YOUNG ITA

Young ITA Newsletter Issue 2 – January 2021

Happy New Year from all of us at Young ITA. While we have missed seeing you all in person, it has been a delight to connect with you all virtually at over a dozen #YoungITATalks virtual events this year, held in three languages in time zones throughout the world.
We hope to see you all at in-person events soon. In the meantime, we invite you to stay engaged in Young ITA by attending upcoming events, submitting a paper to our writing competition, or preparing a report or blog post at an upcoming Young ITA conference.

Editors – Robert Reyes Landicho (Young ITA Chair), Crina Baltag (Young ITA Vice-Chair), Catherine Bratic (Young ITA Communications Chair), Thomas Innes (Young ITA Thought Leadership Chair)

Associate Editors – Young ITA Regional Chairs Samuel Pape, Alexander Leventhal, Sylvia Sámano Beristain, Vinicius Periera, Andres Talavera Cano, Cameron Sim, and Demilade Elemo

I. Upcoming Young ITA events and opportunities

ITA-IEL-ICC Joint Conference on International Energy Arbitration: Join us for a virtual version of the annual ITA-IEL-ICC energy conference and Young ITA Roundtable on January 20-22, 2021. Young ITA members are eligible for reduced-price registration. For more information and to register, click here.

Young ITA Writing Competition: The Young ITA Writing Competition and Award is a unique opportunity for Young ITA members to contribute actively to the research of international arbitration and to be recognized as qualified voices in this area. Participants should submit papers between 3,500 and 25,000 words on a topic related to the field of international commercial or investment arbitration. Papers must be submitted via email to ita@cailaw.org under subject line "Young ITA Competition" by on or before **January 15, 2021**.

Become a Young ITA Reporter: If you are interested in preparing reports on future Young ITA events for publication in News & Notes, ITA in Review, or Kluwer Arbitration Blog, please contact Catherine Bratic, catherine.bratic@hoganlovells.com.

II. Regional News and Updates

A. *North America, By Sarah E Reynolds (Partner, Mayer Brown) and James T Coleman (Associate, Mayer Brown)*

United States Supreme Court Rules That New York Convention Does Not Preclude Non-Signatories From Enforcing Arbitration Agreements

On June 1, 2020, in *GE Energy Power Conversion France SAS, Corp., fka Converteam SAS v. Outokumpu Stainless USA, LLC, et al.* (Case No. 18-1048), the US Supreme Court ruled

that state law equitable estoppel and other doctrines, which permit non-signatories to an arbitration agreement to force signatories to arbitrate disputes, do not conflict with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

In an unanimous opinion written by Justice Clarence Thomas, the Supreme Court found that the New York Convention does not conflict with equitable estoppel doctrines. Thus, the Supreme Court resolved a split among US courts of appeals on whether Article II of that Convention precludes the enforcement of arbitration agreements by non-signatories under state law doctrines. Article II reads:

> "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

Central to the Supreme Court's unanimous holding was that the New York Convention does not address whether non-signatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. Looking to the drafting history of the Convention and how it was implemented by signatories, the Supreme Court was unable to find anything in the drafting history to suggest an intent to stop enforcement of concepts like equitable estoppel. Rather, the Convention was meant to impose a baseline standard among signatories.

The Debate Regarding Section 1782(a) Discovery

In *Servotronics Inc. v. Rolls-Royce PLC*, the United States Court of Appeals for the Seventh Circuit deepened the circuit split on the question of whether 28 U.S.C. § 1782(a) authorizes district courts to order a person or entity to give testimony or documents for use in private foreign arbitrations. (7th Cir. Sept. 22, 2020). The Seventh Circuit sided with the Second and Fifth Circuits, holding that Section 1782(a) permits courts to provide discovery assistance only to state-sponsored foreign tribunals, not private international arbitrations.

Servotronics had asked the court to issue a subpoena compelling The Boeing Company to produce documents for a private London-seated arbitration. The Seventh Circuit rejected that request. But in connection with a parallel petition related to the same underlying private arbitration and the same parties, in Servotronics Inc. v. Boeing Co., the Fourth Circuit took the opposite approach earlier this year, permitting discovery. 954 F.3d 209 (4th Cir. 2020).

