PARISBABYARBITRATION

BIBERON

PARISARBITRATIONWEEK

SPECIAL EDITION

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TABLE OF CONTENTS

MONDAY

TUESDAY

WEDNESDAY

THURSDAY

FRIDAY

EDITING TEAM

Alexis Choquet

Julian Mestre Penalver

« Dear loyal Biberon readers and newcomers,

This year, as a Media Partner of the Paris Arbitration Week (PAW), we got the opportunity to produce a unique version of our arbitration cases surveil, this time focused on the events held in Paris for the PAW 2021. Indeed, for the first time, 12 webinars were covered by our reporting team (which you can find below). We gathered them and summed them up to create a partial overview of the topics addressed during the week in 8 different law firms, companies, or universities.

We sincerely hope you will enjoy the reading, and don't hesitate to follow us on our social media to receive our monthly newsletter or podcast in the future.

Sincerely yours,

Paris Baby Arbitration »

REPORTING TEAM

Spela Berlizg

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Bénédicte Marquise

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Gökberk Tekin

MONDAY

"NEW TRENDS AND FUTURE DIRECTIONS OF MINING ARBITRATION IN AFRICA"

By Victoria Muntean

During the fourth edition of the Paris Arbitration Week, Reed Smith hosted, together with AfricArb, a bilingual webinar moderated by Clément Fouchard on the topic of arbitration mining disputes in Africa. The discussion featured a list of distinguished speakers whose experience and knowledge within the field extends to Africa and beyond. The talks discussed preventative best practices, State governance in the context of foreign investment, regulation of climate change, environment, and human rights protection.

Most panellists agreed that the mining sector, in particular in the African region, is prone to contentions with the number disputes being comparably higher in and rising. Among the contributing factors are the continuous dynamism of the mining sector, the complexity of operations, associated risks and the high financial stakes.

Furthermore, as these projects are of long duration, complex, and of large scales, they have environmental, social, and human impacts on the communities inhabiting neighbouring areas. The environmental impacts of mining projects, coupled with the lack of proper public consultation as well as the contrast between, on one hand, the generation of wealth and, on the other hand, the socio-economic depravity of surrounding areas lead to tensions, project development delays, suspension of operations, and frequent regulatory change.

Amani Khalifa underlined that given the African States' difficulty in administrating their whole territory and population communities tend to confuse mining companies' obligations with those of the government. They request mining companies to aid them secure access to better life-quality through access to electricity, potable water, and health service. Karifa Condé indicated that in response to these requests mining companies set up in-house departments in the context of their ESG policies. Taking into account the indigenous peoples' grievances on is more and more frequent given the support offered by international NGOs. Certain requests cannot be entertained by mining companies whilst others should and are addressed, thus,enhancing a positive co-existence with local communities.

Paul-Jean Le Cannu highlighted that a phasing out of disputes in the future is unlikely because mining of minerals and metals is vital for the production of machinery and equipment necessary for the transition towards a greener economy and the shift toward renewable energy. Hence, as these minerals and metals are found in abundance in countries across the African continent, it is only intuitive to suggest that more disputes shall shape the future of the African mining sector. Moreover, in the context of investor states disputes, statistics demonstrate - in the sector of extractive industries, including oil and gas, 31% of the entire ICSID case load involve African states. This is the largest of all world regions, followed by South America with 26%. Looking at the distribution of ICSID cases by economic sector, oil and gas and mining cases account for the biggest share when compared to other economic sectors, namely 25%, whereas extractive industries account for 36%.

To this end, Richard Swinburn explained that disputes arising at the upstream part of the industry incidentally lead to mid-and downstream frictions. In addition, commercialisation contracts are prone to disputes arising out of differences across legal regimes. Long-term supply and long-term offtake contracts stand at the intersection between the in-country contracts and the international contracts governed by English, Swiss or a compromise law. As price of minerals such as nickel and copper have been in "constant" fluctuation, one particular trend noted in recent years, specifically in the last 18 months, are the increasing number of commodities pricing related disputes.

The discussion carried forward looking at the contractual context. Salimatou Diallo spoke about the trends related to the negotiation of stabilisation clauses as the main protection measure afforded to mining companies. Disagreements are likely to arise in this respect because investors seek to have wide encompassing stabilisation clauses while the hosting state might push for a narrower scope. Indeed, stabilisation clauses were the rule in older agreements offering protection against all legislative development. At present, these have evolved such that they mostly apply in relation to fiscal matters. Moreover, environmental, and human rights issues are often now excluded from the scope of stabilisation clauses;new laws regulating these matters will apply to the mining companies as well.

From the perspective of the State, Kimbeng Tah uttered that States are disproving of wide stabilisation clauses and try to renegotiate older agreements to this effect. Karifa Condé contended that stabilisation clauses become less extensive in the protection offered to investors and limited to aspect of taxation. However, in the context of taxation, Habibatou Touré, whist offering an overview of how arbitral tribunals have interpreted such clauses, underlinedthat even in the context of taxation, States may be found liable if they try to oblige mining companies to pay an increased amount of royalties by way of taxes which were not effective in the legislation when the contract was made.

The part two of the Oxford Union-style debate addressed two motions.
Firstly, the following motion has been defended, there should be no limit to a States' right to enact tax and customs regulations in the mining sector. Having regard to state sovereignty and its obligation to regulate in the public interest, it has the right to determine taxes and customs in relation to the resources exploited within its jurisdiction. Indeed, this is balanced out by the duty to comply with freely assumed obligations. However, in the absence of commitment from the host State, investors do not have any legitimate expectation that tax regimes will not change.

It was objected, quoting Saint Augustin that the State's ability to tax must respect justice principles failing which its sovereignty shall be devoid. Further, it was submitted that the motion shall fail as it merely does not fit with the practical reality whereby State's willingly limit their power to tax be entering BITs, MITs, and negotiating stabilisation clauses in concessionary agreements with investors.

The second motion was that arbitral tribunal should be able to prevent parallel proceedings before national courts involving the investor. It was argued that this motion stands as the arbitral tribunal power arises from the arbitration agreement by way of which parties choose to denationalise future arising disputes. Moreover, this right is conferred by the principle of severity and illustrated by the Article 22.1 of the ICC Arbitration Rules to take all necessary steps to resolve the disputes expeditiously and effectively.

It was objected in reply that first it is difficult to know whether the proceedings are in fact parallel or not without hearing the issues first. Secondly, the balance of drawbacks plays in favour of allowing parties to access the forum they have chosen based on the jurisdictional rules applied to that forum. Finally, it would be an excessive use of its power if a tribunal could prevent parties from accessing a forum that would otherwise be available because arbitral tribunals and national courts do not have overlapping powers in terms of the available type of redress permitted and substantive protection.

"FAST & FURIOUS: TRENDS IN GLOBAL PROJECTS ARBITRATION"

By Spela Berlizg

On 20 September, Matei Purice (responsible for Freshfields' global projects disputes practice in Continental Europe) and Mariia Puchyna (senior associates at Freshfields in Paris) invited Erin Miller Rankin (global partner and head of the global projects disputes practice at Freshfields), Maria Irene Perruccio (in-house counsel for the international disputes practice at Webuild), Valia Dousiou (senior director in the expert services practice at Kroll) and Veronique Buehrlen (Queen's Counsel at Keating Chambers) to a fast paced discussion on recent trends in global projects arbitration. Panelists were given roughly a minute to answer a series of questions on a variety of current hop topics in global projects arbitration. The session was introduced by Noah Rubins QC (head of Freshfields international arbitration practice group in Paris as well as of their global CIS/Russia dispute resolution practice group).

