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2021 33RD ITA WORKSHOP AND ANNUAL MEETING – ARBITRATOR ETHICS IN INTERNATIONAL ARBITRATION: A DEVELOPING STORY OF CHALLENGES, CODES, CONFLICTS, AND DISCLOSURES

Report by Eric Lenier Ives and Efat Elsherif,
White & Case LLP, New York

On June 16-18, 2021, the 33rd ITA Workshop and Annual Meeting was held virtually for a second consecutive year due to the ongoing COVID-19 international crisis. Responding to the development of a series of ethics reforms and initiatives in international arbitration, the ITA Workshop focused on consensus and divergence in regulating arbitrator conduct.

A. The 33rd Annual ITA Workshop – Welcome and Tribute to Emmanuel Gaillard

On June 16, 2021, the 33rd ITA Workshop began with a welcome from **Joseph Neuhaus** (Sullivan & Cromwell LLP, New York), who then invited **Philippe Pinsolle** (Quinn Emanuel Urquhart & Sullivan LLP, Geneva), and **Yas Banifatemi** (Gaillard Banifatemi Shelbaya Disputes, Paris) to offer a tribute to **Emmanuel Gaillard**.

Pinsolle began by reminding the audience, "genius is no promise of forever." Gaillard was laying the foundation of the "city within the world" of international arbitration. He was a genius litigator and profoundly human. Those who knew him knew he was simple, approachable, and fun, and those who worked with him knew it was a privilege. Banifatemi, who worked with Gaillard for 24 years, recalled a favorite saying of Gaillard's: "a good theory is always practical." She noted that Gaillard was a visionary theorist with a career in arbitration spanning 40 years, beginning with his Ph.D. in international law and his seminal text on international arbitration. As a Visiting Professor at Yale Law School, Gaillard left a large impact. As a former student told Banifatemi, Gaillard had cultivated generations of inspired students through which his legacy will endure.

B. The Keynote Address of Constantine Partasides – Regulating Arbitrator Ethics: Goldilocks' Golden Rules

Nearly 10 years ago in Singapore, Doak Bishop and Toby Landau debated whether investment arbitration needed ethics for counsel, but their philosophical duel could have applied to arbitrator ethics more generally. Bishop argued that arbitration needed to be able to police itself, while Landau sounded an alarm bell against ever-expanding regulation that draws conduct into compliance with even more rules. Landau coined the term "legislitis"—an uncontrollable urge to publish rules, guidelines, and principles on every conceivable act.

Constantine Partasides (Three Crowns LLP, London) proposed that there was little doubt as to who won the war of ideas. Arbitration has firmly come down on the side of increased regulation, especially of arbitrators' duties of independence, impartiality and disclosure. Partasides argued that we should be more blunt about the importance of guidelines. The paucity of guidelines gave disproportionate power to a small class of influential arbitrators, and this is no longer how arbitration operates in the world. On this point, he set out two propositions:

Proposition 1: Over the last decade, we have seen the value of greater regulation of arbitrator ethics.

Proposition 2: Unless we are careful, we will experience the consequences of over-regulation.

On the first proposition, Partasides referenced the U.K. Supreme Court's recent decision on arbitrators' ethical obligations under the English Arbitration Act in *Halliburton v. Chubb*—an insurance indemnification dispute arising out of the Deepwater Horizon off-shore oil spill. One year into the underlying arbitration, the tribunal chairman accepted a second appointment by Chubb in an arbitration also related to the Deepwater Horizon oil spill.

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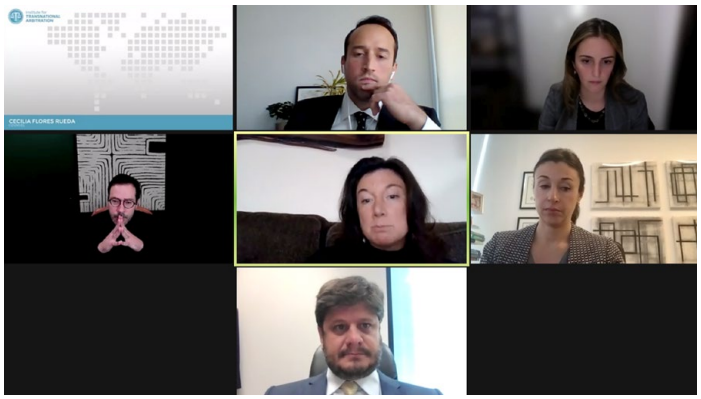
#YOUNGITATALKS BRAZIL AND NORTH AMERICA - ARBITRATION & INSOLVENCY: WHEN THEORY MEETS PRACTICE

Report by Alicia Yeo, Chaffetz Lindsey, New York

On October 22, 2021, Young ITA Brazil Vice Chair **Guilherme Piccardi** (Pinheiro Neto Advogados, São Paulo) introduced the #YoungITATalks webinar "Arbitration & Insolvency: When Theory Meets Practice," which focused on Brazilian and US law perspectives. Young ITA North America Chair, **Lidia Rezende** (Chaffetz Lindsey, New York) moderated the panel, with the participation of **Ruth Teitelbaum** (Arbitrator, Mediator and Advisor, New York), **Eduardo A. Mattar** (Padis Mattar Advogados, São Paulo), **Jennifer Permesly** (Skadden, Arps, Slate, Meagher & Flom, New York), and **André Luis Monteiro** (Quinn Emanuel, London) as panelists. The session was also the closing event for The São Paulo Arbitration Week.



A. The Right to Arbitration

Ms. Rezende opened by asking the panel whether the initiation of insolvency procedures against a party can preclude the right of that party to commence arbitration proceedings. Ms. Permesly, who is also the Co-Chair of the IBA's Insolvency and Arbitration Group, explained that the insolvency regimes in various jurisdictions do indeed purport to preclude arbitration where the insolvency process has already begun. However, it is unclear whether insolvency rules applicable in one jurisdiction must be followed or considered by arbitrators acting in other jurisdictions, a question that the IBA Toolkit on Insolvency and Arbitration seeks to provide guidance on.

Mr. Monteiro then gave an overview of Brazil's recently updated approach, explaining that a new Bankruptcy Act came into force in 2021. For the first time, the new rules acknowledge the intersection between arbitration and insolvency, taking a liberal and arbitration-friendly approach, such as providing that a preexisting arbitration agreement is not discharged by the initiation of insolvency proceedings.

B. Viability of Arbitration

Ms. Rezende then steered the discussion towards how parties decide whether to initiate arbitration at all. Mr. Mattar noted that creditors are unlikely to be recognized as such by bankruptcy courts if there is not an existing arbitral or other judicial award acknowledging the debt they are owed, thereby incentivizing would-be creditors to initiate arbitration or liquidation proceedings. From the insolvent party's point of view, the decision whether to initiate arbitration generally belongs to (i) the debtor-in-possession, or (ii) the debtor's trustee, receiver or administrator if the debtor is no longer in possession. Here, Mr. Mattar noted that Brazil takes a liberal approach regarding the discretion of the debtor-in-possession, as its decisions do not require approval from the courts.

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In the second case, Chubb was disputing an issue with the rig owner as opposed to the cementing company (Halliburton). In the first case, the chairman did not disclose this second appointment and, upon discovery, Halliburton applied for disqualification of the arbitrator.

Both the lower U.K. court and the Court of Appeals rejected Halliburton's challenge. The Court of Appeals held that the mere fact of multiple appointments in interrelated arbitrations does not itself give rise to appearance of bias. There needs to be "something more." Partasides noted that the Court of Appeals' ruling puts Chubb in a privileged position of having dual access to the same arbitrator and their arbitrator having two avenues to information about a factually related dispute. Their ruling also provided the curious result that breach of non-disclosure (despite being a substantive breach) carried no consequence. In this case, the second arbitration was decided on a preliminary issue not found in the Halliburton dispute and there was no harm actually caused by the non-disclosure.

The U.K. Supreme Court's ruling, however, brought U.K. standards back in line with international arbitration practice. The Supreme Court held that an arbitrator accepting multiple appointments in overlapping subject matters might create the appearance of bias or a lack of independence or impartiality. The Court confirmed that disclosure was a legal obligation and the failure to disclose may itself give rise to appearance of bias. Partasides emphasized that the Court's decision relied on the IBA Guidelines and submissions by intervening institutions (including the ICC and LCIA) to bring U.K. arbitration law in line with international practice. The IBA Guidelines provided a common framework from which the hard fought debate could proceed. Without the IBA Guidelines, it would have been even harder. Such guidelines, therefore, promoted harmony in international arbitration and provided useful guidance for domestic courts.

On the second proposition, Partasides argued that the ICSID-UNCITRAL Draft Code of Conduct (currently under debate and subject to ongoing revisions) risks overzealous regulation. The Draft Code overlaps with the IBA Guidelines risking confusion about the arbitrators' obligations and providing new avenues for tactical challenges. In particular, Partasides noted that Article 3 invites debates on an arbitrator's "fear of criticism" and risks emotional disputes about external perceptions. Article 6, covering "Other Duties," lists virtues such as competence and civility, but a mandatory code of ethics is an inappropriate place for aspirational values. Partasides questioned whether these duties would become the basis for tactical challenges simply because the arbitrator arrived at a decision with which a party disagrees. On disclosure, Article 10.2(c)'s obligation to disclose "all" arbitration matters arguably goes too far. Partasides questioned whether it was realistic to expect that hundreds of cases would or could be disclosed in every dispute.

