "real world", as I was thinking at the time…) led me to London, where I acquired my first law firm experience that further boosted my taste for the legal practice. Subsequently, I returned to Prague to complete my studies and qualify. Having spent four years as a trainee and later associate with a small general practice was a priceless experience. Further, by the time I arrived at the ICC, I had worked with some of the major arbitration teams in law firms in Paris and London.

2. After graduating in law from Prague University, you decided to continue your legal studies and to do an LLM in international arbitration at Versailles University. Can you explain to us why you chose to specialize in international arbitration and what motivated you to pursue your studies abroad?

The reasons were purely pragmatic. I had this inner motor that was a combination of passion for law and for travel, so the world of international arbitration was simply the place to be. How did I discover this still relatively unusual field of specialisation? As a freshly qualified lawyer in Prague, I jumped on the opportunity to participate in the "Stage International du Barreau de Paris", a 2-month programme organised annually by the Paris Bar for young lawyers from all over the world. It worked out and once in Paris, I made the decision to stay. What exactly I would do I did not know. Given my rather basic level of French at the time, honestly, my first steps in Paris were not easy, but I remained obstinate. Putting away my pride of a qualified lawyer, I started my adventure on an administrative position in a US law firm. Unsurprisingly, this helped me get my French in a much better shape but what is more, it was here that I also discovered my future area of specialisation: international arbitration! While printing and binding submissions (as thick as I had

never seen before), whenever I had the opportunity, I read them with much interest. Long story short, an advice I received at the time was the following: If you wish to pursue a career in international arbitration, enrol for an arbitration LLM. I was eventually accepted in Versailles. As the Master's founder and former director Thomas Clay used to say, this LLM is a ticket to the small circle of international arbitration.

3. Unlike many professionals in the sector, you have decided to work in an arbitral institution, more precisely at the ICC International Court of Arbitration in Paris. Could you explain to us what led you to this choice and how your work differs from that in a law firm?

Being part of the ICC Court and its Secretariat is an entirely unique experience.
First of all, we have the privilege to follow a large number of international arbitration cases of all shapes and sizes. Thus, I am able to consider the strengths and the weaknesses of all players' work products, which is a great way to learn. Second, we are on the other side – instead of being authors of pleadings, we are their addressees. This creates an invaluable insight into strategic positioning and reasoning of the different players.
When I compare my past experience in law firms, there were busy periods but also periods of "down time". In contrast, the work in an institution is consistently demanding, as there is a constant caseload of hundreds of cases ongoing at any given time.
What I personally consider particularly enriching is the multicultural environment. While it is true that international arbitration teams in law firms tend to be diverse, I find that the employee diversity at the ICC is simply unmatched.

4. Within ICC, how is your work structured? Are you involved in specialized groups whether you work on commercial or investment arbitration, are you grouped by geography/languages or do you have the possibility to get involved on nearly every kind of matter?

In the beginning I mentioned that I am part of the MENA and East Mediterranean case management team of the ICC Court's Secretariat. In total, there are 12 case management teams, and they are indeed formed on the basis of geographical regions, composed generally of one Counsel, two to three Deputy Counsel, and an equal number of assistants, all of whom are from the given region and/or speak one or more of the region's languages. The MENA team, being among the larger ones, generally focuses on cases with parties, applicable law, or the place of arbitration in the region. But as usual, every rule has an exception. Thus, for instance, our newly established case management team in Abu Dhabi generally covers UAE disputes, rather than my team. I personally also happen to be an exception confirming the rule: being a speaker of other languages than those of the MENA and East Mediterranean region, I have been a happy member of the MENA team for more than two years. Focusing predominantly on disputes arising out of projects based in the Gulf and certain other Arab countries as well as Israel, I have acquired the necessary knowledge of the region's arbitration laws and their pitfalls.

5. Since January 2021, the new ICC Rules of Arbitration apply to newly initiated arbitration proceedings. Has this change in rules had a big impact on your work, both before and since? What feedback have you had from practitioners on the new rules?

The new ICC Rules reflect the massive worldwide shift from the previous means of communication to the digital, setting the electronic notification of Requests for Arbitration as the default means (always with the possibility that claimant may choose the classic way by courier). Encouraged by the COVID crisis, the parties have generally been content to proceed with email notifications. In cases of lack of Answer from respondent, claimants have sometimes requested that the Secretariat re-notify by courier in certain jurisdictions. As is the case with some other amendments to the ICC Rules, in practice, Requests were being notified electronically already before 2021, on the basis of claimants' requests. We still look forward to seeing the impact of some of the other amendments, such as the higher threshold for the automatic application of Expedited Procedure Provisions, the parties' obligation to disclose third party funding arrangements, the arbitral tribunal's power to exclude new counsel in case of conflict of interests, or the possibility for the ICC Court to deviate from unfair arbitration agreements which may jeopardise the enforceability of the award.

