Founder/Editor
Nadia Smahi

Editorial Committee
Maxime Chevalier, Andra Curutiu, Leila Kazimi, Sabina Nurbagandova, Gizem Bahadirli, Palak Mishra, Chandrika Sharma

Picture source: pixabay.com

THE

ICALAA Report

The Newsletter of the ICAL Alumni

Featuring exclusive:

Academic articles
Recent developements reports
Conferences and webinars reports
Interviews
Alumni News

Special Guest:

Prof. Patricia Shaughnessy

ICAL Alumna Spotlight:

Evelyn Kachaje

THE PRESIDENT'S COLUMN

Gretta Walters, LL.M.
(Class of 2010-2011)

We are so excited to launch the inaugural issue of the ICALAA Report. Our network — the ICAL family — today spans all corners of the globe. Our alumni consist of more than 500 practitioners, arbitrators, academics and other professionals from more than 70 countries. They are in top companies, law firms, universities and governmental and non-governmental agencies. They have been recognized for their work around the globe in a myriad of sectors. They do complex and high-profile commercial and investment disputes, are leading voices on legal, human rights and environmental issues, and are entrepreneurs in more industries than I could list in this short note. In other words, the ICAL family is nothing short of impressive. One of the key goals of the current ICAL Alumni Association Board has been to celebrate these remarkable achievements by increasing opportunities to promote and connect our members. The ICALAA Report is part of that goal, and this inaugural issue showcases the diversity of the work of our alumni across sectors, jurisdictions and industries. I would like to congratulate Nadia Smahi and the entire Editorial Team on their tremendous effort and also thank all that contributed to this wonderful issue. We hope you enjoy reading it and will find it a useful resource to learn more about the ICAL network.

Gretta Walters is a Partner of Chaffetz Lindsey LLP in New York City. Her experience spans a broad range of commercial and investment disputes in domestic and international arbitration, and in state and federal courts. She has worked on matters arising under the ICDR, AAA Employment, AAA Commercial, AAA Construction, BCICAC, ICC, LCIA, SCC, SMA and UNCITRAL Rules. She also sits as arbitrator, is an adjunct professor at NYU Law School and she is the current President of the Board of Directors of the ICAL AA.

EDITORIAL

Nadia Smahi, LL.M.
(Class of 2012-2013)

The idea of publishing a newsletter for the ICAL Alumni has always been one of the projects of the ICAL Alumni Association. With the "ICALAA Report", the current Board of Directors decided to go one step further and to provide a platform for Alumni to not only share their recent news and professional updates, but also to write short academic articles, recent development contributions as well as conferences and webinar reports. Keeping in mind its "newsletter" spirit, the ICALAA Report still aims to honour the ICAL Alumni by sharing their recent accomplishments and to give the floor to them through its "Alumnus/Alumna Spotlight" feature.

Publishing this first issue turned out to be a tremendous enterprise which involved efforts of many people over the past half year. As Founder and Editor, I am extremely grateful for the help received from our courageous Editorial Committee and for the enthusiasm and diligence of all the authors featured in Volume I, Issue I of the ICALAA Report. I am also thankful to the Board of Directors for its trust in my work - and to Piktochart for proving me that even a lawyer can turn into a "designer" with the right tools (and months of time). I truly hope you will enjoy this first Issue as much as we enjoyed preparing it. Bonne lecture à tous!

Nadia Smahi is a Swiss-qualified Attorney-at-law, currently working as a Senior Associate for Bär & Karrer Ltd in Geneva, Switzerland. Her practice focuses on counsel work in international and domestic arbitration, as well as cross-border and domestic litigation. She represents parties and acts as arbitrator and secretary to arbitral tribunals in numerous arbitral proceedings, both ad hoc and institutional (e.g. ICC, LCIA, SAC, CAS) in various disputes relating to oil and gas, international sales, distribution and licensing agreements, shareholders' agreements, brokerage contracts, intellectual property disputes and sport related disputes.

THE EDITORIAL COMMITTEE

Maxime Chevalier (Assistant-Editor) is currently an Assistant Professor at the Law School of O.P Jindal Global University (India) where he mainly teaches Indian Arbitration law and Contract law. He recently passed the French Bar and has published several academic papers in notorious arbitration reviews.

Andra Curutiu (Assistant-Editor) is an LL.M. student in the International Commercial Arbitration Law programme at Stockholm University. Originally from Romania, Andra moved to the Netherlands at the age of 18 to pursue her Bachelor's studies in International and European Law.

Leila Kazimi (Assistant-Editor) is a dispute resolution lawyer specializing in international commercial and investment arbitration. After receiving her full legal education in Ukraine, she completed an LL.M. in International Commercial Arbitration Law at Stockholm University. Her experience includes working with both leading Ukrainian and international law firms.

Sabina Nurbagandova (Assistant-Editor) is a Russian-qualified lawyer pursuing an LL.M. in International Commercial Arbitration at Stockholm University. She has graduated with honors from the National Research University Higher School of Economics (Moscow). Sabina recently finished an internship at the Arbitration Institute of the Stockholm Chamber of Commerce.

Gizem Bahadirli (Conference/Webinar Reports Manager) is a Turkish-qualified lawyer currently pursuing an International Commercial Arbitration Law LL.M. at Stockholm University. She holds an LL.B. from Galatasaray University in Istanbul. Between 2020 and 2021, she worked as a trainee associate at Cetinel Law Firm, based in Istanbul and specialized in international construction law and international dispute resolution.

Palak Mishra (Conference/Webinar Reports Contributor) is currently pursuing her LL.M in International Commercial Arbitration Law at Stockholm University as a Swedish Arbitration Association Scholar. She is an Indian-qualified lawyer with over four years of experience in commercial arbitration and litigation.

Chandrika Sharma (Alumni News Manager) is an arbitration practitioner and licensed attorney from India, specializing in dispute resolution and commercial litigation. Currently, she is pursuing her LL.M in International Commercial Arbitration Law at Stockholm University. She also holds a Post Graduate Diploma in ADR apart from her dual degree in Business Administration and Law.

ICALAA Report - Volume I, Issue I

TABLE OF CONTENTS

ICAL Alumni News

All ICAL Alumni are welcome to submit their career related news at all time to: info@icalaa.org

Picture source: pixabay.com

1 Manuela de la Helguera

ICAL Alumna of 2010, Manuela de la Helguera recently gave an inspiring interview to elsalvador.com. The full interview is available at: https://www.elsalvador.com/noticias/nacional/salvadorenos-destacados-en-el-exterior/945162/2022/

2 Dr Yuliya Chernykh

ICAL Alumna of 2005, Dr Yuliya Chernykh recently published a new book: "Contract Interpretation in Investment Treaty Arbitration: A Theory of the Incidental Issue". The book has been published in open access by Brill: https://brill.com/view/title/56164?language=en

3 Frida Altamirano Jiménez

ICAL alumna of 2014, Frida has recently been appointed as Secretary General of the Arbitration Center of Mexico ("CAM"), which is one of the leading arbitral institutions in Mexico. The ICAL Alumni Association wishes her all the best in this new endeavor.

ICAL Alumni News

All ICAL Alumni are welcome to submit their career related news at all time to: info@icalaa.org

Picture source: pixabay.com

4 Dr Manuel Arroyo

ICAL Alumnus of 2007, Dr Manuel Arroyo recently joined Eversheds Sutherlands in Switzerland as Partner. Due to his many achievements, Manuel was the very first recipient of the "Outstanding ICAL Alumni Award" in 2014. The ICAL Alumni Association wishes him the best of luck in this new endeavor.

5 Dominika Durchowska

ICAL Alumna of 2013, Dominika Durchowska has recently become one of the Partners of the well-renowned Polish law firm Kochanski & Partners. She is also the Head of the firm's Cracow office. The ICAL Alumni Asssociation congratulates her on this impressive achievement.

6 Brian Kotick

ICAL Alumnus of 2012, Brian Kotick has recently joined M.B. Kemp as Partner, following several years at prestigious law firms in Stockholm and London. The ICAL Alumni Association wishes him all the best in this new endeavor.

ICALAA Report Special Guest

Interview with Patricia Shaughnessy

Stockholm, Sweden

Hi Patricia, thank you for being here. As we all know, you are a US citizen who has been based in Sweden for a while now. Could you remind us your background and what led you here?

I have been a Swedish resident for approximately 30 years, which certainly is quite a while. My path to Sweden started at a train station in Chur, Switzerland when I was travelling to a ski resort with a friend and met my husband, who was travelling with friends and we ended up in the same ski resort and at the same hotel. I had been practicing commercial law and litigation in Honolulu for ten years, and was an adjunct professor at the University of Hawaii, School of law, so the move to Stockholm about a year later was a big professional and personal step, but one I am happy to have taken.

I think it is an understatement to say that the ICAL family is very grateful to you for your creating the LL.M. Program. Could you please tell us more about the circumstances that surrounded its launch? What gave you the idea? Who contributed? And what challenges did you face?

I had a strong interest in arbitration and believed that Stockholm University (SU) would provide an excellent venue for a specialized LLM program, given Stockholm's role as a leading arbitration center and SU's attractiveness for international studies. Professor Julian Lew has always been an inspiring leader and I was impressed with the School of International Arbitration, at Queen Mary University of London. I collaborated with Professor Lars Heuman in establishing the ICAL program and enlisted the support of my colleagues, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the local and international arbitration legal community. The biggest challenge was not having any staff other than myself, no budget, and no marketing other than the university webpage. At that time, other

than the Queen Mary LLM, there were no master programs specialised in arbitration studies, which was both an opportunity and a challenge.

Many alumni of the LL.M. are still friends to this day – including those that studied during different years. It seems like you always had a "special touch" in hand picking the students. What was your secret?

Attracting ambitious, talented and active students is the key to graduating successful students. But sometimes these students are not directly identifiable, some may not even realize their own capacity and talent. I sought to bring together a truly diverse group of students who were all highly motivated and willing to work hard together to deeply study both the theoretical and practical aspects of international arbitration. From the first day I sought to encourage students to foster friendships, to collaborate, to respect the differing backgrounds and perspectives of their classmates, to engage in robust discussions, and seek to take responsibility for academic learning and professional skills development.

Looking back at all the years you dedicated to the LL.M., can you please share with us some of your happiest memories?

I have so many happy memories and new ones being made all the time as ICAL students continue to achieve so many impressive professional and personal accomplishments. One of the most rewarding and happiest aspects of being part of the ICAL "family" is sharing the successes of group activities such as the VIS Teams' success, as well as individuals in their post-graduate lives. But the most heart-warming is witnessing how ICAL alumni continue to support each other and how friendships across classes, years and regions continue to develop.

As a final word, is there anything you would like to tell all the alumni reading today? Thank you so much for your time.

Each and every member of the ICAL alumni has contributed to the success of the program and success of its graduates. The ICAL Alumni Association has created a strong platform for continuing to support and develop the program and the connections between the alumni. I would encourage all of the alumni to actively participate in the ICAL Alumni Association and to take advantage of this international network of like-minded professionals, some who work in arbitration and others who have taken other professional paths, but all who have shared the ICAL experience and share the ICAL collegial attitude of collaborating with, respecting and supporting colleagues.

* * * * *

Interview by Nadia Smahi, LL.M. (ICAL Class of 2012-2013), November 2021.

ICAL Alumna Spotlight

Interview with Evelyn Kachaje

ICAL Class of 2016-2017

Hi Evelyn, thank you for being here. At such a young age, you have had quite an impressive career already. Could you remind us your background?

Thank you very much for extending this invitation, its lovely to be here! It has been a pretty incredible journey so far indeed. I'm originally from Malawi, spent a lot of my childhood in Botswana, and I've been lucky enough to live in a number of pretty amazing places since then. I moved to Toronto, Canada for my undergraduate degree and then obtained my law degree from Harvard Law School. Post graduation I practiced in an international law firm in New York, and following my LL.M at Stockholm University, I have since moved into the international organization world, working first for the UN World Food Programme in Rome and now for the UN International Organization for Migration in Geneva.

Could you tell us what led you to Stockholm University? And what led you to pursue an LL.M., having already graduated from Harvard Law School?

In my time in New York, I practiced in the litigation department of a law firm, and I really enjoyed the litigation practice. I was drawn to arbitration however because of its international nature – it one of the few and rare truly international practices in law. With this in mind, I wanted to focus on arbitration with the hope of growing in that practice area, and Stockholm University's LL.M in Arbitration is one of the best in the world. Now – even though I don't practice solely in arbitration, the skills I learned in my LL.M remain invaluable in the international law setting in which I practice, and I put my LL.M to use almost every day.

You worked for the UN World Food Programme for a few years. Could you tell us more about what you did there? In general, do you think that your LL.M. made a difference in your professional career since you have obtained it?

Indeed, in both my roles at the UN World Food Programme, and in my role now, I am a legal officer in administrative law. We deal with the administrative laws and rules of the organization, and arbitrate before the International Labour Organization Administrative Tribunal. The structure of arbitrations, in which the rules vary depending on the jurisdiction and the parties involved, and the fact that arbitrations are so wide-ranging because they span many countries and legal systems lends itself very well to the legal practice in international organizations. In addition, the LL.M at Stockholm University gave me such a rich and diverse network of friends and colleagues that I still call upon now when I come across a novel question or interesting legal

conundrum. I can 100% say that the LL.M enriched my career.

You have recently been ranked in the prestigious and highly selective "Forbes 30 under 30" list. Could you tell us more about this?

Thank you very much! It felt very surprising, but also very humbling to find out that I had been selected for the Forbes 30 under 30 list in Europe. I was selected for the Social Impact Category – and it is such an honor to be included on this list with so many people who are doing such important and world changing work. It had been a dream of mine for a long time to be on the Forbes 30 under 30 – but, like some of those craziest and far to reach dreams, it did not feel like it could really be a possibility until it happened!

To compile the 30 Under 30 Europe list, Forbes receives and vets thousands of nominations, and Forbes's reporters also search the region for leading innovators across the various categories. Forbes then puts together a panel of expert judges to distill the shortlist down to the final 30 in each category. Somehow, I was one of the 30. It was great to have the important work that we do in these UN agencies recognized on such a global scale.

As a final word, do you have any advice for students and young lawyers who are impressed by your achievements and also wish to pursue an international career (not necessarily in international arbitration)? Thanks again for your time.

First – your dreams are never too big. Always apply for that school, that scholarship, that job that feels out of reach - you would be surprised to find it isn't!

Second - GET. INVOLVED. In addition to focusing on your studies, which are of course extremely important, it is essential to get involved outside of the classroom and the workplace. It is so enriching on a personal level, but also on a professional level to participate in the opportunities offered – extracurricular groups, moot courts, clubs, young professional associations, alumni associations e.t.c. Some of my best professional experiences have come from these kinds of opportunities. In addition to the practical skills you learn in activities such as moot court and volunteer programs, the people I met in these extra-curriculars places opened up doors to places I never would have imagined.

As with a lot of people who work in this field, my career began with an internship. In my first summer of law school at Harvard, I applied for and was accepted for an internship in the legal department at the World Food Programme in Rome. I learned about this internship through another student I met through the Human Rights student group in the law school who had done the internship the year before.

These networks stay with you throughout your career and open you up to contacts throughout the international legal world. I am very grateful for the doors that have opened to me professionally through these kinds of involvements, and for the lifelong friends!

* * * * *

Interview by Nadia Smahi, LL.M. (ICAL Class of 2012-2013), October 2021.