To kick things off, the four panelists were each asked to name three developments or trends that they have experienced in global projects arbitrations in the past 24 months. The panelists noted an increase in the use of emergency arbitration proceedings, a shift to virtual hearings (also as a result of the COVID-19 pandemic), greater attention being focused on gender diversity and environmental concerns during the process of construction, as well as novel questions arising from a series of landmark insolvencies that affected mega projects around the world.

The next series of questions tackled the impact of the COVID-19 pandemic on global projects disputes. Speakers addressed the issue of the supply chain being affected by the restrictions put in place by governments and their impact on international construction projects. They highlighted that governments responded differently to the pandemic, with some governments stopping all projects while others insisting on progress despite difficulties with the supply chain. One panelist pointed out that she had never seen such a high number of *force majeure* notices being issued by contractors as during the pandemic. It was noted, however, that *force majeure* claims remained very fact specific; and in the context of the COVID-19 pandemic, one difficulty is understanding how force majeure may have affected different parts of the supply chain at different points in time. Considering the diversity of actors in the construction field and therefore the diversity of contracts, the panelists agreed that consolidation of proceedings can be challenging.

The panelists also noticed that the long-term consequence of the pandemic is the increase the use of virtual tools in conducting and attending hearings, which would otherwise be impossible due to governments restrictions. From a contractual point of view, the most relevant impact of the COVID-19 crisis is the pandemic being mentioned in the majority of *force majeure* clauses. In the speakers' experience, virtual hearings can be more tiring and may require shorter hearing days to accommodate participants attending from different time zones. Going forward, certain types of hearings may continue to be held virtually while hearings in more complex global projects may require a hybrid approach.

Panelists continued the discussion by focusing on how arbitral institutions responded to the COVID-19 pandemic and, more generally, what institutions' rules are more commonly used in global projects disputes. One of the speakers provided advice on what she considers most important to keep in mind when negotiating contracts. She noted that the top concern is the "arbitration versus litigation" dilemma, to be considered in light of the jurisdictions at stake. The second question to tackle is the kind of institution to use; and thirdly, need to be taken into account the applicable law and seat of arbitration.

The discussions then tackled the issue of expert and witness evidence in global projects arbitrations. Starting from the recent International Chamber of Commerce report on the accuracy of fact witness evidence in international arbitration, panelists shared their views on tips on maximizing fact witness and expert evidence.

Further questions related to assessing delay, concurrency issues and global claims.

Finally, speakers discussed the topic of diversity. Speakers agreed that the field has made significant progress. However, they believe that more can be done, in particular with regards to inclusion when nominating arbitrators or selecting experts. While institutions can help, counsels also have a role to play when discussing potential appointments with their clients.

TUESDAY

"CONSTRUCTION DELAY, CAUSATION AND EXPERT EVIDENCE"

By Dani Habel

David FALKENSTERN (managing partner at Kroll) and David COYNE (director, delay expert at Kroll) invited Rena SCOTT, partner at Orrick, Herrington & Sutcliffe LLP and Yann SCHNELLER, partner at Cartier Meyniel Schneller, to host a webinar on Tuesday 21, September, during the Paris Arbitration Week 2021 to discuss construction delay, causation and expert evidence.

The webinar was thus divided into three parts: basics of delay, issues of causation and finally the collaboration between experts and lawyers. The panelists then started the discussion by providing a simple guide to construction delays analysis. To this end, an analysis of the construction project will allow the parties to determine the delay and the cause, in order to anticipate damages that may occur.

David COYNE pointed out that there are two ways or methods to determine and analyze delay. The first method is retrospective, and perhaps the best retrospective method is the "as planned as built" method. The second is more prospective, and perhaps the best prospective method is the the "time impact analysis" method. From Mr. COYNE's point of view, the first method is the best at the end of a project which is likely the case in an arbitration. Before explaining it concretely, he added that a good delay analysis needs good records and data from the construction sites. Record keeping is thus strategically important, for the good of all contractors. Concerning the "as planned as built" method, the methodology to be pursued include the selection of the baseline, to find the critical path that will allow to split into windows, to finally measure delay and find its causes. The use of recommended practices like the SCL Delay and Disruption Protocol or the AACE International Forensic Schedule Analysis, allow a better application of this method.

On the other hand, causation involves analyzing whether a close connection exists between the event, here the delay, and the damage. Issues of causation may involve the establishment of the delay that occurred, the sending of documents by clients, the regular feedback from the expert…

Finally, speakers discussed the collaboration between experts and lawyers and how to improve it. If the experts are independent and their duty is to help the tribunal, the lawyers are not independent, they represent their respective parties and they can use the expertise and the reports to the profit of their clients. However, collaboration between them is necessary especially during the preparation for the hearing which is the opening presentation for the experts. Lawyers need to explain to their clients the role of experts to provide their needs. Human interaction through face to face meetings is important. The webinar ended with a sharing of experiences by the lawyers and the experts on their collective work during the proceedings.

WEDNESDAY

"INVESTMENT ARBITRATION & THE GREEN TRANSITION"

By Pushkar Keshavmurthy and Spela Berlizg

On 22 September, as part of the Paris Arbitration Week 2021, Mr. Christopher Moore (Partner, Cleary Gottlieb) introduced this conference by emphasising the much-needed discourse on the significant rise in investment arbitration disputes relating to the green transition as witnessed in the recent past. He further explained that the two sets of panel discussions would address the incentives and risks associated with the 'Green Transition' and the evolution of treaty protection and arbitration landscape.

Panel 1: "The Green Transition: Incentives and Risks"

Moderator: J. Cameron Murphy (Counsel, Cleary Gottlieb)

Panelists: Ana Stanič (Principal, E&A Law); Jamie Donovan (Principal, Monument Economics Group); Kenneth Grant (Managing Director, Berkeley Research Group).

Mr. Murphy moderated the panel discussion, providing a holistic view on the evolving legal and policy framework which concerned stakeholders have to keep in mind. Mr. Murphy then invited Mr. Donovan, Ms. Stanič, and Mr. Grant to share their practical experience and views on risks and incentives for foreign direct investment linked to the green transition.

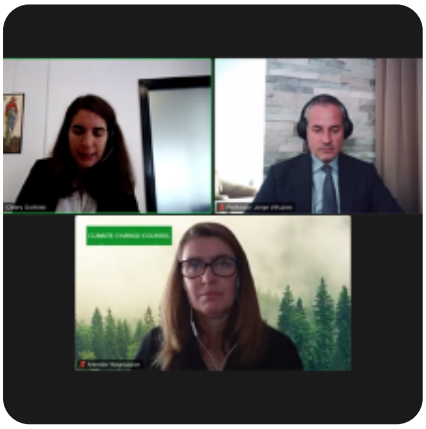
Mr. Donovan began his presentation by demonstrating the acceleration of solar and wind energy generation in the previous two decades. He further displayed the share of world total energy generation for the year 2020, dominated mainly by oil, natural gas, and coal, followed by other sources of energy such as nuclear, hydroelectric, and a small fraction of wind and solar. While explaining the Levelized Cost of Energy (LCOE) for 2011, 2016, and 2020, he remarked that the LCOE of solar energy has drastically decreased by 324% during the period 2011-2020 compared to wind energy (decreased by 78%). However, the LCOE of coal has witnessed a rise of 1% in price in 2020, as in 2011. Mr. Donovan concluded his presentation by analyzing Foreign Direct Investment in electricity generation and its age of investment by region and country wise for both coal & natural gas, and wind and solar.