The Ninth Circuit may soon pick a side as well. The scope of Section 1782(a) is an issue presented in HRC-Hainan Holding Co., LLC v. Yihan Hu. No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020), appeal docketed, No. 20-15371 (9th Cir. Mar. 4, 2020). The district court in HRC-Hainan held that a private arbitration before the China International Economic and Trade Arbitration Commission was a "foreign or international tribunal" for purposes of Section 1782(a). Id. at *8. The parties argued the case on September 14, 2020.

With clear disagreement in the circuits, the issue is ripe for review by the US Supreme Court.

B. *United Kingdom,* By Samuel Pape (Young ITA Chair for the UK & Associate, Latham & Watkins) and James Mathieson (Trainee Solicitor, Latham & Watkins)

What is the correct approach for determining the law governing an arbitration agreement? In England, this question has been the subject of conflicting decisions and debate among scholars. However, on 9 October 2020, the UK Supreme Court settled the question in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38. The decision held that the English court will first look to the law chosen by the parties – expressly or implicitly – and, in the absence of such choice, to the law to which the contract is most closely connected.

In its decision, the Supreme Court made clear that:

i. If a contract contains a general governing law clause but does not specify which law governs the arbitration agreement, there is a presumption that the general governing law will apply to the arbitration agreement.

ii. The choice of a seat of arbitration in a jurisdiction that is different to that of the governing law does not displace the presumption.

iii. However, the presumption may be displaced by "(a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective".[1]

The Supreme Court's decision will likely be of interest in other jurisdictions, particularly as the decision surveys international academic literature and approaches adopted by the courts in other jurisdictions. Ultimately, the majority in the Supreme Court decided to side with the approach taken in jurisdictions such as Singapore, India, Pakistan, Germany, and Austria.[2] However, a minority (Lord Burrows and Lord Sales) departed from the majority's opinion, holding, *inter alia*, that in cases in which no specific express choice is made for the law governing the arbitration agreement, there should be a general presumption that the law of the main contract (whether expressly chosen or not) is also the law governing the arbitration agreement. Particularly in light of the minority's reasoning and differences in academic opinion, further consideration of the issue in other jurisdictions and arbitral fora is likely.

C. *Mexico and Central America,* By Sylvia Sámano Beristain (Young ITA Chair for Mexico and Central America & Secretary General at the Arbitration Center of Mexico) and country authors as indicated below

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[1] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 at 170.

[2] *Ibid*., at 56.

(a) *Costa Rica, By Jorge Arturo González C. (Aguilar Castillo Love)*

Arbitration in Costa Rica has continued to adapt well to the COVID-19 pandemic, with the leading arbitration institutions (CICA, CCA, CFIA) successfully relying on their technological platforms for casefile management. As of recent months, many hearings have been online-only (video-conference), whereas others have been held under hybrid formats, *e.g.* with each party in a different room within the same building.

Regarding public sector disputes, Spanish company Acciona Agua recently prevailed in an arbitration proceeding against the water and sanitation public utility ("AyA" for its Spanish acronym). The dispute, administered by CFIA, arose out of a contract for the construction of a wastewater treatment plant adjudicated to the Spanish company. AyA was reportedly ordered to pay over USD 6 million in compensation and legal fees.

Furthermore, a Venezuelan telecom investor filed an ICSID claim estimated at USD 25 million against the State of Costa Rica, under the Venezuela-Costa Rica BIT. The investor is the controlling shareholder of Costa Rican company V-Net Comunicaciones, and the dispute concerns the termination of the company's exclusive distribution contract with Kölbi, a State-owned telecom enterprise.

(b) *Honduras, By José Emilio Ruiz Pineda (Jr. Associate at CENTRAL LAW in Honduras & Vice-President of Honduran Young Arbitrators) and Alberto Andres Hernandez Franks (Legal Researcher, Penn State Law & Associate at Honduran Young Arbitrators)*

The Effects of the COVID-19 Pandemic and the Challenge of Virtual Hearings

Due to the COVID-19 pandemic, the government of Honduras imposed specific prohibitions that derived in the suspension of work in the public and private sectors during the time of exception (still active). Consequently, the leading conciliation and arbitration centers (CCA) of the country; CCA–CCIT and CCA–CCIC, are still closed to this date, whilst they restructure their safety protocols to host hearings. It is expected that the centers make important reforms in their rules that will make virtual hearings possible while still being compatible with Honduran law.