6. Do you have any advice for students and young practitioners starting out in this field?

I would like to take this opportunity to humbly thank each and every person (my colleagues, other arbitration professionals, professors & students, recruitment specialists) that gave advice to me. I will paraphrase three of them.

First, use your language skills: for instance, when you wish to join an arbitration team, research the market and target the teams handling cases involving parties from a country where your language is spoken.

Second, try to acquire knowledge of the law and practice on a national level before stepping into arbitration. This will make you much more comfortable in making certain supporting analyses in international arbitration, pertaining for instance to penal law, administrative law, civil procedure before national courts etc.

Third, never give up: arbitration may be a tough arena and persistence is essential. For instance, if you apply for a position and you are not accepted on the first try, stay positive and keep trying, as nothing is lost yet!

EVENTS OF THE NEXT MONTH

October 6th, TagTime S04E03 – Bart Legum on "Enforcement of ICSID Convention Arbitration Awards : How to Fix a Broken System"

ONLINE

Hosted by Bart Legum, this webinar will discuss the enforcement of ICSID Convention Arbitration Awards.

Website: https://delosdr.org/my-events/tagtime-s04e03-bart-legum-on-enforcement-of-icsid-convention-arbitration-awards-how-to-fix-a-broken-system/

October 8th, ICC YAF : Roundup of Tech Disputes

ONLINE

Webinar addressing the reasons for the increasing use of arbitration in tech-related disputes, the arbitrability of different types of tech-related disputes, and the differences between mainstream commercial disputes and tech-related disputes.

Website: https://2go.iccwbo.org/icc-yaf-roundup-of-tech-disputes.html

October 11th, International Arbitration Summit 2021

HYBRID : the event will take place at Queen Elizabeth II Centre, Broas Sanctuary, Westminster, London SW1P 3EE, but online tickets will be available (only for those based outside of the United Kingdom)

Sixth annual Legal Business International Arbitration Summit, with a focus on the development of arbitration in the Covid era, including the opportunities and challenges facing arbitration centres to adapt to new ways of working.

Website: https://www.legal500.com/events/international-arbitration-summit-2021/

October 12th, SIAC and JAA Kansai Chapter Osaka webinar series : Part 2 from negotiations to constitution of the arbitral tribunal : a practical guide to preparing for arbitration

ONLINE

This webinar will provide practical guidance on drafting an arbitration clause and commencing an arbitration.

Website: https://us02web.zoom.us/webinar/register/WN_8lWT38wSTDazx3agi2RMGQ

October 12th, Launch of the ICC Centre of Entrepreneurship in Buenos Aires

ONLINE

Online event celebrating the launch of the ICC Centre of Entrepreneurship hub in Buenos Aires.

Website: https://2go.iccwbo.org/launch-of-the-icc-centre-of-entrepreneurship-in-buenos-aires.html

October 13th, Portugal as a Seat for International Arbitration

ONLINE

This online event will address the rising importance of Portugal as a Seat for International Arbitration.

Website : https://delosdr.org/global-arbitration-events-calendar/

October 18th, Introduction to the ICC Central Asia Initiative

ONLINE

Webinar presenting the mission of ICC's involvement in the recovery of the Central Asia region.

Website: https://2go.iccwbo.org/introduction-to-the-icc-central-asia-initiative.html

October 21st, ICC Australia : an update on the workings of the ICC Secretariat

ONLINE

In this webinar, ICC Australia will present the updates of ICC Court's and the ICC Commission on Arbitration and ADR workings.

Website: https://2go.iccwbo.org/icc-australia-an-update-on-the-workings-of-the-icc-secretariat.html

October 25th, Launch of the ICC Centre of Entrepreneurship in Jakarta

ONLINE

This online event will present the launch of the ICC Centre of Entrepreneurship hub in Jakarta.

Website: https://2go.iccwbo.org/icc-launch-of-the-centre-of-entrepreneurship-in-jakarta.html

October 26th, Winning Strategy for Asian parties, and In-house counsel

HYBRID : Taipei (Taiwan) and online

Co-hosted by the Taiwan Chapter of Chartered Institute of Arbitrators during the Taiwan Arbitration Week, experts from prestigious law firms will share with the audience their experiences assisting Asian parties with a civil background in international arbitration.

Website: https://2go.iccwbo.org/icc-yaf-winning-strategy-for-asian-parties-and-in-house-counsel.html

October 26th, ICC Croatia Online Conference on Social Responsibility in Marketing

ONLINE

Webinar dedicated to ICC's evolutions on the scope of its Advertising and Marketing Communications Code, which provides a globally applicable self-regulatory framework aimed at protecting consumers.

Website: https://2go.iccwbo.org/icc-croatia-online-conference-on-social-responsibility-in-marketing.html