Ms. Stanič, at the outset, remarked that she would be focusing on policy measures in the European Union (EU) and the United Kingdom (UK) to assess the risks and incentives for a green transition. With various targets set, such as achieving Net-Zero by 2050 and a 25% reduction of Green House Gases by 2030, Ms. Stanič quoted the European Commission's cost estimation of USD 350 Billion per year to highlight financing issues of such a green transition. Since the phase of energy regulations is rapidly changing, Ms. Stanič opined that the regime for investment protection remains unclear for popular sources of energy such as hydrogen and wind. Ms. Stanič further illustrated the unpredictable legal framework for nuclear power in the Netherlands, Spain, and Belgium. Citing the cases involving Slovakia (on the applicability of EU Law), Hungary (AES privatization measures), and Italy (Feed-in Tariff) measures, Ms. Stanič considered the evolving policy landscape. She further raised the regulatory concerns that investors should keep in mind to claim a 'legitimate expectation' and corresponding treaty protections for their investments.

Reiterating the financial risks associated with investing in renewable energy projects, Mr. Grant discussed a broad range of issues that a quantum expert should consider in their assessment of disputes relating to green transition such as: (a) What are the material changes by governments in according treatment to foreign investors; (b) What are the regulatory powers that governments can exercise under respective bilateral and multilateral investment treaties and free-trade agreements containing investment chapters; (c) Whether the measures adopted by host states were foreseeable by foreign investors in the near future; and (d) How to determine the valuation date for disputes arising out a series of acts amounting to a creeping expropriation.

Answering an audience question on the suitability of a separate and distinct legal forum for adjudication of climate change and environmental disputes, Ms. Stanič stated commercial arbitration tribunals seated outside the EU are comparatively better than the investment arbitration tribunals which have been overused as a mechanism in the recent past. Afterward, addressing the question on stranded assets in the fossil fuel sector, Mr. Donovan proposed various suggestions for divestments and conversions, and Mr. Grant raised the consideration of internal costs while exiting such sectors by established foreign investments. Mr. Murphy concluded the first panel discussion by pointing out various incentives that have emerged in the process of the green transition.

Panel 2: "Evolution of Treaty Protection and Arbitration Landscape"



Moderator: Laurie Achtouk-Spivak (Counsel, Cleary Gottlieb)

Panelists: Annette Magnusson (Co-founder, Climate Change Counsel); Prof. Jorge Viñuales (Professor of Law and Environmental Policy, University of Cambridge)

Ms. Achtouk-Spivak introduced the panel discussion by noting that ‘climate protection' is a new driver of change in international law, where the development of international law in the 20th century was largely driven by the quest for peace and prosperity. She distinguished the old generation treaties and the new generation treaties for environmental disputes. She further noted that in the latter category of treaties, most of them have express language in carve-out clauses and limitations to the substantive standards of treatment. Highlighting the bulk of Energy Charter Treaty claims in the renewable energy sector, Ms. Achtouk-Spivak then invited Ms. Annette Magnusson and Prof. Jorge Viñuales to share their practical experience and views on the evolution of treaty protection and arbitration landscape.

Ms. Magnusson began by briefly mentioning the three-part essay “The Secret Diary of a Sustainable Investor” authored by Tariq Fancy, BlackRock’s former sustainable investing chief. In her opinion, he makes a convincing case in arguing that engagement with ESG criteria will not take us where we need to be. The author thinks we need more regulation and compares the restrictions and rules imposed by the governments due to the spread of COVID-19 with the contrasting lack of extensive and strict rules to help tackle the issue of climate change.

Ms. Magnusson quotes an excerpt from Mr. Fancy’s essay: “if we can listen to science and change our behavior in order to flatten the curve of something that is killing us quickly, why can’t we listen to science when it tells us to change our behavior to flatten the curve of something that is killing us slowly?

Ms. Magnusson further explained that treaties alone imposing obligations to help fight climate change are not enough; governments must also take action. According to her, the concept of environmental carve-out clauses in modern treaties is a policy space that the State traditionally reserves on environmental protection in their international treaties. She further noted she is skeptical of such solutions. Ms. Magnusson regards ESG investment as a dangerous placebo and worries it steers focus from what really needs to happen. In fact, to her, the risk of not going further than environmental carve-outs is that governments might not feel the need to go further in terms of their own regulation. As a matter of fact, the iron law of climate policy says that when there is a confrontation between environmental regulation and the market economy, the market economy wins every time. Ms. Magnusson believes this is where the governments could make a big difference. In her opinion, policy space created in favor of the government appears quite empty, therefore, the legal framework is extremely unclear and is a complex picture.

Illustrating the examples of more forward-looking approaches to treaty drafting to address this issue other than policy carve-outs, Ms. Magnusson referred to the recently concluded FTA between the EU and the UK in which one can find articles addressing environmental and climate commitments based on the UNFCCC and the Paris Climate Agreement, where the parties explicitly recognize the importance of combating climate change. It remains to be seen how the treaty transposes in practice, but she thinks it contains forward-looking and interesting language. Another good practice example listed by Ms. Magnusson is the recent Model BIT of the Netherlands, which in Article 6 focuses explicitly on sustainable investment.

While assessing the Energy Charter Treaty as a friend or as a foe for the energy transition, Ms. Magnusson explained that the governing law provision of Article 26, which provides for international law obligations as the substantive law, should be invoked to its fullest potential. She concluded her remarks by reaffirming the previous panel's point that even though the world has seen significant investment in renewable energies in the last five years, that needs to more than double to meet the goals.

Prof. Viñuales continued with the discussion, addressing how the treaty toolbox works in practice and how it will impact the arbitration landscape. He believes the energy system is changing, but the question is, is the law? Part of the answer is yes, there are plenty of environmental clauses incorporated into international investment treaties. He added that there was a peak in 2008, but most FTAs have some reference to the environment since then. Nevertheless, most treaties in force on the whole still do not refer to the environment, including climate change.