Regarding virtual hearings, there are some concerns under Honduran law – the principle of immediacy – which requires that "The judge [arbitrator] who issues the sentence [award] must be the one who has witnessed and directed the taking of the evidence…, under penalty of nullity...". Awards that don't comply with this principle may be susceptible to annulment. Nonetheless, virtual hearings could be held in Honduras under ad-hoc proceedings where parties may design their own rules or import international ones.

The Honduras Próspera ZEDE

The Honduras Próspera ZEDE, which is a new type of special economic zone authorized under the Organic Law of the Employment and Economic Development Zones (ZEDES) (Decree No. 120-2013) pursuant to its organic law, which makes the default method of resolution arbitration, contracted the Próspera Arbitration Center (PAC), as its default

arbitration provider. The PAC is authorized to resolve any present and future conflict which is contractual by nature, including labor law disputes which is something uncommon under Honduras main jurisdiction. The PAC allows for the use of Common Law, which gives them an advantage in terms of foreign investors being more familiarized and comfortable when establishing their business inside the ZEDE.

The PAC is composed by a roster of experts divided into Senior Arbiters, Arbiters, and Arbiter Officials predominantly judges from high courts in common law jurisdictions who have ample experience in diverse areas of practice. Something to notice is that the PAC will open up the possibility for Honduran legal professionals to be hired as Arbiter officials, and eventually to Arbiters in such a way that Honduran lawyers will now have access to a bigger and international market of clients previously unreachable due to the lack of an attractive system for international entities to resolve their disputes in Honduras.

Arbitration awards issued by the PAC are enforceable on a domestic and international setting pursuant to the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (New York Convention) and the "Inter-American Convention on International Commercial Arbitration" (Panama Convention); both conventions having already been ratified by Honduras. It is important to note that The Conciliation and Arbitration Law (Decree No. 161-2000) will not be applicable to any dispute or award from the PAC unless agreed upon by the parties. Instead, the default law applicable in the PAC is the Honduras Próspera ZEDE Arbitration Statute.

(c) *Panama, By Christopher Glasscock (Associate, LOVILL)*

Panama has experienced two notable recent developments in the field of arbitration: (i) Local arbitration centers are embracing the use of technology in arbitral proceedings, and (ii) a new legislation for public procurement has clarified that disputes related to public works with the State are arbitrable.

Local Arbitration Centers Promote Arbitration

In the wake of the COVID-19 pandemic, Panama´s two main arbitral institutions, "Centro de Arbitraje y Conciliación de Panamá (CeCAP)" and the "Centro de Solución de Conflictos (CESCON)," have increased efforts to promote virtual hearings and seek digital solutions to ensure continuity of ongoing arbitration proceedings. Most notably, CeCAP issued a guide for virtual hearings applicable to national and international arbitration cases, which includes the legal framework for protecting virtual hearings and a detailed procedure to be followed by all actors in the arbitration process.

New Public Procurement Law

The National Assembly of Panama issued Law 153 of May 8, 2020, which reforms Law 22 of June 27, 2006 "*that regulates Public Procurement and dictates other provisions*". This new piece of legislation includes a provision making it permissible for bidding entities to include arbitration clauses in their contracts with the State. The explicit reference to arbitration has brought clarity to the issue of whether contracts with the State rendered under the Public Procurement Law are arbitrable. Law 153 came into force on September 8, 2020.

(d) *Mexico,* By Yvette Seferian (Intern at Arbitration Center of Mexico)

Mexico's actions to continue its status as an attractive seat for arbitration were not slowed down by the pandemic. In fact, despite the circumstances brought on by the pandemic, there have been significant changes towards a more pro-arbitration perspective.

When COVID-19 struck, the courthouses closed by judicial decree, and justice came to a halt. However, this decree did not halt arbitration proceedings. Mexico's National Chamber of Commerce ("CANACO") and the Arbitration Center of Mexico ("CAM") continued administering arbitration proceedings.

Regarding institutional arbitration, CAM signed a collaboration agreement with ArbitralWomen in order to promote gender equality in the appointment of arbitrators.

Positive actions are not limited only to arbitration. In the last months, an initiative has been presented to the legislature for a new law that will regulate commercial and civil mediation throughout the country; this initiative will promote mediation practice in Mexico.

D. *Brazil, By Vinicius Pereira (Young ITA Chair for Brazil & Partner, Campos Mello Advogados)*

In February of this year, the Superior Court of Justice (the highest court in Brazil for non-constitutional matters) held that an arbitral tribunal has no jurisdiction to rule on disputes with the federal government resulting from Operation Car Wash, a far-reaching corruption scandal involving, among others, the semi-public Brazilian oil and gas company, Petrobras.