Partasides proposed that the proper question is how to strike the right balance. Drawing on the experience of the financial services sector, Partasides suggested that there is a risk of under-regulating in good times and over-regulating following a crisis. Instead of oscillating between the two, Partasides set out Goldilocks' Golden Rule: the international arbitration community should assess the marginal benefit of every new regulation and, if the benefit does not outweigh the cost, should exercise restraint. Partasides concluded that we should take the lesson from other fields and resist reacting to under-regulation by moving too far in the opposite direction.

C. Roundtable on Emerging Codes of Conduct for Arbitrators in ISDS

Following Partasides' keynote, **Ank Santens** (ITA Workshop Co-Chair, White & Case LLP, New York) moderated a panel discussion on the ICISD-UNCITRAL Draft Code of Conduct for Adjudicators in ISDS. The panel was composed of **Prof. Catherine A. Rogers** (Università Bocconi & Queen Mary University, Milan and London), **Laurent Lévy** (Lévy Kaufmann-Kohler, Geneva), and **Nassib G. Ziadé** (Chief Executive Officer, Bahrain Chamber for Dispute Resolution, Manama).

The panel began with Ziadé's assessment that a uniform code would strengthen the legitimacy of the system, protect practitioners, and obviate the need for more radical regulation. He noted too that the IBA Guidelines set principles, but they were drafted by the group they are intended to regulate. He proposed that institutions should lead the way in setting principles. Lévy countered that caution was necessary to avoid the pitfalls associated with so many distinct codes of conduct. He noted that the IBA Guidelines are valuable because so many jurisdictions have adopted them and was in favor of an updated version. Rogers posited that it was not a question of too much or too little regulation, but rather that the regulation which does exist should be purposeful, meaningful, and effective. She noted that parties and institutions should be making decisions about whether certain information is disqualifying rather than arbitrators themselves.

Examining the disclosure standard under the Draft Code, Santens asked the panel whether the heightened disclosure requirements increased the risk of challenge or placed an onerous burden on arbitrators. Rogers emphasized that the disclosure obligation is not subject to the enforcement provision and worried that this gap may frustrate parties seeking greater clarity. Lévy noted that the standard is doubly subjective because it calls for disclosure of facts that "in the eyes of the parties" would give rise to doubts. It was noted that the Draft Code should include a list of circumstances in its commentary.

With regard to double hatting, Lévy noted that the Draft Code's waivable bar on double hatting would essentially prohibit counsel from acting as arbitrators. In his view, the pool of arbitrators would resemble 1960s France when arbitrators were either retired practitioners or academics. Lévy noted that he has nothing against this, but that the arbitration community should be clear about this effect. Lévy also remarked that a bar could restrict the renewal of the arbitrator pool. Ziadé proposed that while many in the arbitration community have discussed the impact on diversity of a bar on double hatting, no one can reliably predict its impact. Rogers highlighted that the market for arbitrators is undergoing a "tectonic shift" and that any regulation should try to understand the shifting market before enacting a rule.

On issue conflict, it was noted that maintaining a list of publications and speeches would provide the parties with transparent, equal access to information but that there is little chance that a challenge based on academic writings would succeed.

Finally, the panel discussed implementation and enforcement of the Draft Code, which has yet to be finalized. Rogers reiterated that the Code creates a gap between substantive obligations and the consequences of breaching those obligations. She noted that the goal is a deterrent, not a punishment. Ziadé cautioned that the Draft Code's obligations may conflict with existing institutional rules. Lévy finally cautioned that the Draft Code could open the door for more challenges even beyond ISDS.

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D. Workshop: Arbitrator Conflicts of Interest and Disclosures

The workshop consisted of an interactive session posing questions to the audience on multiple factual scenarios. The panel was moderated by **Prof. Loukas Mistelis** (Workshop Co-Chair, Queen Mary University, London), who introduced the panelists: **Julie Bédard** (Skadden, Arps, Slate, Meagher, & Flom, New York and Sao Paolo), **Miannaya Aja Essien** (SAN, FCIArb Principles Law, Lagos), **Vladimir Khvalei** (Baker McKenzie LLP, Moscow), and **Lord Jonathan Mance** (7 King's Bench Walk, London).

The first scenario revolved around an arbitrator's duty to disclose a relationship with an expert witness, based on the facts in *Eiser v. Spain* and *TECO v. Guatemala*. For Khvalei, spending too much time with an expert creates a "friendship" that could create an appearance of bias. Bédard agreed that it must be a "friendship" to create bias. Lord Mance pointed to the German and Russian approaches, which require "neutral experts."

The next scenario related to an arbitrator who was challenged as a result of pre-appointment discussions on a topic related to the case without involving any case specifics. For Khvalei, an arbitrator should not be challenged merely if they have a view on a particular issue because then "any professor writing about a topic will be challenged." Essien discussed the Lagos High Court ruling in *Global Gas and Refinery Limited and Shell Petroleum Development Company*, in which the court noted that an arbitrator should immediately resign upon being challenged.

The third scenario was based on the recent U.K. Supreme Court case, *Haliburton v. Chubb*. Lord Mance summarized the Court's ruling that an arbitrator must make reasonable inquiries, rather than exhaustive inquiries as to inappropriate connections. For Mance, the duty to disclose extends beyond matters that would disqualify an arbitrator, noting that the fact of disclosure itself makes an arbitrator "less biased."

The last scenario asked whether the duty of disclosure was absolute and whether it was objective. On the first question, Essien noted the duty is absolute only for certain facts. The IBA Guidelines, for example, do not require disclosure of facts that are public knowledge. To the second question, Essien discussed that the Lagos court in *Global Gas* agreed with the decision in *Halliburton* that the standard was objective. It was noted that in small jurisdictions, repeat appointments could not be avoided, but that this only meant that arbitrators needed to disclose these relationships more often.

In closing, Lord Mance noted that disclosure required under English law was minimal which naturally leads parties to ask for more information. Khvalei stated that arbitrators should put themselves in counsel's position and ask whether they would prefer to know an undisclosed fact. If yes, then the arbitrator should disclose.

E. Motion: "Challenges of Arbitrators Have Been On the Rise, Often For Tactical Reasons, and They Should Be Discouraged"

The final workshop featured a mock debate moderated by **Prof. Chiara Giorgetti** (University of Richmond School of Law, Washington, DC) between **James M. Hosking** (Chaffetz Lindsey, New York) and **Mélanie van Leeuwen** (Derains Gharavi, Paris) on the regulation of tactical challenges in arbitration. The panelists were assigned their respective positions.

The panel began with a poll of the audience asking whether tactical challenges should be discouraged with **74%** voting 'Yes.'

Hosking, arguing for discouraging arbitrator challenges, emphasized that challenges put tribunals in the uncomfortable position of judging a fellow arbitrator. They must then apply nebulous standards, risking conflicting results. He argued that the system needs to be re-balanced, and even measures such as publicizing case lists and private sector research solutions have not obviated the opportunity for strategic challenge. Rather than tribunals or institutions, Hosking posited that courts are best positioned to resolve arbitrator challenges and cost-shifting mechanisms could be used to discourage strategic challenges. Conversely, any measure proposed to liberalize challenge standards would only increase the risk of tactical challenges.

Van Leeuwen, arguing against the motion, began by noting that, unlike arbitrators, national judges are appointed and siloed into the judicial function. Because any individual can be an arbitrator, they must be subject to checks and balances, such as the duty of independence and impartiality. There must also be a way to *test* that duty in order to vindicate and give meaning to the parties' fundamental right to challenge. She noted that challenges and cases are fact-specific and the solutions should be as well. A neutral decision-maker must also apply the challenge standard in a reasonable timeframe because the only way to vindicate the right to challenge is the timely resolution of challenges.

Asked whether there is a fundamental right to challenge, Hosking countered that every right must have its limit. While in theory, the right exists, it must be controlled and considered along with the right of parties to their chosen arbitrator. He noted that additional solutions besides challenges are required. Van Leeuwen posited that the right should be maintained notwithstanding the parties' discretion to appoint an arbitrator. She noted that the number of challenges is actually falling and resists the idea that challenges brought for tactical reasons are occurring *en masse*.

Finally, the audience was asked again whether tactical challenges should be discouraged with **70%** voting 'Yes.'

ITA Workshop Co-Chairs, Mimi M. Lee, Prof. Loukas Mistelis, and Ank Santens offered concluding remarks and the 33rd Annual Workshop came to a close. Following the event, the ITA hosted an arbitration Trivia Night where teams competed in several rounds of questioning on arbitration lore and history.