Can Issue Preclusion be a Reason for an Arbitral Award to be Set Aside or Refused Enforcement: An Analysis of the Hong Kong Court's Decision in *A v. AW*

by Sherlin Tung, LL.M.
(ICAL Class of 2009-2010) and
Alex Ye, LL.M. (ICAL Class of 2017-2018)

Abstract

One interesting question that has not drawn much attention previously is the consequence of breaching the principle of preclusion, in particular the doctrine of issue preclusion, in rendering an arbitral award. Would such an arbitral award be set aside or refused for enforcement by the relevant courts? This article analyses the Hong Kong court's decision on this particular question and compares the Hong Kong position to the stance adopted by the courts in the U.S.. This article concludes that courts in both Hong Kong and the U.S. are reluctant to set aside or refuse enforcement of an arbitral award based on the doctrine of issue preclusion or similar doctrines under the public policy or manifest disregard of the law exception. To set aside or refuse enforcement of an arbitral award, the courts must be convinced that there was serious or egregious conduct involved such that due process is undermined.

I. Introduction

One of the key objectives of international arbitration is to provide a final and binding resolution for the parties' dispute.[1] To achieve this objective, most national laws and arbitral institutional rules require parties to comply with the arbitral award rendered by the arbitral tribunal.[2] In addition, many jurisdictions extend the principle of preclusion found in litigation to arbitral proceedings further strengthening the concept of a final and binding nature of an arbitral award.

The principle of preclusion aims to alleviate the injustice of a party finding a way to re-litigate the same claims or causes of action or identical issues that have already been decided upon in a previous litigation. Generally speaking, there are two types of preclusion: (i) claim preclusion (also known as "*res judicata*") and (ii) issue preclusion (also known as "issue estoppel" or "collateral estoppel").[3] Claim preclusion provides that a judgement or arbitral award accepting or rejecting a particular claim or cause of action is binding upon the parties to the proceeding so that the unsuccessful party in that proceeding will be precluded from attempting to revert the decision against the same party in a later litigation or arbitral proceeding.[4] Whereas issue preclusion prevents a party from re-litigating or re-arbitrating, against a counter-party, a particular issue of fact or law forming a necessary ingredient in a cause of action that has been decided by a competent forum.[5] Issue preclusion

---

1 Gary B. Born, *International Commercial Arbitration*, 4099 (3rd ed., Kluwer Law International 2021).

2 Gary B. Born, *International Commercial Arbitration*, 4100 (3rd ed., Kluwer Law International 2021).

3 The term "issue estoppel" is normally used in England, Hong Kong and Singapore, while the term "collateral estoppel" is normally used in the U.S.

4 Gary B. Born, *International Commercial Arbitration*, 4102 (3rd ed., Kluwer Law International 2021).

5 Toby Landau QC, *Arbitral Groundhog Day: The Reopening and Rearguing of Arbitral*

aims to prevent a reopening of a particular issue in subsequent proceedings between the same parties but involving a different cause of action to which the same issue is relevant.[6]

One interesting question that has not drawn much attention previously is the consequence of breaching the principle of preclusion, in particular the doctrine of issue preclusion, in rendering an arbitral award. Would such an arbitral award be set aside or refused for enforcement by the relevant courts? Recently, the Hong Kong High Court has addressed this particular question.

In 2021, in a very rare move, the Hong Kong Court of First Instance ("**HKCFI**"), in *W v AW*, set aside an arbitral award due to a violation of public policy. The HKCFI held that the arbitral award rendered in an arbitration administered by the Hong Kong International Arbitration Centre ("**HKIAC**") was "*manifestly invalid*" because the findings in the arbitral award contradicted and were inconsistent with the findings which had already been made in a previous separate arbitral award on the same issues involving the same parties and one of the same arbitrators.[7]

II. Background

The parties, W and AW, were two companies who entered into two related agreements, namely, a Share Redemption Agreement and a Framework Agreement. The two agreements were part of a broader transaction involving the acquisition of AW's interests in Mainland China and both contained HKIAC arbitration clauses. W and AW were the only parties to the Share Redemption Agreement while the Framework Agreement was executed by W and AW as well as four other parties.

Following a series of disputes, W commenced arbitration against AW and other parties under the Framework Agreement ("**Arbitration 1**"). In response, AW filed a counterclaim in Arbitration 1 and commenced a separate arbitration under the Share Redemption Agreement ("**Arbitration 2**"). AW appointed the same co-arbitrator and raised identical claims of misrepresentation in both arbitration proceedings. The remaining arbitrators in both arbitrations were different.

On 13 March 2020, the arbitral tribunal in Arbitration 1 issued a unanimous award in W's favour, dismissing the counterclaim for misrepresentation ("**Award 1**"). Four months later, on 13 July 2020, the arbitral tribunal in Arbitration 2 issued a unanimous award in AW's favour, upholding AW's misrepresentation claim ("**Award 2**"). Both awards dealt with essentially the same misrepresentation claim by AW.

Following these diverging awards, W applied to set aside Award 2. W claimed, *inter alia*, that Award 2 was in conflict with the public policy of Hong Kong because the arbitral tribunal in Arbitration 2 made inconsistent findings on the same issues between the same parties that had already been decided in Arbitration 1. AW, in turn, applied for leave to enforce Award 2 and sought an order for security to be provided by W. The judge's decision in *A v AW* was made in the context of AW's application for security, in which the merits of W's setting aside application was

---

Determination, 2 Singapore Arbitration Journal, 1, para. 16 (2020).

6 Toby Landau QC, *Arbitral Groundhog Day: The Reopening and Rearguing of Arbitral Determination*, 2(1) Singapore Arbitration Journal, 16 (2020).

7 *W v AW* [2021] HKCFI 1701 ("***W v AW***").

one of the circumstances that needed to be considered by the court.

III. The Hong Kong Court's Decision

The public policy ground relied upon by W was based on the principle of issue estoppel. W claimed that Award 2 was in conflict with public policy of Hong Kong because the tribunal in Arbitration 2 was bound by the findings on common issues already determined in Award 1 but nonetheless chose to ignore these findings without dealing with the matter of issue estoppel.[8]

After a detailed review of the two Awards and the written submissions in the two arbitrations, the HKCFI held that the misrepresentation claims raised by AW in the two arbitrations, while based on two different causes of actions and arising from two separate contracts, were a result of inconsistent findings based on the same issues of facts and law, which were necessary in a misrepresentation cause of action.[9] In the court's view, there were inconsistencies and contradictions which could not be reconciled in spite of the same facts and law, which were necessary to the reasoning of both arbitral tribunals.[10]

What is important to note, however, is that in spite of the above findings, the HKCFI emphasised that applications to set aside or oppose enforcement of an arbitral award is not an appeal for the court to review the correctness of the award on either facts or law.[11] The mere finding that the arbitral tribunal in Arbitration 2 was wrong in law to have ignored the principle of issue estoppel is not in itself a ground to set aside Award 2.[12] Instead, the concern and focus of the court was the structural integrity of the arbitral process leading to the arbitral award.[13] If there is conduct which is so serious, or egregious, such that due process is undermined, the court may consider whether the arbitral award should be enforced or be set aside on the ground of public policy.[14]

In this case, the court found that as AW's appointed arbitrator sat in both arbitrations, W was entitled to expect that the arbitral tribunal in Arbitration 2 would deal with the question of issue estoppel after Award 1 had been rendered[15] In the court's view, when AW's appointed arbitrator became aware of the findings made in Award 1, fairness and the justice of the case required AW's appointed arbitrator to invite submissions to be made by the parties in Arbitration 2.[16] However, AW's appointed arbitrator did not issue any dissenting decision in either of the arbitrations, nor did AW's appointed arbitrator provide any explanation in Award 2 as to why there were inconsistent findings.[17] The court held that AW's appointed arbitrator's failure to deal with and explain the inconsistent findings on essentially the same issues constituted an injustice and grave unfairness to W.[18]

In light of the above findings, the court found Award 2 "*manifestly invalid*" as the enforcement of the Award would be contrary to Hong Kong's conceptions of justice.[19] Material to the court's

8 *A v AW, para. 24.*
9 *A v AW, para. 46.*
10 *A v AW, para. 33.*
11 *A v AW, para. 50.*
12 *A v AW, para. 51.*
13 *A v AW, para. 51.*
14 *A v AW, para. 52.*
15 *A v AW, para. 52.*
16 *A v AW, para. 53.*
17 *A v AW, para. 52.*
18 *A v AW, para. 52.*
19 *Ibid, para. 56.*

decision on the invalidity of Award 2 was the fact that AW's appointed arbitrator was the common arbitrator in both Arbitrations.[20]

IV. Analysis

A. High Threshold for Setting Aside or Refusing Enforcement

The HKCFI in *A v AW* made it clear that the doctrine of issue preclusion on its own is not a ground to set aside or refuse enforcement of an arbitral award, even if an applicant can prove that the arbitral tribunal was wrong in law to have ignored such doctrine.[21] The threshold to set aside or refuse enforcement of an arbitral award in Hong Kong is high.

To constitute a ground to set aside or oppose enforcement of an arbitral award for a case involving the doctrine of issue preclusion, the relevant conduct must be so serious, or egregious such that due process is undermined.[22] It is only when the court is convinced that the structural integrity of the arbitral process and the arbitral award is affected by such conduct, would the court consider setting aside or refusing enforcement on the ground of public policy.[23]

The material factor relied upon by the court was the appointment of the same arbitrator in both arbitrations. In spite of the same arbitrator sitting in both arbitrations, the tribunal in Arbitration 2 issued Award 2 without dealing with and explaining the inconsistent findings on identical issues made in Award 1 and Award 2.[24] These facts heightened the sense of injustice and unfairness to W, which, according to the HKCFI, constituted a violation of the public policy of Hong Kong. Nevertheless, while finding Award 2 "manifestly invalid", the Hong Kong court's judgement in *W v AW* shows that the Hong Kong courts have a high threshold for setting aside or refusing enforcement of an arbitral award on the basis of issue preclusion. This demonstrates Hong Kong's pro-arbitration stance.

Describing *A v AW* as a "*highly unusual case*", the HKCFI's reliance on the unique factor of the presence of a common arbitrator in both arbitrations in its judgement indicates the very limited situation where the doctrine of issue preclusion could be used as a basis to set aside and/or oppose enforcement of an arbitral award. Following the HKCFI's reasoning, for a successful application to set aside or refuse enforcement of an award in Hong Kong, it is not sufficient to show that an arbitral tribunal is wrong in law to have ignored the doctrine of issue preclusion in the award. Nor is it sufficient to show that the sole reason to set aside an award is because an issue had already been previously decided. There must also exist factors to show that the failure of the arbitral tribunal in taking a 180 degree turn on an identical issue based on the same set of law and facts is to the heightened level of a serious, egregious act that cannot be excused.

B. Comparable to the U.S. doctrine of Manifest Disregard of the Law

The requirements to set aside or refuse enforcement of an arbitral award in Hong Kong are comparable to the requirements for setting aside or refusing enforcement of an award in the U.S. Specifically, the reasons relied upon in *A v. AW* are similar to the controversial doctrine of "*manifest disregard of the law*" in the United

[20] *A v AW, para. 56.*
[21] *A v AW, para. 50.*
[22] *A v AW, para. 51.*
[23] *A v AW, para. 51.*
[24] *A v AW, para. 52.*

States of America ("**U.S.**"), which also requires quite a high threshold to be reached for an application to vacate an award to be successful.

The U.S. Supreme Court has held that the Federal Arbitration Act ("**FAA**") provides the exclusive grounds for vacating an arbitral award rendered in the U.S.[25] Specifically, under Chapter 1, Section 10 of the FAA, a court may vacate an arbitral award only if limited grounds exist. The grounds provided by the FAA are: (i) the award is a result of corruption or fraud; (ii) there was evident partiality or corruption of an arbitrator; (iii) there was arbitrator misconduct; or (iv) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award was not made.[26]

In addition to these four statutory grounds, the U.S. federal courts are split as to whether the doctrine of a manifest disregard of the law remains an additional basis to vacate an arbitral award. The doctrine of a manifest disregard of the law has its roots from the U.S. Supreme Court, which use this term passively in dicta in 1953 in its decision in *Wilko v Swan*.[27] Specifically, the U.S. Supreme Court remarked that any "*failure* [by an arbitrator]" in order to vacate an award "*would need to be made clearly to appear…*" since "*interpretations of…law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation*".[28] To this day, it remains unclear what the Supreme Court intended by these cryptic remarks and there is now a circuit split as to whether the doctrine of a manifest disregard of the law is a valid ground for vacating arbitral awards.

The Second Circuit (which encompasses New York, a jurisdiction that hears a large number of international arbitration matters in the U.S.) as well as the Fourth, Sixth, Ninth and Tenth Circuits, have held that the doctrine of manifest disregard of the law is a valid ground for vacating arbitral awards.[29] However, the Second and Ninth Circuits have taken this one step further and found that the doctrine of manifest disregard of the law on its own is not sufficient as an independent, non-statutory ground for vacating an award. Instead, the courts in the Second and Ninth Circuits consider that arbitrators who manifestly disregard the law have "*exceeded their power*" under section 10(a)(4) of the FAA. Accordingly, because the arbitrator is aware of a controlling legal principle yet refuses to apply it, the arbitrator disregards the law in such a manner as to exceed the powers that have been bestowed on the arbitrator.[30] Nevertheless, even the Second and Ninth Circuits recognize the doctrine of a manifest disregard of the law as part of a test to determine whether an arbitral award should be vacated. The doctrine of a manifest disregard of the law as a reason to vacate an award remains an open question in the Third Circuit and the District of Columbia, it has been completely abandoned by the Fifth and Eight Circuits, and whether it exists as an independent,

---

25 *Hall Street Associates v Mattel*, 552 US 576 (2008).
26 9 U.S.C. Section 10.
27 *Wilko v. Swan*, 346 U.S. 427 (1953).
28 *Wilko v. Swan*, 346 U.S. at 436-437 (1953).
29 *See* Jonathan J. Tompkins, *Manifest Disregard of the Law: The Continuing Evolution of an Historically Ambiguous Vacatur Standard,* 12(2) Dispute Resolution International, 154-158 (2018).
30 *See* Jonathan J. Tompkins, *Manifest Disregard of the Law: The Continuing Evolution of an Historically Ambiguous Vacatur Standard,* 12(2) Dispute Resolution International, 156, 154-158 (2018).

non-statutory ground for vacating an award is not yet fully decided in the First, Seventh, and Eleventh Circuits. While the U.S. does not have an express public policy prong for vacating an award, the doctrine of a manifest disregard of the law, while controversial not only of its existence but also application, would be the relevant test to apply under circumstances similar to those present in *A v. AW*.

In *Interdigital Communications Corporation and Interdigital Technology Corporation v Samsung Electronics Co., Ltd.*, the Southern District Court of New York (a part of the Second Circuit) held that a party relying on the doctrine of a manifest disregard of the law in order to vacate an arbitral award must prove a two prong test: (i) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether; and (ii) the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case.[31] The court reasoned that in order to show the first prong of the test was met, there must be showing of the arbitrator's intent to "*flout*" the principle, either based on the arbitrator's explicit acknowledgement, or, the court could infer the intent if it found that the error made was so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator.[32] Accordingly, the "knowledge" of a governing legal principle would be either actual knowledge or knowledge that should not have been unknown.