Prof. Viñuales explains the legal and regulatory framework for environmental issues is evolving at different speeds in many dimensions:

1. Reinterpreting classic concepts of investment law – considering legitimate expectations claims under FTAs require very fact-sensitive inquiries, and Mr. Viñuales suggests three parameters that have to be met: First, it is no longer possible to argue that one is not aware of the risk that the regulatory landscape would change, and the risk is part of one's commercial operation. Secondly, there must be some specific commitment by the governments or regulators. Thirdly, the narrative of transition has to be established. Using such parameters does not exclude the risk but minimizes the risks of what might happen if one is involved in an investment treaty dispute.
2. Prof. Viñuales pointed out that environmental clauses in their respective treaties have been invoked, or issues regarding environmental protections have been raised in the past investment arbitration cases, and they are starting to bite again now. He then illustrates by categorizing the three generations of cases that refer to environmental issues such as: S.D. Myers v. Canada (2002), Al Tamimi v. Oman (2015), Spence International Investments et al. v. Costa Rica (2017), Bear Creek Mining Corporation v. Peru (2017), Infinito Gold v. Costa Rica (2021), and Eco Oro v. Colombia (2021). Prof. Viñuales then explained the different types of clauses, such as the general reservation on regulation and the exception clauses. He opined that such clauses could be invoked either to exclude jurisdiction (as was tried but failed in Eco Oro) or on the level of liability, at the primary level of the investment standard or at the secondary level of the defense, justifying the measures on grounds such as 'necessity'. He further explained Article XX of GATT-like exceptions are being pressed into service in investment arbitration disputes.
3. Proactive 'Climate Change Litigations' are emerging. For example, in the Milieudefensie v. Royal Dutch Shell case, the Hague District Court (26 May 2021), ordered for compulsory worldwide reductions of CO2 emissions by 45% by 2030 (compared to 2019 levels), a ruling which has been viewed as judicial activism for effective policymaking.

Answering an audience question on how the panelists see the current treaty framework would play out in the context of the states' right to regulate, Ms. Magnusson answers that she does not see the State's right to regulate as disappearing anytime soon. Prof. Viñuales explains that we have seen cases in which the environmental clauses in investment treaties have backfired. However, customary international law, from where powers of the State are derived and such sovereign rights are invoked, still holds significance in investment law. Concurring with Ms. Achtouk-Spivak, the panelists concluded the discussion with their optimistic view that the investment treaties can also effectively foster the green transition in the near future.

THURSDAY

"VIEWS FROM THE EAST: UPDATES AND TRENDS FROM RUSSIAN AND CIS REGION RELATED ARBITRATION"

By Gökberk Tekin

On 23 September 2021, Fieldfisher and the Russian and CIS (Commonwealth of Independent States) Arbitration Network (RCAN) hosted the Panel "Views from the East: Updates and trends from Russian and CIS region related arbitration" as part of Paris Arbitration Week 2021. Topics discussed in the panel included specific regional arbitral developments, arbitration-related legislative changes, recent experiences of arbitrations in the region, and the effect of Covid. The presentation of each speaker was followed by the 1-minute comments and questions of the other panelists. Moderated by Dan Hayward (Partner at Fieldfisher LLP). Noah Rubins QC (Partner at Freshfields Bruckhaus Deringer LLP), Laurence Ponty (Counsel at Archipel), Evgeniya Rubinina (Partner at Enyo Law LLP), Artem Doudko (Partner at Osborne Clarke LLP), Stephanie Balsys (Managing Associate at Mishcon de Reya LLP) and RCAN Secretary Tomas Vail (Legal Counsel and Arbitrator at Vail Dispute Resolution) shared their evaluations on the updates and trends from Russian and CIS region related arbitration.

Firstly, Noah Rubins QC presented his experience regarding the voluntary compliance with investor treaty awards in the CIS region and particularly in Ukraine. Beginning his speech with the importance of the enforcement process for the parties and funders, Mr. Rubins pointed out that, unlike some other CIS countries, leaving some exceptions aside, Ukraine complies with the investment treaty awards after the confirmation made before Ukrainian courts, which are described as a high-speed and low-cost process. Concluding with the possible reasons for the situation, Mr. Rubins noted that the peculiar situation of the market may have influenced the Ukrainian Government to comply with the treaty awards.

Following that, Mr. Tomas Vail summarized the case of Stati and others v. Kazakhstan, which is a 500 million-dollar SCC (Stockholm Chamber of Commerce) award issued based on the Energy Charter Treaty. After an overview of the case and relevant facts, Mr. Vail emphasized some points in the enforcement process bringing novelty to the investment treaty arbitration. In this context, after pointing out that the enforcement efforts have been subject to the supervision of various courts like Sweden, Netherlands, UK, and Belgium, Mr. Vail emphasized the decision of the Belgian Court of Appeals dated June 29, 2021, upholding the attachment of 542 million dollars deposited in Belgium as Kazakhstan's state assets. Explaining the reasoning behind the decision, Mr. Vail noted that the Court found that the said assets were a part of a mechanism established by Kazakhstan to hide its assets beyond the reach of the award creditors. As the second novelty brought to the field, Mr. Vail provided information regarding the second claim issued by Stati Investors based on not fulfilling the award itself, constituting a breach of the treaty itself.

Furthermore, Ms. Stephanie Balsys elaborated on her experience regarding the Astana International Financial Centre (AIFC) which contains a separate and independent court from the judicial system of the Republic of Kazakhstan: the AIFC Court. Ms. Balsys noted that being established in January 2018, the court has been administering 712 cases and that the period required for the resolution of the disputes is 6 months. Ms. Balsys pointed out that parties from over 16 countries have resorted to the AIF Court so far including parties from Russia, Turkey, Azerbaijan, India, and China.

Emphasizing the facilities and the well-structured response to the COVID-19 pandemic with the help of online and hybrid proceedings, along with the trend in the region to include AIFC Court clauses to the contracts, Ms. Balsys concluded that the AIFC Court should be followed for future developments.

Later, Ms. Evgeniya Rubinina focused on the arbitration law of the Russian Federation. More specifically, Ms. Rubinina elaborated on the interpretation of amendments in the Russian Arbitrage Law dated 19 June 2020, allowing the sanctioned Russian entities to avoid arbitration and bring their claims before Russian Courts. Noting that the legislation itself is very unique and creates certain concerns in the arbitration community, Ms. Rubinina noted that the courts have interpreted the said legislation fairly restrictively. Emphasizing the decision of the Russian Supreme Court in the Uraltransmash Case, she concluded in the presentation that the said mechanism is likely to be used in cases in which the sanctions do prevent sanctioned Russian parties from participating in proceedings. In this context, Ms. Rubinia highlighted that the ICC, LCIA, and SCC have confirmed that sanctions do not prevent parties from participating in proceedings and concluded that she is hopeful about the developments in this regard.

Moreover, Mr. Artem Doudko shared his views on the remote hearings that emerged from the COVID-19 pandemic process. Mr. Doudko noted that the COVID-19 pandemic gave the international community the chance to test the system which as a result created more effective proceedings for certain disputes. Elaborating on the need for efficiency, Mr. Doudko noted that high costs and long periods required by arbitral proceedings have created concerns for the parties. According to Mr. Doudko, emphasizing that it is possible to have more efficient proceedings, remote hearing is a good example of tailoring more efficient procedures. Later Mr. Doudko noted that in any case the procedures should be shaped in accordance with the dispute and while for larger claims remote hearings may pose some problems, for small claims remote hearings can help to create a more efficient framework. Mr. Doucko concluded his presentation by sharing his view that remote hearings are here to stay to make the procedure fit better for the dispute in question.

