# PBA
# BULLETIN

PARISARBITRATIONWEEK

## SPECIAL EDITION
## 23-27 March 2026

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# A DECADE OF COMMUNITY AND POSSIBILITY

**Yasmin Mohammad**

Founder of Paris Arbitration Week

Ten years ago, Paris Arbitration Week began as a simple and rather audacious idea: that Paris already had everything it needed to be showcased as a global capital of international arbitration — its practitioners, its institutions, its judiciary, its history, and its incomparable ability to bring people together. What we wanted to do was to create the space for that richness to be visible, shared and celebrated.

**A decade later, it is deeply humbling to look at what Paris Arbitration Week has become.**

What started as a concentrated effort to highlight Paris has evolved into a truly global moment in the arbitration calendar. Today, PAW brings together practitioners, academics, judges, institutions and students from every part of the world. International firms without a permanent presence in Paris now travel here to organise events, exchange ideas and participate in collective reflection. Arbitral institutions from across continents engage openly with one another. The French judiciary and the Paris bar have not only joined the conversation, but have become an integral part of it, reinforcing Paris's distinctive dialogue between arbitration and the courts.

This growth did not happen by accident. It happened because PAW is, at its core, about sharing — knowledge, experience, perspectives, and increasingly, responsibility.

From its earliest years, PAW made a deliberate choice to pass the reins regularly, to invite younger generations to challenge inherited structures, to innovate, to question and to reshape. That choice has been one of our greatest strengths. Change is not disruption; it is life, movement and continuity. Watching PAW become better, broader and more inclusive each year has been a source of immense joy.

Paris Baby Arbitration embodies that philosophy perfectly. As a long-standing partner of PAW, PBA has shown — year after year, including through this special edition — what younger members of our community can achieve when trusted with responsibility and given space to contribute meaningfully. Through rigorous reporting, bilingual accessibility and genuine intellectual curiosity, PBA has helped ensure that PAW's conversations live on well beyond individual rooms and individual weeks.

Diversity has always been central to Paris Arbitration Week's identity. This year marks an important step in that goes beyond words. With the launch of the PAW Fellowship, Paris Arbitration Week is translating its commitment into concrete action by supporting access, integration and participation for individuals who might otherwise remain at the margins of our profession. By providing targeted financial and institutional support, the Fellowship seeks not only to open doors, but to ensure that those who walk through them can fully take part in our community.

PAW exists for all generations, all backgrounds and all voices. Its success belongs to every one of them.

If the last ten years have taught us anything, it is that community is not built by standing still. It is built by action, trust, openness and the courage to evolve together. I cannot wait to see where the next decade takes us.

# FOREWORD

Dear Readers,

We are pleased to present this special edition of the PBA bulletin, prepared in connection with the 2026 Paris Arbitration Week (PAW). For the sixth consecutive year, we have partnered with the PAW Board to cover a wide range of the week's events, capturing the vibrant atmosphere of PAW 2026.

Marking a decade since its inception, PAW remains a key moment in the international arbitration calendar, bringing together a diverse community of practitioners, academics, and students in Paris.

To celebrate PAW's tenth year, this year's special edition offers a foreword from PAW's founder Yasmin Mohammad and the coverage of over 20 events, a curated overview of the conversations and perspectives which are shaping the future of international arbitration.

We extend our sincere appreciation to the PAW Board for its continued cooperation and support. The Board's commitment plays an essential role in fostering an environment where initiatives like ours can thrive. We are equally grateful to the institutions, firms, and organisations that have supported our work, and to our dedicated team of contributors whose efforts have made this publication possible.

We also would like to thank JusMundi for its partnership and assistance in putting together the PAW 2026 Special Edition Bulletin.

We hope this edition provides both insight and inspiration. We also invite you to stay connected with our activities and upcoming initiatives through our LinkedIn page.

Paris Baby Arbitration is a Paris-based network bringing together students, recent graduates, and trainee lawyers with a shared interest in international arbitration. Through its monthly bilingual Bulletin, the association highlights notable developments, decisions, and awards from various jurisdictions. Since 2021, this work has been complemented by a special edition dedicated to Paris Arbitration Week.

By encouraging engagement and contributions from emerging practitioners, Paris Baby Arbitration seeks to promote dialogue and participation within the arbitration community. Grounded in principles of collaboration and accessibility, the association aims to support the next generation in developing and sharing their perspectives on international arbitration.

Yours sincerely,
Inès Amarnath

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# NEW CHALLENGES OF ARBITRATION IN AFRICA: MINING, ENERGY AND INFRASTRUCTURE PROJECTS

*Salma Gharraf & Margarita Ilieva*

On Monday, March 23, 2026, the African Academy of the Practice of International Law ("the Academy") organized a conference dedicated to the new challenges of arbitration in Africa, specifically in the mining, energy, and oil sectors. This conference aimed to examine innovative models in investment arbitration and to strengthen dispute resolution mechanisms, in order to enable African States to reaffirm their sovereignty over their natural resources, in compliance with ethics, environmental standards, and human rights.

The panel, moderated by Prof. Hugues Kenfack (Professor at the University of Toulouse Capitole), was composed of Mr Guy Block (ICSID arbitrator and partner in the energy department at Janson Law Firm), Mr Alain Fénéon (Honorary lawyer and arbitrator), Prof. Walid Ben Hamida (Professor at the University of Lille), Ms Yaye Diabaté (lawyer at Clyde & Co and co-chair of the Academy's arbitration section), Mr Bernard Hanotiau (Hanotiau Tossens Goldman), and finally, Mr Stéphane Brabant (Senior Partner at Trinity International).

To begin the session, the moderator gave the floor to Mr Block, who outlined the current context of mining and energy disputes, both in Africa and globally. He began by demonstrating that a dispute may arise at three different stages of the lifecycle of extractive projects: upstream of the allocation of rights, during the operational phase, and at the end of the concession. He noted an explosion in energy and mining disputes, with an increase from 10% to 40% of cases brought before the International Centre for Settlement of Investment Disputes ("ICSID"). He invited the audience to consider whether these disputes concern only Africa, or whether African cases merely reflect the most alarming statistics. Answering in the negative, he illustrated his point with a series of cases across different regions of the world: Mexico, Russia, Slovenia, Kazakhstan, and Peru, thereby emphasizing the profoundly global nature of these issues. Finally, beyond the litigation framework, he stressed the connection between the energy sector and environmental concerns: "It is essentially Ms Ecology and Mr Environment that are entering into projects," referring to the growing desire to align energy policies with ecological transition objectives. He also recalled the mistaken distinction often drawn between mining and energy: "one gets the impression that the right hand ignores the left." He cited the cases *Nova Scotia v. Venezuela* and *Westmoreland v. Canada*, where the tribunal refused protection on the basis of a restrictive understanding of the investment, effectively isolating mining activities from their energy dimension, an approach he considered questionable. On this point, he concluded his presentation by emphasizing the need to reconcile the two notions: "No mining without energy."

Taking a completely different approach, the floor was then given to Mr Feneon, who highlighted mediation as an evolving procedure that is increasingly integrated into disputes in the extractive sector; whether prior to arbitration, during arbitral proceedings, or even after the award has been rendered. He addressed the financial dimension of arbitration, noting that some awards , such as the 10 billion USD ordered against Nigeria by an ICSID tribunal, can far exceed a State's financial capacity. In such cases, amicable settlement offers a practical means of reconciling the parties and reaching a mutually acceptable outcome. He illustrated this with the case *Echo Vault v. Tanzania*, where, through a mediation process, the parties agreed on a settlement of 30 million dollars, whereas the original claim amounted to ten times that figure. Mediation also plays a role in addressing the issue of non-enforcement of arbitral awards, which is often hindered by execution immunity, the inalienability of public assets, and procedural constraints. Whether institutional or *ad hoc*, mediation sometimes emerges as a mandatory preliminary step, particularly under certain frameworks such as the OHADA rules.

Third, Prof. Ben Hamida took the floor to draw the audience's attention to the interaction between the obligation of transparency in the extractive sector and the confidentiality of arbitration. He began by establishing that transparency is becoming a cross-cutting standard in all areas of law, and is the subject of increasing demand from States in the extractive sector, particularly through the requirement to publish mining contracts. Calls for the codification of such an obligation are driven by the fight against corruption, often associated with this sector, the need to enable oversight of the compliance of investments with fiscal, social, and environmental standards, as well as the claims of local communities, which are directly affected by these projects and concerned with their credibility. In response, a gradual movement toward the institutionalization of transparency in mining contracts has taken place in around thirty States, in Africa and elsewhere, encouraged by soft law instruments such as those of the OECD. Nevertheless, he questioned whether such transparency can and/or should extend to arbitral awards related to these contracts, where arbitrators interpret their clauses. It is at this point that he presented the audience with the paradox of having a public mining contract containing an arbitration clause referring disputes to confidential arbitration, thus revealing a conflict of norms. He explained that such an extension could be envisaged by treating transparency obligations as overriding mandatory rules (*lois de police*), extending to everything connected with the contract, including the award interpreting it, and thus binding not only the parties but also the arbitral institution. However, he recalled that overriding mandatory rules are subject to strict scope and interpretation, which does not guarantee such an extension. Alternatively, he suggested invoking estoppel against the State party to the contract, which could be seen as having waived the transparency obligation.

Next, Ms Diabaté took the floor to address the rise of nationalist movements in Africa within the mining sector and their impact on investments. She first pointed to the growing interventionism of States through legislative means, particularly via reforms aimed at strengthening State control and participation in exploitation activities. These include requirements for local content, the introduction of pre-emption rights, as well as increased tax pressure. Alongside these normative measures, coercive actions may also be observed; these include the revocation of licenses, the seizure of assets, and forms of indirect nationalization. She referred to a recent dispute between Mali and a major investor, where, prior to referral to an ICSID tribunal, the conflict was resolved through a settlement. This example illustrates the coexistence of both a negotiation dynamic and a confrontational dynamic in disputes within the extractive sector. Despite the emergence of conflict, the parties share a mutual interest in preserving the continuity of their economic operations. She therefore emphasized the existence of space for negotiation between the parties in order to reach a solution. She added that certain environmental tax measures may affect the profitability of investments and may be characterized as indirect expropriation when they are introduced after the investment has been made.

Mr Hanotiau then took the floor to address the issue of counterclaims in investment arbitration, particularly in the mining sector. While investment arbitration traditionally allows investors to bring claims against States, States may also submit counterclaims for harm caused by investors. In practice, such counterclaims remain rare, largely due to the absence of explicit investor obligations in many treaties. Nevertheless, Article 46 of the ICSID Convention permits them, provided jurisdictional requirements are met and a direct connection to the dispute exists, with some tribunals holding that consent to ICSID arbitration implicitly extends to counterclaims. Others rely on umbrella clauses, which allow contractual obligations to be elevated to the level of treaty obligations, or on the existence of a specific agreement between the parties. The case *Burlington v. Ecuador* represents a significant development in this regard, as the tribunal admitted and upheld a counterclaim based on environmental damage. Today, although their success remains limited, counterclaims are experiencing increasing development, particularly in environmental disputes, as illustrated by the case *Aven v. Costa Rica*, as well as in recent investment treaties, which tend to recognize this possibility more explicitly.

Finally, Mr Brabant's intervention focused on arbitration in the extractive sector through the lens of seeking a balance between acceptability and efficiency in the African context. Opening with an emotional statement: "Everything is human," he conveyed the idea that disputes are no longer confined to a confrontation between States and investors, but now incorporate issues of social acceptability, particularly those relating to local communities. In this context, the arbitrator's role is evolving beyond mere dispute resolution, encompassing complex situations, multiple interests, and the restoration of balance. This shift reflects a greater openness to public international law considerations, such as human rights, and to third-party participation. The intervention ultimately stressed the need to adapt arbitration to local realities and strengthen African arbitration centers to enhance their legitimacy and efficiency.

In their final remarks, the panel presented the board behind this conference. The Lex Extractiva Chair positions itself as a center of excellence dedicated to a major strategic transformation: shifting Africa from the status of a "rule-taker" to that of a central actor in the global regulation of critical resources. In a context of increasing demand for strategic metals, it aims to structure a sovereign governance of value chains, from extraction to recycling, and to ensure sustainable value capture. Supported by an alliance between the African Academy of the Practice of International Law, MINES Paris - PSL, and the African Legal Support Facility, it operates as a true normative command center, where the legal, scientific, and industrial standards of the energy transition are designed. Over a 25-year horizon, it deploys a platform for systemic transformation based on the control of extractive value chains, the training of experts capable of designing "generational" contracts, and the strengthening of operational sovereignty. For its partners, it represents a strategic lever: securing local content commitments, reducing risks, and providing access to advanced normative engineering.

# THE FUTURE OF ARBITRATION IN A DISRUPTED WORLD: TECHNOLOGY, SUSTAINABILITY AND POWER SHIFT

*Farida Hassaan*

On Monday, 23rd of March 2026, the HAAART Foundation hosted a conference regarding the future of arbitration and launched its HAAART Foundation International Court of Arbitration ("HICA") in Paris. The panel, composed of two round tables, was moderated successively by Ms Mariana Nogales Paez Buzance (Director of HICA) and Ms Ramona Grewan (Supervisory Board Director of the HAAART Foundation), and featured Ms Camelia Bogdan (Arbitrator, P.R.I.M.E Finance expert), Ms Rana Kharouf (Professor at Sciences Po University, judge at the Parisian court of Asylum), Mr Jose Andres Lama (Arbitrator, member of the International Construction Chamber), Ms Veronica Sandler (Founder of Woman Way Arbitration), Ms Rita El Murr (PhD law Candidat at Paris 1 Panthéon Sorbonne University), Mr Abang Iwawan (Managing partner of Abang & Co, Chair of the Malaysian Bar Council Arbitration Committee), and Mr Rostislav Kats (Lawyer, Product Manager at Kluwer Arbitration).

The session opened with introductory remarks by Mr Kaylan Krishna Bandaru (Chairman of the HAAART Foundation) and Mr Timothy Wong (Governing Board Director and Head of the Research Team of the HAAART Foundation), who introduced the HAAART Foundation which was founded on 18 July 2025 in the Netherlands. They explained that growing concerns over the effectiveness of international law, in the context of ongoing conflicts and environmental challenges, led to the establishment of HAAART Foundation with the aim of promoting global peace and justice. This ultimately also led to the creation of HICA, an international arbitration court equipped with its own rules and designed to resolve territorial and sovereign disputes between States.

The discussion then shifted to the ability of international arbitration to address emerging challenges, particularly in the fields of environmental law, human rights, artificial intelligence, and water-related disputes. The floor was given to Mr Andres Lama, who examined dispute resolution in energy construction projects in South America. He explained that, in the context of the transition from fossil fuels to renewable energy, dispute resolution mechanisms must evolve to take into account not only technical considerations, but also the political realities faced by States.

Turning to Latin America, he identified three recurring challenges affecting infrastructure development: political instability, significant imbalances in resources, and a persistent risk of conflict. By way of illustration, he referred to a decision of the Mexican Supreme Court, which found the 2021 Electricity Industry Law unconstitutional for violating the principles of free and fair competition (*Acción de Inconstitucionalidad sobre la Ley de la Industria Eléctrica 64/2021*). This example highlights the disconnect that may arise between public policy objectives and industrial development, often rooted in shortcomings within the regulatory framework.

The floor was then given to Ms Kharouf, who extended this discussion to water-related disputes. Drawing on her experience as a judge, she emphasised the growing number of refugee cases linked to environmental pressures, noting that access to water is increasingly becoming a source of conflict. While the protection of essential humanitarian needs is imperative, she underlined that water remains closely tied to State sovereignty, limiting the effectiveness of international agreements, which often function as guiding principles rather than binding frameworks. She referred to disputes such as those surrounding the Nile River and noted that arbitration remains a useful tool, as illustrated by the I*ndus Waters Kishenganga Arbitration (2013)*, alongside recent developments such as the Permanent Court of Arbitration Optional Rules on Environmental Disputes.

Moving to the obstacles arbitration faces in the context of climate change, Ms Sandler highlighted that according to international investment law, the bilateral treaties must shield the investor's interest. However, this framework is increasingly accompanied by environmental obligations, requiring States to adopt regulatory measures that may affect their relationship with investors. In this evolving context, she referred to *Urbaser S.A. v. The Argentine Republic (2012)* as a significant example of adaptation, as the tribunal was one of the first to grant the right to clean water while still allowing contractual claims against the State.

Building on this perspective, Ms Bogdan stressed that "law is only as strong as its enforceability," shifting the discussion toward the challenges posed by crypto-assets and decentralized finance organizations. These emerging technologies are reshaping economic behaviour while exposing the limits of fragmented regulatory frameworks and the shield of sovereign immunity. The real challenge in enforcement, she argued, lies less in the rise of digital assets themselves than in the regulatory asymmetries between major financial jurisdictions. For instance, Switzerland has integrated the segregation of digital assets into its Code of Obligations, positioning itself as a favourable forum for arbitration, whereas the Commodity Futures Trading Commission in the United States treats such assets as commodities, and the United Kingdom has recognized them as property in AA v. Persons Unknown. Against this backdrop of regulatory fragmentation, the pressing question is no longer whether international arbitration can adapt to technological and geopolitical shifts, but how rapidly it can do so.

The discussion then turned to whether international arbitration was ready to address artificial intelligence ("AI") and ongoing geopolitical conflicts. Ms El Murr highlighted the limitations of Article 33 of the United Nations Charter and Chapter VII of the United Nations Charter, which promote the peaceful settlement of disputes. She noted that these mechanisms often fail to bring conflicts to an end, as peacebuilding processes are lengthy and involve sensitive issues such as State responsibility. In this context, she advocated for the use of ad hoc arbitration to resolve boundary disputes between States at war emphasizing its flexibility, confidentiality, and binding nature. She then focused particularly on the case of Lebanese & Israeli boundaries, highlighting the difficulties of dispute settlement in the absence of diplomatic relations. The core obstacle is not a legal incapacity but political tensions, as arbitration requires mutual consent, its absence makes mediation the most viable option, allowing indirect communication through a third party, as illustrated by the 2022 maritime boundary agreement arranged by the United States.

Mr Iwawan then shifted the discussion to the issue of legitimacy. He emphasised that arbitration is not only about determining the applicable law, but also about deciding whose perspective is allowed to shape the dispute. He illustrated this point through the dispute between the Sultan of Sulu and the Government of Malaysia, where the issue extended beyond legal interpretation to encompass questions of sovereignty and historical identity reframed as commercial claims. While the tribunal approached the agreement through the lens of intertemporal law, he recalled that legal systems have, at times, upheld arrangements that would now be considered fundamentally unjust. Similarly, in *Heinrich von Pezold v. Zimbabwe*, indigenous communities sought to participate in the proceedings, yet the tribunal declined their involvement and proceeded without hearing from those whose history lay at the core of the dispute. This, he argued, demonstrated that a system which excludes relevant voices may produce legally sound outcomes while still lacking legitimacy.

Finally, Mr Kats highlighted the rapid integration of artificial intelligence into legal practice, noting that nearly 92 % already relied on AI for tasks such as legal research, drafting, and the development of arguments. Yet, only a minority appeared equipped to navigate the emerging regulatory framework, with just 34% reporting preparedness. Although a large majority acknowledged the potential impact of regulation, most remained uncertain as to how to address it in practice. He noted that the main obstacles to the use of AI lay in technical limitations and data privacy concerns, areas in which only a limited proportion of practitioners felt adequately prepared. In this context, the discussion ultimately raised a critical question: whether AI can be trusted within arbitral proceedings. He concluded that stronger institutional oversight would be necessary, not only to monitor its limitations, but also to ensure that these tools are properly trained and used in a manner consistent with the realities of legal practice.

# NEW FRONTIERS IN DELAY AND DISRUPTION ANALYSIS

*Alexa Buathier-Phillips*

On Monday 13 March 2026, as part of the 2026 edition of Paris Arbitration Week, A&O Shearman LLP hosted a conference titled "*New Frontiers in Delay and Disruption Analysis*." The panel was moderated by Ms Sandrina Antohi (Senior Associate, A&O Shearman) and Ms Louise Bouvery (Associate, A&O Shearman). The discussion was structured around a series of tailored questions from the moderators, directed to a distinguished panel comprising Mr Daniel Garton (Partner, A&O Shearman), Mr Charles Bouttier (Acting Head of Disputes at ADNOC, speaking in his personal capacity, not on behalf of ADNOC), Ms Véronique Buehrlen KC (Arbitrator and Barrister at Keating Chambers), Mr Hervé de Trogoff (delay and disruption analysis expert, Partner at Accuracy), and Mr Alexander Voigt (delay and disruption analysis expert specialised in System Dynamics Modelling, Director of Construction Dynamics Solutions).

The floor was given to Mr de Trogoff at the beginning of the session, who emphasized that new technologies do not change the underlying approach to delay and disruption analysis, but rather the way it is performed. Speaking in the context of his work on the third edition of the Society of Construction Law ("SCL") Protocol, he identified three reasons for this: (i) the lack of sufficiently developed systems and standards, (ii) limited readiness among key audiences, and (iii) the fact-based nature of delay analysis, which requires rigorous reasoning and evidentiary precision that current probabilistic models cannot provide. In practice, he noted that these tools are useful for handling large datasets and isolating relevant evidence, as well as for document navigation and chronology building, but remain unreliable on issues of criticality and causation. He concluded that their use should be limited to lower-stakes tasks to improve efficiency without undermining analytical rigor.