Looking at the situation in *A v AW*, for the circuits that recognize the doctrine of a manifest disregard of the law as a reason to vacate an arbitral award would also, in very limited circumstances, decide to vacate the arbitral award. As the court in *Interdigital vs Samsung* explained, an arbitral award can only be vacated on a ground of a manifest disregard of the law where "*some egregious impropriety on the part of the arbitrator is apparent*".[33] If there is even a "*barely colorable*" justification for the outcome reached, the court must confirm the arbitral award.[34] In spite of these limited circumstances, it appears that the same conclusion as the HKCFI in *A v AW* would be reached should the *Interdigital v. Samsung* test be applied. First, the arbitrator who sat in both Arbitration 1 and Arbitration 2 had clear knowledge that a situation involving issue preclusion was present, given that a party raised identical claims based on the same set of facts and legal basis, and the arbitrator should have raised it with the arbitral tribunal in Arbitration 2 once the final award in Arbitration 1 was rendered. Second, the existence of the same issue for decision in Arbitration 1 and Arbitration 2 and the decision made by the arbitral tribunal in Arbitration 1 was well defined, explicit, and clearly applicable to Arbitration 2. The issues existing in both Arbitration 1 and Arbitration 2 were identical claims and based on the same set of facts and legal basis. By ignoring the fact that an identical issue had already been decided upon based on the same set of facts and legal basis and then deciding in a completely opposite way, the arbitral tribunal had arguably committed an egregious impropriety and the courts would

[31] *Interdigital Communications Corporation and Interdigital Technology Corporation v Samsung Electronics Co., Ltd.*, 528 F.Supp.2d 340, (S.D.N.Y. 2007) ("***Interdigital v Samsung***").

[32] *Interdigital v Samsung,* para. 356.

[33] *Robin Weiss v Sallie Mae, Inc.*, 939 F.3d 105 (2019) ("***Weiss v Sallie Mae***"), 109.

[34] *Robin Weiss v Sallie Mae, Inc.*, 939 F.3d 105 (2019) ("***Weiss v Sallie Mae***"), 109.

likely also vacate the arbitral award on the grounds of a manifest disregard of the law.

C. Cases Where a Court Will Set Aside or Refuse Enforcement Under Issue Preclusion or Related Doctrines Remain Rare

Notwithstanding Hong Kong court's decision to set aside the underlying arbitral award in *A v AW,* for an arbitral award involving potential issues of issue preclusion, it is rare that the relevant conduct of the arbitral tribunal would amount to the structural integrity of an arbitral process being undermined or for a manifest disregard of the law to be recognized. It is clear that *A v AW* is a "highly unusual case".

The Southern District Court of New York's decision in *Interdigital v Samsung* is a clear example of courts' deferential approach to the arbitral tribunal's decision and the high threshold that needs to be met in order for an arbitral award involving potential issues of issue preclusion (or any other reason) to be vacated. In *Interdigital v Samsung,* the court refused an application to vacate an arbitral award on the basis that the arbitral tribunal manifestly disregarded the principle of collateral estoppel. The court held, amongst other things, that there was a "*colorable justification*" for the arbitral tribunal to conclude that the previous award should not be accorded collateral estoppel effect, which compelled the court to confirm the arbitral award.[35]

Interdigital and Samsung were parties to two arbitrations arising out of a patent licensing agreement between them. The disputes in the two arbitrations concerned calculation of payment by Samsung of royalty fees to Interdigital in two different periods, *i.e.*, Period 1 and Period 2. In the first award ("**Samsung I Award**"), the tribunal in the first arbitration accepted Samsung's position on calculating the royalty fees for Period 1. In the second award ("**Samsung II Award**"), the tribunal in the second arbitration did not accept Samsung's position in calculating the royalty fees for Period 2. Interdigital filed its petition to the U.S. District Court in New York to confirm the Samsung II Award. Samsung filed its opposition to the petition as well as a cross-petition to vacate the Samsung II Award.

The U.S. District Court in New York held that it was clear from the Samsung II Award that the arbitral tribunal in the second arbitration acknowledged the relevance of the doctrine of collateral estoppel to the issues in the second arbitration.[36] It was also clear to the court that the arbitral tribunal in the second arbitration found that the Samsung I Award addressed a separate and distinct issue than that before them, and thus, should not be accorded collateral estoppel effect.[37] The court noted the arbitral tribunal's finding in the Samsung II Award that the Samsung I Award was limited to Period 1, and accordingly was not determinative of the issue before them, which related to the royalty obligation for Period 2.[38]

In light of the above findings, the court held that the arbitral tribunal in the second arbitration clearly had a "*colorable justification*" to conclude that, although collateral estoppel bounds the parties to the findings in the Samsung I Award to the extent the identical issues were involved, the issue of Samsung's Period 1 royalty obligation

35 *Weiss v Sallie Mae*, 356, 358.
36 *Weiss v Sallie Mae,* 357.
37 *Weiss v Sallie Mae,* 357.
38 *Weiss v Sallie Mae,* 357.

that was addressed in the first arbitration was not identical to the issue of Samsung's Period 2 royalty obligation that was being addressed in second arbitration.[39] Accordingly, the court held that the arbitral tribunal in the second arbitration did not manifestly disregard the law of collateral estoppel, and thus confirmed the Samsung II Award.[40]

V. Conclusion

The mere existence of the issue of issue preclusion in an arbitral award is not sufficient to set aside or refuse enforcement of an award in Hong Kong and in the U.S.

It is clear from *W v AW* and *interdigital v Samsung* that courts in both Hong Kong and the U.S. are reluctant to set aside or refuse enforcement of an arbitral award based on the doctrine of issue preclusion or similar doctrines under the public policy or manifest disregard of the law exception. A mere violation of the doctrine of issue preclusion itself is not a sufficient ground to set aside or oppose enforcement of an arbitral award. The courts must be convinced that there was serious or egregious conduct involved such that due process is undermined.

The Hong Kong court's reliance on the unique factors of existence of a common arbitrator in the two arbitrations in A v AW where unanimous awards were issued in both arbitrations indicate that factors of similar nature must be present in order to elevate the relevant conduct to the level of undermining the structural integrity of the arbitral process. Had the second award in Arbitration 2 had a dissenting opinion, or, had the arbitral tribunal in Arbitration 2 acknowledge the existence of the findings on the identical issues in Arbitration 1 and explain their discrepancy, the HKCFI would have been unlikely to have set aside the arbitral award in Arbitration. This was in line with the court's reasoning in Interdigital v Samsung despite the existence of two arbitrations over identical issues to be decided.

Sherlin Tung, LL.M.

Sherlin is a Partner in the Litigation and Arbitration Team at the Litigation and Arbitration Team at Withersworldwide in Hong Kong.

Email: Sherlin.Tung@withersworldwide.com

Alex Ye, LL.M.

Alex is an Associate in the Litigation and Arbitration Withersworldwide in Hong Kong.

Email: Alex.Ye@withersworldwide.com

[39] *Weiss v Sallie Mae,* 358.

[40] *Weiss v Sallie Mae,* 359.

The Duty of Curiosity of the Parties in the Age of Social Media

by Chloé Heydarian, LL.M.
(ICAL Class of 2020-2021)

Abstract

This article will analyse the duty of curiosity in relation to the Sun Yang v. WADA case. In said case, the claimant, the Chinese swimmer Sun Yang, challenged one of the arbitrators for lacking impartiality and independence. The challenged arbitrator had published racist tweets against the Chinese community at the same time as the arbitral proceedings were taking place. The author argues that the parties should be seen as having a duty of curiosity limited to prior to the commencement of the arbitration proceedings. Moreover, this duty of curiosity should be limited in time, or it will create an unfair burden to the parties, who would then have an unlimited duty to investigate for the parties.

I. Introduction

On 22 December 2020,[1] the Swiss Federal Supreme Court revised an award of the Court of Arbitration for Sport[2] (hereinafter referred to as the CAS) and affirmed that parties have "a duty of curiosity", which should not turn "into an obligation to carry out extensive investigations"[3] of the impartiality and independence of arbitrators, no matter if the litigious fact was online. This decision is exceptional because out of the forty-one revision requests filed before the Swiss Federal Supreme Court, only three had recently been successful.[4] Indeed, an award can be revised only if the requesting party has demonstrated a certain level of "due diligence" as it pertains to the discovery of the previously unknown facts, evidence or grounds of impartiality forming the basis of a given request.[5]

The CAS affirmed in its award that the Chinese swimmer Sun Yang (hereinafter referred to as the Claimant) had failed his duty of curiosity by not investigating extensively as to the level of the sanctions, i.e., an eight-year ban from swimming. It also held that the Claimant should have investigated the social media of the arbitrator, his Twitter to be exact. The Claimant could and should have discovered the litigious tweets because the arbitrator has published them during the arbitral procedure. The fact that a retired journalist could have found the information, is

1 Sun Yang v. WADA, 4A_318/2020 (SFSC 22 December 2020).

2 World Anti-Doping Agency v. Mr Sun Yang & Fédération Internationale de Natation (FINA), 2019/A/6148 (CAS 28 February 2019).

3 Sun Yang v. WADA, 4A_318/2020 (SFSC 22 December 2020).

4 Panagiotis Kyriakou and Charlène Thommen, *The Revision of Arbitral Awards on Independence and Impartiality-Related Grounds: Delimiting the Parties "Duty of Curiosity" in the Age of Social Media* (Kluwer Arbitration Blog, 27th February 2021) <http://arbitrationblog.kluwerarbitration.com/2021/02/27/the-revision-of-arbitral-awards-on-independence-and-impartiality-related-grounds-delimiting-the-parties-duty-of-curiosity-in-the-age-of-social-media/> accessed 22 January 2022.

5 Panagiotis Kyriakou and Charlène Thommen, *The Revision of Arbitral Awards on Independence and Impartiality-Related Grounds: Delimiting the Parties "Duty of Curiosity" in the Age of Social Media* (Kluwer Arbitration Blog, 27th February 2021) <http://arbitrationblog.kluwerarbitration.com/2021/02/27/the-revision-of-arbitral-awards-on-independence-and-impartiality-related-grounds-delimiting-the-parties-duty-of-curiosity-in-the-age-of-social-media/> accessed 22 January 2022.

additional evidence for the CAS proving that the Claimant has failed his duty of curiosity.

The question of whether a party should investigate the social media of an arbitrator and to what extent is delicate. However, knowing that 79% of the US adult between 18 to 49 years old use Facebook,[6] 38% of the 18 to 29 and 26% of the 30 to 49 use Twitter,[7] 28% of the 18 to 29 and 37% of the 30 to 49 use LinkedIn ,[8] it can be easily affirmed that social medias offer a virtual gold mine of information.[9] This could probably lead to an increase in the number of disputes regarding the duty of curiosity of the parties, but also the duty of disclosure of the arbitrator.

Whereas guidelines[10] and ethical codes[11] exist on what an arbitrator should disclose and how to behave online, this information does not exist regarding the scope of the duty of curiosity of the parties. Glick and Stipanowich affirmed, that "arbitrators should monitor information that is available about them on the Internet and control the information they post online, especially on social media sites […] and think about whether their Internet activities might require disclosure".[12] Therefore, arbitrators must have the primary duty to disclose to the parties any information that could raise doubts towards their independence and/or impartiality. In the Sun Yang vs. Wada case (hereinafter referred to as the SY case), the arbitrator had published a series of controversial tweets targeting Chinese citizens.[13] The question of his impartiality will not be more extensively studied as there is no doubt that the arbitrator is lacking this obligation.

It seems possible to argue that, in the close future, there will be a march towards an extensive duty of curiosity of the parties, which means that they will have to investigate the social media of the arbitrators (II). However, this extensive duty should not become unlimited (III).

II. The Need of Investigating the Social Media of the Arbitrators

The arbitrator's duty of disclosure is counterbalanced by the so-called duty of curiosity of the parties. The duty of curiosity can be defined as the duty for the parties to investigate easily accessible information that could question the independence or impartiality

6 Social Media Fact Sheet (Pew Research Center) <https://www.pewresearch.org/internet/fact-sheet/social-media/> accessed 22 January 2022.

7 Social Media Fact Sheet (Pew Research Center) <https://www.pewresearch.org/internet/fact-sheet/social-media/> accessed 22 January 2022.

8 Social Media Fact Sheet (Pew Research Center) <https://www.pewresearch.org/internet/fact-sheet/social-media/> accessed 22 January 2022.

9 Jan L. Jacobowitz and Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U.Miami L.Rev. 445, 472, 445 – 485 (2014).

10 IBA Guidelines on Conflict of Interest in International Arbitration, 23 October 2014.

11 Social Media Ethics Guidelines of the New York State Bar association, 20 June 2019. <https://nysba.org/NYSBA/Meetings%20Department/2018%20Annual%20Meeting/Coursebooks/Dispute%20Resolution/3.Social-Media-Guidance-Note-Final062015.pdf> accessed 22 January 2022.

12 Ruth V. Glick and Laura J. Stipanowich, *Some guidance concerning the obligation to disclose internet activity and online relationships*, 67 No.1, Dispute Resolution Journal, 28, 22-29 (2012).

13 Sun Yang v. WADA, 4A_318/2020 (SFSC. 22 December 2020).

of an arbitrator.[14] However, this duty lacks clarity as it also varies according to the circumstances of each case. In article 180(2) of the Swiss Private International Law on Act (PILA), the duty of curiosity is explicitly stated as it includes the parties' duty to investigate. The Swiss Supreme Court had already confirmed this principle in the Valverde case in 2012, by stating that parties cannot rely fully on the disclosure made by arbitrators.[15] Instead, they must do some investigation themselves, even if there is no reason in advance to be suspicious of the arbitrator's dependence or partiality. The Supreme Court also added that the level of diligence imposed on parties is even higher in Sport arbitration dispute. In contradiction with its previous jurisprudence, the Court recognized in the SY case that the parties have a duty of curiosity, but that such duty was not extensive.

The duty of curiosity is not unlimited as it is circumscribed to easily accessible facts. Mavromati and Reeb affirm that the article R34 of the Code of the Court of Arbitration for Sport implies that the parties should investigate on the internet.[16] This has been confirmed in the SY case, where the Court required the parties to investigate through computer engines and "consult sources likely to provide, a priori, elements revealing a possible risk of bias on the part of an arbitrator, such as the websites of the main arbitral institutions, of the parties, of their counsel and of the law firms in which they practice, the law firms in which certain arbitrators work, and – in the field of sports arbitration – those of the Respondent Foundation and of the sports institutions concerned".[17] Surprisingly, the Court did not include social media and affirmed that, even if information on social media are freely accessible, such access is not easy. Thus, the parties do not seem to have the duty to consult the arbitrator's social media.

The Court explained this distinction by referring to the work of El Chazli,[18] who states that all information online is presumed freely accessible from a material point of view, but not necessarily from an intellectual point of view. It means, that even though a piece of information can be easily and freely accessible thank to a simple "click", it does not mean that the information will also be easily identifiable.[19] Consequently, a party would need to do extensive research only if there are alarming signs that the partiality of an arbitrator can be questioned.[20] The Court in the SY case, thereafter, concedes that the Twitter account of the arbitrator was accessible to all the general public as it is one of the first results shown by Google. Accordingly, the parties could in theory have had easy access to it. However, since the first

14 Eric Loquin, *L´essor de l´obligation de curiosité des parties au moment de la constitution du tribunal arbitral, note sous Paris*, Pôle 1 – Ch. 1, 12 avril 2016, Rev. Arb. Volume 2017, Issue 1, 251, 240-253 (2017).

15 Valverde v. Italian Olympic Committee, 4A_234/2010 (SFSC. 29 October 2010).

16 Despina Mavromati and Mathieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, 161, Kluwer Law International; (2015).

17 Sun Yang v. WADA, 4A_318/2020 (SFSC 22 December 2020), section 6.5.

18 Karim El Chazli, *L'impartialité de l'arbitre, Étude de la mise en œuvre de l'exigence d'impartialité de l'arbitre*, 325, 330 (L.G.D.J Edition (2020).

19 Karim El Chazli, *L'impartialité de l'arbitre, Étude de la mise en œuvre de l'exigence d'impartialité de l'arbitre*, 329 (L.G.D.J Edition (2020).

20 Karim El Chazli, *L'impartialité de l'arbitre, Étude de la mise en œuvre de l'exigence d'impartialité de l'arbitre*, 329 (L.G.D.J Edition (2020).

tweets were not showing a certain partiality of the arbitrator, the Court declared that the parties didn't have a duty to do more extensive research.