Lastly, Ms. Laurence Ponty shared her views on the developments that followed the 2016 arbitration reforms in Russia. More specifically, Ms. Ponty provided information regarding the new licensing system introduced by the amendments. According to said system, arbitral institutions willing to administer the arbitration in Russia, whether Russian or foreign, should obtain the “Permanent Arbitral Institution” license. She provided information that, recently, two major arbitration centers, namely the International Court of Arbitration of the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC) have been granted the permanent arbitral institution status by the Ministry of Justice, after the Hong Kong International Arbitration Centre (HKIAC) and Vienna International Arbitration Centre (VIAC) and five Russian institutions. Concluding her presentation, Ms. Ponty pointed out the concerns of the Russian Federation and the impacts of the "Permanent Arbitral Institution” mechanism for the parties and arbitration practitioners.

The session ended with the panelists' opinion on the Russian-speaking arbitrators' list published by "Russian Arbitrators Guide” and closing remarks of all speakers.

"ARBITRATION TRENDS POST COVID-19: QUEEN MARY UNIVERSITY/WHITE & CASE SURVEY FINDINGS"

By Dani Habel

Norah GALLAGHER (QMUL) and Professor Julian LEW (QMUL, Twenty Essex) invited Dr. Maria FANOU (QMUL), Dr. Rukia BARUTI (African Arbitration Association), Geraldine FISCHER (ICSID), and Elizabeth OGER-GROSS (White & Case), on Thursday 23, September, during the Paris Arbitration Week 2021, to discuss the key findings of QMUL's twelfth major empirical International Arbitration Survey.

Norah GALLAGHER introduced the webinar by saying that arbitration, in general, as a dispute resolution method, changes and adapts according to the demands of its end users. The choice of the survey name in 2020-21 "International Arbitration Survey: Adapting Arbitration to a Changing World" given the rapid changes demanded by Covid was prophetic... Professor Julian LEW emphasized that this webinar was an opportunity to share ideas. He pointed out that arbitration is an international comparative system with different parties coming from different cultures, languages, systems… Party autonomy is central to the arbitration process. The aim of the empirical studies is to identify the preferences of the arbitration community and what developments might improve the arbitral process in the future. Then, Dr. Maria FANOU's speech set out the key findings of the 2021 Survey following the three segments in which the webinar was divided: current practices of arbitration around the world, the question of diversity and the use of technology.

Concerning the current practices, the aim was to identify the user's preferences in reference to several issues, including the preferred dispute resolution method for cross borders disputes, key choices (such as the choice of the seat of arbitration) and the potential adaptation that could influence these preferences. According to the survey, 90% of respondents said that international arbitration is the most preferred dispute resolution method (either on a stand-alone basis (31%) or in conjunction with ADR (59%)). The survey included a set of questions regarding for example the preferred seat, rules, institutions, as well as adaptations that could make respondents change their preferences and choose another resolution method or another arbitral institution/rules… Among these adaptations, responses mentioned the impartiality and neutrality of the local system, the administrative and logistical support, cybersecurity and commitment to a more diverse pool of arbitrators.

On the diversity topic the speakers discussed the current concerns in arbitration practice. Dr. Rukia BARUTI said that the survey results showed a growth in gender diversity compared to previous years. However, more could be done to increase the geographical representation of arbitral tribunals as this did not see an improvement. Institutions have done much to increase and encourage the promotion of diversity. However, the number of institutional appointments is limited because nominations are mostly made by the parties. Institutions can make proposals of new arbitrators but these must ultimately be agreed to by the parties. It is therefore necessary that all actors in an arbitration play their role to increase diversity. The parties so concerned may be the counsel (including in-house), their clients, arbitral institutions, arbitrators and States.

The panel ended with a discussion of some of the challenges faced by the arbitration community, specifically the impact of COVID that led arbitration to shift to a virtual format. This transition created opportunities like access for all to international events and discussions and an acceleration in the proceedings. However, issues and difficulties were numerous including quality of internet connection, challenges of building relationships remotely for aspiring arbitrators, zoom fatigue, cross examination and multiple time zones. Overall, the panel experience with technology had been positive and it seems that virtual hearings will remain at least for procedural matters in the future.

" FOCUS ON THE CLIENT: IN-HOUSE COUNSEL'S ROLE AND EXPECTATIONS FROM THE ARBITRAL PROCESS"

By Bénédicte Marquise

On Thursday, September 23rd, 2021, Mayer Brown hosted the Paris Arbitration Week event entitled "Focus on the client: In-house counsel's role and expectations from the arbitral process". Dany Khayat, Partner at the Paris office, and Luiz Aboim, Partner at the London office, moderated the conference. Members of the panel were Besma Boumaza (General Counsel at Accor), Patricia Garcia (Senior Legal Counsel at VINCI Airports), Alma Forgó (Head of Arbitration at Airbus) and Charlotte Gaussel (Head of Litigation and Arbitration at Veolia Environnement).

Starting with a general approach to the conference topic, the speakers discussed their role with regard to arbitration and how they manage such process. In this respect, the role varies depending on the company at stake. Indeed, Mrs Garcia explained that, as a project lawyer, her role was to follow projects from beginning to end, and thus taking an interest in arbitration if such litigation arises. Mrs Boumaza further stated that her role was less dedicated to litigation than other speakers, as there is no litigation department at Accor, focusing then on the field and establishing strategy for litigation if needed. Moreover, Mrs Gaussel pointed out that her department deals with different types of disputes, international arbitration as well as criminal and civil procedures at a national level. Contrarily to the other speakers, Mrs Forgó's role is focused on arbitration. She explained that some of the work relating to arbitral proceedings can be internalized, which allows the company to save expenses and costs. However, she analyzed that the workload relating to arbitration can vary depending on how many proceedings are pending. She thus emphasized the importance of flexibility for in-house counsel.

The speakers further developed the love-hate relationship between companies and arbitration, which is caused, according to Mrs Boumaza, by the reasons why companies choose to go to arbitration. As this decision is a strategic choice, companies have to consider both the benefits and downfalls of the process. Moreover, she analysed that the increase in the use of arbitration can be explained by the fact that arbitration is better known, leading to a better understanding and simplification of the mechanisms. She added that confidentiality is an essential quality. The speakers further discussed other benefits of arbitration, such as the specificity of this process to deal with international disputes and the expertise of the arbitrators alongside their independence and impartiality.

Furthermore, costs were stated as a useful dissuasive element to start an arbitration. Moreover, the length of the proceedings appeared as an important downfall. Mrs Forgó pointed out that the parties might also cause high costs and significant delays if they work with expensive counsels and arbitrators and as they take their time to find the better outcome to the dispute.

Then the speakers addressed the use of alternative dispute resolution mechanisms such as mediation. Mrs Bouzama pointed out her systematic use of a mediation clause to avoid litigation, noting nonetheless that this system requires strong will from the parties involved to be effective. However, the other speakers disagreed with the systematic use of mediation, considering that mediation involves drawbacks such as the increase proceedings' length, and that it can be pointless if the dispute is already too advanced. Nevertheless, mediation as a tool to reduce the number of claims in order to make arbitration more straightforward created a consensus among the panelists. Furthermore, Mrs Forgó indicated that mediation could be used at any stage of the process to settle.

Then the discussion turned to the internal process required for a company when it considers starting an arbitration. The panelists analyzed that before filing a claim, the first aspect to be acknowledged is the financial aspect. Secondly, as arbitration is also about defending the company's position and sending messages to the competitors, it has reputational implications, and thus public relations aspects have to be considered. Mrs Gaussel pointed out that a balance has to be found between confidentiality and disclosing the arbitration. Hence, different other departments are consulted before the competent body makes a decision.