The discussion then turned to Mr Voigt, who addressed whether advances in computing power and large language models could make system dynamics modelling, a rising method since the 1970s, more accessible in delay and disruption analysis and more apt to be presented before arbitral tribunals. He explained that system dynamics model intricate cause-and-effect networks in heavily disrupted projects through mathematical equations, but that adoption remains limited due to their complexity and "black box" perception. He noted that technological advances have improved usability through faster simulations and better data capture, leading to more reliable models. Finally, while artificial intelligence ("AI") can assist in processing large datasets and identifying disruptive events, it remains limited in supporting model development and establishing causation.

Pivoting to the legal perspective, Mr Garton explained that, much like experts, lawyers are using new technologies mainly to process large datasets more efficiently. While this does not change the nature of the analysis, it facilitates previously time-consuming tasks and improves the presentation of evidentiary submissions such as chronologies and graphics. He highlighted, however, that key challenges relate to complexity and trust, with arbitral tribunals often being sceptical of tools that are difficult to explain. He therefore stressed the importance of early introduction during proceedings and educating tribunals, as well as recommending that models be kept simple and transparent to avoid the failure of one element undermining the whole case.

Turning to the perspective of an in-house counsel at industry stakeholders, Mr Bouttier addressed the appetite for adopting new technologies, including AI, during both project execution and dispute stages. He noted that industry actors increasingly view AI as a necessity rather than an optional tool, driven primarily by efficiency gains. However, adoption at the dispute preparation stage, or in an ongoing dispute, depends not only on accuracy but also on perceived reliability by users and decision-makers. He further emphasized that parties relying on AI in disputes must play an active role in helping tribunals understand and accept these technologies.

From the arbitrator's perspective, Ms Buehrlen KC noted limited reliance on these new technologies in arbitration, largely due to the time lag of disputes currently examined by tribunals, which currently still largely stem from projects impacted by Covid. In her experience, AI-generated chronologies and summaries have often proven unreliable, although some research tools can assist in locating key documents during hearings. In relation to delay and disruption analysis, she emphasized that tribunals continue to favour traditional methodologies, particularly the "as-planned versus as-built" method, which are valued for their clarity, transparency, and grounding in factual evidence, especially from on-site witnesses. On the introduction of new methodologies, she stressed the importance of addressing admissibility and methodological issues early, noting that early engagement between experts can help facilitate tribunal acceptance.

On whether AI-assisted scheduling tools may increase the risk of invalid baseline programmes, Mr de Trogoff explained that, despite longstanding efforts, such software remains unable to reliably generate coherent baselines, often requiring substantial reworking. From a legal perspective, Mr Garton noted that reliability depends on how these tools are used. Parties must be able to stand behind any outputs, and experts must clearly explain the underlying assumptions in arbitration; otherwise, credibility may be undermined. He also highlighted the potential for earlier integration of such tools during project execution, subject to later review. Mr de Trogoff added that future developments enabling better identification of contractor intent would be particularly valuable, as this currently remains dependent on expert analysis.

Turning to the use of shared project execution datasets by Employers and Contractors during the course of a project, which new technologies might be better at enabling, Mr Bouttier emphasized that the opportunities afforded by access to information outweigh their risks, particularly in improving transparency, and bridging the gap between project reality and its reconstruction in disputes. He suggested that parties may consider agreeing at the contract stage on the tools and data frameworks to be used throughout the project and in any subsequent dispute. Mr Garton acknowledged certain legal risks linked to extensive data availability, including waiver arguments, but agreed that on balance access to reliable shared data is essential to better understand project events and reduce ambiguity. Drawing on his experience advising clients, he also highlighted the importance of structuring data collection from the outset so that it can be effectively used, including through AI tools, both during the project and in any subsequent dispute.

On the recognition of system dynamics in delay and disruption protocols, Mr Voigt explained that its inclusion in the SCL Protocol has enhanced its credibility, further supported by guidance such as the Association for the Advancement of Cost Engineering's ("AACE International") recommended practice on model development and reliability. He noted that its greatest potential lies in analysing heavily disrupted projects, particularly when combined with traditional delay methods such as "as-planned versus as-built", to better demonstrate causation and the impact of disruption. From a delay expert's perspective, Mr de Trogoff observed that he only encountered system dynamics in one proceeding, and the system was not retained by the tribunal. He added that future editions of the SCL Protocol are likely to remain principles-based rather than prescriptive as to a particular method.

Addressing potential guardrails in arbitration, Mr Bouttier emphasized that the key priority is maintaining trust in the arbitral process, particularly confidence that tribunals will engage with the tools used by the parties while remaining flexible. He doubted the need for formal AI-specific guidelines, noting that issues of data reliability should remain within the tribunal's discretion. In his view, further prescriptive rules would likely be unnecessary or overly restrictive.

Concluding the discussion, Ms Buehrlen KC addressed whether arbitrators should proactively upskill in new technologies. She suggested this is unlikely in practice, given time constraints and the breadth of methodologies involved. However, she added that those who also act as counsel are often more familiar with these tools. Ultimately, she stressed that the central issue is not trust but understanding, with arbitrators relying on clear, simplified explanations from counsel to engage effectively with new technologies.

# CONTRACTS AS INVESTMENT – DISPUTES THAT FALL BETWEEN COMMERCIAL AND TREATY ARBITRATIONS

*Nour el Ghadban & Margherita Duse*

On Monday, 23 March 2026, as part of the 2026 edition of Paris Arbitration Week, FTI Consulting hosted a conference on the complex relationship between commercial contracts and investment treaty protections. The panel, moderated by Mr Nicolas Mocq (Senior Director at FTI Consulting), brought together Ms Maxi Scherer (Co-Founder of ArbBoutique and Professor at Queen Mary University of London), Mr Noah Rubins KC (Partner at Freshfields), Ms Juliette Fortin (Senior Managing Director at FTI Consulting) and Ms Marion Gady (Managing Director at FTI Consulting). The discussion examined how and when contractual rights may qualify as protected investments, the strategic considerations that guide the choice between commercial and treaty arbitration, and the implications of that choice for damages and valuation.

The floor was first given to Ms Scherer, who set out the historical evolution of the distinction between contract and treaty claims. She explained that the 19th century was marked by the prevalence of the Calvo doctrine, which held that claims had to be treated by national jurisdictions according to the principle of equality between foreign and local investors. She noted that the second half of the 20th century marked a turning point with the proliferation of investment treaties and the introduction of Article 26 of the ICSID Convention of 1966, which granted investors a direct right to arbitrate under the investment treaty and often bypass local remedies. She observed that the 21st century brought a backlash against investor-state arbitration, leading to renegotiations of bilateral investment treaties ("BIT") and a renewed emphasis in the European Union on domestic and regional judicial remedies. It was noted that this shift explains the current resurgence of interest in investment contracts and contractual claims.

Ms Scherer then explored the reasons why the dividing line between contract and treaty claims remains blurry. The first reason lies in the definition of "investment", which many treaties frame in asset-based terms that include both tangible and intangible assets, such as shares, claims for money, and contracts. She highlighted that this expansion created interpretative challenges for tribunals, which had to determine when a contract constituted an ordinary commercial agreement and when it qualified as an investment. It was noted that more recent BITs attempt to clarify this point, such as the 2012 US Model BIT, which lists certain types of contracts as investments, and NAFTA, which excludes mere contracts for goods and services. Umbrella clauses were identified as the second reason for the blurred boundary, as these clauses elevate contractual commitments to treaty obligations. It was explained that tribunals examine the specific wording of the clause to determine whether a contractual breach can be treated as a treaty breach. Some tribunals attempted to narrow the scope of umbrella clauses, prompting States to remove or refine them in later treaty models.

Ms Scherer concluded by addressing the renewed interest in investment contracts and contract claims. From the investor's perspective, instability in the treaty system encourages investors to seek alternative protections, including investment contracts with stabilisation clauses or arbitration clauses. From the host State's perspective, investment contracts allow States to rebalance obligations by imposing commitments on investors, such as environmental or labour standards. It was predicted that the number of contract claims will increase as more investment contracts are concluded.

The floor was then given to Mr Rubins, who addressed the strategic considerations that guide the choice between bringing a claim under a commercial contract or under an investment treaty. He observed that although parallel claims are often criticised as abusive, the drafting history of BITs shows a clear intent by States to cover certain types of contracts. He explains that this is evident in two ways. First, most first- and second-generation BITs explicitly listed contract claims among protected investments, reflecting States' desire to offer additional protection to attract investment. Second, umbrella clauses were initially included to provide an additional layer of protection.

Mr Rubins then identified six strategic factors that influence the choice between contract and treaty claims. He highlighted that the first factor is where the rights are strongest and clearest. If the treaty is well drafted and favourable to the investor, there may be strong incentive to pursue a treaty claim. The second factor is the dispute resolution mechanism, as contractual clauses that send parties to national courts may be unattractive, except in jurisdictions where domestic courts have shown independence. The third factor is whether the dispute truly concerns the contract, as regulatory measures may cause harm that cannot be remedied through contractual claims. The fourth factor is whether the investor remains involved in the project, since investors who continue operating may avoid antagonising the State. The fifth factor is attribution, which concerns whether the conduct of a State-owned entity can be attributed to the State; it was noted that tribunals have narrowed attribution in recent years. The sixth factor is enforceability, as enforcement prospects may differ depending on whether the counterparty is the State or a State-owned company. Mr Rubins concluded by stressing that the choice is not binary and that parallel remedies may coexist in distinct legal frameworks. In this respect, Ms Scherer further noted that fork-in-the-road clauses can play an important role in preventing parallel proceedings, although their application ultimately depends on how tribunals interpret the concept of the "same dispute".

The floor was then given to Ms Gady, who addressed the implications of the choice between commercial and treaty arbitration for damages. She explained that the valuation date differs significantly: treaty claims often value the investment at the date of breach, whereas contractual claims typically use the current valuation date or the termination date. Valuation period also differs, as contractual damages run until the contract's expiry, while treaty claims may value the asset as a going concern. Similarly, interest rates also diverge, with contractual claims relying on contractual or statutory rates, while treaty claims may invoke the respondent State's borrowing rate under the forced loan theory.

Ms Fortin then addressed valuation frameworks and adjustments, explaining that fair market value is appropriate when the business is fully expropriated, whereas loss of profits applies when the harm affects an ongoing business. It was also noted that complex ownership structures require adjustments for taxes, lack of control, lack of marketability, and insolvency within the corporate chain.

The discussion concluded with questions from the audience on sequential proceedings, *res judicata*, lenders' reluctance to bring BIT claims, and the psychological impact of losing a contractual case before pursuing a treaty claim. The panel emphasised that the formulation of the claim, the factual basis, and the strategic context all play a decisive role in determining the appropriate forum and the scope of recoverable damages.

# INTRA-AFRICA INVESTMENTS: MANAGING RISK AND RESOLVING DISPUTES

*Emmanuelle Busigniès & Abigail Goldman*

On 23 March 2026, Reed Smith Paris and Africarb held a conference entitled "*Intra-Africa Investments: Managing Risk and Resolving Disputes*." The panel, introduced by Mr Clément Fouchard (Partner at Reed Smith) and Mr Orphée Haddad (Head of Disputes at AfricArb), and moderated by Ms Aurélie Lopez (Counsel at Reed Smith), included Ms Mariam Diawara (Executive Secretary of the Sanctions Appeals Board at the African Development Bank Group), Mr Matthew Fisher (General Counsel at La Mancha Resource Capital), Ms Anne-Claire Gremeaux (Group General Counsel at Axian Group), Mr Mamadou Konaté (Attorney Arbitrator and Former Minister of Justice of Mali), Mr Karim M'Ziani (Legal Counsel at the PCA and Registrar of the Mauritius International Arbitration Centre), and Ms Lucy Winnington-Ingram (Partner at Reed Smith).

In his opening statement, Mr Fouchard highlighted that investor profiles in Africa are shifting. While historically investment in Africa was framed almost exclusively from the outside, African investors are increasingly investing across the continent. Mr Fouchard emphasized four questions surrounding this trend: criteria driving African investors, risk management, investment financing and legal frameworks governing intra-Africa investments. Mr Haddad then introduced AfricArb and its mission to unite African-focused arbitration practitioners through an open and inclusive platform.

The panel first analyzed how African investors identify opportunities on the continent. Ms Gremeaux explained the Axian group's strategy, notably to mitigate risks. First, the investment must create long-term value by improving access to essential services and developing durable projects in the region. Second, in acquisition scenarios, the group must carefully review the investment's history and derisk it, notably through liability warranties. Third, the group ensures compliance with anticorruption and ESG expectations. Other decisive criteria include currency convertibility, access to local bank financing and capital stakes, and operational control.

The panel then examined key risks associated with investment in Africa. Mr Fisher cautioned against viewing Africa as a monolith. Investors who succeed in one African jurisdiction may wrongly assume that the same strategy will work elsewhere on the continent. Ms Diawara added that investors should be mindful of differing legal frameworks within Africa. While regional economic communities and continental treaties have established common rules in theory, harmonization remains unrealized in practice.

Regarding risk management strategies, Mr Fisher emphasized that strong management teams with local knowledge on the ground are the most important layer of risk mitigation. When an investment is minority owned, the company can protect itself through board seats and contractual rights. By contrast, in wholly owned investments, the investor can build legal protections into the structuring itself, including tax and treaty planning. Ms Winnington-Ingram agreed, observing that contractual and treaty protections should function as a safety net, that is ideally never solicited.

The panel then turned to investment structuring and legal protections. Ms Winnington-Ingram explained that investors should engage in treaty mapping to identify a jurisdiction of incorporation offering appropriate treaty and domestic law protections. She added that contractual protections remain especially important in intra-African investments, though their effectiveness depends on leverage and, crucially, on whether the entity signing on behalf of the state holds binding authority.

Turning to the PCA's diplomatic role in reinforcing investments in Africa, Mr M'Ziani underscored the benefits for states of becoming contracting parties to such conventional instruments: by engaging with international dispute resolution institutions and treaty frameworks, states signal credibility, interact with peer states, and participate in shaping the future of international investment law.

The discussion next addressed sanction mechanisms at the financing institutions' level. Ms Diawara explained that multilateral development banks have adopted a common understanding of sanctionable practices, including corruption, collusion, coercion, fraud, and obstruction. Where allegations are substantiated following investigation, companies may face debarment. She also emphasized the reputational effect of publishing sanctions decisions and shared that companies seeking reinstatement must go through integrity compliance programs involving anti-corruption training.

Next, the panel considered whether African investors occupy a different position from non-African investors. Mr Konaté noted that in disputes involving African states, political context is often key. One possible response, he suggested, is to diversify capital structures and rely more heavily on African financial institutions, whose involvement may mitigate political risk. Mr Fisher agreed, adding that African investors often better understand local relationships and rules. Unlike foreign investors, African investors are often better equipped to know where formal protections are needed and where flexibility is possible.

After examining investment strategy and investors' protection, the panel turned to dispute resolution. Mr Konaté first described the situations typically giving rise to disputes. He reiterated that the principal source is politics, including abrupt changes in legal frameworks, regime changes, and increasingly, sovereigntist rhetoric used to justify revisiting long-term investment agreements despite contractual stability clauses. In practice, this may result in tax increases, customs obstruction, or criminal proceedings against management, begetting disputes. Ms Diawara then explained the role of multilateral development bank in protecting affected communities, notably through the Independent Recourse Mechanism (IRM) at the African Development Bank Group. The affected communities seek compensation to be put in a better situation than the one they were in before the project. This frequently generates disputes, as civil society actors increasingly mobilize affected populations by invoking bank standards.

The panel then addressed the use of arbitration for resolving intra-Africa disputes. Ms Gremeaux affirmed that arbitration remains the preferred mechanism for all the usual reasons, including the unpredictability of local courts and the length of domestic proceedings, although she observed that in practice, many disputes settle before arbitration unfolds. Mr Konaté noted that arbitration clauses are often not seriously negotiated at the time of contract formation, since the focus remains on closing the deal. He added that the frequent turnover of state interlocutors makes disputes especially difficult to arbitrate. Mr M'Ziani agreed that arbitration in Africa presents practical challenges, but noted that states are becoming more sophisticated in their approach to dispute resolution by incorporating multi-tiered dispute resolution clauses. He further mentioned that tribunals increasingly provide "negotiation windows" during proceedings to encourage settlement. Ms Winnington-Ingram suggested that the emerging African investment protocol on the ISDS side, which provides for the termination of existing intra-African BITs, including sunset clauses, and replaces traditional protections with narrower, more balanced standards, may reshape the field.

During the Q&A, a participant from Tunisia noted that Tunisian law has, since 2016, opened arbitration to both Tunisian and foreign investors and made mediation a mandatory prior step. Another participant asked about resource nationalism, to which Mr Fisher and Ms Winnington-Ingram responded that it is likely to remain a real risk, especially in extractive sectors. On the usefulness of mediation and ADR, Mr Konaté expressed concern that these mechanisms are often treated merely as formal preconditions to arbitration rather than as genuine settlement tools. He suggested that a more meaningful preliminary discussion phase might facilitate genuine resolution. Ms Lopez responded that where a business relationship is particularly valuable, less adversarial forms of dispute resolution – such as mediation – might be preferred. Mr M'Ziani noted that many PCA cases resolve at the ADR stage. Next, when asked whether the cooling-off period can be used more creatively, Ms Winnington-Ingram explained that an investor's leverage with its host state significantly influences the productivity of negotiations.

# RECENT DEVELOPMENTS AND PRACTICAL GUIDANCE REGARDING ANNULMENT PROCEEDINGS IN FRANCE

*Anissa Boujdag & Nellie Wagner*

On Monday, 23 March 2026, as part of the 2026 edition of Paris Arbitration Week, DLA Piper France LLP hosted a conference on recent developments and practical guidance relating to annulment proceedings in France. The panel was moderated by Ms Séréna Salem (Counsel at DLA Piper France) and brought together Ms Agnès Bizard (Counsel at King & Spalding), Prof. Maximin de Fontmichel (Professor at Université Paris-Saclay, Arbitrator and Expert), Prof. Jérémy Jourdan-Marques (Professor at Université Lumière Lyon 2) and Ms Fabienne Schaller (former judge at the International Commercial Chamber of the Paris Court of Appeal).

**French courts' approach to annulment proceedings**

Addressing the French courts' general approach to annulment, Ms Schaller first recalled at the outset that the role of the French annulment judge is limited to a strict review of the validity of the award, within the grounds exhaustively listed under article 1520 of the French Code of civil procedure in line with the 1958 New York Convention. Annulment proceedings do not constitute an appeal in themselves and cannot be used to rule on the merits. She emphasised that French courts adopt a pro-arbitration and deferential approach, respecting arbitral awards, subject only to compliance with procedural guarantees and international public policy. This is a posture she described as "counterintuitive" for judges traditionally accustomed to ruling on the merits of disputes. She further noted that this approach remains largely stable, although some recent developments have emerged.

Prof. de Fontmichel emphasised the high level of trust placed by French courts in arbitral tribunals and their deliberate limited review of arbitral awards. He illustrated this approach with two recent examples. First, in the *Green Network* decision of 18 September 2024 (RG n°21/20140), the French Court of Cassation held that arbitrators may reject requests for document production without this leading to the annulment of the award, contrary to the position in neighbouring jurisdictions such as Spain. Second, the reliance on a formula for calculating surcharges or quantum, even where that formula was not itself subject to adversarial debate, does not constitute a ground for annulment under French law.

Prof. Jourdan-Marques underlined the open-minded approach of the specialised chamber of the Paris Court of Appeal and its receptiveness to doctrinal criticism. Ms Schaller added that the International Chamber has sought to make its case law more predictable, in response to criticism from common law practitioners regarding the absence of binding precedent.

**Best practices in anticipation of annulment proceedings**

Ms Salem then invited the panel to turn to best practices within the arbitral process, viewed through the prism of potential annulment proceedings, beginning with the topic of third parties.

Regarding the position of the annulment judge vis-à-vis third parties to the arbitration, Ms Schaller recalled the particularly favourable approach of French law to the extension of arbitration agreements to non-signatories, treating consent as the determining criterion, inferred from the parties' common intention and conduct, rather than formal requirements. She nevertheless pointed to the limits of this approach, as illustrated by the *Eckes* decisions of 6 December 2022 (RG n°21/11615) and of 28 January 2025 (RG n°23/08063), in which the Paris Court of Appeal refused the enforcement of a foreign award due to insufficiently established consent of certain parties. She also clarified that the intervention of third parties in annulment proceedings is not allowed unless expressly agreed by the parties, as illustrated by the *Devas* decision of 10 September 2024 (RG n°24/00151).

Against this background, and turning to the strategic question of whether it is advisable to involve multiple third parties in arbitration, Prof. Jourdan-Marques cautioned that, in order to avoid annulment proceedings, third parties should only be joined where there is a solid justification.

Indeed, by multiplying respondents, the claimant offers them the opportunity to challenge the award on jurisdiction and, consequently, to challenge the award as a whole through annulment proceedings. Prof. Jourdan-Marques noted that it may be strategic for co-respondents to be represented by different law firms, or even to adopt differing positions on jurisdiction, in order to preserve a potential ground for challenge regardless of the outcome of the award.

The discussion then moved to the issue of non-participation in arbitral proceedings. Ms Schaller first addressed the assessment by the judge of a party's refusal to participate in arbitral proceedings. The *Champ'Pom Export v. DCU Potatoes* decision of 20 February 2024 (RG n°23/01702) confirmed that non-appearance does not in itself constitute a ground for annulment based on a breach of the adversarial principle. However, a clear distinction is to be drawn between a State that was not properly notified, as in the *Libya v. Siba Plast* case of 1 October 2024 (RG n°21/11112), and a State that, having voluntarily consented to arbitration through a treaty, seeks to evade the proceedings by invoking a lack of notification. In the latter case, French courts have consistently rejected such challenges. Non-participation is not a procedural shield.