Contrary to the Court's position, one could argue that, because social media are easily accessible, parties should consult them deeper than just the first few posts or tweets. However during the first instance, the CAS's position that the Claimant should have searched with "China" as a keyword, might be questioned as well because such an investigation would work from the premise that the arbitrator had racist inclinations.[21] At the outset, besides having racist inclinations, an arbitrator might have other issues relating to its impartiality, such as its law firm advising regularly the opposing party.[22] How to delimitate investigations of this kind is thus a complex question.

An idea would be to use the French praetorian concept of "notorious facts", to decide if the information is easily accessible. The Paris Court of Appeal[23] has stated that a fact is notorious when the arbitrator has no obligation to reveal it since such fact is supposed to be known by all parties. Indeed, the Court has confirmed that the information was to be considered notorious because it was online and was supposed to be on a website well-known by all German law firms.[24] The Paris Court of Appeal upheld this position even though the party was not a German law firm and thus needed more than "a click" to be able to find the information. The Paris Court of Appeal implied that the fact was notorious because it was online, even though it was hardly accessible. One could argue, in the SY case, without being as strict as the Paris Court of Appeal, that information on social media such as Twitter should be considered as notorious facts. Indeed, social media and specifically Twitter are not hardly accessible, hence the Claimant could be seen as having had a duty to investigate the arbitrator's Twitter account in a more extensive way, instead of being bound to investigate the first tweets only.

In the SY case, the Claimant had called on a forensic expert to investigate the impartiality and independence of the arbitrator, without finding anything that could question its impartiality. The fact that a retired journalist could find the litigious tweets does not necessarily mean that the Claimant had failed in its duty of curiosity. The hiring of an expert forensic makes for a strong argument of good faith. It seems possible to argue that a google search is probably not sufficient any longer to fulfil the duty of curiosity. The duty thus rather risk becoming an obligation and it might be a reason to therefore discuss more strict limits on the duty of curiosity.

III. Limiting the Duty of Curiosity

In the SY case, the Court stated that a party should not be obliged to pursue its investigation, including on social media, once the arbitral procedure has started. Already in 2016, the Swiss Federal Supreme Court affirmed that ex-post discovery of a violation of the provisions governing the composition of the arbitral tribunal is a ground for revision.[25] This ground has been expressly recognized with the new PILA, which entered into force on 1 January 2021 under

[21] Sun Yang v. WADA, 4A_318/2020 (SFSC 22 December 2020).

[22] IBA Guidelines on Conflict of Interest in International Arbitration, 23 October 2014.

[23] 16-09386 (Paris CA. 27 March 2018).

[24] 16-09386 (Paris CA. 27 March 2018).

[25] X. S.p.A v. Y.B.V, 4A_386/2015 (SFSC 7 September 2016).

article 190a.[26] Thus, the duty of curiosity of the parties is limited to prior to the commencement of the arbitration proceedings only. Once the proceedings start, this duty is instantly replaced by the obligation of disclosure of the arbitrator. Therefore, the Claimant had no duty to look for the arbitrator's Twitter account during the arbitral proceedings and could have not known or been aware of the litigious tweets.

The Court further pointed out that in this case, the arbitrator was very active on his Twitter account, and thus it would have been unreasonable to be too demanding towards the parties. However, the Court did not define what is the reasonable time that the parties should spend investigating the impartiality of an arbitrator, knowing that they have no more than seven days to file a challenge at the time of the chairperson's appointment. There are two options, either the parties investigate all the posts on social media the arbitrator has posted for x number of years, or as proposed by Delanoy, parties´ investigation is limited to a certain amount of time and/or number of clicks on internet.[27]

Both options have their flaws, as stated previously. For example, some arbitrators are more prolific than others. Thus, in order to read all the posts the arbitrator had published, even only the last two years, it could take either minutes or days. Limiting the amount of time seems to be a better alternative, but then the question would be raised of what a reasonable amount of time would be for a party to dedicate for this kind of investigations? The best solution would probably be that the arbitral institutions should be the ones giving an answer and adapt it according to the size of the claim, also bearing in mind whether the process is an expedited arbitration or not. However, to not transform the "duty of curiosity into an obligation to carry out extensive investigations, if not almost unlimited",[28] one could argue that the investigations should not take more than a couple of hours.

IV. Conclusion

Already in 2012, Glick and Stipanowich were predicting that there will be cases involving arbitrator´s Internet activity and the issue of arbitrator disclosure.[29] Indeed, they wondered whether Courts would accept to challenge or set-aside an award based on information found online, if the information was available before the beginning of arbitral proceedings.[30] The Court in the SY case answered this question, reaffirming the principle that the duty of curiosity of the

[26] Article 190a PILA: "A party may request a review of an award if it has subsequently become aware of significant facts or uncovered decisive evidence which it could not have produced in the earlier proceedings despite exercising due diligence; the foregoing does not apply to facts or evidence that came into existence after the award was issued".

[27] Louis-Christophe Delanoy *Indépendance de l'arbitre : la Cour de cassation confirme la variabilité dans le temps de l'obligation de révélation, note sous Cass. Civ. 1ère, 3 octobre 2019*, Rev. Arb. Volume 2020 Issue 2, 430, 425- 435 (2020).

[28] Sun Yang v. WADA, 4A_318/2020 (SFSC. 22 December 2020).

[29] Ruth V. Glick and Laura J. Stipanowich, *Some guidance concerning the obligation to disclose internet activity and online relationships*, 67 No.1, Dispute Resolution Journal, 24, 22-29 (2012).

[30] Ruth V. Glick and Laura J. Stipanowich, *Some guidance concerning the obligation to disclose internet activity and online relationships*, 67 No.1, Dispute Resolution Journal, 25, 22-29 (2012).

parties does not equal an extensive and unlimited duty to investigate. Moreover, this duty is limited in time and should not be prolonged after the commencement of the arbitral proceedings.

Instead, the duty of disclosure of arbitrators may be more extensive. Indeed, the IBA Guidelines state that if there is "any doubt as to whether an arbitrator should disclose certain facts or circumstances, it should be resolved in favour of disclosure".[31] The recent international jurisprudence also seems to confirm this. The English Supreme Court found in the Halliburton case,[32] that the duty of disclosure is extensive, since a breach may occur even if the undisclosed fact is not sufficient to establish an apparent bias. Hence, the Court concluded that the failure to disclose certain facts and circumstances was itself a factor to which the fair-minded and informed observer would have regarded in reaching a conclusion as to whether there was a real possibility of bias.[33] This conclusion was also applied to a certain extent in the Eiser v. Spain case.[34] Indeed, in this case, the challenged-arbitrator had not disclosed public information that was easily accessible. However, the Tribunal concluded that "the existence of the information in the public domain does not discharge the burden of the Eiser Parties to prove that Spain was aware of the relevant facts".[35] Therefore, the duty of disclosure seems to be a safeguard against an extensive and unlimited duty of curiosity of the parties.

To conclude, the Sun YG case reveals the need to define to which extent the parties have to fulfill their duty of curiosity. Otherwise, there may be more disputes regarding ex post-evidence which could lead to question regarding the impartiality or independence of arbitrators.

Chloé Heydarian, LL.M.

Chloé is a French jurist who graduated from the ICAL program in 2021. She holds a Master's degree in Business Law from the Université Paris Est Créteil.

Email: Heydarian.chloe@yahoo.fr

31 IBA Guidelines on Conflict of Interest in International Arbitration, 23 October 2014, Part I, General standard 3.d.

32 *Halliburton Company vs. Chubb Bermuda Insurance Ltd*, 46 (UKSC, 27 November 2020).

33 Karim El Chazli, The UK Supreme Court on Arbitrator's Apparent Bias and Disclosure: Some Clarifications and Missed Opportunities: Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48, 2 Civil Quaterly Issue, Thomson Reuters, 75 – 85, 82 (2021).

34 *Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v Kingdom of Spain*, Case No. ARB/13/36 (ICSID, 11 June 2020).

35 *Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v Kingdom of Spain*, Case No. ARB/13/36, 61 (ICSID, 11 June 2020).

Recent Development in Arbitration (Sweden): SCC Rules for Express Dispute Settlement

by Miljana Bigović, LL.M.
(ICAL Class of 2018-2019)

I. Introduction

On 26 May 2021, the Stockholm Chamber of Commerce ("**SCC**") published its Rules for Express Dispute Assessment ("**SCC Express Rules**"), providing for an alternative form of dispute resolution. According to the SCC, the Rules are designed to meet the need for a more streamlined and focused dispute resolution process, favouring time- and cost-efficiency.

II. Main Features of the Dispute Resolution Method

The SCC Express Dispute Assessment ("**Assessment**") was presented as a tool between mediation and arbitration. The Assessment provides the parties with an evaluation of their dispute in less than three weeks, at a predictable cost. The Assessment was principally created for resolving less complex differences or disputes centered around a limited number of legal or factual issues. However, this mechanism can also be used for general assessments of complex disputes.

The main characteristics of the Assessment are limited scope of written evidence and limited or even no oral evidence at all. The adjudicator (the "**Neutral**") is expected to play an active role in the proceedings and request all information needed to conduct the Assessment in twenty-one days. Ultimately, the parties can decide to make the Neutral's findings contractually binding or, even, appoint the Neutral as an arbitrator after the Assessment, allowing it to confirm its findings in an award.

III. Overview of the Proceedings

The Assessment presents a stand-alone dispute resolution process offered by the SCC. It differs from any other services provided by the SCC, or any other arbitral institution, so far. Therefore, for parties to commence the Assessment, they must expressly agree on this dispute resolution method, with at least one of them submitting a Request for an Assessment to the SCC. This means that an agreement to arbitrate under the SCC Arbitration Rules or the SCC Expedited Arbitration Rules is not required nor adequate for the commencement of the Assessment.

Request. A Request for an Assessment submitted to the SCC shall contain similar elements as a Request for Arbitration submitted under the SCC Arbitration Rules.

- The requesting party has to specify the opposing party's details and their counsel, provide a summary of the dispute and a statement of issues to be assessed by the Neutral. In its Guidelines to the SCC Rules for Express Dispute Assessment ("the **Guidelines**"), the SCC clarified that a summary of the dispute should be sufficiently detailed to allow the opposing party to respond. The SCC Express Rules also require the requesting party to clarify the factual and legal grounds it relies upon and specify the relief sought.
- Further, the party will have to provide a copy of the parties' agreement on this dispute resolution mechanism, with comments on the applicable law. The SCC Board must dismiss the Request if a party's

consent is missing. However, if the party primarily agreed to the Assessment, but subsequently declined to participate, the requesting party can proceed alone by accepting to bear the non-participating party's share of the costs. In that case, regardless of its non-participation, all communications will be sent to the non-participating party.

- The parties may also submit their evidence with the Request but must refrain from burdening the process with voluminous evidentiary submissions. All these steps are required to facilitate the SCC's task of identifying and appointing a Neutral with the necessary expertise.

Response. After receiving the Request, the SCC Secretariat will provide the other party with the opportunity to respond and confirm its consent to the Assessment. The time allowed for the Response will depend on the scope of the Request, but, as the Guidelines provide, it should generally be 5 days. The Response should focus on the points of disagreement between the parties and the responding party can submit counterclaims only if they are directly related to the issues at dispute.

Appointing the Neutral. The SCC Board alone will appoint a Neutral, who is mandated to evaluate issues of fact or law relating to the dispute.

- When deciding on the appointment, the Board will consider the parties' proposals, the nature and circumstances of the dispute, the applicable law, and the nationality and language of the parties.
- Although the SCC's Guidelines explain that the influencing factors for the appointment of a Neutral are the same as those guiding arbitrators' appointment, unlike in its Arbitration Rules and the Expedited Arbitration Rules, the SCC did not explicitly mention the seat of arbitration as a relevant factor in its selection of the adjudicator. Further, the SCC specified that the Board shall take into consideration the language of the parties (and not the language of the dispute) when making the appointment. Additionally, availability, previous arbitrator experience, as well as demonstrated case management skills will be considered in the appointment of a Neutral.
- Interestingly, considering the likelihood of online meetings and hearings, the Neutral must also be comfortable using technology and handling cybersecurity matters. When there are many candidates of similar qualifications, the SCC will actively consider gender, age and geographical diversity.

Challenging the Neutral. The Neutral's duties of impartiality and independence remain the same as for an arbitrator and a mediator in SCC-administered proceedings.

- The Guidelines provide that SCC Practice Notes on Challenges to Arbitrators should guide the parties and Neutrals on these issues. Although the substantive requirements remain the same, the challenge procedure in the Assessment significantly differs from the one in SCC-administered arbitrations.

- Considering the Assessment's urgency, a party can challenge the Neutral only within 48 hours from the time the circumstances giving rise to the challenge became known to the party or it will be deemed to have waived its right to make the challenge. The final decision on the challenge will be made by the SCC Board. However, the Board must, beforehand, provide the Neutral and the parties with the opportunity to submit their comments to the challenge. If the Neutral is removed, it will not be able to act as an arbitrator in any future arbitration regarding the dispute (unless otherwise agreed by the parties), and the Board will appoint a new Neutral "without delay".

Case management conference. If/when a Neutral has been properly appointed, a case management conference will be held without delay, during which a Neutral will establish a timetable for the Assessment. The Guidelines clarify that, when doing so, the adjudicator must consider the parties' agreements, but only to the extent that those agreements can be accommodated within the 21-day timeframe, given the adjudicator's inquisitorial role.

Assessment. Upon Neutral's appointment, the SCC Secretariat will promptly refer the dispute to it, enabling the Neutral to conduct its assessment. However, when doing so, the Neutral must consider the parties' agreement and the procedural time limitations.

- The SCC highlighted the Neutral's obligation to conduct the process giving all parties an equal and reasonable opportunity to present their case. This duty needs to be seen against its duty to conduct the Assessment in a time-efficient manner.
- Further, the Neutral will summarize the issues put forward and inquire whether the parties wish to agree for the findings to be contractually binding. When doing so, the Neutral is expected to provide directions to the parties, limit the scope and length of the submissions, restrict the use of written/oral testimonies and propose preparatory meetings. Further, the SCC highlighted Neutral's obligation to create a summary of issues in the Assessment. This is because SCC's user consultations indicated that, in some cases, a preliminary oral assessment may lead to a settlement and be time- and cost-saving.
- Unsurprisingly, the Neutral must assess the merits of the dispute based on the law(s) the parties agreed upon or, in the absence of which, on the law(s) that it considers appropriate. The Rules specify that the parties' designation of the law of a given state will be deemed to refer to the substantive law of that state and remind the Neutral to decide the dispute *ex aequo et bono* or as *amiable compositeur* only if expressly authorized to do so.

Confidentiality. The confidentiality provision included in the Rules ensures that the parties' arguments and the rendered findings remain undisclosed to the public. This approach follows the SCC's Mediation Rules, specifying that the parties cannot use any information learned in the context of the Assessment, whether in a subsequent arbitration or otherwise. Therefore, the parties are free to lay all their cards on the table in the Assessment, increasing the quality of the decision-making process.

IV. A Decision in the Form of Findings

Instead of an arbitral award, the Neutral will render its *findings* no later than 21 days from the date the Request was submitted. The SCC Express Rules entitle the SCC Board to extend the time limit for delivering the findings upon a reasoned request from the Neutral, *or* if otherwise deemed necessary. In this regard, the Guidelines expressly provide that even when the Neutral and the parties agree that more time is necessary, extensions for more than a few days should not be expected. This approach is based on SCC users' feedback which indicated that predictability of time and cost is one of the main advantages of the Assessment.