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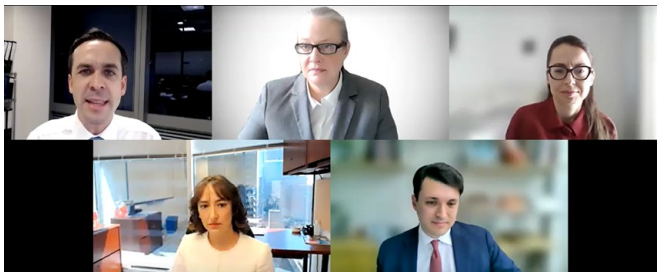
F. Young ITA Workshop: Document Production and Double Hatting

On June 17, 2021, **Catherine Bratic** (Incoming ITA Chair; Hogan Lovells LLP, Houston) and **Karima Sauma** (Incoming Young ITA Vice Chair; Executive Director, ICCA, AmCham, San Jose) welcomed Young ITA members to two virtual panels addressing recent trends in document production and double hatting international arbitration.

Cameron Sim (Young ITA Asia Chair, Debevoise & Plimpton, Hong Kong) moderated the first panel, titled "Document Production: Agreeing to Procedural Rules and Implementing Best Practices in Document Production." The panelists included **Pelin Baysal** (Baysal and Demir Legal, Istanbul), **Marcela Berdion-Straub** (TotalEnergies, Houston), **Samuel Pape** (Young ITA UK Chair; Latham & Watkins, London), and **Natasha Tunkel** (KNOETZL Law Firm, Vienna).



Sim discussed the current divide between the civil and common law approaches to document production that eventually led to the emergence of the Prague Rules to counteract the "growing Americanization" of the IBA Rules. Baysal provided participants with a brief history on the development of the Prague Rules in light of a "creeping Americanization" of disclosure in arbitration. Baysal added that the revised version of the Prague Rules "does not contradict the IBA Rules, but rather supplements them." As for Tunkel, the Prague Rules initiated a discourse that needed to take place.

Questioned on the extent to which parties should be compelled to disclose, Pape noted that the IBA Rules provided a "compromise of some sorts" between common and civil law traditions. He discussed the current document production process in the UK that requires parties to agree to a procedure of disclosure and justify their requests. Berdion-Straub emphasized that the IBA Rules provided flexibility. Marion Straub also noted that the amount of documents produced can be a "challenge to in-house counsel."

On "relevance" and "materiality" standards, Pape noted that relevance and materiality are "amorphous" in the common law, while Tunkel, speaking from a civil law perspective, argued that evidence must go to the outcome of a case to be relevant and material. For Berdion-Straub speaking from an in-house counsel's perspective, documents that explain a company's business are the most important because they guide the tribunal.

Finally, Baysal discussed problems associated with government institutions' assertions of privilege when asked to produce relevant documents, as well as the difficulty in obtaining documents from governments with fragmented document management systems. For Baysal, this discrepancy between the State and the other party violates the principle of equal treatment. The panelists echoed concerns about equality of arms, highlighting the implications on document production of having one party with extensive recordkeeping and another who does not.

The second panel debated the question, "Should Double Hatting be Permitted in Investor State Dispute Settlement?" **John D. Branson** (Squire Patton Boggs, New York) and **Alexander Slade** (Vinson & Elkins LLP, London), who were assigned their roles, pleaded their case before a panel of commentators including, **Dr. Veronika Korom** (Queritius; Assistant Professor of International Business Law, ESSEC Business School, Paris and Budapest), **Kate Brown de Vejar** (Global Co-Chair of International Arbitration, DLA Piper, Mexico City), and **Dr. Aloysius "Louie" Llamzon** (King & Spalding, New York and Washington, DC).

For Branson, double hatting should not be permitted in ISDS. Citing Senator Elizabeth Warren and Phillipe Sands, Branson highlighted the inherent conflict between adjudicator and counsel roles. Branson stressed the importance of *perception* in maintaining the integrity of ISDS. Further, Branson criticized *KSD v. Spain* (ECT), a case that lacked a discussion on issue conflict despite the arbitrator being challenged for acting as counsel in a separate ECT case.

On the other hand, Slade argued that a putative ban on double hatting has not been thought through. For Slade, a ban on ISDS would impede diversity in tribunals and encroach unjustifiably on party autonomy. Further, Slade noted that it is more problematic for an arbitrator to decide repeatedly an issue in a certain way than for an arbitrator to argue as counsel in a case with similar facts. The real target for Slade is issue conflict, not double hatting.

On that last argument, Brown de Vejar noted that double hatting may be the most viable solution because issue conflicts are not obvious at the outset. Korom asked about possible ways forward when it comes to arbitrator challenges. Branson responded that the tie should not go to the arbitrator because such an approach still causes the appearance of impartiality. Finally, Llamzon raised the issue that if a ban were implemented, arbitrators will consist mostly of academics, diminishing diversity. Both Branson and Slade concurred. An empirical study on diversity was suggested.

In closing, Korom noted that arbitrators should have "real life experience as counsel before resolving real life cases." Llamzon suggested a transition period for diverse arbitrators and 1-2 appointments before giving up the role as counsel. Finally, Brown de Vejar stressed that the process must be centralized to ensure the integrity of ISDS, otherwise integrity would be enforced on a treaty-by-treaty basis, leading to fragmentation.

The 33rd ITA Workshop and Young ITA Workshop ended with closing remarks from Joseph Neuhaus. On Friday, June 18, 2021, the ITA Annual Meeting took place, with various stakeholders engaging in the annual forum discussion.

For more information on this year's event, please visit www.cailaw.org/ita.

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However, if external funding is involved, depending on the circumstances - such as if the financing is considered a transfer of assets the court's approval may be required.

Ms. Teitelbaum added a further dimension to the overall picture by explaining the decision-making process that potential funders follow. She noted that funders face many risks to recover their assets even if the claimant prevails, including the cost and time required to monetize a claim, potential flaws in the funding transaction, and the possibility that the claimant loses ownership of the claim by means of the reorganization. The possibility that the funding agreements themselves, rather than the existence of funding, become public record once approved by courts also exists. The aforementioned risks are driving certain funders to avoid any direct relationship with the insolvent party or claim itself, and instead fund law firms through portfolio financing or other routes.

C. Security for Costs

Ms. Rezende then asked the panelists which factors tribunals normally consider when deciding on applications for security for costs. Mr. Monteiro explained that, generally, if it seems likely that the claimant will be unable to pay the adverse costs award, tribunals allow the respondent to apply for security for costs. However, the mere fact that a claimant has obtained third party funding does not necessarily mean that there is a material deterioration in the claimant's finances, as financially stable claimants may also choose to share risk and liquidity through such arrangements.

Mr. Mattar also clarified that that the debtor is in insolvency proceedings does not mean that security for costs is required. This might even indicate the opposite, as reorganization or liquidation proceedings protect the debtor's pre-existing and ongoing obligations, including costs arising from a pre-existing arbitration. However, Mr. Mattar cautioned that this is still case-specific.

Finally, Ms. Teitelbaum gave an overview of current trends relating to security for costs. She noted that, while the number of applications for costs involving insolvency proceedings has increased, this has not been met with an equal increase in the number of decisions from tribunals awarding such costs. Furthermore, the case law on security for costs is troubling, as there is still no coherent view or policy on the role arbitrators should play in deciding the post-award priority of creditors, creating significant uncertainty and making international arbitration more costly for all involved.

D. Enforceability of Awards Involving Insolvent Parties

To close the session, the panel turned to the post-award stage. Ms. Permesly began with a reminder that the overarching principle of arbitration is to issue an enforceable arbitration award, so arbitrators must consider how insolvency proceedings may stymy the award.

Drawing on her experience with the IBA Toolkit, Ms. Permesly further noted that one similarity among the jurisdictions surveyed was that an arbitration award is *not* automatically enforceable if insolvency proceedings are ongoing. The award will at least need to be brought before a court, whereby the prevailing party will receive the same consideration as any other creditor in the insolvency proceedings. In other words, an arbitration award does not allow a creditor to circumvent insolvency proceedings via the New York Convention's enforcement mechanisms to receive payment before all other creditors. While the creditor may be able to enforce the arbitration award in other jurisdictions, the court assessing the enforcement action will have to carefully consider conflict of laws and public policy issues, which arise where insolvency proceedings are ongoing abroad.

Lastly, Mr. Mattar provided insight on how one should handle offsetting in relation to the arbitration award where this might impinge on the priority of creditors in the insolvency proceedings. He noted that whether the arbitration claim was brought pre-petition or post-petition is a question for the bankruptcy court, and not the arbitral tribunal, to determine.

#YOUNGITATALKS SOUTH AMERICA - STATE DEFENSE MODELS IN INVESTMENT ARBITRATION: CHALLENGES AND IMPLICATIONS

Report by Isabella Lorduy, Zuleta Abogados, Bogotá

On October 28, 2021, Young ITA South America Chair **Maria Camila Rincón** (Zuleta Abogados, Bogotá) and Young ITA South America Vice-Chair **Santiago Lucas Peña** (Bomchil, Buenos Aires) introduced the inaugural South America (Spanish-speaking jurisdictions) #YoungITATalks webinar, "State Defense Models in Investment Arbitration: Challenges and Implications." They were joined by the event's speakers, **Álvaro Galindo** (Carmigniani Pérez, Quito), **Giovanny Vega Barbosa** (National Legal Defense Agency of Colombia, Bogotá), **Cindy Rayo** (Ministry of Economy of Mexico, Mexico City), and **Ricardo Ampuero** (Independent Consultant, Lima).