Prof. de Fontmichel provided practical recommendations for arbitrators faced with a defaulting party: identifying the reason for non-appearance, multiplying means of notification, initiating investigations through a bailiff, raising jurisdiction and admissibility issues *ex officio*, and ensuring that all elements are communicated to the absent party in order to respect the adversarial principle at each stage of the proceedings.

Prof. Jourdan-Marques complemented this analysis by warning against the temptation to default, which deprives the respondent of any opportunity to defend the case on the merits, with no right of appeal. He further noted that, in the *Central Bank of Iraq v. CARDNO ME* decision of 21 January 2025 (RG n°23/05511), the Paris Court of Appeal held that failure to participate amounts to a waiver of its right to raise objections. He also highlighted the risks associated with the absence of reservations under Article 1466 of the French Code of Civil Procedure. Ms Schaller added that, since the decision of 30 September 2025, case law has extended the scope of this provision to both arguments and grounds, making the failure to raise reservations particularly risky.

Ms Salem also questioned the panel on the practice of arbitrators asking whether the parties have any "reservations" regarding the conduct of the proceedings, often with a view to precluding future challenges.

While Ms Bizard did not consider this practice to be unfair, Prof. Jourdan-Marques suggested that it calls for courage from counsel and may be inherently unfair when asked without any intention of drawing consequences from the answers.

Ms Bizard then addressed recent developments regarding annulment based on a violation of international public policy, particularly in relation to corruption, and why these issues should be considered from the outset of the arbitration. She recalled that the Paris Court of Appeal relies on the "red flags" approach. The recent decision *Averda v. Gabon* of 28 October 2025 (RG n°23/16145) illustrates a shift towards greater reliance on tribunals' analysis. The court relied directly on the arbitral tribunal's detailed analysis of invoices to justify rejecting the defendant's request for full annulment.

Regarding the adversarial principle, Ms Bizard recalled that, even in expedited proceedings where time constraints are more acute, it is essential that each party be given an opportunity to respond in the event of a dispute. Prof. Jourdan-Marques stressed the importance of drafting the award carefully, particularly by separating each claim in the operative part. Failing this, where the operative part is drafted as a single paragraph, the Court of Appeal may be led to order total annulment, even if only part of the award is challenged. As noted by Ms Bizard and Prof. de Fontmichel, the use of a summary operative part submitted by the parties prior to the rendering of the award also constitutes an example of good practice.

Ms Schaller added that, from the perspective of the annulment judge, errors in reasoning are not, as such, grounds for annulment, provided that the tribunal has not exceeded its mandate and that the decision remains coherent. However, clarity and concision are essential to facilitate judicial review.

**Prospects for reform**

The conference concluded with a discussion on the ongoing French reform project. Prof. Jourdan-Marques indicated that the working group's draft decree includes, amongst other things, a provision allowing the judge to refer the parties back to the arbitral tribunal within a very broad scope (Article 82 of the draft reform project). Ms Schaller expressed strong reservation regarding this provision, viewing it as a potential infringement of the principle of arbitral autonomy. In her view, the national judge should not interfere more in the course of arbitral proceedings.

The discussion highlighted that the proposed reform raises fundamental questions which will continue to fuel debate within the French and international arbitration community.

# FIDIC CONTRACTS, NATIONAL LAWS, AND INTERNATIONAL ARBITRATION

*Elisa Gueye*

On 23 March 2026, De Gaulle Fleurance hosted a conference following the release of "*The FIDIC Conditions of Contract and Domestic Construction Law: A Guide for Global Dispute Resolution.*" The discussion aimed to explore the interactions between FIDIC's harmonised provisions and national construction law from both civil and common law traditions. Moderated by Ms Anne-Laure Gosset (Vice President of Legal and Compliance at Alstom for the AMECA region), the panel was composed of contributors to the FIDIC Guide: Mr Pierrick le Goff (Partner at De Gaulle Fleurance), Mr Lútsen de Vries (Partner at Stauch), Mr Friedrich Rosenfeld (Partner at Hanefeld) and Ms Laura Azaria (Partner at Lalive).

Ms Gosset opened the discussion and invited the panellists to identify the applicable liability regime under national law for FIDIC contracts.

Speaking from the French legal perspective, Mr le Goff emphasised the importance of contract qualification. Where a contract is characterised as a contract for works, it falls under a different statutory liability regime than the one applicable to a contract of sale. This determines which statutes of limitation are relevant or whether a statutory liability for hidden defects is applicable, for example.. Therefore, practitioners should always ensure parties agree on the contract qualification.

Mr Rosenfeld then provided a comparative insight from German law, where clauses are treated as standard terms (*Allgemeine Geschäftsbedingungen*) when they are pre-drafted for repeated use and imposed by one party. This triggers specific rules on their validity and interpretation. Interpretation is subject to the *contra proferentem rule*, so if a clause remains unclear after interpretation, it is read against the party who drafted it. He added nonetheless that according to recent developments in the German Supreme Court cases, some effects of these rules may be limited in certain situations, without affecting the validity of the arbitration agreement.

Mr Rosenfeld also highlighted the uncertainties surrounding the starting point of liability and the commencement of the Defects Notification Period. Under German law, defects liability is generally triggered upon acceptance, at which point the contractor is deemed to have fulfilled its obligations, subject to a continuing duty to remedy defects. By contrast, under FIDIC and in line with common law approaches, liability typically shifts upon the issuance of the Taking-Over Certificate.

Mr de Vries then outlined the implications of contractual classification under Dutch law. He explained that, in commercial relationships, certain liability rules, although protective by nature, may be contractually excluded between professionals. By way of example, he noted that a contractor's liability for defects can be limited where the employer could reasonably have identified the defect at the time of delivery.

Ms Azaria then provided essential clarifications in light of the reform of the Swiss Code of Obligations, which entered into force for contracts concluded as of 1 January 2026. She explained that, prior to the reform, parties enjoyed broad contractual freedom to adjust the liability regime. While this remains unchanged for movable works, the reform introduces two new mandatory provisions for immovable works and movable works incorporated into immovable property.

First, with respect to defect notification, she noted that defects must now be reported within a fixed sixty-day period, which cannot be contractually shortened. This replaces the previous requirement to notify each newly discovered defect within a few days. Second, the statute of limitations period has been extended from two to five years and may no longer be reduced to the detriment of the employer.

Ms Gosset then invited the panellists to address limitation of liability issues. Mr le Goff explained that, under French law, there are no major obstacles to the validity of overall limitation of liability clauses or clauses excluding liability for consequential losses, as provided under FIDIC. He nevertheless recommended that parties clearly define what they understand by "consequential losses" in their contracts, as this notion is not recognised as such under French law.

Ms Azaria then addressed the oversight exercised by national courts over FIDIC provisions, focusing on delay damages. She noted that the key issue under Swiss law lies in their legal classification, namely whether they qualify as penalty clauses or as liquidated damages. Where delay damages are characterised as penalty clauses, the agreed sum is payable irrespective of the actual loss. By contrast, if they are treated as liquidated damages, Swiss courts retain the power to reduce them, albeit on an exceptional basis, as confirmed by the Swiss Supreme Court.

Building up on the distinction between penalty clause and liquidated damages, Mr Rosenfeld referred to a recent decision of the German Federal Court of Justice (15 February 2024), which set a threshold for penalty clauses at five percent of the contract value. Beyond this limit, such clauses are to be considered invalid.

Turning to current challenges, Ms Gosset then addressed recent crises such as the shortage of electronic components and armed conflicts through the lens of *force majeure*.

Providing a legal framework, Ms Azaria outlined the conditions under which an event qualifies as force majeure under the FIDIC conditions, as well as the remedies available. She explained that the event must be beyond the parties' control, unforeseeable at the time of contracting, and impossible to avoid or mitigate. Where these conditions are met and proper notice is given, the contractor may be entitled to an extension of time, recovery of costs, or, in certain cases, termination of the contract.

Ms Gosset complemented this analysis with practical insights from her experience in the AMECA region, noting that in times of crisis, parties often show greater flexibility and a willingness to cooperate beyond their strict contractual obligations.

Addressing French law on the related topic of hardship, Mr le Goff observed that the FIDIC framework does not include a hardship clause. In such cases, the French doctrine "*théorie de l'imprévision*", as embodied in article 1195 of the French civil code, will be applicable to provide relief unless the parties have expressly excluded the applicability of this civil code provision.

The discussion then turned to the final topic, namely the interaction between FIDIC provisions and dispute resolution aspects under national laws. Mr le Goff noted that, in practice, the choice of French law often goes hand in hand with the designation of France as the seat of arbitration. He then indicated that France takes a flexible stand on the extension of the arbitration clause to non-signatory parties, especially if they have been involved in the contract negotiations or in key decisions affecting its performance.

Following a Dutch approach, Mr de Vries added that, while the general rule requires a notice of default, Dutch law recognises situations where default arises automatically, unlike under FIDIC. He also referred to a decision of the Dutch Supreme Court (20 January 2023), which marked a significant development by confirming the enforceability of agreements to mediate.

Mr Rosenfeld concluded by emphasising that enforceability ultimately depends on clearly defined conditions, leaving no room for ambiguity.

# DOPING AND MATCH FIXING IN TENNIS AND BEYOND

*Agathe Bertoux*

The 2nd edition of "*Doping and Match Fixing in Tennis & Beyond*" organized by Derains & Gharavi and held on 23 March 2026 as part of the tenth edition of Paris Arbitration Week, took place in the prestigious presidential box of the Philippe-Chatrier Court at Roland-Garros and brought together leading voices of all segments of the sports industry for an in-depth debate under the auspices of the host and organizer Hamid Gharavi. The focus of this year's conference were the increasingly sophisticated practices of doping and match-fixing and how sports federations must constantly adapt in order to preserve the integrity of competitions and protect athletes.

The discussion was co-moderated by Mr Hamid Gharavi (Founding partner of Derains & Gharavi) and Ms Joëlle Monlouis (lawyer and Secretary General of the French Football Federation), and the speakers included Mr Ben Rutherford (Senior Director, Legal at the International Tennis Integrity Agency ("ITIA")), Mr Ross Wenzel (General Counsel at World Anti-Doping Agency ("WADA")), Mr Giovanni Fares (Executive Director of the Gymnastics Ethics Foundation), Mr William McAuliffe (Head of Disciplinary of the Union of European Football Associations ("UEFA"). Tennis stars Mr Mansour Bahrami (Director of the Legends Tournament, Ambassador of the French Tennis Federation), Mr Eric Deblicker (coach and former ATP top 50 player), Mr Richard Gasquet (former ATP world No. 7), and Mr Cédric Pioline, former ATP world No. 5, Director of the Paris-Bercy Tournament) provided their practical insights.

Mr Gharavi opened the conference by thanking the President of the French Tennis Federation, Mr Gilles Moretton, present for the kickoff, as well as CEO Stephane Morel, the speakers, and particularly his friends: tennis players who exceptionally accepted to attend and share so openly in trust and confidence their practical experience which is unprecedented.

Mr Morel followed by thanking Mr Gharavi in turn for the initiative emphasizing the importance of mobilizing all stakeholders in the fight against sophisticated practices of doping and match-fixing, which presents a greater threat to the integrity of the sport. He stressed the need, at every level of the sports ecosystem, to educate and raise awareness among all actors, including, for example, players, coaches, and broadcasters.

He highlighted the interest of all parties to engage in "cleaner" sport practices, increasing integrity, credibility and, in turn, the overall value of sports.

The conference first focused on current issues related to doping. Mr Wenzel opened the discussion by presenting the WADA, an independent international organization established in 1999 at the initiative of the International Olympic Committee ("IOC"). Its mission is to develop, harmonize and coordinate the global fight against doping in sport. Its governance and funding are equally shared between the sports movement and governments and now include athlete representatives. Further, WADA's first World Anti-Doping Code ("Code") took effect as of January 2004 and since then been regularly updated with the new Code taking effect in January 2027. The Code applies to international sports federations, national anti-doping organizations, and major competition organizers, such as the IOC, provided they are signatories.

WADA works closely with national anti-doping agencies, sports federations, and specialized bodies such as the ITIA, which was presented by Mr Rutherford. Created in 2021 by the ATP, the International Tennis Federation and tennis organizations as an independent body, the ITIA aims to safeguard the integrity of professional tennis worldwide by combating corruption, match-fixing, and doping. In this context, the ITIA provides practical support to players in meeting their anti-doping obligations and develops educational programs to inform players and their support teams about the applicable legal framework. It also has independent investigative powers and may impose sanctions for violations of the WADA Code.

Mr Rutherford explained that ITIA performs around 8,000 tests a year, which is split between "in-competition" and "out-competition". He also explained that ITIA endeavors to use its resources wisely and strives to subject the players at the top end of the sport to doping tests more frequently. On the other hand, lower ranked players, without big tournament experience, are tested less frequently. Mr Rutherford emphasized that this distribution of tests, rather than purely random application across 15,000 professional players, allows for the preservation of brand value for big tournaments such as Roland Garros, as it ensures that players competing in these tournaments are tested regularly.

Mr Pioline highlighted the importance of such oversight and the collaboration between the tournament organizers and the ITIA to achieve the cleanest level in tennis. He added that young players, often entering the circuit with limited financial resources, may be particularly vulnerable to temptation. He emphasized their need for protection and education on the subject matter, which in turn conveys a positive message to fans and maintains the sponsors' trust.

It was raised that, in practice, two major challenges face players throughout their careers: whereabouts obligations and the risk of contamination. Indeed, three missed tests or a positive test can have irreversible consequences for a player's career.

Regarding whereabouts requirements, Ms Monlouis questioned Mr Wenzel about the strictness of the system. Mr Wenzel explained that players must provide their daily availability and location through the ADAMS system to allow for unannounced testing. According to him, such strict rules are necessary: in case of doubt, testing must prevail. Mr Wenzel emphasized that the whereabouts system, although imperfect and burdensome, is critically important to the success of the anti-doping program run by WADA as it allows WADA to test the athletes at the right time and location, adjusting to and meeting the challenge of increasingly sophisticated doping practices. Mr Wenzel also added that doping practices are detected not only through tests, but also investigations and whistleblowers.

Mr Rutherford added that in a sport like tennis, where players travel frequently, this requirement demands heightened vigilance. This is particularly important because in tennis, as opposed to team sports, most of the events are "knock-out events", meaning that the athlete may have planned to stay in the tournament but may end up leaving earlier if eliminated, which requires them to update their whereabouts even in the middle of a tournament. To ease this burden, ITIA has introduced support tools such as WhatsApp channels allowing players to more easily report location changes.

Regarding contamination risks, Mr Wenzel acknowledged the difficulty of determining whether the presence of a prohibited substance is intentional or accidental, such as contamination from partners or objects, as technology has now made it possible to detect very low levels of prohibited substances. Many cases involve unintentional ingestion yet those cases can still lead to sanctions. Defending such cases can be costly, in response to which ITIA provides players with access to a list of *pro bono* lawyers.

Mr Gharavi underscored the disparity in the extent of anti-doping controls in different sports disciplines.

Mr Gharavi then asked the Players their personal experience with anti-doping tests and how did this requirement affect the organization of their professional and personal lives.

The guest players provided their insight into the anti-doping procedures and how they have evolved over the course of their careers, most especially Messrs Bahrami, Deblicker and Pioline, who walked the audience via entertaining and telling examples through the challenges of the past.

Richard Gasquet accepted in trust and confidence to respond to Hamid Gharavi's inquiries about his experience at CAS, where he prevailed, but at great emotional and financial costs.

The second part of the conference addressed the challenge of match-fixing.

Mr McAuliffe explained that within UEFA, several teams are dedicated to safeguarding the integrity of football, including one specifically focused on combating match-fixing. Unlike anti-doping efforts, which rely on scientific analysis, this work is primarily investigative.

One of the key indicators is the manipulation and suspicious financial activity of betting markets. Specialized companies analyze betting patterns and detect suspicious behavior. The system notably includes preventive measures: at the start of a season, if serious concerns arise, a club may be denied entry into the competition.

It was highlighted that match-fixing generally affects smaller clubs with limited resources rather than major teams. Nonetheless, UEFA's integrity unit has jurisdiction across all competitions and conducts thorough investigations, which may include analyzing data from mobile phones, given the seriousness of the offenses.

Finally, the need for regulatory bodies to adapt to emerging challenges, such as the rise of predictive betting platforms like Polymarket, was also raised.

Mr Gharavi pointed out that top-ranked players were at times approached (and not just average ranked players) by intermediaries but did not report by fear of repercussions and disruptions on their careers. Also, he underlined the importance of training and informing players that they will necessarily be caught if they engage in match fixing because of the betting alerts, the matching scores, the examination of their devices and the criminal investigation of States judiciaries on the criminal networks. Mr Gasquet also confirmed that even top-ranked players are approached and may even be threatened by those involved in such schemes and candidly admitted that he himself was approached once.

Beyond tennis and football, other sports are also affected by various forms of misconduct. Mr Fares addressed the specific challenges faced in his discipline. Following the Larry Nassar scandal, in which a former doctor of the U.S. women's gymnastics team was found guilty of the sexual abuse of more than 265 gymnasts, the International Gymnastics Federation (now World Gymnastics) established the Gymnastics Ethics Foundation in 2019.

This independent body aims to protect athletes and stakeholders in gymnastics from all forms of harassment and abuse. It allows for anonymous reporting of ethical violations, conduct investigations, initiates disciplinary proceedings, and, where appropriate, imposes sanctions. It also ensures compliance with principles of good governance and ethics among federation members.

In response to an audience question regarding live betting, Mr Rutherford noted that ITIA does not have regulatory authority over it, but countries like France have introduced strict requirements. He suggested that it may even be helpful if the betting companies shared data with regulators as that information can be leveraged by ITIA for investigations.

In conclusion, the conference highlighted the growing complexity of integrity issues in sport. Faced with constantly evolving practices, only a collective effort, bringing together institutions, athletes, and all stakeholders, can safeguard the credibility of competitions. More than ever, education, cooperation, and vigilance remain the cornerstones of a more ethical and sustainable sporting environment.

# THE ADVOCATE'S DILEMMA: WHEN CONFIDENCE BECOMES OVERCONFIDENCE

*Ece Buse Gürpınar*

On Monday, 23 March 2026, as part of the 2026 edition of Paris Arbitration Week, the International Chamber of Commerce ("ICC") hosted the 10th ICC European Conference on International Arbitration in Paris. This year, the conference, titled "*Why we are all a little biased: Cognitive Biases in Arbitration*", was a shared topic in all three panels including the opening discussions between Mr Mihael Jeklic (Director of Professional Skills, King's College London, United Kingdom) and Mr Alexander G. Fessas (Secretary General; ICC International Court of Arbitration; Director, ICC Dispute Resolution Services, France). This article focuses on the second panel entitled "*The Advocates Dilemma: When the Confidence Becomes Overconfidence*", relating to myside bias and overconfidence and how these phenomena affect the counsels, parties, and overall case strategy from different perspectives of panellists based on their experience.

The session was moderated by Ms Claudia Salomon (President, ICC International Court of Arbitration, France) and the panel was composed of Mr Todd Wetmore (Founding Partner, Three Crowns, France), Mr Stephen Ruttle KC (Commercial Mediator, Brick Court Chambers, United Kingdom), Ms Noradèle Radjai (Partner, Lalive, Switzerland) and finally Mr Gauthier Vannieuwenhuyse (Head of Legal & Compliance, Total Energies, France).

Ms Salomon commenced the session by referencing the opening discussions, highlighting that no matter how experienced we are in making an objective assessment or how much we strive to overcome biases, our brains are wired for it. She emphasised that it is therefore challenging - if not sometimes impossible - to overcome our biases including myside bias, more commonly known as confirmation or advocacy bias.

Regarding the vital question of whether we believe that even an experienced advocate falls prey to myside bias and overconfidence, the floor was first given to Mr Wetmore, who delved into the matter by emphasising that this invisible and subtle bias is specific to the advocacy role. Mr Wetmore explained that the task of powerful advocacy is a highly focused one which requires conducting a thorough review of a substantial number of documents to build arguments. When advocates review opposing arguments, it is from a perspective focused on defeating them rather than adopting the mindset of the other side by imagining the strong points against one's case. Mr Wetmore further stated that culturally, young advocates are not encouraged to be true devil's advocates and point out the weaknesses in their arguments - in fact, they are mostly encouraged to build their own case without dismantling it or considering other party arguments. He finally emphasised the need to work on the weaknesses of the case, and by doing so, one can strengthen its case and become a better advocate, and a more empathetic one.

Mr Ruttle KC, who acted as a barrister for many years and now serves as a mediator, addressed this question from a mediator's perspective. He stressed the fact that a mediator facilitates the parties in reaching a settlement which allows the parties to listen to each other and this substantially differs from advocacy where the objective is to dismantle the other side's arguments. As a mediator, Mr Ruttle explained that he stands as a third party with the aim of shaping the whole evolution of the process in which these early discussions might be crucial to eliminating myside bias without the decision-making position of a third party as an arbitrator or a judge. Mr. Ruttle then explained that mediation helps people 're-humanise' and engage in two-way listening by interacting with a different reality than their own. He concluded his remarks by describing the mediation process as a dynamic, unique way of resolving disputes.

Ms Salomon then pointed out that given the client's entire focus tends to be on winning, myside bias affects both client advice and case strategy. She concluded her comments by giving the floor to Ms Radjai to answer the question regarding how an advocates can give accurate advice to a client and develop the case strategy without being affected by their biases.