The speakers also examined the role of institutions during the proceedings. Having worked at the International Chamber of Commerce, Mrs Forgó argued that institutions can play an important role, as they help communicate with the tribunal, raise issues if needed, and make the enforcement process easier. Moreover, institutions can be helpful to have an overview of cost and time. Panelists noted that institutions had proven to be adaptive, indicating that institutional arbitration was at times safer than ad hoc proceedings.

Furthermore, the question of the choice of the arbitrators was raised, whether in-house counsels play a role in this choice or whether the choice lies with outside counsels. Panelists agreed that even though they rely on external counsels' advice, in-house counsels' opinions are fundamental in choosing the arbitrators. They contact the arbitrators to know their availability, experience, and work methods. Speakers also approved the practice of interviewing potential arbitrators, which has significantly increased in the last 15 years, as highlighted by Dany Khayat.

As a conclusive point, panelists gave their view on choosing outside counsel, agreeing that selecting an outside counsel with aligned values with the company's was the best way to do so, advising to select the right lawyer for the right case.

« ENERGY REFORMS IN LATIN AMERICA:
AN IMPACT FOR ARBITRATION? »

By Juan Diego Niño-Vargas and Tuğçe Ergüden

Partners Laurent GOUIFFÈS and Thomas KENDRA, along with Counsels Melissa ORDONEZ and Gauthier VANNIEUWENHUYSE, invited Dr. Gloria ALVAREZ, Professor at the University of Aberdeen, Guillermo PETRICIOLI ALFARO, Legal Manager for TC Energy, Christopher GONCALVES, Chair and Managing Director of BRG's Energy and Climate practice, and Omar GUERRERO RODRIGUEZ, Managing Partner of Hogan Lovells' office in Mexico City, on Thursday 23 September, as part of Paris Arbitration Week 2021, to share their practical experience and expertise on energy reforms and international arbitration in Latin America. The event was moderated by Melissa ORDONEZ, Counsel in Hogan Lovells' Paris office, with particular expertise in investment arbitration and energy disputes, who has recently launched Hogan Lovells' Paris-LatAm Desk, dedicated to assisting client in the region.

Melissa ORDONEZ opened the session by pointing to recent changes in the energy sector brought about by environmental concerns and the more global transition towards cleaner energy, and what this may entail for Latin America, a continent abundant in natural resources, and raised the question of these changes' potential impact on disputes in the region.

The four panellists stressed that even though Latin America is wealthy in energy resources, it is currently facing, as the rest of the world, the challenge of higher demand in energy following the recovery of industrial activities after the Covid-19 shutdown. One of the biggest challenges for Latin America is therefore having to enter the international market to buy energy (gas, for example) at European or Asian prices. This situation seems to illustrate perfectly the existing tension between the will of several governments in the region to transition towards alternative sources of energy while still relying heavily on fossil energies. Dr. Gloria ALVAREZ gave an example of this by providing an overview of the difficulties Brazil is facing to meet the country's electricity demand. Brazil relies on hydropower energy, which is being affected by a drought: the country consequently has to buy gas at high rates in the international market. Dr ALVAREZ also pointed out, in contrast, the encouraging projects of Chile on hydrogen production with the goal of not only meeting 100% of its own energy needs but also to start selling it to its neighbors.

Speakers further highlighted the various energy reforms in the region. For almost twenty years many countries in the region such as Argentina, Chile, Brazil and Mexico, have been reforming their energy regulatory framework by opening the market to foreign investors and focusing on environmental issues such as energy efficiency, renewable energy, and methane abatement. However, some governments appear to be trying to change this trend by prioritizing State-owned companies and enhancing direct State investment. Mr. Christopher GONCALVES gave an overview of the recently proposed policies in Mexico, and pointed to some of the key issues to be taken into account when building counterfactual scenarios for quantum analyses in investment arbitration cases.

Both Mr. Omar GUERRERO RODRIGUEZ and Mr. Guillermo PETRICIOLI ALFARO shared their experience in litigating cases in Latin America and mentioned specific factors that might impact arbitration proceedings relating to the energy sector. Mr. GUERRERO RODRIGUEZ mentioned the use of "amparo" proceedings in Mexico, a legal mechanism enabling the challenge of specific decisions on constitutional grounds. This type of remedy may also be found in other countries of the region (such as Colombia) and may prove to be a disrupting factor in arbitration proceedings. In addition, Mr. GUERRERO RODRIGUEZ provided a brief overview of relevant bilateral investment treaties ("BITs") and current arbitral cases. He mentioned that there are approximately 30 countries in the Latin America and that 16 of them are parties to the ICSID Convention. He further stated that there are around 600 BITs in the region, which is a significant number and provides reassurance to foreign investors. The treaties provide broad protections such as fair and equitable treatment, the right to compensation, and protection against direct and indirect expropriation. The group also noted that in Latin America, investment arbitration is very active, with Argentina involved in more than 60 cases and Venezuela in more than 50 cases, numbers that are comparatively very large. Similarly, Mr. PETRICIOLI ALFARO gave his insights on the difficulties faced by energy projects that have an impact on indigenous communities, and mentioned that over the last 10 years, 3 Mexican federated States have enacted indigenous consultation laws.

Panellists further mentioned that one of the problems in renewable energy cases is the unclarity of investment protection rights definitions. For instance, there may be ambiguity as to when a FET clause will apply or as to what it means to give a "specific" commitment to an investor.

Panellists finally concluded that while several Latin American countries have initiated reforms to transition towards cleaner sources of energy following the Paris Agreement on Climate Change, the region may continue to rely on fossil energy to face the high energetic demands for the years to come.

FRIDAY

"CONSTRUCTION DISPUTES IN THE EASTERN MEDITERRANEAN REGION"

By Gökberk Tekin

On 24 September 2021, Kroll hosted the "Construction Disputes in the Eastern Mediterranean Region" Panel as part of Paris Arbitration Week. Moderated by Mehmet Bircan of Kroll; Valentine Chessa of Castaldi Partners (Paris, France), Alexander Marcopoulos of Shearman & Sterling LLP (Paris, France), Louk Korovesis of Kroll (Paris, France) and Valia Dousiouof Kroll (London, UK) shared their insights regarding the subject.

Firstly, Mr. Louk Korovesis focused on the lessons learned from the second edition of Society of Construction (SCL) Law Delay and Disruption Protocol ('The Protocol'). In his speech, Mr. Korovesis firstly touched upon the background of the Protocol and provided information on the content and legal nature of the Protocol. Following that Mr. Korovesis emphasized the differences between the Protocol and the reality of the Eastern Mediterranean Region under five main points. In this context, it has been pointed out that:

- Although record-keeping itself and agreeing on the types and details of the records to be kept are promoted by the Protocol; in reality, in most cases, these records are not timely kept, are of poor quality, and sometimes don't even exist, which leads to conflicts between the parties.
- Despite the fact that the Protocol encourages strict compliance with the contract, in reality, it is not uncommon to see that the absence of a dedicated contract manager or legal support, the use of bespoke contracts, the inclusion of clauses open to interpretation, and the verbal agreements cause problems in this regard.
- Although the Protocol encourages otherwise, the parties often fail to resolve the disputes in a timely manner, for example as close as possible to the event, and that creates disputes.
- Contrary to the Protocol, in some cases, parties file global claims which are rooted in poor record-keeping and lead to the disruption of the relationship between the parties.
- The Protocol says to be cautious about disruption claims, since such claims require a retrospective analysis and an important amount of data which is not available in most cases. Without the proper data and the fulfillment of some other factors, disruption claims are not likely to get accepted.