A. Defense Models in México, Perú, Ecuador, and Colombia

Following questions by Ms. Rincón and Mr. Peña, the speakers analyzed the defense models employed by their respective countries when facing investment arbitrations. Ms. Rayo opened by referring to Mexico's hybrid model, which she characterized as successful. She noted that Mexico combines strong in-house work with specialized support from external counsel, even though the latter is subject to budgetary restrictions.

Mr. Ampuero continued by referring to Peru's defense model, which also combines in-house and outside counsel. In contrast to Mexico, however, he highlighted that Peru's system is flexible in terms of retaining external counsel, while concluding that the system has also rendered favorable results.

Mr. Galindo later discussed Ecuador's hybrid model, in which the in-house officials have recently been given more responsibility.

In the case of Colombia, Mr. Vega Barbosa explained the key role of the National Agency for Legal Defense. He noted that while the state usually retains external counsel, the Agency maintains control of certain aspects within the dispute, such as selecting the party-appointed arbitrator before any external hiring is made. He also commented that the hybrid system is slowly but decisively transitioning to a mostly in-house one.

B. Negotiation of Treaties

The speakers continued by addressing the negotiation of treaties in the light of each defense model. Ms. Rayo began by highlighting the importance of modernizing the first-generation BITs, noting that in Mexico, a true modernization of treaties has taken place, including the negotiation of new free trade agreements with Australia, Panama, and Europe.

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In such cases, the in-house defense team substantively contributed to the investment chapters within the treaties by drafting clauses and interpretative notes clarifying the meaning of controversial standards, such as the minimum standard of treatment. Moreover, the states also included a code of conduct for arbitrators and alternative expedited procedures for settling jurisdictional issues in these new generation agreements.

The case of Ecuador raised several questions, in light of the country's recent return to the ICSID Convention. Mr. Galindo explained that the original decision to withdraw from the treaty was foremost a political one, but that the government currently in office took the necessary steps to make Ecuador a contracting state again, sending a crucial message to the country's geographical neighbors and foreign investors.

Mr. Ampuero instead referred to a specific investor-state negotiation case, in which a technically and legally feasible solution is being sought. He reflected that, even if a settlement is not reached, states gain from participating in negotiation attempts as they can identify key information to prepare the state's defense for the ensuing arbitration.

C. UNCITRAL Working Group III

Ms. Rincón and Mr. Peña then asked the speakers to discuss UNCITRAL Working Group III's ongoing reform discussion. Mr. Ampuero pointed out Peru's proposal for a multilateral investment treaty containing general provisions, which states could use as a basis for updating and renegotiating bilateral agreements.

Ms. Rayo applauded the proposal, while acknowledging that any multilateral instrument should be pragmatic in offering certain flexibility to states.

On the other hand, Mr. Galindo expressed the concern that a multilateral investment treaty could create two parallel worlds within international investment law, with certain states potentially adhering to the instrument, but others choosing not to.

The session concluded with questions from the audience.

#YOUNGITATALKS MEXICO & CENTRAL AMERICA - MEXICO & INVESTMENT ARBITRATION

Report by Adolfo Suárez Romo, Von Wobeser y Sierra, S.C., Mexico City.

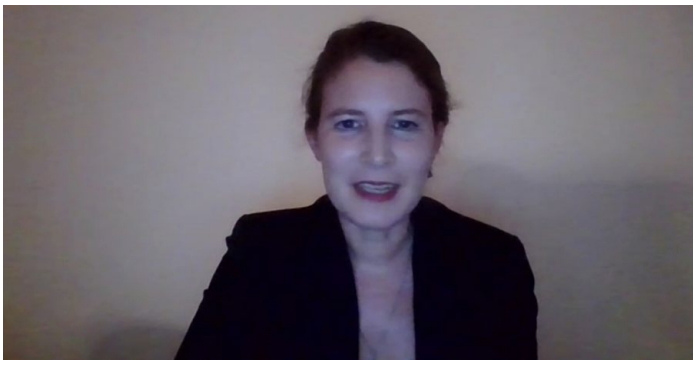
On December 9, 2021, Young ITA Chair for Mexico and Central America **Rodrigo Barradas Muñiz** (Von Wobeser y Sierra, S.C., Mexico City) introduced the #YoungITATalks webinar "Mexico & Investment Arbitration." Mr. Barradas was joined by the event's speakers, **Laura Yvonne Zielinski** (Holland & Knight, Mexico City), **Alan Bonfiglio Rios** (Ministry of Economy of Mexico, Mexico City), and **Juan Pablo Hugues** (Foley Hoag LLP, Washington D.C.).

A. Context of Investment Arbitration in Mexico

Mr. Barradas opened by asking Mr. Bonfiglio to address the investment protection regime in Mexico and the associated existing international treaties entered into by Mexico. Mr. Bonfiglio described Mexico's wide range of trade and investment agreements, highlighting the importance of NAFTA even beyond North America. He concluded that, like other free-market economies, Mexico is committed to the multilateral trade system, while also noting that the country faced arbitrations under the ICSID Additional Facility Rules before entering the ICSID Convention.

Mr. Barradas then asked Mr. Hugues to comment on Mexico's experience in international dispute resolution from a historical point of view. Mr. Hugues explained that Mexico's first experiences with international tribunals date back to the mixed commissions for conflict resolution in the 19th and 20th Centuries, formed with the United States, Germany, and France, among others. Mr. Hugues also highlighted that Mexico participated in both Hague Peace Conferences, during which the Permanent Court of Arbitration was created.

The Young ITA Mexico and Central America Chair continued by asking Ms. Zielinski about cases brought against Mexico. Ms. Zielinski mentioned that Mexico has participated in 37 investor-state cases to date, some of which are still ongoing.



B. The Mexican Experience

Mr. Barradas followed by asking Mr. Hugues to compare Mexico's experience to that of other Latin American economies. Mr. Hugues observed that there is no apparent correlation between a country's GDP, the number of treaties to which it is a party, its population size, and the number of investor-state cases in which it is involved.

*(See **YOUNGITATALKS MEXICO & CENTRAL AMERICA** page 8)*

*(Cont'd from **YOUNGITATALKS MEXICO & CENTRAL AMERICA** page 7)*

Nevertheless, he stated that Mexico has had a positive experience because the State has faced a reasonable amount of investment disputes considering the large number of treaties it has entered into, its large population, and its developed economy.

Consequently, Mr. Barradas asked Mr. Bonfiglio to comment on the first investor-state cases filed against Mexico. Mr. Bonfiglio focused on the Mexico-U.S. Claims Commission created under the 1923 Bucarelli Treaty. He highlighted the *Neer* case, whose findings on the "fair and equal treatment" standard continue to be used to this day. He explained that Mexico's history in ISDS could be divided into three sagas: the first concerning cases in connection with dangerous residues; the second concerning cases arising from fructose syrup measures; and the third concerning cases with diverse subject matters.

C. Landmark Decisions

The discussion then moved on to landmark cases involving Mexico. Ms. Zielinski referred to *Metalclad* and *TecMed,* whose findings have influenced the interpretation of the "fair and equal treatment" standard and the concept of "legitimate expectations" in subsequent cases. She also highlighted the more recent *Lion v. Mexico* case for setting a precedent for denial of justice under NAFTA.

Mr. Hugues instead emphasized a defense pleaded by Mexico in the fructose syrup saga, based on the use of countermeasures. This defense was key because it led the tribunals to clarify the standard of countermeasures in public international law and to conclude that investors also had rights under the relevant treaties in public international law.

Mr. Bonfiglio discussed *Azinian*, which was very similar to *Metalclad*. Notably, the tribunal in *Azinian* distinguished between treaty and contract claims under NAFTA.

D. The Future

Ms. Zielinski closed her participation by underscoring Mexico's extensive experience and professional attitude toward investment arbitration. She added that Mexico is not opposed to investment arbitration, as evidenced by its recent adoption of treaties such as the CPTPP and a BIT with Hong Kong.

Responding to a question by Mr. Barradas on ISDS reform, Mr. Bonfiglio stated that Mexico's main concern is the rise of *mega-claims*, *i.e.* increasingly higher amounts claimed by investors. Finally, Mr. Hugues highlighted that Mexican investors abroad have also relied on treaties entered into by Mexico to file investor-state claims against other governments.

The session concluded with an interactive Q&A session.

#YOUNGITATALKS "*DA MIHI FACTUM, DABO TIBI IUS*" – FACT FINDING AND *IURA NOVIT CURIA* IN ARBITRATION: HOW FAR DO ARBITRATORS' POWERS REACH?