Ms Radjai emphasised that while overconfidence harms persuasion and affects credibility, studies show that a healthy dose of myside bias or confidence might help advocates better articulate the arguments supporting their case. She noted, however, that as necessary as confidence may be, when it becomes overconfidence, a counterproductive outcome emerges. When one becomes too invested in their case, they might overlook the perspective of the ultimate decision maker, which would result in overlooking the weak points in their arguments or discounting the strength of the opposing view.

Moreover, she highlighted that such a shift is where myside bias affects case strategy and negotiations, given that the chances of reaching a favourable outcome would be significantly diminished, especially if one does not have a realistic assessment of its case. This would lead to giving a great amount of weight to the favourable evidence and not giving enough to unfavourable evidence and hence would stand in the way of building the strongest-case strategy and would create blind spots that the decision maker will see regardless. Ms Radjai then underlined the fact that if advocates are not given the structured support to make cognitive assessments, they too might fall prey to their own biases, and she reiterated the importance of balance in confidence to maintain client trust and ensure effective advocacy. Otherwise, such a shift into overconfidence would affect judgement, prevent settlement, and weaken the case strategy. Ms Radjai concluded by stating that the real challenge for advocates is protecting that confidence externally while maintaining objectivity internally.

The floor was finally given to Mr Vannieuwenhuyse, who addressed the effects of myside bias and overconfidence from an in-house perspective, highlighting the immediate and concrete effects of bias on case strategy, organisational choices and ultimately, on how the company values the case. He began by identifying two main problems that may arise from myside bias and overconfidence, the first being strategy blind spots, as early predictions within the company create anchors and company expectations are formed around that early estimate, which are significantly more difficult to correct at a later stage. Mr Vannieuwenhuyse explained that myside bias and overconfidence affect the amount of budget allocated to the case and settlements, as the company would genuinely believe its chance of success exceeds 50%. He later identified the second problem, stating that overconfidence has a negative impact on internal trust and governance, as early assessments influenced by overconfidence might undermine their credibility, which might also have an impact on future evaluations. He concluded by underlining the importance of trust in legal advice for the companies, and that such trust might be substantially undermined in cases of overconfidence.

Finally, guided by Ms Salomon, the panellists touched upon the practical tools and measures to overcome bias in their approach. While Mr Wetmore mentioned the use of artificial intelligence ("AI") tools might be helpful in identifying the ambiguities in one's arguments, Mr Vannieuwenhuyse agreed that AI may serve as a useful tool, under human supervision. The panellists further reached a consensus that external review of the case through mediation, facilitation, or a third-party assessment either within the law firm or external to it, is paramount and, at the same time, viable. The key takeaway from the panel was that although it might be challenging to recognise and overcome myside bias and overconfidence, it is crucial for advocates to engage with them to formulate stronger case strategy and provide better advice to clients.

# NEW-GENERATION BITs: REFORM, REBRAND, OR RESET? INSIGHTS FROM KEY STAKEHOLDERS

*Satine Berton and April Hoang*

On Tuesday, March 24, 2026, Wordstone Dispute Resolution and the associations Paris Investment Arbitration Group (PIAG), led by Ms Jelena Todić and Ms Charlotte Matthews, and Young International Federation for Investment Law and Arbitration (YIFILA), led by Ms Stephanie Collins and Ms Emma Iannini, organized a conference on new generation Bilateral Investment Treaties ("BITs").

The panel, moderated by Ms Audrey Caminades (Of Counsel at Wordstone Dispute Resolution), included Ms Marija Šobat (Senior Associate at GBS Disputes), Ms Jennifer Younan (Partner at A&O Shearman), Ms Anna Toubiana (Legal Counsel at the International Centre for Settlement of Investment Disputes ("ICSID"), and Mr Olivier Whitehead (Legal Counsel at the Ministry of Foreign Affairs of the Netherlands).

Ms Caminades began the conference by highlighting that despite years of practice and case law, there is still no universal consensus on the definition of an investment or on the scope of TBI protections. She explained that the conference would examine whether BITs have undergone substantive changes, and the panelists would explore whether new-generation BITs seek to rebalance protection between investors and States or to grant greater regulatory autonomy to the latter, or whether they merely constitute updated versions of earlier treaties that had been criticized, *inter alia*, for being overly favorable to investors.

The discussion was structured around three main topics: the content of "new generation" treaties; their practical application; and the question of whether these developments should be considered as reform, rebrand or reset.

Ms Šobat began the first topic by discussing the provisions of the treaties. She provided historical context on expropriation, explaining that it evolved from the idea of the State seizing *de facto* ownership control to encompassing the taking of contractual rights through a diminution of value. She added that contractual rights were often overlooked in the general understanding of expropriation, and that decisions rendered by different tribunals expanded the modern concept to include not only property rights and titles but also contractual rights, along with a depreciation in property value. The focus is therefore no longer limited to *de facto* ownership. New expropriation provisions can be found, for example, in the Canada Model BIT.

Ms. Toubiana then continued by exploring the shift toward transparency between the new BITs and the earlier ones. Previously addressed only during negotiations, transparency is now an integral part of the procedure. She noted that at the end of the 19th century, transparency was not a consideration. Over the years, States began to move away from this approach, as illustrated by BIT models such as the Colombian or Canadian ones. Today, the 2022 ICSID Arbitration Rules establish transparency as a default rule, and confidentiality must be affirmatively requested by the parties. Parties can now agree, in a specific procedural order No. 2, on transparency and confidentiality provisions concerning the publication of awards, orders and decisions, other documents filed in the proceedings, transcripts and recordings of hearings, open hearings, and the definition of confidential and protected information.

Mr Whitehead spoke about the interplay between law and policy over time. He noted that transparency provisions are increasingly featured in new treaties as a result of evolving policy considerations. He then turned to the second topic, namely the obligations included in the new BITs. He gave the example of the 2019 Dutch Model BIT, which was revised to provide more balanced obligations, guarantees, and policy freedoms. He observed that Dutch politics play a role in shaping the content of treaties and that BITs are now regarded as useful instruments in support of other policy objectives, such as sustainable development, which has in turn led to the incorporation of corresponding provisions into the model BIT.

Ms. Younan discussed the investor-State dispute settlement ("ISDS") provisions, which are generally converging with the provisions included by States in their BITs, albeit with certain exceptions. States continue to maintain ISDS mechanisms, though with some reservations. She noted that in the new BITs, States tend to codify or modify existing provisions, while also incorporating additional considerations such as gender, geographical and age diversity, as well as the balance between common law and civil law traditions. She further noted that the introduction of mediation as a preliminary phase constitutes a notable development, and that provisions prohibiting double-hatting in ICSID proceedings have emerged.

The speakers noted that a large percentage of case law in arbitration is still based on older treaties, making it complicated to assess the real effect of new BITs. In this regard, it was observed that since the publication of the 2019 Dutch Model BIT, there have been no new BITs signed, although some negotiations are ongoing. He said he sees a role for the U.N. Working Group III and that modernization can be seen through efforts such as multilateral forums. He stated that underlying policy for new-generation BITs can be achieved in current arbitration on the basis of old treaties.

However, Ms. Younan said that the fact that a large percentage of case law in arbitration is still based on older treaties can make it complicated to assess the real effect of the new BITs. To illustrate this point, she cited examples such as *Eco Oro v. Colombia,* which shows efforts on the part of States in adopting new BITs with new provisions, but arbitral tribunals still heavily rely on old treaties or precedents based on earlier BITs. She also cited a study by Wolfgang Alschner entitled *Investment Arbitration and State-driven Reform: New Treaties, Old Outcomes* to illustrate the impact of awards based on old TBIs on the new treaties.

Ms. Toubiana then agreed that there has not been enough time to observe the global effects of the new BITs. Even though the language is evolving, older treaties still have an impact.

Ms. Šobat then returned to the issue of expropriation, citing new US, Canadian, and Chinese BITs that contain provisions on expropriation. She described some provisions that we can observe*, i.e* indirect expropriation that can be excluded from the definition of the expropriation in the BITs' provisions; application to regulatory measures; and regulatory definitions aiming to frame expropriation. She finished her explanation by saying it is more difficult to agree that a discriminatory measure can constitute expropriation, and there is more space for interpretation.

The question remains: who will decide on the new BITs' application? The arbitral tribunals, and thus we may return to older precedents. Essential national security provisions have also been added, addressing fundamental issues for the State, and are increasingly invoked.

The panelists concluded the conference by reiterating that progress is slow and that it will take time to actually see the real impact of the modernization of BITs in practice.

*The speakers participated in their personal capacity and the views expressed do not necessarily represent those of their respective State, institution, firms or clients.*

# SANCTIONS AND COUNTERACTIONS: THE NEW ARBITRATION BATTLEFIELD

*Jihane Bensaid & Matias Muniz Mariategui*

On Tuesday, 24 March 2026, as part of the 2026 edition of Paris Arbitration Week, Clyde & Co hosted a conference entitled *"Sanctions and Counteractions: The New Arbitration Battlefield."* The panel included Mr Ivan Urzhumov (Partner at Clyde & Co) and Ms Sophie Bayrou (Counsel at Clyde & Co), alongside guest speakers Prof. Régis Bismuth (Professor of Law at Sciences Po Law School), Mr Aakash Brahmachari (Managing Director – Head of Intelligence & Asset Tracing at Ankura), and Mr Arnaud Douville (Deputy Group General Counsel & Chief Compliance Officer). The event brought together academic rigor and front-line professional experience, offering the audience a rich and layered perspective on one of the most pressing issues currently facing the arbitration community.

Ms Bayrou opened with a remark that drew laughter from the room. The *Hôtel de Crillon*, she noted, overlooks the very square where Louis XVI and Marie Antoinette lost their heads, and the Declaration of the Rights of Man once hung from its facade. It seemed, she suggested, a fitting venue to discuss what happens when the law is used as a weapon. Particularly, in a world of rising geopolitical tensions, sanctions have truly ceased to be a matter of public law and foreign policy alone. They now permeate commercial arbitration at every level, operating as a jurisdictional weapon in parallel to the physical violence of military operations.

Since Russia's invasion of Ukraine in 2022, the EU has adopted sixteen packages of restrictive measures against Russia, affecting all stages of international arbitration - from access to counsel and funding, through procedural conduct, to the enforceability of awards and asset recovery. Multi-jurisdictional disputes have become inherently entangled with sanctions.

Yet, as Ms Bayrou noted, there is a striking contradiction at the heart of the matter: sanctions serve a dual role. They are simultaneously barriers to justice and generators of disputes, triggering claims of unlawful expropriation or breach of treaty obligations. Investment arbitration, in particular, has become a tool for counterattacking sanctions, with sanctioned states or state-linked entities using BIT claims to challenge the legality of measures taken against them.

The real question, then, is how sanctions and counteractions shape the form, substance, and legitimacy of arbitration proceedings.

Prof. Bismuth followed elegantly with an in-depth analysis of the "no-claims clause" ("NCC") under Article 11 of EU Regulation No. 833/2014. He explained that this provision prohibits the satisfaction of certain claims brought by Russian entities where contractual performance has been affected by sanctions. His analysis focused in particular on the case *NV Reibel v. JSC VO Stankoimport*, currently pending before the Court of Justice of the European Union. According to the Advocate General, disputes involving sanctions remain arbitrable; however, arbitral tribunals cannot grant claims that are prohibited under EU law. This creates a disconnect between the ability to hear a case and the possibility of enforcing a favorable award. The speaker further stressed that the NCC forms part of EU public policy, requiring national courts to conduct *ex officio* review of arbitral awards. This development introduces tension with the traditional principle of limited judicial review in arbitration and raises concerns about inconsistent application across EU member states, even being contrary to the European public order. Additionally, the NCC has implications for the choice of arbitral seat: EU seats, subject to stricter scrutiny, risk becoming less attractive compared to non-EU seats that are free to grant compensation irrespective of sanctions regimes.

Mr Urzhumov then addressed Russian countermeasures, identifying two main categories. The first concerns measures relating to the transfer of control over foreign assets from companies operating in Russia. More specifically, the Presidential Decree No. 302 (25 April 2023) allowed the Russian state to place foreign-owned companies under "temporary administration" managed by the Federal Agency for State Property Management. These measures have triggered a wave of investment arbitration proceedings from expropriated foreign investors.

The second category involves mechanisms designed to shield Russian entities from foreign sanctions, notably thanks to the "Lugovoy Law" (Federal Law 171-FZ, June 2020) which amended Articles 248.1 and 248.2 of the Russian Arbitrazh Procedure Code: the former grants exclusive jurisdiction to Russian commercial courts over disputes involving sanctioned Russian persons or entities, irrespective of any valid arbitration clause; the latter empowers Russian courts to issue anti-suit injunctions prohibiting foreign counterparties from initiating or continuing proceedings abroad, backed by fines equal to the full amount of the claim in foreign proceedings. The largest reported fine to date is EUR fourteen point three billion (*Gazprom Export v. Uniper/Metha*). In 2024 alone, Russian courts invoked Article 248 more than two hundred times. Mr Urzhumov highlighted the resulting jurisdictional conflicts and contradictory decisions, as well as the responses of Western courts, including counter anti-suit injunctions.

Mr Douville turned to the practical implications of sanctions for businesses, emphasizing the need for a proactive approach to contract drafting. EU Regulation 833/2014, for instance, imposes heavy constraints by limiting transactions with designated Russian banks and forcing companies to switch to alternative currencies such as euros or yuan, while the war in Ukraine and Russia's dominant role in global nickel production have triggered supply chain disruptions and price spikes, leaving companies tied to contracts that are economically unviable rather than impossible, thereby complicating force majeure claims. In this environment, sanctions create major operational challenges across payments, supply chains, and currency management, making contractual drafting a crucial risk management tool: parties should precisely define "best efforts" obligations (e.g., obtaining licences, sourcing nickel from alternative suppliers, or rerouting logistics), provide clear termination triggers linked to sanctions with appropriate notice mechanisms, adapt or suspend penalty clauses, include robust remedies for sanctions-related non-performance, and comply with any applicable reporting obligations.

The conference ultimately closed on a note of sober realism, highlighting how enforcement has become the true fault line of sanctions-affected arbitration. As Mr Brahmachari underscored, a defining paradox now prevails: creditors may be fully aware that substantial assets exist, yet remain unable to access them due to state-imposed freezes, while increasing opacity renders asset identification ever more complex. In this "frozen landscape," traditional enforcement techniques have lost much of their effectiveness, forcing practitioners to rethink their approach: success now depends on combining precise intelligence on where assets lie with the ability to establish a clear legal link between the debtor and those assets, often in the face of deliberately obscured information. Consequently, enforcement strategies have shifted toward more creative and pragmatic solutions, including targeting non-traditional or indirect assets, mapping supply chains and commercial relationships, and pursuing recovery in third jurisdictions such as India or the United Arab Emirates, where business activity continues despite sanctions. Above all, the growing reliance on human intelligence and sector-specific expertise marks a profound evolution of the field.

# A FOREWARNED RESPONDENT IS FOREARMED – ANTICIPATING INTERNATIONAL ENFORCEMENT STRATEGIES

*Maureen Louis & Marianne Mapola*

On Tuesday, 24 March 2026, the law firm Jones Day hosted a conference on anticipating international enforcement strategies in the context of arbitration. The session was moderated by Mr Thomas Dauvillier (Senior Associate, Jones Day) and featured Mr Michel Thirion (Senior Legal Counsel in charge of litigation, TotalEnergies), Ms Asma Mze (Partner, LX Avocats), Professor Lilian Larribère (Professor, Université Paris Nanterre), Mr Cyril Philibert (Partner, Jones Day) and Ms Claire Pauly (Partner, Jones Day).

Mr Dauvillier opened the discussion by recalling that, in international arbitration, an award, however well-reasoned, only truly has value if it can be enforced. The very fact that one speaks of forced enforcement shows that it does not occur automatically. While one might assume that a respondent ordered to pay should simply comply, the reality is more nuanced: there are various legitimate mechanisms, both for challenging and resisting enforcement. An informed respondent can anticipate these and not only mitigate their effects but, in some cases, use them to their advantage.

Professor Larribère explained that enforcement strategies must be prepared in advance, starting from the arbitral proceedings. According to him, if the respondent waits until the award is rendered to consider these issues, significant difficulties may arise. Preparation therefore involves bringing to the arbitral tribunal's attention any difficulties encountered during the proceedings, particularly in light of Article 1466 of the French Code of Civil Procedure, which prevents a party from invoking before the annulment judge any irregularities that were not raised before the arbitral tribunal.

He also highlighted the uncertainties surrounding the interpretation of this provision: the *Schooner* decision accepts that, once a grievance has been raised before the arbitral tribunal, additional arguments may subsequently be developed before the reviewing judge. By contrast, a decision of the Paris Court of Appeal requires that all irregularities be raised during the arbitral proceedings. He then outlined several strategies that may be used at the enforcement stage, including actions to set aside the award, requests for a stay under Article VI of the New York Convention on the recognition and enforcement of foreign arbitral awards, as well as more original mechanisms such as anti-suit injunctions, the use of the *"retrait litigieux"* to repurchase a claim assigned to a third party, or the invocation of *forum non conveniens*.

Mr Thirion then referred to the development of parallel proceedings in the United States based on Section 1782 of Title XXVIII of the U.S. Code, which allows federal courts to order evidence-gathering measures in support of foreign proceedings. He recalled that three main conditions must be satisfied: the person from whom discovery is sought must be located within the jurisdiction of the court, the request must support a foreign proceeding, and it must be made by a person with an interest in the matter. If these conditions are met, the court then exercises its discretion in deciding whether to grant the request, in light of the *Intel* factors, such as the nature of the foreign proceedings, the possibility of circumventing evidentiary restrictions, or the burdensome nature of the request.

He illustrated these practices with two ongoing proceedings involving TotalEnergies before U.S. courts. In one case, a request for document production was filed at the time TotalEnergies was preparing to begin its listing on the New York Stock Exchange. The company challenged the request before the federal court, arguing in particular that the request was excessive, that the applicant lacked standing, and that the timing of the request was opportunistic. In another case related to enforcement through seizures, the request sought to verify, through U.S. banks, the existence of potential payments or debts that may not have been disclosed.

Ms Pauly then returned to the use of Section 1782 and the possible ways to defend against such requests. She recalled that this mechanism, introduced in 1855, now allows parties to request the production of documents, tangible evidence, or witness depositions in support of foreign proceedings. She noted, however, that since 2022 this provision can no longer be used in support of commercial arbitration. It may nevertheless be relied upon in support of enforcement proceedings or preliminary evidentiary measures such as those provided for under Article 145 of the French Code of Civil Procedure. She also emphasised the broad scope of this procedure, as any person or entity present in the United States may be targeted, including individuals who are not parties to the foreign proceedings. Finally, she outlined several possible strategies for respondents, including seeking to limit the scope of the requests or, in some cases, applying for a similar measure in return.

Ms Mze recalled that under French law, an action to set aside an award or an appeal against an exequatur order does not have suspensive effect: despite the challenge to the award, the creditor may continue enforcement measures. The party ordered to pay may nevertheless request a stay or an adjustment of enforcement, but such a request does not suspend ongoing measures and only produces effects for the future. To obtain it, the applicant must demonstrate that enforcement is likely to cause serious harm, a threshold generally met either where enforcement would threaten the company's viability or where there is a serious risk that the sums would not be recoverable if the award were later annulled.

Mr Philibert recalled that at the enforcement stage it is necessary to combine arbitration law with the domestic law governing enforcement procedures in order to act effectively against a recalcitrant debtor. He emphasised in particular the role of the third-party debtor, a central mechanism of French law allowing a creditor to seize sums owed to the debtor by a third party, with an immediate impact on the debtor's cash flow once the award has been granted exequatur. He also referred to the difficulties in identifying assets to be seized, mentioning the use of the bank accounts registry "Ficoba". Finally, he noted that the length of enforcement proceedings often encourages parties to pursue settlement strategies, although these strategies may conflict with the primacy of national law when it comes to enforcement. Mr Philibert illustrated his position with a worked example where a party wants to rescind or annul a settlement agreement to enforce the initial award. In this case, if arbitration agreements have been inserted in the settlement agreement, the local court (the only one that can effectively enforce the award) will decline jurisdiction and invite the parties to initiate new arbitration proceedings to establish the non-validity of the settlement agreement. This example demonstrates that choosing arbitration law without considering the primacy of national law as regards enforcement can lead to significant hurdles at this enforcement stage.

A question was raised regarding the possibilities for recovery when a debtor company has been placed into liquidation. Mr Thirion referred to a similar experience in which, despite obtaining a favorable arbitral award, enforcement proved impossible because the company had been liquidated between the start of the proceedings and the issuance of the award. The possibility of relying on the theory of piercing the corporate veil was explored, but this approach faced the difficulty of demonstrating the effective control of the parent company over the subsidiary. Ms Pauly and Professor Larribère then highlighted that such difficulties may be anticipated by seeking, during the arbitral proceedings, an extension of the arbitration agreement to the parent company in order to engage its liability. This reflection ultimately brought the discussion back to the core message of the conference: in international arbitration, a forewarned respondent is forearmed.

# FAST & FURIOUS Q&A – CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION

*Redeat Mulugeta Zewdie*

On Tuesday, 24 March 2026, Freshfields LLP hosted its annual panel discussion titled *"Fast & Furious: Cross-Examination in International Arbitration"*. The session was moderated by Mr Matei Purice (Counsel at Freshfields LLP) and Ms Veronika Timofeeva (Senior Associate at Freshfields LLP) and followed a fast-paced question-and-answer format, with each speaker given sixty seconds to respond, offering concise and practical insights drawn from experience. The speakers included Mr Noah Rubins KC (Partner at Freshfields LLP), Ms Jane Davies-Evans KC ( Barrister and Arbitrator at 3 Verulam Buildings), Ms Erica McCormick-Dorst (Senior Legal Counsel at Shell), Ms Selma Baccari (Senior Director at Kroll), and Mr Ed Williams KC (Barrister and Founder of Assurety Training).