The SCC Express Rules provide that the *findings* shall be made in writing and include the Neutral's position and reasoning on the issues presented by the parties. However, the Rules note that the parties *together with* the Neutral may agree on having oral findings with/without a brief written summary. If the Neutral cannot reach a conclusive position on the issues or the dispute within the specified time, the SCC Express Rules mandate that the Neutral must try to provide an opinion that, even if not determinative, has value for the dispute.

The general rule presented in the SCC Express Rules is that the Neutral's findings are not binding. However, the Rules also provide that the parties can obtain a binding outcome in several ways: (i) by agreeing on a contractually binding nature of the findings in their contract or during the Assessment, (ii) by turning the rendered findings into a settlement agreement, and (iii) by agreeing, together with the Neutral, to appoint the Neutral as an arbitrator and confirm its findings in an arbitral award. However, the parties must consent to the above option(s) explicitly or the findings will not be binding. Only upon the final delivery of the findings, the Assessment will be terminated. Otherwise, the proceedings can be terminated upon parties' joint request.

V. Practical Concerns: Costs of the Proceedings

Special provisions of the SCC Express Rules have been allocated to the costs of the Assessment, being one of its main advantages. Article 11 particularly specifies that the costs entail a non-refundable administrative fee of EUR 4,000 and the Neutral's EUR 25,000 fee. Unless otherwise agreed by the parties, the costs and the Neutral's reasonable expenses shall be paid by the parties in equal shares.

In contrast to the proceedings under SCC's Arbitration Rules, Expedited Arbitration Rules and Mediation Rules, in the Assessment, the requesting party will have to submit proof of payment of the administrative fee of EUR 4,000 immediately with its Request. The SCC Express Rules do not provide that if the registration fee is not paid upon filing, the SCC will set a period within which the party must pay such fee. Whether exceptions could be made in this regard is still unclear.

Comparing the fixed fee of EUR 29,000 the Assessment entails with the costs of an expedited arbitration before the SCC which would be priced around EUR 29,000 only if the value of the dispute would be EUR 500,000, we can conclude that the Assessment mechanism was created for resolving disputes of higher worth. However, if that is the case, the parties will, presumably, want to ensure that the result of such procedure is binding and, therefore, can be easily enforced.

Unless there is trust between them, a more permanent relationship requiring their cooperation or a need for a very prompt decision, an expedited arbitration might be preferable for parties whose disputes are valued at less than EUR 500,000.

Additionally, in exceptional cases, even without the parties' agreement, the SCC Board can decide to increase or reduce the Neutral's fee. Notably, such a decision must be made considering the length of the proceedings, the work required from the Neutral, the scope of the parties' submissions, and any other relevant circumstances. In its Guidelines, the SCC acknowledged that the predictability of costs had been valued highly by its users, which is why the SCC stated that it would apply this possibility conservatively. Nevertheless, considering the existence of this possibility, even when the value in dispute is high, sometimes it might be better to opt for expedited proceedings if the dispute is of a more complex nature.

Regarding the costs for legal representation and other expenses, the SCC Express Rules provide that each party will bear its own costs. Interestingly, the SCC did not explicitly provide that the parties can agree differently on this issue. This default rule again highlights the type of disputes the Assessment was designed to resolve – issues of a higher value that require quick resolution, enabling further cooperation between the parties.

Will that be its actual use – it remains to be seen in practice.

Miljana Bigović, LL.M.

Miljana is an Associate with the Dispute Resolution group of DLA Piper Sweden. She is a graduate of Stockholm University (LL.M. in International Commercial Arbitration Law) and University of Novi Sad (LL.M. in International Investment Protection and Banking Law, summa cum laude), passing her bar exam in Vojvodina, Serbia. Miljana represents individual and corporate clients in international arbitration proceedings seated in Sweden and abroad.

Email: Miljana.Bigovic@se.dlapiper.com

Recent Development in Arbitration (India): E-Sports Arbitration in India – Will It Bloom or Fade?

by Pooja Damodaran, LL.M.

(ICAL Class of 2019-2020)

I. Introduction

Even though the concept of e-sports arbitration is quite new, the industry of e-sports traces its origin back to 1972. One of the first championship was the space invaders championship followed by StarCraft 2 tournament on the computer (PC) which saw a world-wide audience of 50 million online viewers. Ever since the e-sports industry has gained serious momentum, the rough mathematical profit of this industry is about $1 billion as of renowned sources (Global E-Sports Revenue Reaches More Than $1 Billion As Audience Figures Exceed 433 Million, https://www.forbes.com/sites/jamesayles/2019/12/03/global-E-Sports-revenue-reaches-more-than-1-billion-as-audience-figures-exceed-433million/?sh=3d20f4d91329 last accessed on 28 November 2021).

The e-sports industries have currently appeared in the Asian Games and Olympics for its recognition in these world-class events. Information available currently is that e-sports is a sport recognised by the International Olympic Committee (IOC) and Olympic Council of Asia (OCA) and is a considered medal sport in AsianGames'22. In the words of the Director of E-Sports Federation of India (ESFI), "E-Sports is the only sport that can outrun cricket, India's most popular sport right now" (https://www.wipo.int/wipo_magazine/en/2018/01/article_0004.html last accessed on 28 November 2021).

II. E-Sports Games on the Rise in India

India, like most nations with wide youth population, have seen significant growth in the E-sport sector. Some of the famous international e-sporting games played in India are Dota, FIFA, Counterstrike or Fortnite and Indian-based games such as Teen Patti, Rummy, Poker and Fantasy Sports are few e-sport games allowed to be played for money, making it a considerable revenue avenue for many young gaming minds (Ikigai Law, Unpacking a billion-dollar industry: digital games and sports in India, An IAMAI Report (January 2021), pp. 6, 7).

However, certain regulatory measures, such as betting bans, make it complicated for one to indulge in these games on a longer run. Although there are no federal laws against online betting, Indian laws presently allow for gambling on games of skill and not on games of chance (State of Bombay v. Chamarbaugwala, AIR 1957 SC 699 and AIR 1957 SC 628). Considering this, the gaslight definition of E-sports sees a wobbly future in India.

III. Pandemic's Impact on the E-Sports Sphere

The pandemic and the era of transforming to the virtual world most definitely has kept the air fresh in seeing a rise in e-sports in India and investments towards e-sports in India. It is noted that "the number of smartphone game users per week grew from 60% in pre Covid-19 times to 68% during the lockdown. Similarly, the mobile games per user spent went from 151 minutes before Covid-19 to 218 minutes after the lockdown"

(https://www.digitalstudioindia.com/technology/9707-especially-E-Sports last accessed on 28 November 2021). This, in turn, has attracted many e-commerce platforms such as Flipkart and Reliance Jio Infocomm Limited to invest in terms of hardware, i.e., ROG gaming laptops for affordable prices and high-speed data availability. The new blooming industry has given rise to employment opportunity, futuristic technology advancement, start-ups and e-sports cafés.

Moreover so, the e-sports industry has seen considerable amount of growth and interest specifically, in the recent times, for instance, PUBG Mobile, a Battle Royale game, grew gradually since its release and exponentially during the lockdown, especially in India. PUBG Mobile has been credited as one of the key sources that has given pace to gaming and e-sports in India. PUBG Mobile earned $2.6 billion in 2020; 64% more than 2019 according to the report made in Business Today in November, 2021 (https://www.businesstoday.in/latest/trends/story/pubg-mobile-earns-26billion-in-2020-64-more-than-2019-281680-2020-12-16 (last accessed on 28 November 2021). "PUBG Mobile has a very large user base in India — about 24 percent of game's App Store and Google Play downloads come from the country," said Craig Chapple, Mobile Insights Strategist, EMEA, Sensor Tower (Record-Breaking Eight Mobile Games Surpass $1 Billion in Global Player Spending During 2021 (sensortower.com), last accessed on 25 January 2022).

IV. Bans based on threat to security

Last year, the Government of India banned PUBG Mobile and 118 other Chinese apps under Section 69A of the Informational Technology Act, 2000. The Indian Government stated that the apps were posing as a threat to the nation's security by stealing and transmitting unauthorised data to servers located outside India. The precautionary actions of the Indian Government caused disappointment in the e-sports industry and its gaming community. Many e-sports organisations faced problems relating to the contracts they had with their players due to this unforeseen ban. The e-sport players and families who opened up to the idea of e-sports as a profession have again gone back into their shells due to the uncertain future of e-sports in the country (Demon in every house': 10 arrested in Gujarat for playing PUBG, https://www.hindustantimes.com/india-news/demon-in-every-house-10-arrested-in-gujarat-for-playing-pubg/story-7H8wSyILwRRNuYD8F02QBM.html last accessed on 28 November 2021).

V. E-Sports Dispute Resolution

It is evident that when there are large stakes involved, there is a greater chance of the existence of disputes concerning the agreements, players' contracts, non-competence, council rules, tournaments, conflict of interest and so on. The recent debate amongst the e-sports fraternity is whether there will be a mechanism introduced in terms of statutory regulation of such disputes. The other debate involves the question of which dispute resolution mechanism is better equipped to deal with these disputes: courts, tribunals for e-sports or Court of Arbitration for Sport (CAS) (Lindholm, J. A legit supreme court of world sports? The CAS(e) for reform. Int Sports Law J 21, 1–5 (2021)).

In recent times, it is known that the E-Sports Tournament Organizer, ESL pro league of "Counter Strike: Global Offensive" was the first to operate under the World E-Sports Association (WESA) arbitration rules and regulations, any dispute arising from this league will be heard before the Arbitration Court of E-Sports (ACES) (Esports Essentials: The Legacy of Counterstrike, https://archive.esportsobserver.com/how-esports-works-counter-strike/ last accessed on 26 November 2021). Alternatively, Esport Integrity Coalition (ESIC), established in 2015, further sets out to provide an arena for handling disciplinary, corruption and doping issues in e-sports. As of now, ESIC has gained the legitimacy and partnership of UK Gambling Commission (A Significant Step for ESIC and the E-Sports Community", https://archive.E-Sportsobserver.com/E-Sports-integrity-coalition-adds-uk-gambling-commission-significant-step-esic-E-Sports-community/ last accessed on 25 November 2021).

VI. Conclusion

It is yet to be seen if e-sports in India will partner with any of these front running organizations or choose to formulate its own arbitration rules and tribunals and become a leading virtual/physical venue for global and domestic e-sports arbitration disputes. As the whole Indian e-sports industry is gaining investment and support from the government, we are sure to tell it is blooming. With the bloom in the industry, we look forward in seeing the dispute resolution route it chooses.

Pooja Damodaran, LL.M.

Pooja is an Advocate admitted in the Bar Council of India. She graduated from the ICAL Program in 2020. Pooja is presently working in the Dispute Resolution Team of Glimstedt in Lithuania and is also a Lecturer at Vilnius University.

Email: *pooja.damodaren@gmail.com*

Recent Developments in Arbitration (Switzerland): Switzerland Is Gearing Up for the Future of Arbitration

by Simon Bachmann, LL.M.
(ICAL Class of 2019-2020)

I. Introduction

Switzerland, and in particular Geneva and Zurich, has traditionally been a preferred venue for arbitration. To date, Switzerland's popularity as selected seat for arbitration remains unchanged. However, to maintain its leading position and its attractiveness as an arbitration venue, arbitration in Switzerland is adapting and further developing.

The year 2021 marks a very important milestone for arbitration in Switzerland and is nothing less than a firework of innovations: The Swiss International Arbitration Law was revised, the Swiss Arbitration Centre was established and the Swiss Rules of International Arbitration were amended. This contribution will outline these recent developments and show the most important changes. As will be seen: Switzerland is ready for the future of arbitration.

II. The Revision of the Swiss International Arbitration Law: Soft Revision of a Well Proven Law

Thirty years ago, the Swiss International Arbitration Law, which is incorporated in chapter 12 of the Swiss Private Law Act (**PILA**), was enacted. Since then, Swiss International Arbitration Law proved itself to be very modern and arbitration-friendly. At the same time, Swiss International Arbitration Law provides a transparent and clear legal framework, which is able to accommodate different types of arbitration proceedings, such as commercial and investment arbitration, ad-hoc proceedings, institutional proceedings and sports arbitration. All this – together with Switzerland's neutrality, political stability and excellent infrastructure – have made and still make Switzerland an attractive and leading place for international arbitration.

However, time does not stand still – particularly not in the country of watches. Aim of the revision was to reinforce the Swiss International Arbitration Law's attractiveness and to modernize it by addressing the established case law of the Swiss Federal Tribunal since 1989. Another goal was to further increase the user-friendliness and strengthening of party autonomy. The revision achieved these goals and – at the same time – ensured that the Swiss International Arbitration Law maintained its key characteristics (Felix Dasser, Stefanie Pfisterer, *Revision of the Swiss International Arbitration Law*, 23 June 2020, last visited 10 February 2022, available at https://www.homburger.ch/de/insights/revision-swiss-international-arbitration-law).

The revisions entered into force on 1 January 2021. The key changes of the revised Swiss International Arbitration Law are:

- *The scope of application was clarified, enhancing legal certainty*: The Chapter 12 PILA (and not the regulations of Swiss domestic arbitration) applies, if, *at the time of the conclusion* of the arbitration

agreement, at least one of the parties to the agreement had its domicile, seat or habitual residence outside Switzerland (Article 176(1) PILA).

- *The formal requirements for arbitration agreements are modernized*. The new Article 178(1) PILA clarifies that an arbitration agreement must be made in writing or *any other means of communication* allowing it to be evidenced by text, which includes the conclusion of arbitration agreements by way of e-mails.

- *Strengthening of party autonomy*. Article 178(4) PILA expressly sets forth that Chapter 12 PILA applies by analogy to arbitration clauses in a unilateral transaction or in articles of associations, which strengthens party autonomy. Hence, Swiss International Arbitration Law expressly clarifies that corporate related disputes, disputes concerning foundations, last wills and trusts may be subject to arbitration.

- *Appointment, challenge and removal procedure of arbitrators clarified in more detail.* Under the previous provisions of Chapter 12 PILA, difficulties arose where, *inter alia*, the procedure for appointing or replacing of arbitrators was not specified by the parties. The revision resolves this issue and now clarifies that the "state court first seized" (the *juge d'appui*) has authority to appoint the members of the arbitral tribunal if there is no agreed seat (Article 179(2) PILA). In addition, once the arbitral tribunal is constituted, the arbitral tribunal may then choose a seat (Article 176(3) PILA). Furthermore, the Swiss International Arbitration Law now provides for a provision regarding the appointment of arbitrators in multi-party disputes (Article 179(5) PILA).

- *Codification of the established case law of the Swiss Federal Tribunal.* The Swiss International Arbitration Law now expressly regulates the *legal remedies of correction, interpretation and* amendment *of an award* (Article 189a PILA) as well as the possibility to request *revision of an award* for limited grounds (Article 190a PILA).

- *Support of assistance of foreign arbitral proceedings by the Swiss state* courts. An arbitral tribunal with seat abroad or a party to foreign arbitration proceedings may directly file a request to the Swiss state court for an interim or conservatory measure at the place where the measure is to be executed (Article 185a PILA), without having to use the time consuming channels of international legal assistance.

- *Admissibility to file submissions in English to the Swiss Federal Tribunal*. The parties have the possibility to file submissions to the Swiss Federal Tribunal in English, such as setting-aside challenges against arbitral awards and requests for revision of an arbitral award. So far, only submissions in one of the official languages of Switzerland were permitted and English is not an official language of

Switzerland. This amendment of the law was highly debated and criticized by the Swiss Federal Tribunal itself. Nevertheless, the amendment significantly modernizes the law and enhances user-friendliness, in particular because English is one of the predominant business languages and often used in arbitration. However, in light of the criticism of the Swiss Federal Tribunal, it might be advisable to continue drafting submissions in German, French or Italian (see Felix Dasser, Stefanie Pfisterer, op. cit.).