Report by Dr. Viktor Előd Cserép,
POVARIS Varga and Partners, Hungary

On September 28, 2021, Young ITA's inaugural conference took place in a new region, Central and Eastern Europe. Organized and moderated by **Dr. Viktor Előd Cserép** (PROVARIS Varga and Partners, Budapest) as the Young ITA Central and Eastern Europe Chair, the event explored "*Da mihi factum, dabo tibi ius* – Fact Finding and *Iura Novit Curia* in Arbitration: How Far Do Arbitrators' Powers Reach?" The speakers were invited to argue in two rounds of one-on-one, Oxford-style debates in favour of broad versus limited powers of arbitrators to establish the facts of the case as well as to find and apply the relevant law. Topics touched upon the guiding principles of arbitration, with specific relevance to CEE jurisdictions in view of recent developments in arbitral rule-drafting (such as the Prague Rules or the new HCCI (Budapest) Rules).

A. The First Debate: "*Da Mihi Factum* – Give Me the Facts (or Not)!" – How Far Do Arbitrators' Fact-Finding and Evidence-Taking Powers Reach?

1. Sua Sponte, Broad Fact-Finding and Evidence-Taking Powers for Arbitrators

Prof. Dr. István Varga (Eötvös Loránd University and PROVARIS Varga and Partners, Budapest) pointed out that there are tensions between the expectations of a well-founded decision based on common law principles and legal certainty as well as basic procedural systems. He noted that common law favors the establishment of objectively true facts through disclosure and pre-trial discovery compared to the continental tradition, which is characterized by trial-phase fact-finding and reliance on substantive rules governing the burden of proof. He pointed out the heightened judicial responsibility of arbitrators resulting from the absence of appeals in arbitration, given that they have to reach the same finality in one-instance proceedings just as judgments rendered in multiple-tier litigation proceedings do. In Prof. Varga's view, the lack of appeals and cross-cultural differences in international arbitration should be overcome by entrusting arbitrators with broad fact-finding and evidence-taking powers. A "relativized inquisitorial approach" also serves the integrity of arbitration; "the case should be closed, not the docket," he added.

2. Work with what you got – arbitrators are limited to the facts the parties submit

Dr. Miklós Boronkay (Szecskay, Budapest) noted that state courts are not allowed to take evidence *ex officio*. He argued that the absence of appeals does not justify giving additional powers to arbitrators because the lack of review for mistakes by an additional forum is a trade-off compensated by other means to eliminate mistakes.

*(See **YOUNGITATALKS CENTRAL AND EASTERN EUROPE** page 9)*

*(Cont'd from **YOUNGITATALKS CENTRAL AND EASTERN EUROPE** page 8)*

Second, Dr. Boronkay identified three potential downsides of *ex officio* evidence-taking: (i) assistance to the party who has the burden of proof, risking unequal treatment; (ii) increased costs and duration of the arbitration, and (iii) uncertainty as to where the arbitrators should stop. He concluded by suggesting that any *ex officio* evidence-taking powers of arbitrators must be subject to the parties' agreement, with the default rule being that arbitrators are limited to what the parties submit.

B. The Second Debate: "*Dabo Tibi Ius* – I Will Give You the Law (or Can I)?" – How Far Do Arbitrators' Powers to Find and Apply the Correct Law Reach?

1. Iura novit arbiter: arbitrators can – and must – develop the legal reasoning (themselves)

Dr. Veronika Korom's (Queritius and ESSEC Business School, Paris) proposition comprised several points. Dr. Korom noted that arbitrators are entrusted with the task of rendering justice, which is possible only if the law is correctly applied. A number of arbitration laws and rules explicitly recognize the arbitral tribunal's power and duty to implement and assess the right law (*See e.g.,* Art. 22, LCIA Rules; Art. 6,Polish Chamber of Commerce (PCC) Rules). Dr. Korom also noted that arbitration laws and rules (a) typically foresee the arbitrators' duties to base the award on law (*e.g.,* Art. 28, Model Law; Art. 21, ICC Rules; Art. 6, PCC Rules; Art. 32, HCCI Rules), and (b) place case management powers at arbitrators' disposals, enabling them to independently ascertain and apply the law. She also stated that arbitrators could rely on legal arguments favoring a defaulting party. Arbitral tribunals' duties to apply independently the law can also be derived from the duties to render an award that will withstand challenge. Dr. Korom noted that challenges against awards on grounds that the tribunal relied on a legal argument not invoked by the parties have largely been unsuccessful. Dr. Korom further observed that when appointing arbitrators, a significant consideration is the arbitrators' expertise in a given legal system; this advantage would be lost absent *iura novit arbiter*. Finally, Dr. Korom noted that arbitrators must be allowed to apply the law *ex officio* so that arbitration maintains its reputation, absent the possibility of correction of awards at law.

2. Arbitrators cannot go beyond the legal arguments and provisions submitted by the parties

Dr. Viktor György Radics (DLA Piper, Budapest) pointed out that litigation and arbitration are different in nature; state courts are manifestations of the sovereign and, by definition, sovereign power is not limited to party submissions. Dr. Radics noted that the holder of sovereign powers must know the correct law, apply it correctly and render the correct decision. It was noted that in litigation, not knowing the law is an effective burden to access to justice. In arbitration, however, this is not an issue; arbitration is a voluntary opt-out of the system of sovereign courts. He noted that from the perspective of enforcement and setting aside, the award does not have to be correct; it just cannot be against public policy. As to the idea of a correct decision, Dr. Radics argued that it is not a mandatory obligation of arbitrators to apply the law correctly regardless of the parties' submissions. Even in the LCIA Rules and the PCC Rules *iura novit arbiter* is construed as an option. He then criticized the discretionary nature of *iura novit arbiter* saying it can lead to impartiality, whereas the requirement of equal treatment is codified in practically all arbitration laws. Dr. Radics also noted that where awards are set aside in a similar context, it is typically because the arbitral tribunal did not give the parties the opportunity to comment on decisive legal grounds. Finally, Dr. Radics emphasized that all parties to an arbitration are fully aware that they have to submit and substantiate their claim and will receive an award based on their own arguments. He concluded that the arbitrators' task is to decide over the parties' dispute, without having the power to turn cases discretionally from one side to the other.

C. Conclusion and Perspectives

The active participation, the ensuing lively discussion, and the positive responses at the event have shown that ITA's activities and exchanges within and beyond the local and regional arbitration communities are "of absolute importance" in the development of the arbitration scene, which is looking forward to "many more great events with Young ITA CEE" in a rapidly growing region.

#YOUNGITATALKS AND ALLEN & OVERY JOINT EVENT: THE PSYCHOLOGY OF WITNESS EVIDENCE AND ITS ROLE IN TRIBUNAL DECISION-MAKING

Report by Alexander Westin-Hardy, Allen & Overy, London

On October 27, 2021, Young ITA organised an event on the topic of "The Psychology of Witness Evidence and its Role in Tribunal Decision-Making," hosted by Allen & Overy in London. Young ITA UK Vice-Chairs **Katrina Limond** (Allen & Overy, London) and **Robert Bradshaw** (Lalive, London) led a roundtable discussion panelled by **Professor Kimberley Wade** (Professor of Psychology, University of Warwick), **Christopher Newmark** (Arbitrator, Mediator and former Chairman of the ICC Commission on Arbitration and ADR), **Professor Aldert Vrij** (Professor of Applied Social Psychology, University of Portsmouth) and **Professor Maxi Scherer** (Chair of International Arbitration, Dispute Resolution and Energy Law, Queen Mary University of London; WilmerHale, London). Katrina Limond began by giving a brief introduction and summary of recent developments, highlighting the importance of psychology in dispute resolution, particularly for witness evidence. These developments included the publication of the ICC Report on The Accuracy of Fact Witness Memory in International Arbitration (the ICC Report) and the introduction of a new Practice Direction governing trial witness statements in the Business and Property Courts of England and Wales.

*(See **ALLEN & OVERY JOINT EVENT** page 10)*

*(Cont'd from **ALLEN & OVERY JOINT EVENT** page 9)*

Robert Bradshaw opened the discussion with the reliability of fact witness memory. Professor Wade explained that eliciting detailed and accurate reports from witnesses can be difficult. Multiple studies have demonstrated the fallibility of witness memory, and Professor Wade pointed to two key explanations for why honest witnesses may nevertheless misremember events. First, a witness's memory may be influenced by information (and misinformation) they encounter after the event, including practices commonly employed by arbitration counsel in preparing witness evidence. For instance, evidence such as emails, meeting minutes or photographs may unconsciously override a witness's recollection of events. Similarly, discussing events with other witnesses can "contaminate" witnesses' memories. To reduce the risk of such contamination, Professor Wade highlighted recommendations in the ICC Report, including interviewing witnesses separately and eliciting reports before witnesses can confer. Second, witnesses' personal perspectives matter, and their beliefs and motivations may unconsciously bias the way they report information. This is particularly relevant in international arbitration, where witnesses will often take a particular perspective, as either claimant or respondent, especially when testifying on behalf of their employer. Subtle differences in the phrasing of questions can also affect a witness's answers, and even influence their recollection of events.