The session opened by highlighting the tensions inherent in cross-examination. While counsel often view it as a key moment of advocacy, for experts and witnesses it requires navigating a highly adversarial environment. From the perspective of in-house counsel, the focus instead lies on efficiency, cost control, and overall case management. These diverging perspectives underscore the need for a delicate balance between performance, credibility, and practical constraints in cross-examinations.

The discussion then focused on the qualities that define an effective witness. The most valuable witnesses are those who can tell the truth clearly, possess relevant knowledge of the case, and respond effectively to questioning. The panel stressed that credibility and responsiveness matter more than performance, marking a shift away from overly rehearsed advocacy. Early involvement of counsel was also seen as essential, allowing practitioners to test witnesses and identify weaknesses before the hearing.

From an in-house perspective, there are more practical constraints, noting that a good witness must be available, credible, and able to grasp what is at stake, including the strengths and vulnerabilities that may ultimately determine the outcome of the case. Experience was considered a clear advantage, particularly in complex disputes. Experts should also demonstrate a clear methodology, strong technical expertise, and relevant experience, while engaging closely with counsel from an early stage. Experts are therefore increasingly seen not simply as technical contributors, but as integral to the overall advocacy strategy.

Preparation emerged as a defining aspect of effective cross-examination, as it often involves structured sessions with external counsel, tailored to the needs of each case. The panel then offered a more nuanced perspective, stressing that preparation must not come at the expense of authenticity, as overly rehearsed testimony can appear artificial and ultimately undermine credibility. A common misconception among witnesses is that they must "win" the exchange, whereas effective testimony instead requires discipline, attentive listening, and concise answers, often reflecting the principle that less is more.

The discussion then turned to how tribunals navigate competing expert narratives. Arbitrators, drawing on their experience, are generally well equipped to identify the most persuasive position or, where appropriate, to reach a balanced middle ground.

Strategic considerations also featured prominently in the discussion. The panel underscored that cross-examination should be used selectively rather than as a matter of course, and only where it meaningfully advances the case. Decisions on whether to proceed were typically made jointly by in-house and external counsel, following a careful assessment of the potential risks and benefits. In this context, preparation was described as both early and continuous, often beginning upon receipt of witness statements, with a focus on isolating the points most likely to reinforce the overall case theory.

Against this backdrop, the panellists dispelled the notion that legal culture fundamentally alters preparation. While theoretical differences exist, credibility assessments in practice were said to rest largely on human perception, with arbitrators tending to converge in their evaluation of witnesses during deliberations. Witnesses were nevertheless made aware of procedural nuances, though preparation remained centred on equipping them to face difficult questioning with clarity and composure. In parallel, artificial intelligence was recognised as a valuable support tool, particularly in managing complex evidentiary records and testing consistency, but one that must remain subordinate to counsel's strategic judgement.

Finally, the discussion turned to the future of cross-examination and how it may be refined in practice. The panel suggested a clear shift towards greater discipline and selectivity, pointing to a move away from exhaustive questioning, particularly in relation to expert evidence. Cross-examination should serve to assist the tribunal, rather than merely discredit the opposing party.

# REBUILDING THE ATOM: CONSTRUCTION DISPUTES AND SOVEREIGN RISK IN NUCLEAR PROJECTS

*Clara El Semman & Matthieu Khamphannasing*

On Tuesday, 24 March 2026, as part of Paris Arbitration Week, Pinsent Masons hosted a conference on construction disputes and sovereign risk in nuclear projectsThe panel featured five speakers: Ms Kamalia Mehtiyeva (Law Professor at the Université Paris Est Créteil), Mr. Stefan Dudas (Head of Legal at Framatome), Mr. Steve Ovenden (Head of Legal at EDF UK), M.s Gaelle Filhol (Partner at Pinsent Masons), and Ms. Ileana Smeureanu (Legal Director at Pinsent Masons), and was moderated by Mr. William Brillat-Capello (Legal Director at Pinsent Masons).

The discussion first provided a broader historical perspective on the nuclear sector. Nuclear energy experienced sustained growth from the 1970s until the Fukushima accident in 2011, after which it was widely perceived as outdated, costly and politically sensitive. However, governments realised that renewables cannot provide electricity at all times and that dependence on natural gas is problematic due to geopolitical tensions, which brought nuclear energy back to the table. As a consequence, global nuclear generation reached an all-time high in 2024, with 73 reactors under construction, particularly in Asia, Europe, and the Middle East, showing nuclear is now seen as a necessary complement to renewables in ensuring both energy security and decarbonisation.

The first question related to the evolution of disputes involving nuclear projects. The panellists , explained that most of the disagreements remain about similar elements to those in any infrastructure project, namely safety, quality, time, and cost. However, nuclear projects differ due to their scale and technical complexity. Building a plant requires vast resources, long timelines, and highly specialised engineering. As a result, projects are often broken into smaller programs rather than governed by a single long-term EPC contract. In this context, there has been an increasing reliance on early dispute resolution mechanisms, such as adjudication, throughout the lifecycle of the project, enabling parties to address disagreements before they escalate. The recent "renaissance" of nuclear energy required industry players to relearn critical skills, particularly regarding safety.

From a contractual perspective, the discussion highlighted that while many disputes remain "classic" in nature, new challenges have emerged, particularly in relation to force majeure and international sanctions. These questions, including the allocation of risk arising from sanctions regimes, are now more systematically addressed at the drafting stage. There has also been a noticeable shift towards the inclusion of multi-tier dispute resolution clauses, allowing for disputes to be resolved at earlier stages and thereby reducing the number of cases proceeding to arbitration. In parallel, collaborative contracting models have gained prominence, notably alliancing arrangements such as the Framework Alliance Contract (FAC-1), under which parties share both risks and benefits instead of transferring them unilaterally.

The discussion also addressed the specific features distinguishing disputes in the nuclear construction sector from other types of construction disputes. Although they share common characteristics, nuclear disputes are marked by several unique factors. First, regulators play a central role, acting almost as an "invisible party" with licensing requirements and regulatory interventions directly affecting timelines. Second, design immaturity is "systemic" in nuclear projects, leading to more complex and evolving disputes. Third, nuclear projects generate vast amounts of highly sensitive documentation, including safety files and cybersecurity systems, raising confidentiality challenges similar to those in the defence sector. Finally, disputes relate to proprietary technical components rather than architectural issues, notably instrumentation and control systems, IT integration and cybersecurity upgrades.

The discussion then explored the distinctions between commercial construction disputes and those arising in the context of Investor-State Dispute Settlement ("ISDS"). While the underlying issues may appear similar, their origins differ significantly due to the public dimension inherent in ISDS. In particular, the identity of the parties and the applicable legal framework set these disputes apart. Whereas commercial arbitration typically involves private actors, such as employers and contractors, ISDS proceedings oppose investors to States.

Similarly, commercial disputes are primarily grounded in contractual obligations, while ISDS claims are generally based on treaty protections. These differences also shape the nature of the disputes.

Although construction disputes usually relate to delays and cost overruns, in the ISDS context such issues often arise from regulatory changes rather than purely contractual performance. In this regard, three broad categories of disputes were identified in the nuclear sector: those directly linked to plant construction, those indirectly connected to the industry (notably involving suppliers), and those resulting from policy shifts following nuclear incidents, such as phase-out measures adopted after Fukushima.

The discussion further highlighted the particular exposure of nuclear projects to ISDS claims. Such projects require significant upfront investments, involve long operational lifespans and are inherently immovable, thereby increasing investors' reliance on regulatory stability. At the same time, the sector remains highly sensitive from a political and societal perspective, as it lies at the intersection of public safety, environmental protection and national security. This results in a high degree of regulatory intervention by States. In this context, arbitration may be triggered by a wide range of factors, including regulatory changes, licence withdrawals, forced shutdowns, environmental opposition, abrupt policy shifts or breaches by State entities. Reference was made to cases such as Vattenfall v. Germany, where policy changes adopted in the aftermath of Fukushima gave rise to investment claims.

Turning to risk allocation, the discussion underlined the specific structure of the nuclear industry, characterised by a limited number of market participants and highly complex contractual arrangements. Two principal categories of risk were identified. The first concerns civil nuclear liability, which is governed by international conventions such as the Paris and Vienna Conventions. These regimes generally impose strict liability on the operator while excluding liability for contractors. Divergences from these frameworks at the national level have, in some instances, led to project delays, particularly where liability regimes remain uncertain. This was the case in India before the December 2025 SHANTI Act, which aims to align India's regime with international standards by placing liability on the operator rather than suppliers. The second category is contractual liability, managed through mechanisms such as pain/gain share, performance-based milestones, and alliancing contracts.

In this context, it was emphasised that risk allocation must remain pragmatic and adaptable, given the diversity of actors involved in nuclear projects and the differing nature of the risks they face. Particular attention was drawn to the importance of allocating risks to the parties best placed to manage them, as well as to the benefits of collaborative approaches over rigid risk transfer mechanisms. Recurring challenges were also identified, notably in relation to geotechnical risks and constraints affecting the limited pool of qualified nuclear suppliers.
The interaction between regulatory frameworks and dispute resolution was also addressed. The State was described as playing a dual role, both as regulator and, in certain instances, as a commercial actor, thereby constituting a constant presence in nuclear projects. Regulatory requirements, including testing, reporting and approval processes, may generate delays and give rise to disputes, particularly where the allocation of responsibility for such delays is unclear. In addition, the existence of parallel regulatory proceedings and third-party actions, including those initiated by non-governmental organisations, may further complicate dispute resolution processes.

The discussion also examined the boundary between legitimate regulatory action and compensable interference. While States retain a recognised right to regulate in the nuclear sector, this prerogative is not without limits. Arbitral tribunals typically assess whether regulatory measures have frustrated investors' legitimate expectations, provided that such expectations are based on specific assurances rather than general assumptions. They also consider whether commitments made by the State have been breached, as well as broader criteria such as proportionality and reasonableness. It was further noted that a mere loss of profit is generally insufficient to establish expropriation, which instead requires a substantial deprivation of the investment. In this context, practical steps were identified for investors seeking to mitigate risk, including the careful preservation of evidence of regulatory assurances, thorough documentation of stakeholder engagement, and comprehensive due diligence supported by external legal and technical expertise.

Attention was also drawn to the significant degree of discretion retained by national regulatory authorities in implementing international safety principles, resulting in divergent approaches and timelines across jurisdictions. This regulatory fragmentation may have a direct impact on project execution, even in jurisdictions with well-developed nuclear regulatory frameworks.

The discussion also underlined the importance for investors of carefully assessing the scope of treaty protections, particularly in light of carve-outs that may limit their application, such as essential security clauses or express exclusions relating to nuclear activities.

The panel concluded with forward-looking reflections on the need to further examine the protection of intellectual property rights in the context of nuclear projects, an issue likely to gain increasing prominence as technological complexity continues to grow.

# CRYPTOCURRENCY AND STABLECOIN DYNAMICS IN FRANCE, THE US, AND BEYOND – WHAT ARBITRATION PRACTITIONERS NEED TO KNOW

*Padraic Mc Cafferty & Mauro Rosato*

On Tuesday, 24 March 2026, Forensic Risk Alliance hosted a panel discussion on the rising prevalence of cryptocurrency disputes and arbitration. The panel, moderated by Mr Derek Patterson (Partner at Forensic Risk Alliance), included Ms Meredith Fitzpatrick (Partner at Forensic Risk Alliance), Ms Anne Marechal (Partner at De Gaulle Fleurance), Mr Charlie Morgan (Partner at Herbert Smith Freehills Kramer), and Ms Esperanza Barrón Baratech (Senior Counsel at De Gaulle Fleurance).

The discussion centred on three core themes: first, the emerging legal and regulatory framework governing crypto-assets; second, the scope and nature of disputes now surfacing; and third, the hurdles practitioners face when enforcing arbitral awards. The panel also offered brief reflections on future litigation trends and the prospects for third-party funding in the crypto arena.

Mr Patterson opened the session by observing that cryptocurrency has now entered mainstream finance and is likely to generate a growing number of high-stakes disputes. He highlighted three legislative milestones that now frame the field: EU Regulation 2023/1114 on Markets in Crypto Assets ("MiCA"), the Guiding and Establishing National Innovation for U.S. Stablecoins Act ("GENIUS Act") and the Financial Services and Markets Act 2000 ("Cryptoassets") Regulations 2026 ("FSMA Regs"). Against this backdrop, Mr Patterson emphasised that arbitration is well positioned to play a significant role in resolving cryptocurrency-related disputes, while noting that issues of jurisdiction and arbitrability continue to raise complex and sensitive questions.

Ms Marechal then charted Europe's regulatory path. France laid the groundwork with *Ordonnance* n° 2017-1674 of 8 December 2017, authorising the issuance and transfer of securities on blockchain, and with the Pacte Law of 2019 (*loi Pacte du 22 mai 2019*), which introduced the DASP/CASP regime. These domestic measures informed MiCA, which took effect on 30 June 2024 for stablecoins and on 31 December 2024 for crypto-asset service providers ("CASPs"). MiCA introduces a passport-style license she likened to a banking license in which applicants must pass fit and proper tests, hold adequate capital, implement AML/Combating Financing Terrorism ("CFT") controls, segregate client assets, undergo cyber-security audits and, for stablecoins, maintain a 1:1 redemption ratio backed by liquid reserves held within the EU. Roughly seventy firms have begun the licensing process, but every provider operating in the EU must be authorised by July 2026 or cease activity. The aim, she explained, is to protect investors while fostering innovation, an approach that contrasts with the United States' historically enforcement-heavy stance.

Across the Channel, Mr Morgan noted, the United Kingdom still lacks an overarching framework. Regulation has advanced through consultation and enforcement, whereby the Financial Conduct Authority's ("FCA") first action against the Panama-based exchange, HTX in October 2025, exemplified a "watching-brief" strategy. Political shifts have produced regulatory whiplash, and core concepts such as the definition of "crypto-asset" remain unsettled, even as English courts increasingly treat digital assets as property. Rapid policy reversals and market volatility, he warned, make compliance a moving target.

Ms Fitzpatrick outlined the U.S. perspective. The GENIUS Act addresses only stablecoins, treating them as dollars in digital form whereby issuers must hold fully backed reserves, offer redemption on demand and publish monthly disclosures. She foresaw arbitration claims for misrepresentation, disclosure failures and redemption freezes, especially where reserves prove thin, and the priority between customer claims and reserve assets is contested. Parallel debates over the Digital Asset Market Clarity Act of 2025, intended to settle the Securities and Exchange Commission ("SEC") versus Commodity Futures Trading Commission ("CFTC") turf battle over who regulates them, may themselves trigger disputes over regulatory reach and asset characterisation. As in the UK, the central challenge is definitional. Is a digital asset a 'security', overseen by the SEC, or a 'commodity', falling under the CFTC?

Mr Morgan described the crypto-asset market as decentralised, closely watched by regulators and wildly volatile. He illustrated this volatility by noting that Bitcoin fell from €125,000 in early October 2025 to €65,000 in March 2026.

Ms Barrón Baratech turned to jurisdiction and dispute types. She said that talk of fully on-chain or smart-contract arbitration had not yet produced real cases. The disputes that do reach tribunals are mostly crypto-adjacent. Parties use tokens as collateral or to fund other deals, and the main issues are valuation and evidence rather than arbitrability. A small but growing line of consumer claims has also appeared. In the past four years, French courts have held that individual crypto-asset investors are consumers under Regulation (EC) No 593/2008 (Rome I). That status lets them sue in their own courts even when the contract selects another forum. The *Cour de Cassation* upheld this view on 28 June 2023 in *Spectro Finance (n° 22-12 424*), a case involving the SpectroCoin platform. French law also classifies crypto-assets as intangible movable property, which shapes collateral arrangements and limits proprietary remedies when compared with common-law practice.

The issue of consumer law and crypto also appeared in the English courts with the matter of *Payward Inc v. Chechetkin [2023] EWHC 1780 (Comm).* Following the case reference, Mr Morgan said judges and arbitrators must become crypto-literate, and he urged lawyers to stay current with the technology.

Shifting to evidence, Mr Morgan observed that successful enforcement of a crypto-based arbitral award, like any other form of arbitration, still depends on tracing assets. He suggested parties engage forensic specialists early, before funds move beyond reach.

Ms Fitzpatrick, who traces assets for a living, explained that following blockchain flows is now routine, but linking a pseudonymous wallet to a person, particularly non-custodial wallets, remains the hardest step in answering the question of "who financially benefited from this?" She recalled a recent English case involving €50 million in stolen Bitcoin, where on-chain analytics identified the wallet swiftly, yet proving control required parallel communication record evidence.

Mr Morgan warned that once crypto-assets are mixed with other funds, a proprietary claim can disappear, leaving parties relying on contractual or restitutionary remedies. He advised engaging tracing specialists at the outset to confirm whether the assets remain identifiable property and to tailor the strategy to whether the wallet is single-user or commingled. Courts now accept blockchain analytics as evidence, but speed is critical because funds can cross borders in minutes.

Asked about exchange liability from the audience, Mr Morgan referred to *Philipp v Barclays Bank [2023] UKSC 25*, which sets a high bar for holding banks liable for authorised push-payment fraud; similar hurdles will likely prove relevant to crypto platforms. Ms Fitzpatrick added that, despite a slew of cases brought in the U.S., U.S. courts rarely impose liability on exchanges unless systemic AML, CFT or KYC failures are proven.

The panel briefly looked to the future. Ms Barron Baratech predicted more B2B and collateral-backed disputes and called for greater arbitral training in crypto finance. Ms Fitzpatrick expected "increasing international cooperation" as exchanges relocate to friendlier jurisdictions, noting that entities can easily move around globally and that, whether it was the USA, Europe or the Middle East, there is definitely a changing landscape. Ms Marechal warned that operators unwilling to embrace regulation "have no future."

To close, the audience posed a question on the future of third-party funding in the space. The panel agreed that appetite exists but is tempered by volatility risk. Funders weigh asset swings carefully. For example, Binance's failed, albeit funded, class action at the HKIAC illustrated both interest and peril.

The speakers concluded that as regulatory frameworks consolidate, arbitration practitioners must master both the legal and technical facets of digital assets to steer parties through this fast-moving landscape effectively.

# WHEN POLLUTION BECOMES A DISPUTE: THE RISING WAVE OF PFAS-RELATED CLAIMS

*Soukaïna El Mansouri & April Hoang*

On Tuesday, 24 March 2026, as part of the 10th edition of Paris Arbitration Week, the law firm VingtRue Avocats hosted a seminar on the rising wave of per- and polyfluoroalkyl substances ("PFAS") related claims, and their impact on dispute resolution. The panel, which was moderated by Ms Sarah Becker (Environmental lawyer and Partner at VingtRue Avocats), included Prof. Sandrine Clavel (Professor of law at Paris-Saclay University), Dr Tiffany Thomas (Scientist and PhD in chemistry), and Mr Tony Cole (Independent arbitrator; Reader, Leicester Law School).

The conference opened with an introduction by Ms Sarah Becker regarding the nature of the crisis currently unfolding in environmental law. PFAS are frequently characterised as "forever chemicals" due to their unique chemical properties. These man-made substances are ubiquitous in everyday consumer products, from non-stick cookware to water-resistant clothing and firefighting foams. They possess a carbon-fluorine bond that is among the strongest in organic chemistry, preventing them from breaking down naturally over time. Consequently, they persist indefinitely in the environment and accumulate within the human body, leading to significant long-term health and ecological concerns.

Ms Becker highlighted that the legal landscape surrounding PFAS is shifting from a regulatory concern to a major litigation front. In France, "multiple proceedings" are currently underway involving claims from over two hundred individuals against the chemical giants *Arkema and Daikin*. This litigation is centred on the pollution of the *Vallée de la Chimie* near Lyon, where local residents allege systemic contamination of the soil and water tables. These cases raise fundamental questions about how the legal system should handle class claims where the harm is diffuse, the causation is hard to prove, and the scientific evidence is exceptionally complex.

A central challenge discussed was the evolution of the regulatory framework worldwide. For a long period of time, PFAS were largely unregulated in Europe, creating a period of legal uncertainty for industries. However, besides European regulations (such as REACH) and sectorial French regulations notably on drinking water, on 27 February 2025, a law on PFAS (Law n°2025-188), was adopted, establishing three main pillars for future enforcement.

First, the European Union has moved towards a general prohibition on the use of PFAS, albeit with certain exemptions and exclusions for "essential uses" where no viable alternatives currently exist. Second, new and more stringent standards have been implemented regarding the quality of drinking water, forcing municipalities to invest in advanced filtration systems. Third, industrial actors now face specific obligations regarding water discharges, including the mandatory monitoring of substances released into local water systems. Despite these steps, Ms Becker argued that the current framework remains relatively light compared to the magnitude of the environmental stakes at hand, leaving much of the burden of proof on the victims and local authorities.

Dr Thomas provided a deeper scientific perspective on the technical hurdles inherent in PFAS litigation. As a scientist expert frequently testifying in court, she explained that PFAS is a broad class of chemistry encompassing up to seven million distinct compounds according to the revised Organisation for Economic Co-operation and Development ("OECD") definition of 2021. This staggering variety means that a "one size fits all" legal approach is impossible. From a litigation standpoint, the core difficulty lies in establishing what the relevant parties knew and when. While some safety data sheets explicitly mention PFAS, many others do not name the compounds or use proprietary trade names, complicating the task of tracing liability through complex global supply chains.