In general, the provisions of the Swiss International Arbitration Law became an independent and conclusive set of rules. Before the revision, Chapter 12 PILA referred in some instances to the regulations in Swiss domestic arbitration, which are part of the Swiss Civil Procedure Code. These references were not user-friendly to foreign parties and foreign lawyers.

III. The Establishment of Swiss Arbitration Centre and the New Brand Swiss Arbitration: Strengthening the Backbone of Arbitration in Switzerland

At the end of May 2021, the Swiss Chambers' Arbitration Institution (**SCAI**), which so far supported and administered proceedings under the Swiss Rules of International Arbitration (**Swiss Rules**), was reorganized and renamed Swiss Arbitration Centre Ltd. (the **Centre**). The reorganisation and establishment of the Centre is an important achievement for the Swiss arbitration community.

The Swiss Arbitration Association (**ASA**) becomes the majority shareholder of the Centre and will lead the Centre. Thereby, ASA joins forces with the Swiss Cantonal Chambers of Commerce. The establishment of the Centre and the reorganisation ensures that users will continue to be served at the highest standard. In addition, the new structure ensures that the Centre remains flexible, making the Centre fit to compete internationally (Swiss Arbitration, *New Swiss Arbitration Centre and Revised Swiss Rules*, dated 19 May 2021, last visited 10 February 2022, available at https://www.swissarbitration.org/new-swiss-arbitration-centre-and-revised-swiss-rules/; Felix Dasser, Stefanie Pfisterer, Okan Uzun, *Swiss Arbitration on the Move*, 1 June 2021, last visited 10 February 2022, available at *https://www.homburger.ch/en/insights/swiss-arbitration-is-on-the-move*,).

Another major milestone is the establishment of the new brand "**Swiss Arbitration**" and the launch of the platform www.swissarbitration.org:

- This user-friendly platform will serve as a one-stop shop for practitioners and users worldwide. It provides information on everything related to commercial and investment arbitration with a link to Switzerland: organizations, services, know-how, resources, events, people, and references.
- Swiss Arbitration provides the free "Arbitration Toolbox by ASA" (the

Toolbox). The Toolbox is a unique instrument to share arbitration-related information and know-how for arbitration users. The Toolbox provides for example sample documents (e.g. samples of a request for arbitration, a constitution order, witness statement, a final award).

The establishment of Swiss Arbitration ultimately strengthens the user-friendliness and ensures the high quality of Swiss arbitration and alternative dispute resolution services. The flexibility of this new platform allows the Swiss arbitration community to adapt quicker to the needs of the users and, thus, strengthens the future development of arbitration and dispute resolution services in Switzerland (see Felix Dasser, Stefanie Pfisterer, Okan Uzun, *op. cit.*).

IV. The Revision of the Swiss Rules of International Arbitration: Modernization of Well-Established Arbitration Rules

The Swiss Rules, which were based on the UNCITRAL Arbitration Rules, were last revised in 2012. The Swiss Rules have proven itself to be a success story: the practice has shown that the Swiss Rules provide an efficient and reliable framework for arbitration proceedings for users from all around the world.

As a consequence of the establishment of the Centre, it was necessary to amend the Swiss Rules based on the new structural changes. The Centre took the opportunity to analyse the need for further amendments, considering the latest developments in international arbitration. After the consultation of practitioners and users, the Swiss Rules were slightly revised and modernized. The key changes of the Swiss Rules concern:

- The new Swiss Rules apply to all arbitration proceedings in which the notice of arbitration is submitted on or after 1 June 2021, unless the parties have agreed otherwise. The model arbitration clause has also been amended accordingly.
- Overall, the revision strengthens the role of the Centre and its arbitration court (the **Court**) as institution (see e.g. Articles 5(1), 5(2), 7(1), 23 Swiss Rules).
- The improvement of efficiency of the proceedings (see e.g. Article 19 and 24 Swiss Rules).
- The modernization of the arbitration proceedings, such as
  - the rule that the notice of arbitration as well as the answer to the notice of arbitration may be submitted electronically (Articles 3(1) and 4(1) Swiss Rules) and
  - that hearing may be held remotely by videoconference (Article 27(2) Swiss Rules).
- Multi-party and multi-contract proceedings, including:
  - the admission of cross-claims among the parties, a joinder of an additional party or the intervention of an additional party (Article 6 Swiss Rules),
  - the possibility of a third person to participate in the arbitration proceedings in a capacity other than

an additional party (Article 6(4) Swiss Rules),

- clarification on the requirements for a consolidation of arbitration proceedings (Article 7 Swiss Rules).

- Express regulation on tribunal appointed experts (Article 28 Swiss Rules).
- Facilitation of settlement of the dispute by, e.g. mediation (see e.g. Article 19(6) Swiss Rules).
- Lastly, clauses referring to SCAI or the Chambers of Commerce remain valid and binding. The Centre will apply these agreements as a legal successor of SCAI (see Introduction (c) and Article 1(1) Swiss Rules).

V. Conclusion

The year 2021 brought important changes to arbitration in Switzerland and modernized the Swiss arbitration landscape:

- The Swiss International Arbitration Law's revision found the right balance between reinforcing its attractiveness, modernizing the law and clarifying open issues, while – at the same time – increasing user-friendliness and strengthening party autonomy. Switzerland continues to be a very attractive venue for arbitration proceedings under the Swiss Rules, but also under other institutional rules and ad hoc proceedings.
- The establishment of the Centre together with its reorganization and the introduction of the innovative platform of Swiss Arbitration is an important step to maintain the high level of quality for the arbitration and dispute resolution services provided by the Centre. Access to information, know-how and user-friendliness significantly increased.
- The revision of the Swiss Rules provides continuance of a well-established and efficient framework for arbitration proceedings. At the same time, the revision brings the necessary modernization to reinforce the attractiveness of the Swiss Rules for the next decade.

All these changes successfully prepare Switzerland for the future of arbitration. As a result, Switzerland has been (re-)strengthened as a venue for arbitration and alternative dispute resolution.

Simon Bachmann, LL.M.

Simon is an Attorney-at-Law, associate at Homburger AG, Zurich, Switzerland. He has been admitted to the Zurich Bar since 2016. Simon Bachmann studied at the University of Zurich (Master of law, 2012) and the University of Stockholm (LL.M. in International Commercial Arbitration, 2020).

Email: simon.bachmann@homburger.ch

Recent Development (Non-Arbitration): When Winning before a Tribunal Isn't Enough: Why Protecting One's Social License is Necessary in Emerging Markets

by Simon Wolfe, LL.M.
(ICAL Class of 2011-2012)

I. Introduction

In international commercial and investment arbitration, it is essential that foreign investors adopt a wider risk management strategy that leverages and goes beyond black letter legal advice and looks beyond tribunals and courts when resolving disputes. This requires an acceptance that foreign investment is fundamentally political, and so therefore are the disputes that arise from those investments.

Russia's invasion of Ukraine in February 2022 is a stark reminder of this and has destroyed the myth that corporates can remain neutral to politics. Much business with Russia is now prevented by sanctions – and others (including BP (see below)) are withdrawing by self-sanctioning dealing with the country. Foreign investment is political, and disputes from those investments are as well.

Disputes in emerging and frontier markets lay bare a truism many arbitration and litigation practitioners understand: the dispute in and of itself is often merely the tip of the iceberg. The legal process, which rightly deals with the evidence and laws before it to decide the dispute, may not address the underlying cause of a relationship breakdown, or provide a permanent solution. This phenomenon is clearer to witness in emerging and frontier markets largely due to the closer interaction of business, law and politics. A contractual dispute between a foreign investor and a host state for delivery of road infrastructure is rarely just about the failure to lay the asphalt or make timely payments; it has resulted because of a deeper break in trust; a loss of social license to operate. If this is the case, parties to disputes (and their lawyers) must think beyond gathering evidence and producing strong legal arguments to obtain a favourable ruling before a tribunal. They must go deeper to understand where the trust broke down and how the rupture can be addressed. In doing so they will understand the true causes of a dispute which may either help with its swifter resolution or enable a continued commercial relationship between the parties.

Equally, even if victory is achieved in a legal forum, this does not guarantee a commercially satisfying result for the winner – all of the causes of the dispute (e.g. toxic politics, community opposition, business & human rights issues) can resurface to prevent enforcement or destroy any long-term prospects of a continued investor-state relationship.

The challenge to foreign investors is not limited to winning and enforcing arbitral awards. In many emerging markets, disputes may be played out simultaneously in domestic courts and international tribunals while the real battles take place in the political arena and comprise murkier tactics that a strictly legal approach may be insufficient on its own to tackle. The following paragraphs highlight cases in India, Russia, and

Tanzania which illustrate the need for a wider strategy in dispute resolution.

Investor-state disputes should be viewed as inherently political. Charles Brower writes, "Starting with the political character of investment treaty disputes, one should pause to observe that claims under investment treaties almost always involve challenges to the public acts, and often to the public regulatory acts, of host states. In addition, they tend to cluster around politically sensitive topics... In other words, investment treaty disputes often occur in highly politicised contexts." (Charles H. Brower II, *Politics, Reason, and the Trajectory of Investor-State Dispute Settlement*, 49 Loyola University Chicago Law Journal, 271, 272-277, (2017))

In effect, experience shows that legal action is a protective tool and a useful tactic, but not always a successful business strategy. If investor-state disputes and the reasons they occur are inherently political, it follows that foreign investors must approach each step of their investments with the politics and public opinion of the host (and sometimes also home country) in mind.

As most practitioners will be intimately aware of, winning an arbitral award – especially against a state – is just the start of what could prove to be a long and potentially fruitless battle to obtain pecuniary relief. While it is difficult to gauge the extent to which arbitral awards are properly enforced due to their inherent confidentiality (Steven Finizio, Danielle Morris and Katherine Drage, *Enforcing arbitral awards in Sub-Saharan Africa--Part 2*, 1 Lexis PSL Arbitration, 1 (2015)), practical problems relating to enforcement are a serious issue. This may be because domestic courts prove unwilling to enforce an arbitral award for political reasons, or a state party claims sovereign immunity and refuses to accept the arbitral award, among other factors.

II. Enforcement battles with India

In India, for example, multiple cases were brought to international tribunals in connection with the passage of a 2012 law which retroactively amended the country's tax laws. The most controversial of these cases is *Cairn Energy Plc and Cairn UK Holdings Limited v The Republic of India* (http://arbitrationblog.kluwerarbitration.com/2021/07/02/the-cairn-energy-v-india-saga-a-case-of-retrospective-tax-and-sovereign-resistance-against-investor-state-awards/, last accessed 21 Oct 2021). In this case Cairn, a UK-based entity, was hit with a USD 1.6 billion tax liability relating to a transaction in 2006. When Cairn challenged the tax bill under the UK-India BIT, India seized shares held by Cairn in another entity among other punitive measures (http://arbitrationblog.kluwerarbitration.com/2021/07/02/the-cairn-energy-v-india-saga-a-case-of-retrospective-tax-and-sovereign-resistance-against-investor-state-awards/, last accessed on 21 October 2021). When the international arbitral tribunal ruled in Cairn's favour with a USD 1.2 billion judgement, India reportedly ordered state-run banks to withdraw cash held overseas in an effort to prevent enforcement of the arbitral award while it challenged the decision at the Permanent Court of Arbitration at the Hague (https://www.reuters.com/world/india/exclusive-india-asks-state-banks-withdraw-cash-held-abroad-over-cairn-dispute-2021-05-06/, last accessed on 21 October 2021).

The Indian government argued that the case was a matter of public policy. While Cairn pursued Indian state-owned assets across the globe – from attempting to seize Air India's planes (https://www.bbc.com/news/business-57742080, last accessed on 17 January 2021) to a successful freezing of Indian state-owned property assets in Paris (https://www.reuters.com/world/india/cairn-wins-freeze-indias-state-owned-assets-paris-recover-tax-award-2021-07-08/, last accessed on 17 January 2021) – India attempted to turn the dispute away from the merits of the case, focusing instead on public perceptions and policy relating to global tax avoidance. A 23 May 2021 statement from the Ministry of Finance declared that "the award improperly ratifies Cairn's scheme to achieve Double Non-Taxation, which was designed to avoid paying taxes anywhere in the world, a significant public policy concern for governments worldwide." (https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1721039, last accessed on 21 October 2021).

After years of bitter dispute between Cairn and the Indian government, Cairn's efforts to seize Indian government property globally and its relentless media push appears to have won the day, with New Delhi announcing that it would rescind the controversial tax law and refund Cairn as well as other affected companies, which Cairn ultimately accepted. (https://www.business-standard.com/article/companies/cairn-accepts-1-bn-refund-offer-to-drop-cases-against-india-ceo-121090700667_1.html, last accessed on 17 January 2021). The Indian government, rather than admitting legal defeat, appears to have caved under the "increasingly embarrassing" public spat which has damaged investor confidence.

As the Cairn case clearly demonstrates, public pressure is often an essential step to reach a settlement or satisfactory resolution of an investor-state dispute. It was not the prospect of India losing its properties in Paris or the spectre of Air India jets being taken at airports around the world that forced New Delhi to buckle under pressure; rather, it was the considerable damage to India's image as a place safe for foreign investment that ultimately forced the issue. Furthermore, it greatly helped that India under Narendra Modi and the BJP prides itself as being business friendly: ironically, while in opposition in 2012 the BJP had called the retrospective tax law "tax terrorism." (https://www.thehindu.com/opinion/editorial/rewind-to-fast-forward-the-hindu-editorial-on-retrospective-tax/article35776104.ece) last accessed on 17 January 2021).

III. Enforcement battles with Tanzania

In Tanzania, the late president John Magufuli was a committed resource nationalist, making it a core part of his political brand – a telling sign that arbitration or other forms of formal dispute resolution are unlikely to prove fruitful. In 2017, Magufuli ushered in the passage of punitive domestic legislation which effectively allowed the state to rip up existing contracts at will if they constituted "unconscionable terms" while entirely banning the use of any "foreign court or tribunal" as a medium of dispute resolution relating to natural resources.

Tanzania also passed legislation that banned the export of raw resources – an export ban that affected copper and gold miner Acacia Mining

especially hard. The government hit Acacia with an absurdly high USD 190 billion tax bill in 2017, which prompted the mining company to launch arbitration proceedings against the government. However, Acacia recognised from the start that a resolution to the dispute would likely come outside the courtroom, with the company stating at the time that it "remains of the view that a negotiated resolution is preferable to the current disputes and the company will continue to work to achieve this" (https://www.ft.com/content/a129cec7-de8a-35b7-8a75-4f8bf64b902f, last accessed on 21 October 2021). Arbitration thus served as an avenue for the investor to apply pressure on Tanzania while its good chance of winning held out the prospect of increasing its valuation in a future sale.

For Acacia, the solution to the dispute was to play into the government's priorities. Acacia announced a stay in arbitration proceedings in 2019 before being re-acquired by Barrick Gold for USD 1.2 billion (https://www.reuters.com/article/us-acacia-mining-tanzania-idUSKCN1UC0T6, last accessed on 21 October 2021). Barrick Gold, now managing Acacia's assets, came to a USD 300 million settlement with the government, while also agreeing to form a joint partnership with the government to manage its assets in Tanzania (https://www.barrick.com/English/news/news-details/2019/The-Launch-of-Twiga-Minerals-Heralds-Partnership-Between-Tanzanian-Government-and-Barrick-/default.aspx, last accessed 21 October 2021).