Following Mr. Korovesis, Ms. Valentine Chessa evaluated the application of the good faith principle in civil law jurisdictions. After an introduction regarding the importance of the principle, Ms. Chessa emphasized the key role played by the principle in Eastern Mediterranean Region, in which most countries are ruled by civil law. According to Ms. Chessa, the good faith principle bears importance for the pre-contractual negotiations, the performance, execution and termination of the the contract and serves as an important tool in interpreting the contractual provisions, such as the extension of time, and the mitigation clauses. Ms. Chessa concluded her presentation by noting that despite its importance, the good faith principle should not be regarded as a magic formula or a gap filing instrument per se.

Later, the third speaker, Mr. Alexander Marcopoulos shared his observations and views regarding the impacts and risks of climate change and the carbon emissions for construction projects from a legal perspective. Firstly, to provide the necessary background Mr. Marcopoulos pointed out that rapid climate change (even more rapid in the East Mediterranean region) has important implications on the legal and regulatory regime. Following that Mr. Marcopoulos emphasized the effects regarding the schedule risks and changes in law among others. In this context, he pointed out that changes in the law may include precautions including the requirements to change the design/execution of the projects, amendments in licensing regime, and these precautions taken due to the climate change may even result in canceling the project. As a second impact, Mr. Marcopoulos listed the climate change-related events like drought, fires, heatwaves; which may directly affect the ongoing and future projects. Lastly, while concluding his presentation, Mr. Marcopoulos pointed out the importance of due diligence, drafting the contracts by taking climate change into account, and envisioning feasible solutions for preventing the adverse effects of climate change on the construction sector in the East Mediterranean region.

Ms. Valia Dousiou elaborated on the effects of COVID-19 pandemic to the construction sector in the East Mediterranean region. Ms. Dousiou began by noting the unprecedented impacts of COVID-19 on our lives as well as the construction sector. However, she also pointed out that the East Mediterranean region maintained the construction activities albeit with increased costs due to the supply chain problems and increased raw material prices. Furthermore, according to the speaker, the construction sector in the region was also affected by the hardships in executing the safety measures and frequent COVID-19 incidents that happened on the site. As a conclusive remark, Ms. Dousiou pointed out that a collaborative approach is key for resolving the disputes stemming from the delays caused by the COVID-19 pandemic.

The session ended with a Q&A session.

"ECT MODERNISATION - QUOI DE NEUF?"

By Elisa Goubeau

As part of the 2021 Paris Arbitration Week edition, EFILA and ESSEC Business School co-organized a webinar. They invited Amy FREY (Partner, king & spalding), Stephanie COLLINS (Associate Attorney, gibson dunn), Alexander G. LEVENTHAL (Of Counsel, quinn emanuel), Prof. Veronika KOROM (ESSEC), and Prof. Nikos LAVRANOS (EFILA) to shed some light on the current ECT modernization process.

Prof. Nikos LAVARANOS opened the panel discussion describing the current state of play with two recent developments in the field. First, Spain receiving its 50th claim brought by renewable energy investors marks the frequency under which the ECT is being used. Secondly, the recent and groundbreaking Komstroy judgment rendered by the CJEU extending 2018 Achmea decision not only bans intra-european investor-state arbitration but it is now certain that this ban will apply across the world, beyond the European realm.

Alexander G. LEVENTHAL delivered introducing remarks on how the ECT, which was perceived as a proud moment of history, is now in a bygone era. He recalled that the ECT initially started as a European initiative as European investors needed help to capitalize after the collapse of the Soviet Union. When negotiated in 1991, there was an urgent need to create a forum for disputes against States outside their national courts in the energy sector. If the ECT achieved great success encouraging European markets to be more integrated, the ECT has faced a certain backlash. Allegations were made that it restricts States' ability to regulate and that fossil fuels companies are favored. It follows that the ECT Contracting Parties embarked on the journey of modernization of the treaty, starting the first round of negotiations in July 2020.

The speakers then proceeded to answer the question: 'Why modernizing the ECT?'. Amy FREY mentioned that making the ECT greener as part of the energy transition and transforming the ECT ISDS mechanism were two separate goals to achieve. One should ask whether the negotiations did not miss an opportunity to include all Contracting Parties at the time of drafting. She further commented that broader objectives to actually achieve global climate goals could have been more easily included if the potentially competing objective of changing how investments are protected was not also included. In her opinion, although some improvements are possible, the current system operates well, as demonstrated by the ECT caseload. That is why it is not necessarily imperative to push for overall reform.

Stephanie COLLINS then explained the relevance of renewable energy to the ECT modernization process and advised looking at the flood of claims against Spain. Most EU proposals include the outcome of renewable cases. If climate change was not a widely recognized issue when the ECT was signed, there is now a broad consensus to transition by greening the ECT. This goes inevitably through the mobilization of green investments.

The panelists then turned to the relevance of the ECT within an intra-european context. Following the Komstroy decision, ECT intra-european ISDS may no be longer be available despite EU Member States representing half of the ECT membership. The panelists noticed that the position taken by the EU to support modernization comes from the fact that it is the best way for the EU to achieve its objective to terminate intra-european ISDS. The aim of the EU is not necessarily to incentivize intra-european investment as there exist other ways enshrined in European law, although the panelists commented that in reality, not all EU states are considered in the same way among investors. EU law also allows the EU to stimulate investment to meet Paris Agreement objectives. Some speakers raised their concerns about some EU proposals introducing the concept of state aid as a characteristic to determine whether an investment is lawful or not. Such a feature could lead other ECT Contracting Parties to worry as they likely are unfamiliar with European state aid, which itself is not always clear.

The panel agreed that, in light of EU developments, investors would be prudent to consider places to invest outside of the EU or structure their EU investments through non-EU companies, which led to the topic of Brexit. If it is, for now, advisable for investors to structure their investments outside of the EU, the speakers highlighted that those recent developments might benefit forums like the United Kingdom or Switzerland as an apparent result of Komstroy judgment. Prof. Nikos LAVRANOS commented that if the EU foresees in either removing from the ECT or creating an investment court system, in the long term, this could have a dampening effect. He imagined the scenario in which the foreign investors will not be satisfied with the new dispute settlement system, reducing the overall chances of EU Member States to face a claim brought by foreign investors.

The panelists focused more in detail on some of the EU proposals, such as changing definitions to include more renewable energy while excluding fossil fuels or an explicit provision on the right to regulate for States in light of climate change objectives. If such features are already found in treaties like CETA, EU-Singapore or EU-Vietnam FTAs, the speakers preconized that States should not abuse such provisions to deprive investors of all of their benefits, stressing the importance for a balance to be struck.