Dr Thomas further emphasised the "test method" dilemma. As there is currently no single, universally reliable method to quantify the presence or concentration of the thousands of different PFAS substances in a given product or environment, different testing laboratories use different methods that can yield vastly different results for the same sample. For legal practitioners and arbitrators, this lack of standardisation requires a constant and sophisticated dialogue with scientific experts to ensure that the data presented in a dispute is both accurate and relevant to the specific legal claim being made. Scientific uncertainty often becomes a weapon used by defendants to dispute the causation between chemical exposure and the alleged health defects arising therefrom.

Ms Becker then shifted the focus toward the role of international arbitration. While PFAS has been a major focus in the United States and the United Kingdom for over a decade, it has only recently begun to appear on the radar of the international arbitration community. Ms Becker noted that several areas of law are likely to see an increase in PFAS-related disputes. In contract law, specifically regarding Share Purchase Agreements ("SPA"), buyers are increasingly seeking recourse against sellers for undisclosed environmental liabilities discovered after a transaction.

Furthermore, insurance law is becoming a primary battleground. As insurance companies move to explicitly exclude PFAS-related risks from their policies, businesses find themselves in arbitration with their insurers over the scope of coverage for past and future pollution claims. The interpretation of "occurrence-based" versus "claims-made" policies will be crucial in determining who bears the financial weight of these environmental disasters.

Prof. Clavel analysed why arbitration might be a more suitable forum than national courts for these disputes, even for claims involving non-governmental organisations ("NGOs") or third-party victims. She identified several procedural advantages. Environmental pollution cases often involve multiple causes, multiple parties, and require extreme technical expertise that traditional judges may lack. Arbitration allows the parties to select adjudicators who possess the specific scientific or industrial background necessary to understand the evidence. It also offers a flexible procedural framework that facilitates the cross-examination of expert witnesses and the management of massive amounts of technical documentation.

Moreover, Prof. Clavel highlighted the issue of neutrality. Depending on where the pollution occurred, parties may face local courts that are perceived as biased, politically influenced, or simply lack the competence to handle such specialised litigation. Arbitration provides a neutral level playing field that is particularly important when a dispute involves a multinational corporation and a local community. It offers a degree of confidentiality that can be beneficial for sensitive industrial data, while also allowing for amicus curiae interventions from civil society to ensure a degree of transparency.

Finally, the discussion turned to the legal basis for bringing third parties – such as pollution victims – into the arbitration process when no prior contract exists. Prof. Clavel explained that while this is often complex, several theories are gaining traction in practice. Parties may agree to a submission agreement (known in French law as a *compromis*) after the harm has occurred, recognising the efficiency of the arbitral process. Additionally, scholars are examining alternative jurisdictional foundations, specifically focusing on the concepts of "implied" authority and the "social licence to operate," These theories often rely on the principle of the sovereignty of people over their natural resources, a key principle of public international law. Under this view, if a company exploits natural resources and creates negative externalities, i.e., pollution, it must be held accountable to the local population through a fair and accessible dispute resolution mechanism.

Prof. Clavel concluded by underscoring the need to balance, on the one hand, the strengths of procedural creativity and the ability to explore new legal possibilities that arbitration offers against the requirements of public interest and transparency, on the other hand. Mr Cole added that, unlike local courts, arbitration is not strictly bound by precedent, allowing it to explore innovative solutions and even cooperate with local judiciaries to address the unique complexities of "forever chemical" contamination.

# POWER AND INTERNATIONAL LAW: WHAT ROLE FOR INTERNATIONAL ARBITRATION?

*Anthonia Fanokoa & Josepha Nehring*

On 25 March 2026, Foley Hoag hosted a panel entitled *"Power and International Law: What Role for International Arbitration*?" Moderated by Ms Diana Paraguacuto-Mahéo (Partner and Global Co-Chair of International Arbitration at Foley Hoag), the discussion featured Ms Christina Hioureas (Partner and Global Co-Chair of International Arbitration at Foley Hoag), Ms Tafadzwa Pasipanodya (Partner in International Arbitration and Head of the Africa Practice at Foley Hoag), and Mr Kenneth Figueroa (Partner at Foley Hoag, Washington, D.C.), alongside guest speaker Mr Kishore Jaichandani (Founder and Managing Director of Caveat Capital).

Ms Paraguacuto-Mahéo opened by situating international law between two poles: the enduring sovereignty of States and their capacity to assert power, and the attempt of international law to constrain and discipline State behaviour. She noted that international arbitration "came of age in a post-war international order characterised by global cooperation and accepted rules," and that "the end — or at least weakening — of that order will be a significant driver of disputes." She referred to recent trends evidencing stress on the international legal order, including armed conflicts, tariffs, disputes over natural resources, and the rise of resource nationalism. States are increasingly withdrawing from or bypassing multilateral dispute mechanisms, reflected *inter alia* by the "paralysis" of international dispute settlement, most notably the WTO Appellate Body. Against this background, she suggested that certain mechanisms continue to function effectively, with international arbitration remaining relatively successful in constraining power. She pointed to the development of substantial jurisprudence holding States accountable, including powerful State actors, and noted that the International Centre for Settlement of Investment Disputes ("ICSID") registered 67 new cases in 2025 — the second-highest in its history — while participation by investors from the Asia-Pacific region is growing. She also referred to the unanimous and landmark advisory opinion delivered by the International Court of Justice ("ICJ") in July 2025 on climate change obligations, which affirmed that States have binding duties under multiple bodies of international law to prevent climate harm, and that failure to do so can trigger international legal responsibility. That opinion has already begun to reshape the terrain for investment arbitration, as States invoke environmental obligations to justify regulatory measures affecting foreign investors, and investors in turn question whether host States have done enough to support the energy transition.

Framing the intersection between State power and IA, Ms Paraguacuto-Mahéo noted that International Arbitration modulates and is itself modulated by State power. Against this background, Ms Paraguacuto-Mahéo invited the panellists to consider whether international law is effectively constraining State power or is instead increasingly shaped by it.

Ms Pasipanodya responded that both dynamics are at play. She referred to *Philippines v China (PCA, 2016)*, where the Philippines, as a less economically powerful State, obtained an award recognising China's wrongful conduct in the South China Sea despite China's non-participation in the proceedings. Although China has refused to comply, the recognition of the illegality of the "nine-dash line" has served as a lasting diplomatic lever for less powerful States. Ms Pasipanodya emphasised that Investor-State Dispute Settlement ("ISDS") demonstrates that States willingly submit themselves to dispute resolution mechanisms and accept constraints on their power. At the same time, such mechanisms provide a framework within which States must justify their conduct. Investment arbitration thus reflects a balance: it constrains but also structures the exercise of State power.

Referring to Martti Koskenniemi and his work From Apology to Utopia, Ms Pasipanodya recalled that international law oscillates between apology and utopia — it either collapses into an apology for State behaviour, merely describing what the powerful do, or ascends into a utopia too detached from State practice to be taken seriously. International law functions precisely because it allows States a certain degree of latitude while embedding them within a normative framework that compels them to justify their actions against shared legal standards.

Ms Hioureas agreed, emphasising that for vulnerable States lacking military power, international law is often the only tool of defence available. An adverse award or judgment may act as a deterrent, for instance by rendering investment projects too risky. She further noted that advisory opinion proceedings, although non-binding, carry significant legal and political weight. Ms Hioureas referred to the Chagos Advisory Opinion (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, ICJ Reports 2019, p. 95*), in which the Court found that the decolonisation of Mauritius had not been conducted in accordance with international law and that the United Kingdom was required to end its administration of the Chagos Archipelago. Mauritius subsequently deployed a multidimensional strategy — recourse to the Universal Postal Union, correction of the designation on Google Maps, and diplomatic campaigns against British candidacies for United Nations positions. This sustained pressure led, after fifty-five years of occupation, to the signing in May 2025 of a treaty of restitution, demonstrating the capacity of international law to transform a legal victory into political reality.

Mr Figueroa built on this by emphasising the role of enforcement and political pressure. He highlighted the importance of the New York Convention and the Washington Convention, and of the awarding of damages as mechanisms that legitimately limit State power. He referred to *Philip Morris v Uruguay (ICSID, 2016)* and *Philip Morris Asia v Australia (PCA, 2015)*, which confirmed that States retain regulatory space while still being subject to scrutiny. At the same time, Mr Figueroa cautioned that investors may use arbitration strategically to gain leverage in negotiations. In response, States are increasingly driving reform through UNCITRAL Working Group III, including proposals for a multilateral investment court. He added that State power is not inherently problematic but must be exercised within legal limits.

Ms Paraguacuto-Mahéo then turned to the doctrinal "toolbox" available to constrain State power, including advisory opinions, the doctrine of necessity, security exceptions, and countermeasures.

Ms Hioureas began by referring to environmental obligations and recent developments before international tribunals. She cited the International Tribunal for the Law of the Sea ("ITLOS") advisory opinion on climate change (*2024*), which addressed obligations relating to marine pollution and climate change. Before ITLOS, States such as Sierra Leone and Mozambique argued that climate obligations should not be sacrificed in favour of investment treaties. These developments highlight tensions between investment protection and environmental regulation, particularly regarding fossil fuels. She noted that States retain a margin of appreciation to regulate in the public interest, and that such powers have been recognised by tribunals. She also referred to obligations arising under investment treaties, customary international law, and instruments such as the Paris Agreement and the Kyoto Protocol, raising the question of whether such norms operate as *lex specialis* or as part of customary law. Ms Hioureas noted that the ICJ has rejected the idea that climate agreements constitute lex specialis, affirming instead that they must be interpreted consistently with customary international law, human rights law, and investment law. She suggested that the ICJ increasingly recognises certain environmental obligations as customary. She further emphasised the increasing relevance of due diligence and human rights obligations in regulating private actors, requiring treaties to be interpreted in light of these evolving standards.

Moreover, environmental concerns are increasingly intersecting with armed conflict. According to Ms Hioureas, Palestine's position before the ICJ extends environmental due diligence obligations to situations of armed conflict. Under this reasoning, the principle of proportionality in international humanitarian law prohibits targeting the environment as a military objective, opening the door to new forms of State responsibility for ecological damage caused during military operations.

Ms Pasipanodya addressed the doctrine of necessity, noting that, as reflected in *Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, it is subject to a particularly high threshold and is rarely successful. She also referred to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, which confirms the strict conditions governing its application. She highlighted that Article 25 of the ILC Articles on State Responsibility requires necessity to be the only means of safeguarding an essential interest. Turning to the Argentine crisis cases, including *LG&E v Argentina*, she explained that Argentina generally failed to meet the customary international law standard. However, treaty-based necessity clauses may operate differently, and under certain formulations Argentina succeeded. This illustrates the coexistence of distinct legal standards leading to different outcomes, and raises the question of whether specific treaty language — in particular self-judging versus objective necessity clauses — makes a determinative difference for States seeking to invoke Article 25.

Turning to procedural measures, Ms Paraguacuto-Mahéo asked how effective such tools are in practice. Mr Figueroa noted that interim measures are often requested by investors and serve to preserve the *status quo*. While effective if properly implemented, they may also be abused, requiring a careful balance of interests. He referred to tax-related disputes where repeated requests for interim measures led to significant delays and increased costs for the State, even though ultimately refused. He also mentioned a toll road concession case involving allegations of corruption, where interim measures were granted despite ongoing criminal proceedings, raising questions about the definition of the *status quo*. Mr Figueroa observed that corruption is difficult to address in arbitration unless clearly established, and may be better dealt with by criminal courts. He further emphasised the importance of handling security-sensitive evidence carefully, ensuring compliance with domestic law, requiring clear guidelines and transparency protocols. He then referred to sanctions regimes, particularly involving Russia (Lugovoy Act), where domestic measures have interfered with arbitral proceedings and enforcement. This creates tensions between procedural fairness and compliance, with arbitrators playing a key role in safeguarding due process.

Sovereign immunity and licensing regimes may render even a favourable award unenforceable. The *Crystallex v Venezuela* case illustrates how enforcement remains subject to political choices and administrative authorisations. In this regard, the Singapore International Commercial Court dismissed Russia's sovereign immunity defence in the Yukos enforcement proceedings in 2025, relying on transnational issue estoppel — a significant development. Meanwhile, courts in the European Union are being told by Brussels that certain investment awards, such as the Spanish renewables cases, constitute unlawful State aid and must not be enforced. These developments raise the question of whether the effectiveness of international arbitration now depends less on what happens in the hearing room and more on the geopolitical alignment of the enforcement jurisdiction. From the funder's perspective, Mr Jaichandani addressed enforceability and access to justice. He referred to funding and "financial paralysis", questioning whether parties operate on an equal footing. Third-party funding enables access to justice but also affects power dynamics, particularly where funding arrangements are not disclosed. He noted that the effectiveness of international law in general depends on geopolitical context, jurisdiction, and political alignment. This discussion also raised the question of whether tribunals should allow recovery of funding costs — including success fees — to restore procedural symmetry, or whether that would cross an unacceptable line.

Ms Hioureas picked up on this, saying that States are not always in a position of power, questioning whether the invocation of Article 64 ICJ Statute, which obliges parties to bear their own costs, is fair.

In conclusion, the panel turned to avenues for reform. Ms Pasipanodya advocated for the systematic admissibility of State counterclaims, to correct a system perceived as one-sided, while opposing the requirement that States bear the costs associated with third-party funding, as notably raised in the case of *Nachingwea and others v. United Republic of Tanzania*. Ms Hioureas expressed optimism regarding a progressive normative convergence and the possible establishment of a multilateral investment court. Mr Figueroa emphasised the importance of greater transparency in funding. The panellists further addressed the structural critique that, for many States in the Global South, the system itself is a vehicle of power, and questioned whether the UNCITRAL Working Group III reforms — including proposals for an advisory centre for developing States — are ambitious enough to address this deeper asymmetry.

Overall, the discussion confirmed that international arbitration neither fully constrains nor merely reflects State power. Rather, it modulates power through doctrinal tools, procedural mechanisms, and enforcement frameworks. Its effectiveness depends on context, implementation, and political conditions, but it remains a central component of the contemporary international legal order.

# Dialogue between Judges and Arbitrators

*Iftenie Catalina-Alexia & Audrey Morganstern*

On Wednesday, 25 March 2026, the Paris Court of Appeals hosted a conference titled "*Dialogue between Judges and Arbitrators*". The panel, moderated by Prof. Malik Laazouzi (Professor at Paris Panthéon-Assas), included Mr Jacques Boulard (First President of the Paris Court of Appeal), Mr Daniel Barlow (President of the International Chamber of the Paris Court of Appeal), Dr Inka Hanefeld (Arbitrator and Founding Partner at Hanefeld Rechtsanwälte), Prof. George Bermann (Professor at Columbia Law School), Dr Bernard Hanotiau (Arbitrator and Partner at Hanotiau, Van den Berg, HTGO), Sir Robin Knowles (Judge at the Commercial Court of England & Wales) and Prof. Dr Christoph Hurni (President of the First Civil Law Court of the Swiss Federal Tribunal).

Mr Boulard opened the floor, emphasising the importance that State courts attach to international arbitration as a tool for legal security. Mr Boulard held that State justice and arbitration reinforce one another: arbitration offers economic actors a high degree of party autonomy, while State courts review awards and ensure their enforcement. In a context of competition between jurisdictions, he stressed that Paris stands out for the quality of the French legal regime and the fourteen specialised chambers of its Appeals Court, including the International Chamber, which acts as a supporting institution for arbitral proceedings at the International Chamber of Commerce ("ICC") and has overtime developed a relatively "arbitration-friendly" jurisprudence reconciling party autonomy with judicial guidelines.

Prof. Laazouzi then noted that the very idea of a "dialogue" between judges and arbitrators may appear paradoxical, given that in practice, this dialogue most often takes the form of an indirect conversation between absent actors through awards and judgments, rather than through direct exchanges. However, Prof. Laazouzi questioned whether this dialogue is truly reciprocal. While arbitrators are required to take into account the guidelines laid down by State courts, the ability of arbitrators to influence State courts is limited. In doing so, Prof. Laazouzi introduced the main themes of the conference, namely the anticipation of judicial review, jurisdiction, the independence and impartiality of arbitrators, and compliance with international public policy.

From the arbitrator's perspective, Dr Hanefeld explained that part of the arbitrator's role is to anticipate judicial review. Arbitrators have a duty to render a final and enforceable award that meets the expectations of the courts at the seat. Prof. Bermann agreed with Dr Hanefeld, noting that the more demanding a court is, the more demanding an arbitral tribunal must be of itself, but he warned against mechanically replicating domestic litigation practices and recalled that only a small fraction of procedural questions is addressed by the *lex arbitri*, leaving the vast majority to the tribunal's discretion.

Dr Hanotiau then indicated that his priority as an arbitrator is to ensure a smooth procedure in strict compliance with the principle of party equality. He takes into consideration the law of the seat of arbitration, both in terms of public policy and of specific formal requirements at the jurisdiction of enforcement, mentioning for example certain formal requirements for awards in Gulf jurisdictions such as Dubai and Qatar. Mr Knowles highlighted the importance that courts not take a defensive stance towards arbitration. The two share the same objectives and must work together, notably by fostering more dialogue beyond the sole forum of enforcement proceedings.

Turning to jurisdiction, Prof. Bermann emphasized that while both courts and tribunals assess the issue, the focus of that assessment varies greatly between investment and commercial arbitration. In commercial arbitration, key questions include whether a contract was concluded, whether it contains a valid arbitration clause, whether that clause extends to non-signatories and whether the dispute falls within its scope. In investment arbitration, analysis of jurisdiction centres on jurisdiction *ratione personae*, *ratione materiae*, *ratione loci* and *ratione temporis* under the relevant treaty. Mr Knowles warned that the increasing and often counter-productive resort to anti-suit injunctions fails to promote systemic solutions, calling instead for greater harmonisation and for the use of specialised judges in set-aside and enforcement proceedings.

Illustrating the method followed by French courts in investment arbitration, Mr Barlow referred to the Cour de Cassation's Oschadbank decision (*Cour de Cassation, First Civil Chamber, 7 December 2022*). He highlighted the fact that the French annulment judge now strictly focuses its jurisdictional review on the conditions of the arbitration agreement contained in the investment treaty, bringing commercial and investment arbitration closer together and enshrining a clear separation of roles between courts and tribunals. This approach, based on the arbitration agreement as the central framework, allows French courts to exercise control while respecting the tribunal's jurisdictional determinations within that framework.

Moving to the subject of arbitrator independence and impartiality, Dr Hanefeld identified two mains practical issues for arbitrators, the first being disclosure obligations. In a context where challenges for lack of disclosure have significantly increased, arbitrators tend to favour "utmost transparency" in order to preempt eventual objections. Second, she observed that, at the annulment stage, German courts require proof of very serious and unequivocal bias before setting aside an award, which means that annulment on this ground is reserved for situations of particular gravity.

Expressing concern about a rise in paranoia surrounding arbitrator independence and impartiality, Dr Hanotiau suggested that institutions require parties to conduct their own research of publicly available information at the onset of the proceedings, in line with the IBA Guidelines on Conflicts of Interest. He added that counsel should be under an obligation to raise objections as they first arise. Prof. Dr Hurni explained that the Swiss approach to the subject is demanding but not paranoid, citing a procedural example in which the mere fact that counsel and an arbitrator had previously worked in the same law firm did not automatically disqualify the arbitrator. Prof. Dr Hurni underlined the procedural discipline that obliges parties to raise objections immediately under the Swiss Federal Act on Private International Law (PILA).

Mr Barlow noted that the requirement of impartiality is not unique to international arbitration but inherent to the act of judging itself. Mr. Barlow added that French case law interpreting article six of the European Convention on Human Rights informs the practices of both judges and arbitrators. Calling for prudence, common sense and pragmatism, Mr Barlow highlighted that annulments on these grounds remain extremely rare in France and often occur when an institution has itself removed an arbitrator. Mr Knowles warned tribunals against adopting an overly defensive stance, stressing the importance of responsibility and restraint on the part of counsel when considering challenges.

On the issue of public policy, Dr Hanefeld referred to recent German jurisprudence setting aside an award on the basis that the tribunal violated the party's right to be heard. Dr Hanotiau shared his practice of formally requesting that parties undertake all possible investigations during the proceedings to confirm the absence of unlawful payments, thereby reinforcing the integrity of the process. Mr Knowles drew a nuanced distinction between corruption affecting the underlying transaction and corruption infiltrating the arbitral process itself, emphasizing that the latter scenario calls for coordinated action between courts and tribunals to safeguard the integrity of arbitration.

In order to conclude, Mr Barlow raised the possibility of importing the mechanism inspired by article 34 of the UNCITRAL Model Law into French law, which would allow courts stay annulment proceedings to give tribunals an opportunity to remedy certain procedural defects. He recognised, however, that practical questions remain, in particular concerning the reconstitution of a tribunal and the issue of costs. Dr Hanefeld noted that, under German law, a suspension of the annulment proceedings is not foreseen but there is the possibility of the court's remission of the case to the prior tribunal, while Prof. Bermann expressed support for prioritising the preservation of awards wherever possible, very few defects in an arbitral proceeding or award are actually curable upon remand from a court to a tribunal. Neither the incapacity of a party, nor the invalidity of an arbitration agreement, nor failure in the composition of a tribunal, nor the violation of public policy can be cured. Also, once an award is rendered, violations of due process can hardly be corrected. What can realistically be cured are only the failure of a tribunal to entertain a claim before it and the wrongful finding that a claim is non-arbitrable.