Mr. Newmark and Professor Scherer provided practitioners' views on witness memory. Professor Scherer noted that as an arbitrator her experience has been that witness memory is not set in stone, but is contextual. She highlighted the importance for arbitrators to ask open questions, and recommended all practitioners review the ICC Report and the recommendations for witness preparation in a forthcoming article by Professor Wade and Dr. Cartwright-Finch.[1] Mr. Newmark provided an example of wording he has used in a procedural order with an option to describe how witness evidence has been prepared – it remains to be seen how this will affect the content of witness evidence and cross-examination.

The second topic was witness credibility, including how to detect verbal and non-verbal cues of deception. Both Mr. Newmark and Professor Scherer agreed that identifying dishonest witnesses is extremely difficult in practice, and emphasised that they place greater importance on the substance of witness evidence than its delivery. It is all too easy to misinterpret common physical manifestations such as sweating, twitching, foot tapping or gaze aversion as signs of dishonesty, when they may simply be the result of nervousness, individual habits or cultural differences. Professor Scherer emphasised that judging whether witness evidence is credible involves a contextual assessment, and that the only reliable indicator of dishonesty is the presentation of directly contradicting documentary evidence. Professor Vrij, a leading expert on the psychology of deceit, agreed that reliance on non-verbal cues and body language is a poor method for identifying whether someone is lying; there is no universal "tell" in a liar's behaviour. He highlighted a number of errors in the conventional wisdom. For example, while fidgeting is often seen as a sign of dishonesty, liars in fact typically make fewer movements due to the greater cognitive load of fabricating a story. Focusing on the speaker's appearance may actually hinder credibility assessments. A more reliable indicator of honesty is the amount of information provided by a witness; truth-tellers give more detailed answers than do liars. In practice, Professor Vrij concluded, interviewers should focus on listening to witnesses rather than watching them and, if aiming to facilitate verbal lie detection, should ask open-ended rather than close-ended questions.

Third, Mr. Newmark gave an arbitrator's perspective on assessing witnesses and the impact of witness evidence on tribunal decision-making. He explained that while witnesses can provide helpful context, few cases turn solely on witness evidence. He noted that the most effective way for counsel to deploy witness evidence is to focus on the issues of fact that cannot be proven by documents, a strategy that gives the tribunal the essential information they need to make an award but that limits the scope for cross-examination. Mr. Newmark also suggested that counsel consider using descriptive narratives or chronologies in written briefs or opening submissions in place of witness evidence. He reiterated that witness statements need not be unduly lengthy, that first drafts of statements should not be produced until after the client has been interviewed, that witnesses should not argue the case, and that witnesses should be able to acknowledge any gaps in their memory.

Finally, Professor Scherer discussed remote hearings and the effect of remote testimony on assessing witnesses. Professor Scherer discussed the results of a recent survey into remote hearings, which showed that while experts and counsel rated remote hearings as worse for giving evidence and conducting cross-examinations, tribunal members found them better for developing an understanding of the case and for assessing witness and expert evidence. Professor Scherer suggested that hybrid hearings might offer advantages, including more effective assessments of witness evidence up-close and on-screen, easier recall of recordings of the hearing, and improved communication amongst legal teams and tribunal members.

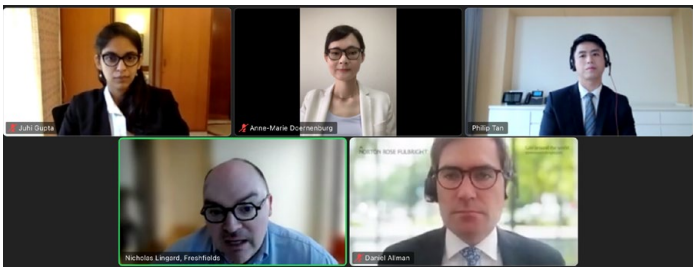
The panel then answered questions from the audience, including considerations for witnesses testifying in a second language (and the potential pitfalls of using an interpreter unless necessary), the impact of time on a witness's memory, and how obvious it can be to tribunal members when witness statements are drafted by lawyers. Katrina Limond rounded off the discussion by providing some tips for practitioners, including considering the practical points in the ICC Report and listening (and reviewing transcripts) closely to pick out discrepancies in evidence that may indicate deceit.

[1] Kimberley Wade & Ula Cartwright-Finch, *The Science of Witness Memory: Implications for Practice and Procedure in International Arbitration,* 39(1) J. INT'L ARB. (Forthcoming, 2022).

#YOUNGITATALKS ASIA, OCEANIA & INDIA INAUGURAL WEBINAR: "*CARPE DIEM* IN APAC ARBITRATION - OPPORTUNITIES AND CHALLENGES AHEAD"

Report by Pushkar Keshavmurthy, Young ITA, Bengal

On September 16, 2021, Young ITA Asia Vice-Chair **Philip Tan** (White & Case, Singapore) introduced the inaugural Asia, Oceania, and India #YoungITATalks Webinar: "*Carpe Diem* in APAC Arbitration - Opportunities and Challenges Ahead." Mr. Tan was joined by Young ITA Asia Chair **Anne-Marie Dornenburg** (Nishimura & Asahi, Tokyo), Young ITA India Chair **Juhi Gupta** (Shardul Amarchand Mangaldas & Co, Delhi), and Young ITA Oceania Chair **Daniel Allman** (Norton Rose Fulbright, Sydney) as speakers, with ITA Asia Task Force Chair, **Nicholas Lingard** (Freshfields Bruckhaus Deringer LLP, Singapore) delivering the event's keynote address.



A. Keynote Address

Mr. Lingard began by reflecting on the present "strange" times of the virtual world, and appreciating the diverse global group participating in the webinar. He referred to current issues such as online hearings and the virtual cross-examination of witnesses, concluding that arbitration practitioners have collectively adapted to the changing times effectively. Mr. Lingard discussed the speciality of international arbitration as a practice area, underscoring the importance of "agency" and "community" among its practitioners.

*(See **YOUNGITATALKS ASIA, OCEANIA & INDIA** page 11)*

*(Cont'd from **YOUNGITATALKS ASIA, OCEANIA & INDIA** page 10)*

Mr. Lingard concluded by introducing ITA's Asia Task Force and reiterated the mission of ITA Chair **Tom Sikora** (Exxon Mobil, Houston) to promote ITA outreach initiatives in emerging geographical regions, including Asia.

B. Young ITA Events and Projects

Daniel Allman mentioned the possibility of holding both online and in-person #YoungITATalks and networking events, depending on Covid-19 restrictions. He then encouraged attendees to take advantage of the opportunities provided by Young ITA, such as contributing to the quarterly Newsletter, joining the Mentorship Program, or submitting a paper to the Writing Competition, in exchange for recognition and attractive prizes.

Juhi Gupta elaborated on the partnerships that Young ITA is working on with arbitration institutions, universities, and hearing centers, with an aim to foster diversity, career-building exercises, and legal education in the field of international arbitration.

Anne-Marie Dornenburg then referred to a schedule of further events, including annual seminars and conferences, joint programs focusing on Asia, and jurisdiction-specific events focusing on regional issues in arbitration, all of which are regularly updated on the ITA website.

C. Key Developments in Asia-Pacific International Arbitration

The speakers then discussed key regional developments in international arbitration, focusing on the emergence of arbitration hubs, changes to institutional rules, and developments in domestic arbitration legal frameworks.

Mr. Tan referred to the recent Queen Mary – White & Case International Arbitration Survey to emphasize the growing popularity and reasons for the emergence of Singapore and Hong Kong as international arbitration hubs, noting the annual increase in caseload of the Singapore International Arbitration Centre ("SIAC") and the Hong Kong International Arbitration Centre ("HKIAC"). He also explained the ongoing review of SIAC Arbitration Rules, which have not been updated since 2016.

Mr. Tan concluded by commenting on the recent legislative developments in China, which are aimed at liberalizing its arbitration regime and adopting international standards, such as allowing foreign institutions to administer arbitrations seated in mainland China.

Ms. Gupta then commented that India has sent mixed signals to the global community regarding its arbitration landscape as a result of increased judicial intervention and a lack of awareness of the role of international instruments such as the New York Convention, notwithstanding the latter's ratification by India in 1960.

Ms. Gupta highlighted that ad-hoc - as opposed to institutional arbitration - is prevalent in India, showing the long road ahead in making the country a hub for arbitration. The Young ITA India Chair also pointed out that the establishment of the Mumbai Centre for International Arbitration ("MCIA") in 2016 was a step in the right direction, with the institution's rules reflecting international standards.

Ms. Dornenburg followed by pointing out the increased use of arbitration by Japanese parties since 2017, highlighting the government's promotion of this mechanism and the establishment of the Japan International Dispute Resolution Centre ("JIDRC") in 2018. She also referred to the review of the Japan Commercial Arbitration Association ("JCAA") Arbitration Rules in 2021, with the reform's objectives to enhance efficiency and transparency, to broaden the arbitral tribunals' powers, and to introduce an expedited procedure. The Young ITA Asia Chair finally described several legislative amendments adopted by Japan during 2020, whose aims included relaxing the requirements for the practice of foreign counsel and arbitrators in Japan.