Prof. Nikos LAVRANOS shared that if the global community agrees that climate change requires a different standard to apply, a risk runs that the qualification of such legal standard will be setting a precedent in international law. One should ask whether it is imperative and desirable to have a different standard because the stakes are higher. Due to the emergency of a green transition, the speakers highlighted that some proposals may be long to agree on wording, so it would be more advisable to focus on what could be easily achieved. Given that investment treaty jurisprudence, as it is, already protects a state's right to regulate except when undermining specific commitments given to investors, it is not evidence that such language is necessary in a new ECT.

The discussion continued on the hypothesis for the EU to include a protocol with a facilitation language as a more feasible solution instead of reforming the ECT radically. Since the EU already has a mandate agreed by its Member States to conclude such an agreement, this option would match its current practice to negotiate facilitation agreements with countries like Angola.

The speakers also recalled that a switch occurred since EU Member States did not always take the side of believing that the ECT would not apply to intra-european ISDS. For instance, States like France or Germany initially defended their investors as their companies were operating abroad. It is important to note that the system provided by the ECT is not one-sided and is efficient. According to some panelists, fearing the risk of being sued during the energy transition is only a temporary problem, and promoting the ECT greening calls for identifying specifically in what it would consist of. Once the energy transition is complete – and probably in order to achieve that goal – investors will need to know that their green energy investments will be protected.

Prof. Veronika KOROM offered concluding remarks. She shared her disappointment as for the attitude of Member States to primarily think about their fear of acting as the Respondent States. In contrast, they should also see themselves as promoters of investments and their investors.

"CONNECTING EUROPE TO THE MIDDLE EAST: THE POST-COVID DISPUTE RESOLUTION ERA."
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By Elisa Goubeau

On the occasion of the 2021 Paris Arbitration Week, as well as the opening of OBEID & PARTNERS' new office in Paris, Prof. Dr. Nayla COMAIR-OBEID (Partner at OBEID & PARTNERS) moderated a panel composed of Paula HODGES QC (Head of Global Arbitration Practice at Herbert Smiths Freehills), Samaa HARIDI (Partner at Hogan Lovells), Constantine PARTASIDES QC (Partner at Three Crowns) and Gerhardt WILL (Senior Counsel at Obeid & Partners). The purpose of the discussion was the current and future opportunities for connection between Europe and the Middle East through international arbitration.

Prof. Dr Nayla COMAIR-OBEID gave some introducing remarks by welcoming the significant and positive development in Middle East States' arbitration legislations while noting the improvement still necessary to achieve a high degree of predictability and certainty for arbitration users. She explained that European arbitration legal frameworks and world-class arbitration institutions provided crucial support in transferring knowledge.

1. Overview of the practice of international arbitration in the Middle East

To begin with, the speakers gave an overview of the practice of international arbitration in the Middle East. Paula HODGES recalled that Middle East parties had been frequent users of arbitration for several years. Nowadays, the expansion of Middle East economies, such as the growth of the leisure sector in the UAE or Qatar, encouraged foreign investments. This leads to inevitable disputes submitted to arbitration, as illustrated by the percentage of parties from MENA in the 2020 LCIA caseload, which accounted for 16.7%. By the same token, the UAE ranked 6th among the most frequent nationalities in the 2020 ICC caseload.

Constantine PARTASIDES further elaborated the recent Bahrain Chamber for Dispute Resolution as a forum having the full potential of becoming the next go-to arbitration hub. He specifically insisted on the 'Free Arbitration Zone' as one attractive and innovating feature hinting at Bahrain becoming a reliable home for delocalized arbitration. This would allow the parties to agree to seat their arbitration in Bahrain while excluding its national courts to hear annulment challenges and to designate the national courts of their choice.

The panelists then turned to the trend to localize arbitration in the Middle East by establishing the ICC and LCIA offices in the region. Paula HODGES shared that, as shown by the recent opening of the ICC office in Abu Dhabi, the experience of such institutions in administering proceedings involving parties from various countries is an undeniable advantage to build connections with MENA.

Samaa HARIDI pointed out the recent and unexpected change of the arbitration landscape in the UAE with the merger of local arbitration centers of Dubai (DIAC, EMAC, DIFC-LCIA). Under the Decree No. 34 of 2021, the activities of the two latter will operate under DIAC. This development is likely to raise questions regarding the scope and meaning of this Decree and concerns about enforcement issues. It remains to be seen whether the structure and the governance of those bodies will sustain the status of Dubai and preserve the integrity of the process and institution.

The speakers then raised the topical issue of enforceability. According to Samaa HARIDI, there have been some improvements. On the one hand, some national courts are still reticent to enforce arbitral awards like the Dubai Court of Appeal in 2016, which refused to enforce an English arbitral award asserting that the United Kingdom was not a Contracting Party to the NYC. She also put forward the recent Egyptian legislation expanding the Supreme Court jurisdiction to scrutinize international awards against Egypt. She raised some concerns towards national courts' ability to substantively review awards for public policy violations.

On the other hand, the speakers stressed that this worrying practice is balanced with pro-enforcement trends. For instance, in 2019, the Beirut Court of Appeal referred to the international definition of public policy instead of the local definition. In 2016, a London award was successfully enforced against a Saudi company in less than three months. This year, Iraq even became a signatory of NYC, a development having a positive effect on the arbitration landscape in MENA.

2. The growth of arbitration in specific sectors (oil and gas, infrastructure, energy)

The second topic of the webinar focused on the growth of arbitration as a preferred dispute resolution method in specific sectors such as oil, gas, infrastructure, and energy disputes. Paula HODGES explained that the reasons were twofold, business-oriented and legal. Firstly, the Middle East is at the heart of oil and gas reserves globally, triggering a tremendous amount of foreign investments, inevitably bringing a cross-border element, leading to disputes to arbitrate. Secondly, she noticed that it is essential to provide alongside a stable dispute resolution framework to foster foreign investments on the legal side. Middle East States adopted UNCITRAL Model Law and the vast number of BITs, which contributes to forming a stable framework for arbitration, encouraging parties to adopt this method in their contracts.

Gerhardt WILL shared his experience in power generation and infrastructure, stressing that the nuclear industry is likely to militate for an international arbitration forum and that there is a need for a forum adapted to the complexity of such endeavors. This calls for a secure and cosmopolitan approach to regulating disputes that are most easily accommodated through arbitration. Samaa HARIDI commented that arbitration popularity also reaches the financial and banking sector, as demonstrated by the recent conclusion of a Memorandum of Understanding between the ICC and the Union of Arab Banks. Constantine PARTASIDES shared his view and optimism on investment treaty disputes as there is good coverage of the ICSID Convention in MENA. He recalled the existence of the OIC Investment Agreement, a multilateral organization countering 57 States, for the effective resolution of prospective investment disputes.

3. Increased connection between Europe and the Middle East in the Post-Covid era

The third and last question addressed by the panelists was how can the Post-Covid era increase connection between Europe and the Middle East. The speakers shared their optimism about remote hearings in the present sanitary context as they noticed that more people participated in the proceedings virtually.

To conclude, the speakers ended the webinar by addressing some remarks on the importance of diversity in the field as it offers more connection. All panelists welcomed the progress in this matter in terms of gender and age of arbitrators appointed. Even if it is part of an internal rule of the law firm, the respect of diversity percentage is supplemented by positive pressure from both practitioners and their clients.