Mr Knowles then concluded the conference by calling for an increased exploration of avenues for dialogue between courts and arbitral institutions. He highlighted the model of the Standing International Forum of Commercial Courts, which brings together 67 jurisdictions worldwide and offers a platform for the exchange of best practices between national courts and arbitration institutions.

# TURNING AWARDS INTO ASSETS: GLOBAL TACTICS FOR ENFORCEMENT SUCCESS

*Louise Denoyes & Sofiane El Ouardi*

On Wednesday, 25 March 2026, as part of the 10th edition of Paris Arbitration Week, the law firm Signature Litigation hosted a conference on the theme "*Turning awards into assets: Global tactics for enforcement success.*" The panel comprised Larisa Babiy (Head of Strategy and Arbitration at Renault), Nicholas Bortman (Partner at Raedas), Ela Barda (Partner at Signature Litigation Paris), Neil Newing (Partner at Signature Litigation London), and Amany Chamieh (Counsel at Signature Litigation Paris).

The floor was first given to Ms Chamieh, who introduced the speakers before expressing her intention to move beyond theoretical considerations and towards the development of concrete strategies. She identified the central question as follows: what strategies should be implemented, and at what stage?

Ms Babiy continued by explaining that the discussion would follow the classic progression of international arbitration, beginning at the contractual stage and extending through to the enforcement of the award. The discussion initially focused on the first phase: contract drafting. According to her, effective dispute management begins well before any dispute arises. In this respect, she highlighted two principal considerations: the identity of the counterparty with whom a dispute may arise, and the jurisdiction in which the award may ultimately be enforced. Mr Newing summarised these issues in two key questions: whom do I wish to bring proceedings against, and how do I wish the dispute to be resolved? He further nuanced the discussion by emphasising the importance of the relevant jurisdiction where enforcement would take place. Ms Barda added that this could even influence the choice between arbitration and state court proceedings because decisions rendered by French courts are immediately enforceable within the EU, without the need to obtain recognition beforehand. Mr Bortman concurred, noting that thresholds and requirements vary across jurisdictions, as does the availability of information.

Ms Chamieh then turned to the second phase, reaffirming that the success of an arbitration largely depends on anticipation, control of information, and the choice of jurisdictions. She emphasised the importance of early anticipation and stressed that the pre-arbitral phase should not be regarded as a mere waiting period. Mr Bortman followed up by posing the practical question: how can we encourage clients to anticipate? The speakers repeatedly emphasised that the effective enforcement of an award is prepared from the early stages of the dispute or even before the dispute arises.

Ms Babiy was then invited to address the criteria considered when selecting an investigator, including prior professional experience with the individual, respect for confidentiality, expertise and experience, availability and on-the-ground presence, as well as the ability to assemble a strong team.

Ms Barda continued by noting that, ideally, measures should be contemplated even before a dispute arises, in order to maximise the "surprise effect" and increase the prospects of recovery. In France, she explained, it is necessary to demonstrate a risk to recovery, for example, financial difficulties that may lead to insolvency. Such evidence may constitute a body of evidence enabling the identification of assets. She added that another tool specific to the French system allows for the appointment of a person with access to all bank accounts, whereas previously such access was only possible following a judgment.

Mr Newing then outlined the approach adopted in England and Wales. He noted certain similarities with France regarding asset freezing, albeit on a broader, more global scale, and stressed the importance of identifying the location of assets worldwide.

The discussion then turned to the cooperation and coordination of measures across different jurisdictions. Ms Barda highlighted the importance of combining tools. Two complementary approaches to enforcement coexist: the English one, based on a global approach to assets, and the French one, based on specific and targeted assets. Indeed, the enforcement focuses not on the debtor as such, but on identifiable assets. Then, coordination would involve mapping assets globally in England, followed by the preparation of targeted applications for assets that are located in France.

The discussion then addressed the growing role of information sources and investigations. Mr Bortman affirmed that the availability and effective use of data are essential to the conduct of proceedings. Ms Barda noted the wide range of tools available, beginning in practice with corporate information databases (such as Infogreffe) to identify changes in management or registered office, before turning to news sources, press coverage, and publications. A broad approach should be adopted. Such elements make it possible to anticipate developments, particularly changes in shareholding, which, while seemingly minor in isolation, may become significant when considered collectively. These tools form part of a broader investigative strategy designed to map the location and structure of assets.

The discussion then shifted to the issue of costs and the identification of objectives. Mr Newing stressed the importance of striking a balance between costs, monitoring and anticipation by initiating the process early, defining a clear strategy, and identifying priorities. In his view, efficiency stems from the rapid identification of key targets. Finding a balance between costs and efficiency implies prioritising measures to put in place for execution by focusing on the most relevant assets.

Ms Barda then addressed insolvency more specifically. She explained that the opening of insolvency proceedings may affect arbitration proceedings. She added that, in terms of enforcement in France, not all interim measures are treated equally in the event of insolvency, and some may be called into question, which constitutes a major risk for creditors.

The discussion continued with the concept of enforcement. According to Ms Chamieh, enforcement rests on two concepts: recognition and execution. In France, for the arbitral award to be binding and recognised within the legal order, an application for exequatur (recognition) is required, the granting of which confers enforceability upon the award. Mr Newing added that, in England and Wales, enforcement similarly involves these two stages, recognition and execution. He specified that, in England, recognition confers a certain weight upon the award and that an administrator over the debtor's assets may also be appointed. However, enforcement may be hindered by public policy exceptions, first domestic and then international.

Ms Chamieh concluded with the specificities of the French system. She mentioned that French judges tend to apply their own rules. Under French arbitration law, it is not necessary to prove the existence of a written arbitration agreement. She added that France, as a party to the New York Convention, applies the principle of the law most favourable to enforcement, which makes it an attractive jurisdiction for recognition and enforcement of arbitral awards, including in the absence of assets located on its territory. Another particularity of the French system is that decisions rendered at the seat to the annul the award do not bind French courts, as the rules governing enforcement are those of the place of enforcement.

Furthermore, Ms Barda addressed the simultaneous seizure of key assets, the purpose of which is to create maximum disruption and provide an incentive to settle. She observed that, in certain cases, this strategy is highly effective as it leads debtors to settle much more rapidly, sometimes within a matter of weeks.

Finally, the conversation turned to the prospects for the evolution of award enforcement. Mr Bortman was relatively sceptical about its future development, pointing to the persistence of heterogeneous legal frameworks and fragmented enforcement procedures across jurisdictions. He highlighted the limits of a system in which enforcement strategies must continuously adapt to multiple and unpredictable legal environments.

# TURBULENCE AHEAD (FOR SURE): POLITICAL TENSIONS RESHAPING INTERNATIONAL ARBITRATION

*Maya Konstantopoulou*

On 25 March 2026, Three Crowns hosted a conference entitled "Turbulence Ahead (For Sure): Political Tensions Reshaping International Arbitration". The discussion was moderated by Richard Trinick (Partner, Three Crowns), and featured Laureanne Delmas (VP Legal, Contract & Compliance, Thales International Development), Michel Jacques Thirion (Senior Legal Counsel Litigations, TotalEnergies SE), Shaparak Saleh (Partner, Three Crowns), Mariia Puchyna (Counsel, ICC), and Pascal Hollander (Founding Partner, arbitrator and counsel, Hollander Vermeire Dispute Resolution). The speakers examined how political tensions are reshaping arbitration proceedings and influencing the strategic, procedural and practical choices of parties, counsel, arbitrators and institutions.

In this context, Ms Delmas and Mr Thirion shared insights on efforts to mitigate risks from an in-house perspective. Ms Delmas noted that, as a general rule, the Group favours active involvement fromthe outset of the contract. This entails reviewing the contractual framework, monitoring sanctions lists, and identifying risks for each project and partner involved. Addressing supply chain issues is a key priority, notably through exploring alternative suppliers and regions, as well as considering risk transfer mechanisms.

Effective contractual protection requires careful drafting, while, as far as possible, leaving room for negotiation and taking potential instabilities into account. In practice, such protection is optimised through provisions dealing with force majeure, hardship and change of circumstances. Dispute resolution clauses are equally critical: they must be robust enough to address current difficulties, while allowing for flexibility. Alternatives and intermediary steps, such as mediation, are taking on a more central role in practice.

Mr Thirion explained that, from TotalEnergies' standpoint, geopolitical risks are a recurring feature of its operations, requiring constant adaptation rather than relying on a single bespoke mechanism. That said, force majeure remains the primary form of protection. However, such clauses can be difficult to enforce, particularly where it is unclear whether the affected contractual obligation falls within the scope of the clause. In practice, they should be drafted with broad triggers. Equally, notification requirements under the force majeure clause, along with any mitigation obligations, must not be overlooked.

Beyond force majeure, hardship clauses also depend heavily on the way they are drafted. They may provide meaningful contractual protection, but their effect varies significantly between civil law and common law systems. While French law was historically reluctant to recognise hardship (see *Affaire du Canal de Craponne*), the reform of the French Civil Code in 2016 introduced the concept of *imprévision*, although its application remains cautious in practice. Under English law, frustration remains a distinct concept, but the threshold for its application is high.

Economic stabilisation clauses may be relied upon where circumstances have changed significantly to the extent that the economic balance of the contract, or its performance, is materially affected. In practice, "black swan" events, such as war, can complicate their operation, particularly where prices have already been revised. This illustrates that even well-drafted clauses can ultimately be tested by reality.

Against this background, Ms Saleh identified two simultaneous trends in how current turbulence is affecting clients' approach to disputes. There are indeed more disputes. However, parties often proceed with particular caution before the arbitration is initiated, as evidenced by extensive document exchanges and efforts to build the record from the outset. At the same time, there is greater strategic reflection, particularly regarding duration, enforceability, and the potential impact of sanctions on the various stakeholders. In short, parties seek to determine whether it is truly "worth winning". In the past, enforcement considerations were rarely addressed at such an early stage.

There is also a noticeable shift in the nature of disputes. The question is no longer whether there has been a breach, but rather who bears the risk when circumstances change. Ms Saleh concluded that, in practice, cases appear to be won or lost based on three elements. First, the governing law and its approach to force majeure, hardship and related doctrines. Second, the drafting of the contract and, in particular, whether the clauses are sufficiently broad and adaptable. Third, timing – a contract drafted ten years ago is not necessarily equipped to tackle current risks.

From an institutional perspective, Ms Puchyna highlighted how the ICC emphasises its impartiality and neutrality *vis-à-vis* all actors. It has been observed that counsel and parties are now more cautious when taking key decisions, taking into account factors such as payment constraints, delays, and sanctions-related risks.

The ICC has a dedicated compliance team, independent of both the Court and the Secretariat, tasked with dealing with sensitive issues. In cases involving sanctioned entities or arbitrators who are nationals of sensitive jurisdictions, matters must also be reviewed by this team. The institution has obtained a general licence from the U.S. Office of Foreign Assets Control (OFAC), allowing it to administer arbitrations involving entities or individuals subject to U.S. sanctions. Within the EU, the ICC works with national authorities, such as the French Treasury, on a case-by-case basis to ensure proceedings proceed smoothly where sanctions are involved.

In terms of appointments, the ICC adopts a case-specific and balanced approach. Where it appoints a sole arbitrator or the president of the tribunal, it seeks to identify a "middle ground", which requires additional analysis by the case management team. In doing so, the ICC takes into account independence, availability, and the specific qualifications required for a particular case and emphasised by the parties.

Turning to arbitrator selection, Ms Saleh highlighted how tensions are affecting both the process and the considerations at play. Arbitrator selection has become both more sensitive and more strategic. The nationality of the arbitrator and the choice of the seat have become key factors, with implications for document production, the need for licences, payment of arbitrators, and the organisation of hearings. For instance, an arbitrator who is not a UK national but sits in London must comply with UK sanctions, while a UK national must comply with UK sanctions irrespective of the seat. More broadly, publicly available information, particularly statements made outside proceedings, is increasingly scrutinised in the context of conflict checks.

From the arbitrator's perspective, Mr Hollander emphasised that, even before considering their duty of disclosure, arbitrators' first responsibility is to ask themselves whether they are in a position to decide in an independent and impartial manner. While an arbitrator's political opinions may fall within their private sphere and, as such, need not be disclosed, an important nuance remains. Where such opinions have been publicly expressed, they become relevant to the assessment of independence and impartiality. By contrast, not all prior public roles or affiliations necessarily require disclosure; the assessment remains context-specific.

He further explained that current turbulence affects how arbitrations are conducted in practice. Arbitrators must consider not only their duty to be impartial and independent, but also whether a party is under sanctions which could render the arbitration impossible (in the case where applicable sanctions would prohibit the arbitrator to act) or inadvisable (e.g. where the applicable sanctions would prevent the payment of the arbitrator's fees). They must also assess the impact of applicable sanctions on the venue of the hearings (possibility for parties, counsel and witnesses coming from a country under sanction to travel to the country where the hearing will take place). Finally, geopolitical crisis may impact the ability of a party to comply with the procedural timetable. Arbitrators must strike a balance between flexibility in light of the objective difficulties caused by a crisis and maintaining control over the timetable.

From an in-house perspective, Ms Delmas emphasised the importance of carefully selecting the seat of the arbitration in order to avoid delays, and noted that institutional arbitration may offer greater reliability than ad hoc proceedings. Similarly, Mr Thirion observed that parties have increasingly requested extensions, often without strong justification. Tribunals, in turn, appear particularly attentive, mindful of the risk of annulment where a party might argue it was prevented from properly presenting a case. While it is unclear whether this reflects a broader trend, it has been observed in practice.

Finally, as to whether current tensions primarily affect procedural aspects or the substance of decisions, Mr Hollander noted that the answer depends on the circumstances. In some cases, sanctions may render performance of the contract unlawful. In other situations, performance remains lawful, but enforcement becomes uncertain – whether temporarily or definitively. Arbitrators have a duty to render an enforceable award, and this consideration may ultimately influence the substance of their decision, especially where the likely place of enforcement of the award is known (because the debtor has assets only at that place).

# MODERNISING ARBITRATION IN EMEA: WHAT TODAY'S REFORMS MEAN FOR TOMORROW'S DISPUTES

*Rebecca Ctorza & Fouad El Hage*

On Wednesday, 25 March 2026, as part of the 2026 edition of Paris Arbitration Week, Herbert Smith Freehills Kramer hosted a conference on ongoing arbitration reforms across the EMEA region. The panel included Ms Laurence Franc-Menget (Partner, Paris), Ms Emily Fox (Partner, Paris), Mr Javier de Carvajal (Partner, Madrid), Ms Catrice Gayer (Partner, Frankfurt), Mr Nick Oury (Partner, Dubai), and Mr Pietro Pouché (Partner, Milan), all at Herbert Smith Freehills Kramer.

The floor was first given to Ms Laurence Franc-Menget, who introduced the state of play of the French reform. In November 2024, the French Ministry of Justice set up a working group co-chaired by Professors Thomas Clay and François Ancel, with the main objective of reinforcing the attractiveness of Paris as an international arbitration seat. The group produced a report containing forty proposals and a draft arbitration code. The report attracted mixed reactions: some in the Paris arbitration community considered that no reform is necessary, while others viewed a potential code as a marketing exercise. The Minister of Justice announced a three-step approach: a decree gathering the most consensual proposals; a cycle of consultations; and potentially a full arbitration code. The draft decree was submitted for consultation in December 2025, though the timeline remains uncertain given the political context.

Ms Fox then addressed the English reform. The Arbitration Act 2025 entered into force on 4 August 2025, amending rather than replacing the 1996 Act, which remains the backbone of arbitration law in England and Wales. The reform pursued three goals: increasing legal certainty — particularly regarding the law governing arbitration agreements; improving procedural efficiency; and reinforcing London's position as a leading arbitral seat. Mr de Carvajal then presented the Spanish position, noting a recent mandatory pre-action mediation protocol and a flexible approach to public policy by the Madrid courts. Ms Gayer addressed the German draft bill, finalised shortly before the conference. Mr Oury spoke about the Middle East: the UAE modernised its arbitration law in 2018, in line with the UNCITRAL Model Law, and Saudi Arabia is consulting on a new draft arbitration law expected to be finalised very soon. Mr Pouché concluded with Italy: Law No. 149 of 2022 introduced, for the first time, interim measures granted by arbitral tribunals, new disclosure obligations, and clarified rules on applicable law.

The first substantive topic was the relationship between courts and arbitral tribunals with respect to interim measures. Mr Pouché explained that prior to the 2022 reform, no provisional measures could be enforced in Italy, compelling parties to seek urgent relief before state courts. The arbitral tribunal may now grant interim measures, though enforcement against a non-complying party still requires recourse to the courts. Mr de Carvajal confirmed that Spain operates a similar framework, adding that no express agreement is needed to empower the tribunal to order such measures. Mr Oury noted that Saudi Arabia's draft law expressly includes interim measures within the definition of an award, enabling enforcement for the first time, and that a recent UAE Court of Cassation decision confirmed the tribunal's power to order them. Ms Franc-Menget highlighted an innovative provision in the French draft decree allowing the *juge d'appui* to render interim measures enforceable through a streamlined mechanism, unless contrary to public policy.

Ms Fox then highlighted the English reform's treatment of emergency arbitration as one of its most significant achievements. Emergency arbitrators had not previously fallen within the statutory definition of a "tribunal," placing courts in an awkward position when asked to support emergency relief. The 2025 Act introduces a new section 41A, expressly recognising emergency arbitration and allowing emergency orders to be enforced as court orders upon application, while preserving the role of courts and not making emergency arbitration mandatory.

The second topic was difficulties arising from the complex areas of multi-party and multi-contract arbitration. Ms Gayer noted that the German draft bill addresses the default appointment mechanism where joint parties fail to agree on a co-arbitrator, leaving the matter to the court's discretion. Mr de Carvajal observed that multi-party arbitration is not expressly addressed in the Spanish statute, though major institutions, such as the *Corte Internacional de Arbitraje de Madrid*, have developed rules to fill the gap. Ms Franc-Menget noted that the French draft decree retains the principle of allowing consolidation of proceedings involving multiple contracts, mirroring the approach in the ICC Rules.

The panel also addressed mechanisms to prevent dilatory tactics and preserve the finality of awards. Ms Franc-Menget drew attention to a provision in the draft decree which, in reaction to the more permissive approach of the *Cour de cassation* in *Schooner*, prevents a party from raising in annulment proceedings arguments it failed to raise before the tribunal, thereby reinforcing the principle of waiver. Mr de Carvajal confirmed that Spain has a similarly strict provision, making failure to raise a timely objection equivalent to a waiver. Ms Fox noted that under the 1996 Act, there was no deference given to the tribunal's prior ruling, allowing parties to reargue and re-adduce evidence from scratch. The 2025 Act preserves the right to challenge but fundamentally changes its nature: where a party participated in the jurisdictional process before the tribunal, it may no longer introduce new arguments or evidence on challenge, except where it was unable to do so at the time.

The third topic was enforcement. Mr Oury noted that Saudi Arabia has removed the former requirement to translate awards into Arabic before seeking recognition. Mr Pouché described the Italian enforcement process as direct and linear, with the award becoming immediately enforceable upon the court's enforcement order. Ms Franc-Menget observed that the French *exequatur* is already among the most efficient in the world, and that the draft decree further modernises it by permitting electronic awards and removing the requirement to produce an original. She also noted that the Paris Court of Appeal's International Chamber now permits all proceedings to be conducted in English. Mr de Carvajal observed that Spain operates a two-step enforcement system for commercial awards: exequatur must be obtained and only then can the enforcement be pursued before a separate first-instance court.

The fourth topic was confidentiality. Mr Oury noted that neither Saudi Arabian nor UAE law contains specific provisions on the matter. Ms Franc-Menget observed that while French law is similarly silent, the Paris Court of Appeal allows redaction of award motivations, and the draft decree explores introducing specific confidentiality provisions. Ms Fox explained that English law recognises no statutory duty of confidentiality, but enforces an implied obligation on a pragmatic, case-by-case basis. Despite pressure from practitioners to codify confidentiality obligations, the Law Commission ultimately decided against any legislative change, preferring to maintain what it described as a sliding scale of confidentiality determined by the circumstances of each case.

By way of conclusion, each speaker identified their preferred seat. Ms Franc-Menget expressed strong support for Paris. Ms Fox highlighted the clarity brought by the 2025 Act on the law governing arbitration agreements as a key achievement for London. Mr de Carvajal recommended Madrid for Spanish-speaking disputes. Ms Gayer advocated for Germany, emphasising the system's credibility and independence. Mr Oury pointed to the rapid evolution of Riyadh. Mr Pouché recommended Milan, citing competitive costs and the modernisation brought by the 2022 reform.

# BEYOND THE PASSPORT: IS NATIONALITY A RELIABLE PROXY FOR NEUTRALITY?

*Paul-Alexis Saint-Antonin*

On Wednesday 25 March 2026, as part of the 10th anniversary of Paris Arbitration Week, Rajah & Tann hosted a panel examining whether the traditional reliance on an arbitrator's passport remains a valid indicator of independence in an increasingly globalized, yet politically polarized, world. The session was moderated by Dr Vanina Sucharitkul (Partner, Rajah & Tann, Singapore) and featured a distinguished panel of speakers: Ms Michelle Li (Head of International Arbitration, Construction & Projects (China), Rajah & Tann), Mr Vladimir Khvalei (Partner at Mansors), Mr Yves Derains (Founding Partner, Derains & Gharavi), and Ms Victoria Orlowski (Of Counsel, Gibson Dunn & Crutcher).