Turning to Australia and the South Pacific, Mr. Allman discussed the 2021 Australian Arbitration Report released by the Australian Centre for International Commercial Arbitration ("ACICA"). He pointed out Australia's arbitration-friendly judiciary, and proposed that remote hearings could be the key to increasing the country's popularity as a seat of arbitration, making up for its geographical remoteness. Mr. Allman also addressed the 2021 revision of the ACICA Arbitration Rules, which included new provisions on joinder and consolidation as well as on third-party funding disclosure obligations.

The Young ITA Oceania Chair continued by pointing out the states that had acceded to the New York Convention in recent years: Papua New Guinea (2019), Palau (2020), and Tonga (2020), while also noting that Samoa, Solomon Islands, and Vanuatu have yet to accede to the instrument. Finally, Mr. Allman mentioned that arbitration legislations based on the UNCITRAL Model Law on International Arbitration were recently adopted in Fiji, Palau, and Tonga.

D. Virtual Roundtable

The webinar concluded with a virtual roundtable and networking session, where the participants and speakers joined smaller groups in breakout sessions. The small groups discussed topics from the earlier segments and career development opportunities.

ITA
EXPERTS...IN THE NEWS

Charles Kotuby, Jr., FCIArb (Center for International Legal Education, University of Pittsburgh School of Law) has joined ITA as an Academic/Government/Non-Profit Member.

Sustaining Member Sullivan & Cromwell LLP, New York, has designated **Dr. Pedro Jose Izquierdo** as a representative on the Advisory Board.

Supporting Member Boies Schiller Flexner LLP, New York, has designated **Jonathan Schiller** and **Ben Love** as representatives on the Advisory Board.

Sponsoring Member Omni Bridgeway, San Francisco, has designated **Nilufar Hossain** as its representative on the Advisory Board.

Hamid Abdulkareem (Three Crowns LLP, London, UK) has been appointed as the Young ITA Africa Chair.

Jennifer Paterson (K&L Gates, Dubai, UAE) has been appointed as the Young ITA Middle East Chair.

Meet the new ITA Arbitration Report Assistant Editors.

(from left to right - **Oscar Figueroa, Ernesto Hernandez, Inigo Kwan-Parsons, Sarada Nateshan, Michele Sonen**)

Grace Cheng (Field Court Chambers, London), has been appointed to the Bar Council's Alternative Dispute Resolution (ADR) Panel. Grace is a barrister in London, a qualified Hong Kong solicitor, and has been granted rights of audience before the Astana International Finance Centre (AIFC) Court in Kazakhstan.

ITA Country Reporter for the Netherlands, **Richard Hansen,** re-joined NautaDutilh as a Senior Associate in Amsterdam as of November 1, 2021, after a two-year hiatus at the Amsterdam branch of a London-headquartered, multinational law firm. He brings back his extensive experience acting as counsel in high-stakes commercial and investment arbitrations and related enforcement and setting aside proceedings. Hansen began his career in 2013 with the international arbitration team at NautaDutilh.

ITA's Reporter for Turkey, **Stephan Wilske** (Gleiss Lutz, Germany), was a Speaker at the Taipei International Arbitration and Mediation Conference 2021 on October 27 where he and his colleague Zelda Bank presented the following topic: "Is There An (Emerging) Ethical Rule In International Arbitration to Strive for More Climate Friendly Proceedings?" A paper with the same title was published in Vol. 14 (2) of the Contemporary Asia Arbitration Journal, 155-184 (November 2021).

Institute for TRANSNATIONAL ARBITRATION

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A Division of THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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(as of February 22, 2022)

ABBREVIATIONS

NY United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly, 1958 New York Convention)
ICSID Convention on the Settlement of Investment Disputes (1965)
IA Inter-American Convention on International Commercial Arbitration (commonly, Panama Convention) (1975)
USBIT United States Bilateral Investment Treaty
TIP US Treaties with Investment Protection Provisions
ECT Energy Charter Treaty (1998)
MC United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (commonly, Mauritius Convention) (2017)

SYMBOLS

S Signed, but not ratified
R Ratified, acceded or succeeded
A Subscribed, but not signed, ratified or paid
(*) Capital-exporting country under MIGA
N/A Not applicable

CHANGES FROM PREVIOUS ISSUE

NY Iraq (A)
ICSID None.
IA None.
USBIT Updated.

ECT None.
MC None.

TIP None.

NATION	NY[1]	ICSID[2]	ECT[3]	IA	USBIT	TIP[4]	MC
Afghanistan	R	R	R			R	
Albania	R	R	R		R		
Algeria	R	R				S	
Andorra	R						
Angola	R					S	
Antigua and Barbuda	R					R[23]	
Argentina	R	R		R	R	R	
Armenia	R	R	R		R	S	
Australia	R	R	S			R / S[19]	R
Austria	R	R	R				
Azerbaijan	R	R	R		R		
Bahamas	R	R				R[23]	
Bahrain	R	R			R	R / S[24]	
Bangladesh	R	R			R		
Barbados	R	R				R[23]	
Belarus	R	R	S[20]		S		
Belgium	R	R	R				S
Belize	R	S				R[23]	R
Benin	R	R				S[22] / R[29]	R
Bhutan	R						
Bolivia[6]	R			R		S[31]	R
Bosnia and Herzegovina[7]	R	R	R				
Botswana	R	R				R[26]	
Brazil	R			R		R	
Brunei Darussalam	R	R				R / R[27]/S[19]	
Bulgaria	R	R	R		R		
Burkina Faso	R	R				S[22] / R[29]	
Burundi	R	R				R[25] / R[30]	
Cambodia	R	R				R / R[27]	
Cameroon	R	R			R		R
Canada	R	R				R[8] / S[19]/S[21]	R

Cape Verde	R	R				S[22]	
Central African Republic	R	R					
Chad		R					
Chile	R	R		R		R / S[19]	
China (People's Republic)[9]	R	R					
Colombia	R	R		R		R / S[31]	
Comoros	R	R				R[30]	
Congo		R			R		S
Congo (Democratic Republic of)		R			R	R[30]	
Cook Islands	R						
Costa Rica	R	R		R		R[10]	
Côte d'Ivoire	R	R				S[22] / R[29]	
Croatia[7]	R	R	R		R		
Cuba	R						
Cyprus	R	R	R				
Czech Republic	R	R	R		R		
Denmark[11]	R	R	R				
Djibouti	R	R				R[30]	
Dominica	R					R[23]	
Dominican Republic	R	S		R		R[10]	
Ecuador	R	R		R		S[31]	
Egypt	R	R			R	R / R[30]	
El Salvador	R	R		R	S	R[10]	
Equatorial Guinea							
Eritrea						R[30]	
Estonia	R	R	R		R		
Eswatini		R				R[26] / R[30]	
Ethiopia	R	S				R[30]	
Fiji	R	R					
Finland	R	R	R				S
France[12]	R	R	R				S
Gabon	R	R					S
Gambia		R				S[22]	R
Georgia	R	R	R		R	R	
Germany	R	R	R				S
Ghana	R	R				R / S[22]	
Greece	R	R	R				
Grenada		R			R	R[23]	
Guatemala	R	R		R		R[10]	
Guinea	R	R				S[22]	
Guinea-Bissau		S				S[22] / R[29]	
Guyana	R	R				R[23]	
Haiti	R	R			S	R[23]	
Holy See (Vatican City)	R						
Honduras	R	R		R	R	R[10]	
Hungary	R	R	R				
Iceland	R	R	R			S	
India	R						
Indonesia	R	R				R[27]	
Iran	R						
Iraq	A	R				S	R
Ireland	R	R	R				
Israel	R	R				R	
Italy	R	R					S
Jamaica	R	R			R	R[23]	
Japan	R	R	R			S[19]	
Jordan	R	R	R		R	R	
Kazakhstan	R	R	R		R	R[28]	
Kenya	R	R				R[25] / R[30]	