IV. Enforcement battle with Russia

Among the more infamous of such disputes was the years-long saga of BP's joint venture in Russia, TNK-BP. The joint venture between BP and four Soviet-born oligarchs (https://www.theguardian.com/business/2011/may/17/aar-billionaire-oligarchs, last accessed on 21 October 2021), which came to an end when BP sold its 50 percent stake to state-owned oil giant Rosneft is a case study in the need for a political risk mitigation strategy to complement black letter legal advice. While the two parties battled it out in multiple arbitration tribunals (https://www.ft.com/content/baeea4f4-4cd4-11e0-8da3-00144feab49a, last accessed on 21 October 2021) and in Russian courts (https://www.reuters.com/article/us-bp-russia-damages-idINBRE86Q0MT20120727, accessed 21 Oct 2021), the joint venture's BP-appointed CEO Bob Dudley was chased out of Russia and denied a visa after facing an "orchestrated campaign of harassment," (https://www.theguardian.com/business/2008/jul/25/bp.oil, last accessed on 21 October 2021), while BP was "hit with billion-dollar back tax claims, [and] having its offices searched by the successor to the Soviet-era KGB," (https://www.risk.net/commodities/energy/2253578/tnk-bp-saga-raises-questions-about-bps-handling-political-risk, accessed 21 Oct 2021), while BP employees were convicted of espionage in sham trials in Russia (https://www.reuters.com/article/russia-espionage-bp-idUSL797667620090507, last accessed on 21 October 2021).

For BP, what appeared to be a disaster in the making in fact resulted in a financially positive outcome. While it lost its controlling stake, the British oil giant sold its stake to Rosneft for USD

17.1 billion and a 12.84 percent stake in the state-owned oil major (https://www.bbc.com/news/business-20030610, last accessed on 21 October 2021), and Bob Dudley – retired from BP – now sits as a Rosneft board member (https://www.rosneft.com/governance/board/item/6081/, last accessed on 21 October 2021). The TNK-BP case still presents numerous lessons: what may appear to be a legal dispute may in fact be politically motivated, and especially when it comes to the extractives sector, the state may prioritise control over all else. What is more, the case again demonstrates that without a wider strategy accounting for political and reputational issues, strictly legal avenues to dispute resolution may prove insufficient. This of course changed dramatically in February of 2022 after Russia's invasion of Ukraine and BP announcing that it intended to divest from Russia. (https://www.bloomberg.com/news/articles/2022-03-10/bp-leaves-russia-after-ukraine-invasion).

Foreign investors must also be aware that domestic courts can be weaponised on behalf of politically connected local partners, as appears to have happened in the ongoing battle between Russia-based American investor Michael Calvey in a dispute with his former business partner, Artem Avetisyan, who is said to enjoy a close relationship with Russia's Deputy Prime Minister (https://www.ft.com/content/4f9e0995-26ba-45af-8f29-f426517e9a30, last accessed on 21 October 2021). Calvey is accused of defrauding and embezzling a Russian bank in a fight over its control and spent nearly two years in house arrest before being given a 5.5 year suspended sentence in a court decision that could hardly be described as impartial (https://www.dw.com/en/russia-us-investor-michael-calvey-receives-suspended-sentence/a-58788389, last accessed on 21 October 2021).

V. Conclusion

Avoiding intractable disputes with local partners or host governments should be a top priority for any company operating in challenging emerging markets. While disputes do not often make headlines until they reach their bitter climax in an arbitral tribunal or similar forum, numerous steps can be taken to minimise reputational, operational, and financial risk. This highlights the importance of protecting a company's social license to operate. Not only does this ensure that trust is maintained between an investor, the host government, and its citizens for smooth commercial operations, it also means that if a dispute does arise the investor will have political and social capital to protect its interests alongside its legal options.

Often, this is about listening and understanding the host government's priorities. For Magufuli's Tanzania, it was greater control of its mineral resources through a joint venture, and the public perception of a victory through the USD 300 million settlement; for India in its disputes over retroactive taxes, it aimed to halt the increasingly dire reputational damage while reaching a settlement that didn't look like a settlement – rescinding the controversial tax law was "a settlement offer masquerading as a law," as one observer put it (https://www.ft.com/content/0f73fe20-1925-488e-bb2f-e56dd08f1653, last accessed 21 Oct 2021). Lawyers advising their clients on any

dispute should be encouraged to think about the wider position of their clients and their reputation, while understanding the political environment, geopolitical drivers, relationships with civil society and the media landscape.

Simon Wolfe, LL.M.

Simon Wolfe is an international lawyer, advocate and Founder / CEO of Marlow Strategy, a geopolitical advocacy and communications firm.

Email: swolfe@marlowstrategy.com

Recent Development (Non-Arbitration): The Trend Called "Compliance" – How Business and Human Rights Are Entering The Compliance World

by Margi Strandberg-Mataj, LL.M.
(ICAL Class of 2015-2016)

I. Introduction

Compliance, in its literal meaning, refers to actions conforming to certain rules, standards, laws. In the phase of its early development, compliance was often regarded as a supplementary tool, e.g., an add-on to the tasks of legal departments. Its perception, however, has changed in time, and compliance is now considered to be a critical component of how companies, organizations, and institutions function. This called for compliance becoming a stand-alone professional department which, in its turn, led to big investments and reorganization of business strategies in order to satisfy such demand.

II. Compliance Monitorship

Most of the developments in the compliance field are surely fueled by changing and far-reaching countries' legislation, which for some companies, when unable to adequately invest in compliance resources so as to properly adhere to these legislative demands, has resulted in reputation damaging headlines and long-lasting legal actions against them. Even terms, such as 'compliance monitorship', most notably those set by the United States Department of Justice under their Foreign Corrupt Practices Act (FCPA), are ones that is heard more often in the business world and indeed is a situation one does not want to find themselves in.

By way of example – Ericsson, one of Sweden's largest companies, has, most recently, found itself in the far-reaching hands of the FCPA on several corruption related charges. It entered into a three-year Deferred Prosecution Agreement (DPA) settlement with the U.S. Department of Justice and is, as part of the resolution, required to engage in an independent compliance monitorship for three years. Amongst other things, the monitorship's main responsibility includes reviewing Ericsson's compliance program, evaluating, based on the terms of the settlement, the company's progress in implementing and operating its enhanced compliance program and put into place all required and necessary improvements to the program within this monitorship period; all of which have entails significant reforms for Ericsson to strengthen its Ethics & Compliance program.

III. A New EU Directive on Corporate Due Diligence: Time for Change?

While some companies are still catching up on their compliance programs and others are already in need of reshaping it, one thing remains to be true – the compliance world is changing rapidly and growing in scope. It is a new full-scale field complete with specific training programs, associations, professional organizations, conferences, codes of conduct, and even lobbying. The newest and strongest development in the recent years is by far that development within the field of Business and Human Rights. Though a topic first taking shape mostly within the sustainability sector with organizations such as the United Nations Global Compact (UNGC) leading the way,

business and human right and how to combat such violations, are now emerging even within the legal and/or compliance world.

The most anticipated development is that of the European Parliament's recommended resolution made on March 10, 2021, to the EU Commission to introduce a directive on corporate due diligence and accountability, which, in essence, will be in place in order to address higher requirements imposed on companies in the field of prevention of human rights abuses and environmental harm. If adopted, the directive would have one of the widest scopes ever introduced, covering a company's whole global supply chain, which includes due diligence not only with regard to its suppliers and customers, but also its end-users. Naturally, such a wide scope would have a significant impact on companies doing business in the EU.

This directive, would in many ways, be paving the way to a new world, where companies are yet again required to take on responsibility for their internal issues and a pro-active stance in addressing them as a part of conducting business.

IV. The Approach Taken by the UK, France and Germany

Some countries have already taken the lead on addressing human rights due diligence procedures, as part of their overall corporate due diligence strategy, through the implementation of specific national legislations.

In 2015, the United Kingdom introduced the Modern Slavery Act, which was designed to address and prevent slavery and human trafficking. The Act introduced new requirements for companies to identify and mitigate such issues within their supply chains. It is applicable to businesses carrying out their commercial operations in full or in part in the UK, companies that supply goods or services, and companies that have an annual turnover of £36 mil. or more. The Act requires companies to introduce internal policies and corresponding due diligence procedures on prevention of slavery and human trafficking.

Two years later, in 2017, France adopted the Corporate Duty of Vigilance Law, which places the burden on companies to create, publish and implement a "vigilance plan" to identify human rights and environmental risks resulting from their business operations. This law requires such risks to be mapped out and addressed appropriately by implementing certain preventative measures. Non-compliance can lead to large penalties and even exclusion from public procurement. The law applies to French companies based both in France and outside the country.

In Germany, the Supply Chain Due Diligence Act was adopted as recently as June 2021, and will come into force in 2023. Similarly to the law adopted in France, this Act compels companies to identify, assess and prevent human rights abuses and environmental risks. It, however, goes even further and compels companies to make such assessment for their entire supply chain with a wider risk assessments scope, which includes the assessment of topics such as forced labor, child labor, violations of freedom of association, poor employment terms and working conditions. Companies' non-compliance can lead to exclusion from public procurement opportunities for up to three years and fines up to 2 percent of their turnover.

V. The EU Global Human Rights Sanctions Regime

In 2020 the EU introduced a new Regulation 2020/1998, December 2020 and Council Decision (CFSP) 2020/1999, December 2020, which created the EU Global Human Rights Sanctions Regime (GHRSR); a regime that applies to genocide, crimes against humanity, torture, slavery, extrajudicial, summary or arbitrary executions and killings, enforced disappearance of persons, trafficking in human beings and other human rights abuses. After only one year since the creation of the GHRSR, The European Parliament has already called upon the European Commission to propose an amended version of the GHRSR. This is because, unlike many other already existing sanction legislations, such as that of the UK and U.S., the GHRSR did not include 'act of corruption' as a basis for human rights violations. Indeed, addressing corruption issues is a fundamental basis for also address human right concerns, as corruption not only negatively effects a country's economic and political system, but also socioeconomic wellbeing. Protection of human rights are at the forefront of the EU's agenda and introduction of sanctions is one of the ways through which the EU aims to play a bigger role in addressing human rights violations.

VI. Conclusion

The existence of the aforementioned legislation, directives and sanction regimes makes it patent how more responsibility is put on business companies to address human rights as a stand-alone topic within their business and compliance structure. Placing the burden on the business to better understand their business structure and supply chains so as to proactively mitigate and avoid human rights violations, will require businesses to invest further into their compliance programs as well as create transparent processes within the entire global value chain. Though the legal landscape is still developing, it is evident that the topic of business and human rights is only growing and compliance, yet again, is growing and developing alongside.

Margi Strandberg-Mataj, LL.M.

Margi Strandberg-Mataj is a Canadian lawyer, currently working as a Global Legal Compliance Officer at Sandvik (Mining industry). She is also a Board Member of the ICAL Alumni Association since 2019.

Email available upon request.

Webinar Report: ARBinBRIEF – S1:E9 COSTS (23 February 2022)

by Gizem Bahadirli (ICAL Class of 2021-2022)

ARBinBRIEF is a practical video guide on handpicked arbitration issues discussed by two arbitrators in an interview format. The ARBinBRIEF series is divided into 10 episodes per season. Episode 9 on Costs in Arbitration (the "**Webinar**") was held on 23 February 2022 and was moderated by Ms Mrinalini Singh (Solicitor at Plesner, Denmark). In said episode, Dr Crina Baltag (Associate Professor in International Arbitration at Stockholm University, Sweden) was interviewed by Dr Maria Hauser-Morel (Counsel at Hanefeld, France).

Dr Hauser-Morel started the discussion by referring to the advantages of the two main models used by arbitral institutions to determine the costs of arbitration: advance fixed by reference to scales applicable to the amount in dispute (eg. the ICC, SCC or DELOS), so-called *ad valorem* model, or costs fixed by hourly rate (eg. LCIA). Dr Baltag noted that one of the advantages of the *ad valorem* model is the predictability of costs and prevention of frivolous claims. Arbitrators under the *ad valorem* model can better foresee the fees prior to accepting the appointment. Dr Baltag also referred to a mixed model under the HKIAC Rules, where the costs are based at an hourly rate, unless the parties agree on *ad valorem.* She added that the hourly rate model, which reflects the actual work of the arbitrators, may be more adequate in the cases of small value, which may turn out to be quite complex. Dr Hauser-Morel observed that the *ad valorem* system may indeed be disadvantageous in smaller cases, but should stimulate the arbitrators to conduct the case in the efficient manner.

The second issue was the topic of readjustments to advances on costs. Dr Hauser-Morel referred to Article 14.7 of the DELOS Rules (similar to the provisions of many other institutions), according to which at any stage prior to the issuance of the final award, DELOS "may adjust the arbitration costs". She referred to an example, whereby a claimant seeks outstanding rent and quantifies its claim in the Request, but then increases its claim at a later stage, and asked whether this automatically leads to an increase of the advance on costs. Dr Baltag noted that Article 14.7 of the DELOS Rules uses the word "may", which indicates that the institution does not increase the costs automatically. Dr Maria Hauser-Morel recalled that, when deciding whether to readjust an advance on costs, the institution may additionally take into consideration other factors, such as the complexity of the dispute.

The third discussed issue was separate advance on costs, whereby each side pays an advance for its own claims or counterclaims. Dr Hauser-Morel asked whether a respondent who is unable to pay the advance fixed for its claim can still pursue the counterclaim. Dr Baltag explained that if the respondent-party does not pay the advance corresponding to its claim, the claim is in principle considered withdrawn, which prevents frivolous claims. At the same time, the institution and the tribunal should make sure that this mechanism does not prevent a party's access to justice. In this regard, Dr Baltag referred to the decision of the French Supreme Court in the Pirelli case (*Société Licencing Projects SL v Société Pirelli*, Cour de cassation, 1e civ., 28 March 2013), where an award was set aside due to the fact that the tribunal failed to consider a

counterclaim following respondent's failure to pay the corresponding advance. In that case, the Supreme Court considered that the counterclaim was intrinsically linked to the main claim, and that such approach may infringe the access justice and the principle of fair and equal treatment of the parties.

The fourth issue was whether the tribunal has jurisdiction to decide on costs even if it does not have jurisdiction to hear the case. Dr Baltag mentioned two diverging positions in this regard. The first one, which is prevailing, is that the *kompetenz-kompetenz* principle extends to the issue of costs, irrespective of whether the tribunal has jurisdiction to hear the case or not. The second position is that due to an invalid arbitration agreement, the tribunal does not have jurisdiction to award costs. Dr Baltag noted that if the tribunal, who lacks jurisdiction on the merits, could not decide on costs, the parties would have to refer the matter to state courts, which would be inefficient.

Moving on to the issue of allocation of costs, Dr Hauser-Morel asked whether "costs follow the event" is always the starting principle. Dr Baltag explained that this depends on the applicable arbitration rules and on the mandatory provisions of the law of the seat. She noted that most rules grant tribunals discretion to take into account all relevant circumstances, i.e., not only the result, but also for instance the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

The last question was whether a party to arbitration proceedings can recover internal costs, such as in-house counsel costs. Dr Baltag stated that as a general rule, internal costs can be covered. However, in order to do so, the party should submit evidence to substantiate the claim, and should, therefore, have a system evidencing these costs.

The Webinar was concluded with a Q&A session.

* * *

Webinar Report: ICC YAF - New Solutions to Old Problems with the Next Generation of Arbitrators (16 December 2021)

by Chandrika Sharma (ICAL Class of 2021-2022)

A webinar on the topic "New Solutions to Old Problems with the Next Generation of Arbitrators" was organized by ICC Young Arbitrators Forum (YAF) on 16 December 2021. Mr Charles "Chip" B. Rosenberg (Counsel at King & Spalding, USA) acted as moderator for a panel discussion highlighting how younger and more diverse arbitrators can offer adaptability, flexibility, and innovation to the arbitral process. The panel was constituted by the following speakers: Ms Ema Vidak Gojković (Independent Arbitrator and Counsel, USA/Croatia), Ms Rachel Gupta (Independent Mediator and Arbitrator, USA), Mr Eric Morgan (Partner at Kushneryk Morgan LLP, Canada) and Ms Sarah Reynolds (Managing Partner at Goldman Ismail Tomaselli Brennan & Baum LLP, USA).