Dr Sucharitkul opened the discussion by referring to her own background as a "third culture individual" holding three passports. Having lived and practiced across multiple jurisdictions, she noted that it was difficult to accept that a single document could meaningfully capture one's identity or decision-making process. She nevertheless observed that nationality is often treated as a proxy for neutrality. Illustrating a more complex reality, she cited a survey of Korean arbitration lawyers in which nearly all respondents objected to U.S. citizens of Japanese parentage, despite their being second- or third-generation Americans. These findings, she commented, suggest that concerns often extend beyond legal nationality to encompass perceived cultural or ethnic affinity.

The panelists then shared aspects of their complex identities. Mr Derains observed that, although of French nationality, his practice extends across several Latin languages. He recalled his early years at the International Chamber of Commerce ("ICC") in the 1970s, where, as the only Spanish speaker, he became closely involved in developing arbitration networks across Latin America, contributing to the establishment of several national committees. Mr Khvalei detailed his journey from Belarus to Russia and subsequently to the United Arab Emirates. Ms Orlowski, an American of Polish origin, shared an ICC anecdote where a Polish party initially refused to speak with a colleague because of her German-sounding name, only to later discover that she was in fact Polish. Ms Li explained that she holds both a Hong Kong-specific Chinese passport and a British passport linked to Hong Kong, while practicing in mainland China for a Singaporean firm.

The discussion then turned to institutional frameworks. Drawing on his experience as former Secretary General of the ICC, Mr Derains noted that nationality rules are deeply linked to the origins of international arbitration, where parties sought to avoid appearing before the national courts of their counterpart. In that context, he further emphasized that arbitrator appointments are often assessed through the lens of appearance more than reality. While nationality is not, in itself, determinative of neutrality, it may influence how neutrality is perceived. Institutions may therefore avoid appointing arbitrators of a particular nationality in order to prevent any doubt arising in the minds of the parties.

The conversation then shifted to how current geopolitical tensions have intensified these concerns. Mr Khvalei observed a growing tendency to scrutinize nationality over the past fifteen years. He referred to a case involving a Russian party in which a Ukrainian arbitrator had been appointed. In light of the tensions between the two countries, enforcement of the award was subsequently refused in Russia. He explained that Russian jurisprudence has developed such that the nationality of an arbitrator from a so-called "unfriendly country" may constitute a ground for refusing enforcement.

Mr Khvalei also raised the question of potential personal liability for arbitrators. Referring to the *Stankoimport v. Rebeil* case, he described a situation in which an award involving a sanctioned Russian entity raised issues under European Union public policy. He questioned whether an arbitrator who renders an award benefiting such an entity could face criminal consequences, and whether this risk might affect their ability to act.

From an institutional perspective, Ms Orlowski explained that the ICC considers a range of factors when confirming or appointing arbitrators. These include nationality, residence, relationships with the parties or the countries involved, as well as availability and the ability to conduct proceedings. Nationality, she noted, is one factor among others and is not decisive in itself. She added that the ICC remains sensitive to situations in which arbitrators need to resign close to hearings due to concerns relating to personal risk.

The panel also addressed the role of National Committees. Ms Orlowski explained that these committees were originally intended to identify suitable candidates at a local level, often putting forward their own nationals. However, this can create difficulties for practitioners living abroad, who may not be considered by either their country of nationality or their country of residence.

Ms Li provided insight into the perspective of corporate users. She noted that clients are often not seeking the "best" arbitrator, but rather a suitable one, particularly in circumstances where an unfavorable outcome might later be scrutinized. In that context, nationality can operate as a safeguard. She mentioned a Hong Kong arbitration in which a Canadian chair based in Japan was appointed in order to ensure that the parties perceived the process as neutral.

The panelists also touched on whether parties and institutions should now be looking far beyond the passport during the selection process. Mr Khvalei mentioned that, for arbitration involving Russia, social media activity is examined to assess an arbitrator's views. Ms Orlowski added that law firms also perform extensive diligence, while arbitrators in certain jurisdictions disclose broadly in order to avoid challenges to awards. Building on this, she commented that the increasing prevalence of dual nationality further complicates these traditional frameworks, as holding a second passport can provide a cultural bridge that a strict single-nationality requirement fails to capture. Furthermore, she observed that failure to disclose all nationalities sometimes requires the ICC to cross-reference internal databases, raising questions about whether a duty to disclose persists even after a citizenship is formally renounced.

Transitioning to the more nuanced lived reality of international arbitration, Dr Sucharitkul raised whether factors such as long-term residence or permanent establishment in a jurisdiction may create stronger ties than formal nationality. Mr Derains indicated that this may be the case, even though such factors are less visible. He also cautioned against appointing arbitrators from overly similar backgrounds, including those shaped by the same academic institutions.

In the final part of the discussion, the panelists addressed whether nationality continues to serve a meaningful role. Mr Derains distinguished between formal nationality and what he described as "real nationality," referring to individuals who hold citizenship without maintaining a functional connection to the country. Ms Li noted that nationality remains an important factor for many users and continues to operate as a form of safeguard. Ms Orlowski added that, while nationality may not be decisive in all cases, it remains a relevant consideration for parties seeking to ensure that their dispute is decided by a tribunal they perceive as neutral.

# JUS MUNDI AI FOR JUSTICE SYMPOSIUM

*Seedley Bouillet & Yeonhwa Kim*

On Thursday, 26 March 2026, as part of Paris Arbitration Week, *Jus Mundi* hosted the conference "*Jus Mundi AI for Justice Symposium.*" The first panel explored AI's impact on justice, discussing trust, fairness, and legitimacy, and asserted that innovation should boost confidence. The second one confirmed AI's role in institutional workflows, highlighting its use in research, drafting, translation, and case management by top arbitral institutions. The third panel focused on operationalising responsible AI through governance and controls, with leaders sharing how they balance innovation and risk management to ensure trustworthiness.

The first panel, moderated by Ms Solène Bedel (Head of Legal, Jus Mundi), discussed AI's impact on the legitimacy of judicial and arbitral systems. Panellists Mr Bertrand Kleinmann (Vice-President, Paris Tribunal of Economic Activities), Professor Maxi Scherer (ArbBoutique co-founder), Ms Marike Paulsson (Secretary General for the Council for International Dispute Resolution of Bahrain), and Ms Sapna Jhangiani KC (Barrister at Blackstone Chambers; Judge at DIFC Court of Appeal) examined the balance between efficiency and due process amid technological changes, highlighting examples of AI use that maintain ethical standards.

Professor Scherer discussed the evolving regulatory landscape, noting that the EU AI Act (Regulation (EU) 2024/1689) could classify arbitration as a "high-risk activity," underscoring its impact on parties' rights and responsibilities. This regulatory framework, blending mandatory requirements with soft-law instruments, will influence AI deployment in the EU and beyond. She pointed out that while arbitral institutions have adapted to new technologies, courts face greater risks from unrepresented parties and public scrutiny. Additionally, she mentioned ongoing efforts by the International Bar Association to develop "living documents" to guide practitioners on confidentiality and ethical use of AI.

Mr Kleinmann offered the perspective of the Paris Tribunal of Economic Activities, one of Europe's most technologically advanced courts, which has taken a leading role in implementing AI tools within a judicial setting. He described the creation of a "circle of compliance" under which judges are prohibited from using unapproved AI tools and must adhere to a strict internal code of conduct. Mr Kleinmann stated that "justice is not a technical aspiration, it is a commitment," asserting that AI's role should be limited to preparatory work and reporting, with decision-making remaining with human judges. The goal is to optimise time and reduce inefficiencies, enabling judges to concentrate on substantive analysis.

Judge Jhangiani emphasised the need for ethical guidelines in AI usage within the judiciary. While French courts are leading in AI integration, many judicial systems are still developing these frameworks. She highlighted the DIFC Courts 2023 AI Guidelines, which promote transparency in AI use while ensuring confidentiality. Although AI can enhance case processing and access to justice, she insisted that it should never replace judges' vital role in reasoning.

From an international standpoint, Ms Paulsson referred to ongoing discussions within UNCITRAL, noting that work on AI remains divided between Working Group III, responsible for treaty negotiations, and Working Group II, which focuses on commercial arbitration instruments such as the UNCITRAL Model Law and the New York Convention. She observed that progress has been relatively slow and that uncertainty persists as to how and where the issue will be addressed, particularly with the possibility of it being moved to the Commission. She raised core questions regarding the scope and level of regulation, including what should be regulated, whether action should be taken at the state or institutional level, and whether soft law may be more appropriate in light of the rapid pace of technological developments.

The second panel featured leaders from major arbitral institutions discussing AI strategies and institutional administration. Moderated by Mr Alexandre Vagenheim (VP of Global Legal Data, Jus Mundi), participants included Ms Ana Serra e Moura (Deputy Secretary General, ICC Court), Ms Eliana Tornese (Registrar, LCIA), Ms Thara Gopalan (Vice-President, AAA-ICDR), and Mr William Sternheimer (Manager for Training and Education, CAS).

Ms Serra e Moura outlined the ICC's long-term strategic approach, noting that while case management teams do not currently use AI for direct decision-making, the institution is focused on data governance and diverse solutions. She highlighted the launch of "ICC One Click", an AI-powered tool designed to facilitate international trade for small businesses and entrepreneurship, and emphasised the ongoing work of the Strategy Commission in shaping a guidance ecosystem for the use of AI in case law. This framework rests on five main pillars, including due process and the balance between soft and hard law.

Ms Tornese, LCIA, said innovation is about structured experimentation. The institution has an internal task force to assess AI in award review and checks. Tornese emphasised that human knowledge and judgment are irreplaceable: "AI can support, but not substitute, institutional judgment."

Ms Gopalan explained that technology has long been integrated into AAA-ICDR operations to enhance access, minimise friction, and ensure proportionate dispute resolution. With approximately five hundred and eighty thousand cases annually, including eight hundred international disputes, scalability is crucial. She introduced the "AI Arbitrator" as a tool that supports, not replaces, human decision-making, and the "Resolution Simulator" as a means for early case assessment. She emphasised that these tools remain optional, with parties maintaining full control over their use of AI.
Mr Sternheimer discussed how AI has been integrated to manage a significant volume of cases annually. This technology has streamlined their research and case management by about thirty per cent, functioning as an efficient "first tool" like a human intern. However, he emphasised the importance of human oversight and cross-checking to ensure smooth operations.

During the Q&A session, the panel discussed the importance of training models on high-quality data, such as the one thousand five hundred cleaned AAA awards used to refine their decision-making support tools. They also emphasised that codes of ethics must evolve to address the disclosure and consensual use of AI in international arbitration.
The third panel, moderated by Mr Jean-Rémi de Maistre (Co-Founder and Chief Executive Officer, Jus Mundi), explored the practical implementation of ethical AI within law firms and legal technology companies. The speakers included Ms Natalia Chumak (Partner, Signature Litigation), Mr Lucas de Ferrari (Partner, White & Case), Ms Eleissa Karaj (Innovation Manager, A&O Shearman) and Mr Filip Nordlund (Legal Engineering Manager, Legora).

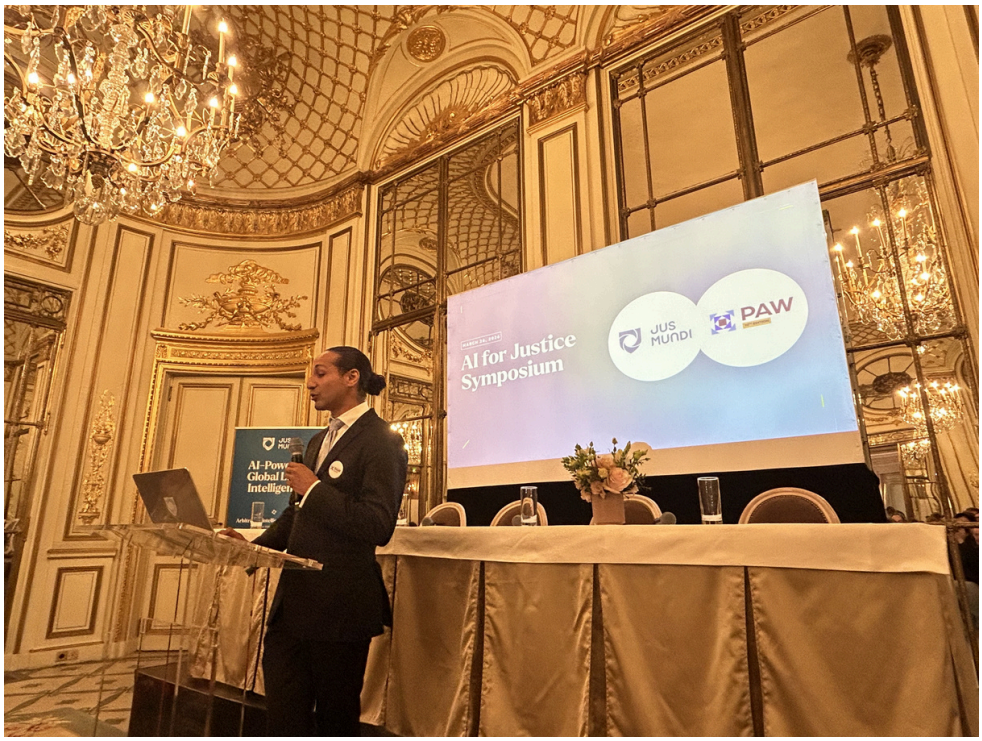
Ms Karaj discussed A&O Shearman's approach to AI deployment, emphasising structured governance and training. The firm initially limited access to AI tools, gradually introducing approved solutions while managing risks. She highlighted the importance of cultural and educational readiness, training lawyers not just in tool functionality but also in responsible judgment, confidentiality, and understanding AI limitations.

Mr de Ferrari explained that White & Case rigorously tested multiple platforms before selecting Legora as its preferred AI system, owing to its reliability and advanced features. Within arbitration teams, AI now supports drafting, research, and analytical comparison, enhancing the quality and coherence of submissions. Yet he emphasised mindset as the decisive factor: adoption requires open curiosity combined with professional caution.

From a litigation perspective, Ms Chumak detailed how AI enhances efficiency in pre-claim assessments, crisis management, and legal research. She described AI as a "sounding board" that stimulates creative reasoning rather than replacing human insight. For Signature Litigation, the focus remains on robust internal governance: ensuring traceability of tool usage, verifying quality of outputs, and maintaining transparency with clients.

Mr Nordlund discussed Legora's partnership with Jus Mundi, focusing on their integration of generative modelling and organised legal data for reliable research. He emphasised the importance of evaluation and transparency in building trust, especially in international arbitration, where confidentiality matters. Mr Nordlund noted that the main challenges in adopting AI often stem from human factors such as misunderstandings, trust issues, and curiosity about these technologies.

Overall, the discussions highlighted that AI is already reshaping dispute resolution by improving efficiency, accessibility, and analytical capabilities. However, its integration raises fundamental questions regarding legitimacy, accountability, and procedural fairness. A clear consensus emerged that AI must remain a tool supporting human decision-making rather than replacing it. Ensuring transparency, maintaining rigorous oversight, and preserving party autonomy are essential to building trust. As technological developments continue to accelerate, the future of dispute resolution will depend on striking a careful balance between innovation and responsibility. Justice must remain human in the digital age.



# A BRIEF HISTORY OF ARBITRATION ACROSS SIX CONTINENTS

*Noémie Gamot*

On Thursday 26 March 2026, as part of the 2026 edition of Paris Arbitration Week, the S*ociété de législation comparée* (Society of Comparative Legislation) hosted a conference on the origins of arbitration around the world. The event, organised by Béatrice Castellane, an international arbitrator, Carine Becharef Jallamion, Professor at the Faculty of Law and Political Science in Montpellier, and Mikaël Schinazi, a senior associate at Jones Day, included Frédéric Constant, Professor at the Université Côte d'Azur, Ferdi Youta, Professor of Public Law at the University of Bourgogne Europe, Anne-Charlotte Martineau, Senior Research Fellow at the the National Centre for Scientific Research (CNRS), and Bruno De Loynes de Fumichon, honorary lecturer in legal history at the University of Paris Panthéon-Sorbonne.

Béatrice Castellane opened the conference and defined the scope of the lecture before giving a presentation of all the speakers and briefly presenting the themes each would address. She emphasised that the aim was not to provide an exhaustive history of arbitration, but rather to highlight the human constants underlying dispute resolution mechanisms: the search for peace, the trust placed in a neutral third party, and the desire to preserve ongoing relationships. In this respect, the conference sought to answer a central question: how and why have all continents converged on similar practices of international arbitration despite their diverse cultures?

The floor was given to Professor Frédéric Constant, to give a presentation of the history of Arbitration in China, more specifically during two dynasties, the Ming and the Qing. The professor first underlined the blurred boundaries between arbitration, mediation and conciliation at the time in China. Judges did not have legal training, had no obligation to hear cases or adjudicate and would often act as mediators. Moreover, their decisions were not always enforceable. The Chinese legal system was very structured, with local judges at the bottom of the administrative hierarchy acting as mouth of the law, and the Emperor at the top, who would review cases with a death penalty.

The panelist then presented three cases to illustrate dispute resolution practices in China at the time. The first case involved a centuries-long land dispute over a lake in Hubei between the Huangs and the Wangs. The magistrates, lacking a legal solution, acted as mediators and repeatedly proposed compromises that were rejected by both parties. In the second case, magistrates prioritised moral reasoning over legal rights. A teacher had died before repaying a debt to a student. The court ruled that, as a former student, he should show loyalty and respect to his teacher and forgive the debt. The same moral reasoning was applied in the third case, a commercial dispute in Canton, where the magistrates ruled that the speculation on silk profit was not an honest form of commerce and forgave a debt instead of establishing contract law.

Professor Ferdi Youta was then invited to speak about selected institutions of arbitration in Africa. While not covering every country, he emphasised that arbitration is deeply embedded in African culture. The presentation was divided into three parts.

The first part focused on the history of arbitration in pre-colonial Africa, beginning with ancient Egypt. The goddess Maat was the personification of justice, embodying a divine order that everyone was expected to follow. Judges would often act as arbitrators under the concept of "Maat", using harmony and equity as a compass rather than law. Another African institution is the "Palaver", the resolution of conflict through language, which took place at the chief's place, or under a tree. Though the tradition was oral, the panelist underlined the existence of a strict procedure and unwritten norms.

The speaker went on to analyse the colonial period. Law was then used as an instrument of domination. Europeans refused to accept African systems of dispute resolution and imposed their own rules. In 1689, in Ivory Coast, France adopted a decree to eliminate all indigenous jurisdictions. But because these institutions were so deeply ingrained in the culture of the people, it was impossible to make them disappear. The colonial powers established indigenous jurisdictions at the bottom of the new judicial system, called "native courts" or "customary courts," chaired by colonial assessors.

The third part explored the post-colonial judicial system. After independence, states kept a close eye on traditional institutions, while still promoting them. In Ivory Coast, the 2016 Constitution entrusts local kings and chiefs with resolving non-judicial disputes. Nowadays, African values are incorporated in the practice. For instance, the concept of "*Ubuntu*", the idea that a person exists through others, was established as an overriding treaty principle by the Africa Arbitration Academy.

The session then moved to Anne-Charlotte Martineau, Researcher at the CNRS, to speak about the transnational arbitration for slave trade disputes from the 16th to the 18th century. The Spanish Crown initially granted licences to Castilian merchants to import enslaved Africans into the Americas, but the beginning of operations was difficult as licences were often given to royal favourites who resold them for profit. From 1522, licences were sold and taxed under centralised control, raising legal disputes handled by slow and uncertain colonial courts. In 1595, the Crown introduced the "*Asiento de negros*", granting merchants monopoly rights over the slave trade. A turning point came in 1662 with the Grillos, who organised the trade directly, introducing the "*Pieza de India*" system, which objectified slaves and integrated slave trading into broader economic policies. They were also allowed to appoint private judges with broad jurisdiction to enforce contracts across Spain and the colonies.

This parallel system aimed to strengthen royal control. Inspired by existing practices in Andalusia, these judges became central to dispute resolution. Over time, foreign companies entered the system, expanding transnational arbitration. Anne-Charlotte Martineau pointed out that these arbitration mechanisms that had become essential to managing the slave trade only made it more acceptable. To conclude her presentation, she highlighted the fact that arbitration was not neutral. Indeed, it reinforced existing power structures and contributed to normalising slave trade, and the private judges never questioned human exploitation while resolving disputes.

Finally, Professor Bruno De Loynes de Fumichon took the floor. He examined the Alabama arbitration (1872), focusing on the dispute, its significance, and the role of the arbitrators. The case arose from the American Civil War, when British ships such as the CSS Alabama, Florida, and Shenandoah aided the Confederacy despite British neutrality. These vessels caused major damage to Union shipping, leading the United States to hold Great Britain responsible. The dispute was settled under the Treaty of Washington, signed in 1871, which established a five-member arbitral tribunal. The tribunal developed key principles of international law, notably due diligence and the primacy of international obligations over domestic law. It ultimately found Great Britain liable and awarded fifteen million dollars to the United States.

This arbitration marked a turning point in international relations, easing tensions between the two countries and contributing to a lasting diplomatic rapprochement. It also revitalised international arbitration by introducing a system with neutral arbitrators and influencing later institutions. Finally, the speaker highlighted the role of the arbitrators' personalities, whose backgrounds and strong characters shaped the proceedings, creating tensions but also illustrating the human dimension behind international arbitration.

After the presentations, the discussion opened with a question from Mikaël Schinazi, who challenged the idea of the Alabama arbitration as a turning point, asking whether it should instead be seen as a reconfiguration of existing practices. Another participant highlighted the focus on harmony and peace during the presentations, suggesting it could inspire contemporary arbitration practice.