Kiribati							
Korea (Republic) (South)	R	R				R	
Kosovo		R					
Kuwait	R	R				S / S[24]	
Kyrgyzstan	R	S	R		R	R[28]	
Lao People's Democratic Republic	R					R / R[27]	
Latvia	R	R	R		R		
Lebanon	R	R				S	
Lesotho	R	R				R[26]	
Liberia	R	R				R/S[22]	
Libyan Arab Jamahiriya						S / R[30]	
Liechtenstein	R		R				
Lithuania	R	R	R		R		
Luxembourg	R	R	R				S
Madagascar	R	R				R[30]	S
Malawi	R	R				R[30]	
Malaysia	R	R				R / R[27] / S[19]	
Maldives	R					R	
Mali	R	R				S[22] / R[29]	
Malta	R	R	R				
Marshall Islands	R						
Mauritania	R	R					
Mauritius	R	R				R / R[30]	R
Mexico	R	R		R		R[8]/S[19]/S[21]	
Micronesia		R					
Moldova	R	R	R		R		
Monaco	R						
Mongolia	R	R	R		R	R	
Montenegro	R	R	R				
Morocco	R	R			R	R	
Mozambique	R	R			R	R	
Myanmar (Burma)	R					S / R[27]	
Namibia		S				R[26]	
Nauru		R					
Nepal	R	R					
Netherlands[13]	R	R	R				S
New Zealand[14]	R	R				R / S[19]	
Nicaragua	R	R		R	S	R[10]	
Niger	R	R				S[22] / R[29]	
Nigeria	R	R				R	
North Macedonia[7]	R	R	R				
Norway	R	R	S				
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Pakistan	R	R					
Palau	R						
Panama	R	R		R	R	R	
Papua New Guinea	R	R					
Paraguay	R	R		R		S	
Peru	R	R		R		R / R[18]/S[19] / S[31]	
Philippines	R	R					
Poland	R		R		R	R[27]	
Portugal	R	R	R				
Qatar	R	R				S / S[24]	
Romania	R	R	R		R		
Russian Federation	R	S	S		S		
Rwanda	R	R			R	R / R[25]	
Saint Kitts and Nevis		R				R[23]	
Saint Lucia		R				R[23]	
St. Vincent and the Grenadines	R	R				R[23]	

Samoa		R					
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Senegal	R	R			R	S[22] / R[29]	
Serbia[7]	R	R					
Seychelles	R	R				R[30]	
Sierra Leone	R	R				S[22]	
Singapore	R	R				R / R[27]	
Slovakia	R	R	R		R		
Slovenia[7]	R	R	R				
Solomon Islands		R					
Somalia		R				R[30]	
South Africa	R					R / R[26]	
South Sudan		R				R[25]	
Spain	R	R	R				
Sri Lanka	R	R			R	R	
Sudan	R	R				R[30]	
Suriname						R[23]	
Sweden	R	R	R				S
Switzerland	R	R	R			R	R
Syrian Arab Republic	R	R					S
Taiwan							
Tajikistan	R		R			R[28]	
Tanzania	R	R				R[25]	
Thailand	R	S				R / R[27]	
Timor Leste		R					
Togo		R				S[22] / R[29]	
Tonga	R	R					
Trinidad and Tobago	R	R			R	R[23]	
Tunisia	R	R			R	R[30]	
Turkey	R	R	R		R	S	
Turkmenistan		R	R			R[28]	
Tuvalu							
Uganda	R	R				R[25] / R[30]	
Ukraine	R	R	R		R	S	
United Arab Emirates	R	R				S / S[24]	
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United States of America[16]	R	R		R	N/A	N/A	S
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Uzbekistan	R	R	R		S	R[28]	
Vanuatu							
Venezuela	R			R			
Vietnam	R					R /S[19] / R[27]	
West Bank and Gaza[17]	R						
Yemen		R	R			R	
Zambia	R	R				R[30]	
Zimbabwe	R	R				R[30]	

Notes: (1) Extends to metropolitan and overseas constituent territorial subdivisions but not to overseas dependent territories. Consult UNCITRAL for definitive status, as well as for the reservations to the Convention. (2) Extends to metropolitan and overseas constituent territorial subdivisions and to overseas dependent territories unless specifically excluded. (3) 1991 European Energy Charter was signed by the US. European Union and EURATOM have ratified the ECT. (4) Treaties signed or ratified by the US with provisions on investments. (5) See also 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. (6) ICSID Convention entered into force for Bolivia on July 23, 1995. On May 2, 2007, Bolivia denounced the ICSID Convention, with effect on November 3, 2007. The Government of Bolivia delivered notice to the United States on June 10, 2011, that it was terminating the "Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment." As of June 10, 2012 (the date of termination), the treaty ceases to have effect, except that it continues to apply for another 10 years to covered investments existing at the time of termination. (7) As of 4 February 2003, The Federal Republic of Yugoslavia has changed its name to "Serbia and Montenegro." Montenegro declared itself independent from Serbia on June 3, 2006. Bosnia & Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, and Slovenia are separated successor states to parts of the former Yugoslavia and have succeeded to the NY. The Former Yugoslav Republic of Macedonia changed its name to the Republic of North Macedonia on 12 February 2019. (8) Included in the North American Free Trade Agreement among the United States, Canada and Mexico. (9) NY: includes Hong Kong Special Administrative Region. (10) Included in the Dominican Republic - Central America - United States Free Trade Agreement. (11) NY: includes Faeroe Islands and Greenland. (12) NY: includes, inter alia, French Guiana, French Polynesia, Guadeloupe, Martinique, Mayotte, New Caledonia, Réunion, and St. Pierre and Miquelon. (13) NY: includes Aruba and Netherlands Antilles. (14) ICSID Convention: excludes Cook Islands, Niue and Tokelau. (15) NY: includes Bermuda, Cayman Islands, Gibraltar, Guernsey, Isle of Man, and British Virgin Islands. ICSID Convention: excludes British Indian Ocean Territory, Pitcairn Islands, British Antarctic Territory and Sovereign Base Areas of Cyprus. ICSID Convention: continues to include Hong Kong Special Administrative Region. (16) NY: includes, inter alia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico and US Virgin Islands. (17) West Bank and Gaza are not recognized as states by the United States. (18) United States - Peru Trade Promotion Agreement. (19) Trans-Pacific Partnership signed on February 4, 2016. (20) The State has signed the ECT and it applies it provisionally, under Art. 45 of the ECT. (21) USMCA signed on November 30, 2018. (22) Economic Community of West African States (ECOWAS) – US Trade and Investment Framework Agreement ('TIFA') signed on August 5, 2014. (23) Caribbean Community (CARICOM) – US TIFA, in force on May 28, 2013. (24) Gulf Cooperation Council – US Framework Agreement signed on September 25, 2012. (25) East African Community – US TIFA, entered into force on July 16, 2008. (26) Southern African Customs Union – US TIFA, entered into force on July 16, 2008. (27) Association of South-East Asian Nations (ASEAN) – US TIFA, entered into force on August 25, 2006. (28) Central Asia – US TIFA, entered into force on June 1, 2004. (29) West African Economic and Monetary Union (WAEMU) – US TIFA, entered into force on April 24, 2002. (30) Common Market for Eastern and Southern Africa (COMESA) - US TIFA, entered into force on October 29, 2001. (31) Andean Community (ANCOM) – US Trade and Investment Council signed on October 30, 1998.

SOURCES:

This issue was compiled by Co-Editors Crina Baltag and Monique Sasson of The Institute for Transnational Arbitration based on the following sources: United Nations; ICSID; UNCITRAL; Organization of American States; Energy Charter Secretariat; UNCTAD and the Office of the United States Trade Representative. The Scoreboard is designed to be a convenient reference and it is not intended to be relied on as legal advice. Please consult the sources directly to confirm the status of any particular ratifications, reservations, changes, special conditions or new developments.

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YOUNG ITA GLOBAL FORUM
Virtual (by invitation only)
February 22, 2022

#YOUNGITATALKS INDIA
BIT Arbitration in India: Developments, Trends and Predictions
Virtual - March 2, 2022

#YOUNGITATALKS ASIA
An Unruly Horse or A Crown Jewel: Working Effectively with Expert Witnesses
Virtual
March 9, 2022 CST /
March 10, 2022 SGT

#YOUNGITATALKS SOUTH AMERICA
Justicia y arbitraje en América Latina
Virtual - March 17, 2022

#YOUNGITATALKS UK
Outer Space Disputes – the Next Frontier for Arbitration?
Virtual - April 5, 2022

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2022

FEB 22

Young ITA Global Forum
VIRTUAL FORUM

Hosted by the Young ITA
The Global Forum will be limited to invited Young ITA moderators and delegates (save for a brief introduction from the ITA Chair) and will be held under the Chatham House Rule.

~~MAR 9-10~~

POSTPONED TO 2023 ITA International Mining Arbitration Conference
THE RITZ CARLTON • TORONTO, CANADA

Conference Co-Chairs: Nigel Blackaby QC (Freshfields Bruckhaus Deringer LLP, Washington, DC), Kathryn Khamsi (Three Crowns, Paris) and Myriam Seers (Savoie Laporte LLP, Toronto)

APR 6

19th Annual ITA-ASIL Conference: Arbitration in Changed Circumstances
WASHINGTON HILTON • WASHINGTON, D.C.

Presented by the ITA Academic Council with the American Society for International Law (ASIL), immediately preceding the ASIL Annual Meeting.

Conference Co-Chairs: Prof. Julian Arato (Brooklyn Law School, New York) and Prof. Kun Fan (University of New South Wales, Law, Sydney)

JUN 15-17

34th Annual ITA Workshop and Annual Meeting
THE LINE HOTEL • AUSTIN, TEXAS

Conference Co-Chairs: Kate Davies (Allen & Overy LLP, London), Prof. Patricia Shaughnessy (University of Stockholm School of Law, Lidingoe SWEDEN) and Laurence Shore (Bonelli Erede Pappalardo Studio Legale, Milan)

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