The round of discussion was initiated with a first question that was put before Ms Reynolds, namely whether appointing young arbitrators can help expedite the arbitration process. Ms Reynolds, along with the other panelists, put forth essential grounds favoring the argument. There was a consensus amongst the panelists that young arbitrators have better schedule availability which ends up being a viable option for time sensitive disputes, whereas most

experienced arbitrators have little or no time on their calendar. Mr Morgan emphasized the speed aspect of arbitration by describing it as "Tesla of dispute resolution, it's fast and it's quiet", thereby proposing that young arbitrators can easily ensure delivery of an award within the prescribed time limit due to their less busy schedule. Ms Gupta elaborated on how young arbitrators not only help save time but also reduce overall cost of arbitration as their hourly billing rate is much lower than experienced arbitrators.

The discussion further progressed towards analysing whether experience as a counsel comes in handy while managing a case as an arbitrator. This question was put to Ms Gojković, and she expressed that there is real value to the experience acquired as a counsel while acting as an arbitrator. As counsel there is appreciation in terms of how much effort goes into drafting submissions, which thus raises expectations from the arbitrators to do their homework. Mr Morgan emphasized that, having worked as counsels earlier, young arbitrators learn to appreciate and respect the parties' resources.

The panelists then listed different procedural innovations by describing how young arbitrator's approach is different from that of experienced arbitrators. The first of the many differences in approach included Lucy Greenwoods' green pledge protocol which promotes "Print Less, Travel Less". Additionally, Ms Reynolds suggested procedural innovation by requesting the parties to share recorded videos of their opening statements to save time. The panelists further discussed how keeping up with technological advancements is extremely beneficial to young arbitrators as they can promote remote visits and thereby save costs. Furthermore, Mr Morgan stated that young arbitrators take initiative to gain subject-matter expertise as it minimizes the need to call experts for arbitration proceedings.

Mr Rosenberg then put an important question before the panelists stating that parties generally have a concern that young arbitrators do not have a strong voice and are less experienced. The panelists addressed this concern by clarifying that experience is relative and that arbitrators usually know how to conduct themselves. Most young arbitrators put immense effort into getting themselves familiar with the case to have real power and voice.

While concluding the discussion, the panelists then elaborated on the advantages of diversity amongst the arbitrators, stating that it helps assimilate a much more comprehensive thinking process and change in mentality.

* * *

Webinar Report: SIAC-IHCF-Yoon & Yang: ESG, technology and the emerging regulatory and disputes landscape (14 December 2021)

by Palak Mishra (ICAL Class of 2021-2022)

On 14 December 2021, the Singapore International Arbitration Centre ("**SIAC**"), jointly with the In House Counsel Forum (IHCF) and Yoon & Yang, held a webinar on developments in regulatory and disputes landscape in the areas of ESG (Environmental, Social and Governance) and new technologies. The webinar was moderated by Ms Michele Park Sonen, Head (North East Asia), SIAC with a diverse panel of speakers including ESG and dispute resolution specialists, Ms Sharon Chong, Partner at Skrine, Kuala Lumpur, Malaysia, Dr Joseph Chun, Partner,

Shook Lin & Bok, Singapore, Ms Myung-Ahn Kim, Co-head of International Arbitration Team and Senior Foreign Attorney at Yoon & Yang, Seoul, South Korea and Mr Joaquin P. Terceno, Partner at Freshfields Bruckhaus Deringer, Tokyo, Japan.

The webinar began with a discussion about the "E" or Environment in ESG, the new buzzword in the international legal community. An overview of the developments in environment regulations in Singapore and Malaysia was provided by Dr Chun and Ms Chong, respectively. The possibility of harmonization of standards for such regulations between Association of Southeast Asian Nations ("ASEAN") countries, in consonance with an EU-based threshold approach, to ensure interoperability between different regulations, was predicted. However, the panel agreed that, for now, the flexibility and different approaches in the region was appreciated by companies, particularly as ESG continues to be a new emerging area of law.

An interesting potential risk arising out of the environmental regulations was highlighted by Dr Chun: "greenwashing", i.e. making claims or pledges pertaining to environmental protection which are not substantiated or reflected in the practice of the company making such commitments. Regulations against such greenwashing in Singapore were discussed at length before the webinar moved on to the cases relating to environmental issues.

The conversation moved on to the landscape in Korea. Ms Kim emphasised the law and courts' approach in Korea on the issue while stressing on the point that a myopic view cannot be taken of environmental regulations as they interact with multitude of disciplines. For that reason, it is important for companies to have reasonable extent of insurance coverage and exclusion clauses.

Ms Sonen then led the conversation to "S&G", or the Social and Governance issues in ESG. Ms Chong highlighted the importance of these topics in the age of social media and "cancel culture". Financial implications of not adhering to the social and governance issues such as forced labour, bribery, etc. were also discussed with a particular emphasis on regulatory framework in Malaysia in this framework. It was also deliberated that in the future ESG might change to "ESHG" with inclusion of "health" as there continues to be a progressive focus on issues such as employees' mental health and work-life balance. The panellists also addressed concerns relating to new technologies, which are closely related to the governance issues.

Ms Sonen then steered the discussion towards the steps to avoid such ESG risks and disputes. Answering the former, Mr Terceno highlighted the importance of an initial heat-mapping exercise by companies to identify potential suppliers or operations that may possess a ESG risk and then following it up with a more detailed due diligence to determine the steps that can be taken to mitigate such risks. The webinar was concluded with a discussion by Dr Chun on opportunities such as green financing and carbon markets that have developed due to the ESG regulations and disputes and the positive effect such developments will have in the future.

* * *

Webinar Report: ICDR Young & International – Lessons Learned From COVID'S Impact On International And Domestic Construction Arbitration (10 December 2021)

by Gizem Bahadirli (ICAL Class of 2021-2022)

A Webinar called "Lessons Learned from COVID's Impact on International and Domestic Construction Arbitration" ("**Webinar**") was organised on 10 December 2021 by ICDR Young & International and was moderated by Michael A. Marra (Vice President at AAA-ICDR, US) and Luis M. Martinez (Vice President at AAA-ICDR, US). The Panel consisted of Aisha Nadar (Infrastructure Contract and Dispute Resolution Consultant at Advokatfirman Runeland AB, Sweden), Albert Bates, Jr. (Partner at Troutman Pepper, US) and Dr. Anamaria I. Popescu (Managing Director at Berkeley Research Group, US).

Co-moderator Luis M. Martinez started the discussion with the topic of effective use of technology in international arbitration, including virtual hearing technology. With regards to virtual hearings, Aisha Nadar stated that, as the restrictions are eased, some arbitrators and parties are willing to go back to in person or hybrid hearings. Albert Bates Jr. added that the use of virtual hearings should be evaluated for each case. Dr. Anamaria I. Popescu mentioned the difficulties of time-zone issue encountered in use of virtual hearings. Regarding the increasing attendance of in-house counsel in virtual hearings, Aisha Nadar stated that not only in-house counsels but also executives from the parties are attending and that this is beneficial for a possible settlement in the arbitration since the parties can get a better assessment as their case goes forward.

The panelists then responded to the following question: "if only one arbitrator has COVID concerns, should the whole hearing be virtual?" Dr. Anamaria I. Popescu shared two examples of experiences she thought were unfair. First, the example of a mediation where only the mediator joined remotely (whereas both parties were present in person). Second, the example of a hearing where all witnesses had to come and testify in person, despite some older witnesses and expert witnesses being uncomfortable doing so. Aisha Nadar suggested that the arbitrators' possibility or impossibility to have in-person hearing should be part of the criteria of appointment. Luis M. Martinez asked the panelists if they did anything differently in preparing for virtual hearings. To that question, Dr. Anamaria I. Popescu, answered that, as an expert, she has not experienced many differences in preparation time. Albert Bates Jr. pointed out that the logistical trainings should be done before the virtual hearings.

Regarding the advocacy skills in virtual settings, Albert Bates Jr. stated that he experienced less formality in virtual hearings. Aisha Nadar was of the opinion that arbitrators have the role to be in control of the hearing and to make sure that they navigate the ship.

Moving on to the issue of evidence, Luis M. Martinez asked for practice tips from the panelists. Aisha Nadar stated that, between physical and virtual hearings, there have not been many changes in having a hearing bundle, pre-agreed and made available for easy access to the arbitrators. Albert Bates Jr. advised that if the arbitrators have their own copies of exhibits as

well as the ones on the screen, counsel should make sure they properly identify the important points so that the arbitrators can go back and find it.

Regarding the issue of time and cost benefits of virtual hearings, Aisha Nadar mentioned that, in her opinion, using virtual hearings and technology will be common feature in arbitration. However, in her experience, regarding the dispute boards used in construction disputes, as the COVID restrictions were lifted, there has been a push by the parties to have in-person site visits. Dr. Anamaria I. Popescu stated that in large international disputes, cost benefits are not significantly taken into consideration and that clients prefer in person hearings.

The Webinar ended with the closing words of Michael A. Marra from an institutional perspective. According to him, institutions will see more hybrid mediations and arbitrations and as an institution, the AAA-ICDR is making sure that it is ready with the technology and facilities.

* * *

Webinar Report: ICC YAF – Don't Forget! How Many Details Can a Fact Witness Remember? (21 November 2021)

by Gizem Bahadirli (ICAL Class of 2021-2022)

A Webinar called "Don't forget! How many details can a fact witness remember?" (the "**Webinar**"), organized by ICC Young Arbitrators Forum (YAF), was held on 21 November 2021. The Webinar started with welcoming remarks from Pablo Jaroslavsky (ICC YAF Representative for Latin America; Senior Associate, Dechamps International Law, Argentina). Agustina Álvarez Olaizola (Associate, Allen & Overy, Spain) moderated the Webinar and Marta García Bel (Senior Associate, Freshfields Bruckhaus Deringer, Spain), and Emmanuel Kaufman (Counsel, Wolf Theiss, Austria) discussed the topic. The discussions were based on the ICC Commission Report on the Fact Witness Memory in International Arbitration ("**Report**") published in November 2020.

Overall, the speakers highlighted that it is essential for counsels to decide if it is important to have a witness give testimony, and to manage all the potential risks associated with it. In this regard, the speakers frequently referred to the Report, which sheds light on the fact that witnesses' memories can be altered.

The speakers shared their recommendations on preparing the witness considering the fact that post-event information can affect a witness' memory. Witness interviews are critical to managing the potential risks. Individual interviews are more recommended rather than group interviews. Also, the witness should be reminded that it is fine to have gaps and that they should avoid speculations and assumptions. According to the speakers, it is better to get answers such as "I don't remember" rather than answers which have been "contaminated" by other people's memories. Moreover, there is a risk if the counsel gives much information on case theory and legal arguments to the fact witness because he/she can be confused and raise the legal arguments incorrectly during the examination. Finally, counsels should try to identify the potential memory distortions and have group meetings or interactions to get accurate information.

Another question addressed during the Webinar was: what can be done if, during the cross-examination, it transpires that a witness has been exposed to post-event information, "filling the gaps" of witness memory? The speakers argued that, only if necessary, it might be useful to point out to the tribunal that there has been exposure to post-event information. The counsel needs to know the facts better than the person that he/she is examining because the witness can bring up his/her personal knowledge. It may be the case especially if the questions are related to the area of the witness' expertise. The speakers also said that it is not recommended to re-ask the question to highlight it again because the witness can correct his/her answer. According to them, if the questioning is going in the wrong direction, the counsel can interrupt the witness in a kind way, because the counsel sets the topic during the cross-examination.

Finally, the panel discussed one of the recommendations in the Report, namely how to address the issue if the tribunal intervenes, for example requesting the witness to give more information on how the witness was prepared. The speakers were of the view that the examination of this point does not bring a lot when pleading with experienced practitioners. However, they specified that it was a good practice to include the wording "I was assisted by counsel to prepare the witness statement" in the witness statement. In any event, tribunals, in general, know when counsel has stretched the facts. For example, when the answer is always the same no matter what the counsel asks, the tribunal would understand that it is rehearsed.

The Webinar was concluded with a live Q&A session.

Note : The organisers of the event have requested that the following links be added to this Webinar Report:

ICC Arbitration and ADR Commission Report on the Accuracy of Fact Witness Memory in International

Arbitration, https://iccwbo.org/publication/icc-arbitration-and-adr-commission-report-on-the-accuracy-offact-witness-memory-in-international-arbitration/ and ICC YAF https://iccwbo.org/dispute-resolution-services/professional-development/young-arbitrators-forumyaf/

* * *

Webinar Report: CIArb Young Members Group - How Will Arbitration Continue to Adapt to the Changing World? (15 November 2021)

by Andra-Iona Curutiu (ICAL Class of 2021-2022)

On 15 November 2021, as part of its Annual Global Conference, CIArb Young Members Group hosted a Discussion Panel on the question of "How Will Arbitration Continue to Adapt to the Changing World?". The panel addressed some of the pivotal developments that occurred within the last couple of years in the international arbitration community as a result of the COVID-19 pandemic.

The Panel was comprised of Lucy Greenwood (UK), Sneka Ashtikar (France), Mercy Okiro (Kenya) and Karl Hennessee (France). The moderator of the session was Prof. Dr. Mohamed Abdel Wahab, Founding Partner of Zulficar & Partners, who gave a brief introduction of the event and the panelists.

The first Panelist was Lucy Greenwood (UK), international arbitrator and founder of the Campaign for Greener Arbitration. In her presentation, Ms. Greenwood discussed the need to reduce the environmental footprint of international arbitrations in order to combat the effects of climate change and touched upon some initiatives that have taken place in the past years in an attempt to protect the environment. For example, in investment arbitration, host states are now permitted to impose stricter environmental regulations, which was traditionally seen as a breach of the protection awarded to investors. Initiatives are also taking place in international commercial arbitration, where the ICC created a task force to examine the potential use of arbitration in climate change-related disputes.

The second Panelist was Sneha Ashtikar (France), Head of Marketing for Jus Mundi in Paris, who presented the impact of technology in arbitration. According to Ms Ashtikar, Jus Mundi aims to democratize access to electronic legal resources by creating multilingual search tools that improve legal research. In her presentation, Ms Ashtikar emphasized the impact technology has had in international arbitration recently, with COVID-19 leading hearings to take place in a digital format and cryptocurrency becoming a novel subject matter of disputes in arbitration. At the same time, technology has fostered new collaborations in the international arbitration community and AI-powered technology should be used more often in the years to come in dispute-resolution processes.

The third Panelist was Mercy Okiro (Kenya), Advocate for the High Court of Kenya and Independent Consultant for M&O Advocates. During her presentation, Ms Okiro focused on the topic and diversity and the opportunity provided by the COVID-19 pandemic to enhance the skills and knowledge of those coming from economically disadvantaged countries. As the world went into lockdown at the beginning of 2020, most activities in the arbitration community have been moved into the online format. This allowed young arbitrations and legal counsels coming from jurisdictions that are economically disadvantaged to participate in online events and conferences, as such improving their skills and networking opportunities.

The last Panelist was Karl Hennessee (France), Head of Litigation for Airbus in Paris, who examined the impact of some recent initiatives on the dispute resolution process. Mr Hennessee expressed his support in favor of using AI for the purpose of predictive justice, which will have a powerful and beneficial role in the settlement of disputes. At the same time, Mr Hennessee emphasized the positive impact diversity and inclusion has had in providing better decisions that cannot be driven by the traditional way of thinking.

* * *

Disclaimer: The respective authors are the sole responsible for the accuracy of the reported Webinar contents.

Picture source: pixabay.com