In that case, which involved underlying claims by some of Petrobras' shareholders against Petrobras and the federal government, the Court declined to compel arbitration even though Petrobras' bylaws clearly provided that shareholders' disputes should be resolved through arbitration, and the Brazilian federal government is the company's controlling shareholder. Despite these facts, the Court held that explicit statutory authorization was required for the federal government to be required to arbitrate disputes arising in this context. Moreover, the Superior Court considered that joint and several liability of the federal government due to the mistaken choice of Petrobras directors and the lack of supervision of the performance of such agents is an extracontractual claim outside the scope of the arbitration agreement provided for in Petrobras' bylaws.

Regarding remote hearings, notably, Brazilian Chambers continue to administer them without problems. For example, the most famous arbitration chamber in Brazil (Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada - CAM-CCBC) has created a specific rule stating that "*The arbitral tribunal, in case there is a need for a meeting or hearing, shall consult the parties and decide upon the occurrence of the remote hearing.*"

E. *South America (Spanish-Speaking Jurisdictions),* By Andres Talavera Cano (Young ITA Chair for South America) and country authors as indicated below

(a) *Argentina,* By Argentina Young Arbitration Practitioners & Argentina Very Young Arbitration Practitioners

Awareness of arbitration in Argentina has developed substantially in recent years and, as a result, the incorporation of arbitration clauses in supply, construction, energy, and merger and acquisition contracts, among others, has become increasingly common. Governmental support has driven this greater embrace for arbitration. For instance, Argentina enacted in 2018 an International Commercial Arbitration Act based on the UNCITRAL Model Law applicable to international arbitrations. Likewise, important governmental programs, such as the Public-Private Partnership scheme, and the Renewable Energy Power Purchase Agreements under the "RenovAr" program, refer to arbitration.

Argentine courts have accompanied these efforts and have shifted towards a *pro arbitri* approach. On 6 November 2018, the Supreme Court of Justice rejected the Federal State's attempt to reopen the merits of a case when challenging a final award. It held that awards may only be set aside subject to specific grounds and that annulment proceedings are distinct from an appeal on the merits. As further evidence of the growth of arbitration in Argentina, in October 2019, the Permanent Court of Arbitration opened its first office in Latin America in Buenos Aires, promoting both Buenos Aires as a hub for international arbitration and its dispute resolution services throughout Latin America.

(b) *Bolivia, By Sociedad Boliviana de Arbitraje -40 (SBA -40)*

An award rendered in Bolivia has been confirmed by US Courts, in spite of the existence of a pending annulment proceeding before Bolivian courts. On August 17, 2020, the U.S. Tenth Circuit Court of Appeals affirmed the judgment of the US District Court for the District of Colorado confirming award issued in favor of a Bolivian company Compañía de Inversiones Mercantiles S.A. (CIMSA) against a group of Mexican companies known as Grupo de Cementos de Chihuahua (GCC). This court ruled that the lower court was correct to enforce the award in March 2019 notwithstanding a challenge by GCC to the court's personal jurisdiction over the Mexican companies, and in rejecting GCC's assertion that the award was not enforceable in the US because of pending challenges in Bolivia.

With regard to arbitration cases involving the State of Bolivia, a decision in the case of *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Bolivia* (PCA Case No. 2018-39) can be highlighted. Through Procedural Order Nº 7 dated April 10, 2020, the tribunal refused to suspend the time-limit for the submission of Bolivia's Statement of Defense, after the state, on grounds of *force majeure*, argued that the coronavirus pandemic had made work on the submission "virtually impossible". In the tribunal's view, although the pandemic had created challenges for the parties, the filing of a written statement of defense was still "feasible". However, it should be noted that three months later, the State Attorney General's Office stated that it had a successful meeting with the PCA's Secretary General and was able to defer the legal deadlines of the two investment cases pending before the PCA (Compañía Minera Orlandini Ltda. and Glencore Finance (Bermuda) Limited).

(c) *Chile, By Santiago Very Young Arbitration Practitioners - Valentina Álamo, Francisco Sepúlveda and Fernando Zúñiga*

Chilean Courts have remained amicable towards recognition and enforcement of foreign arbitral awards through exequatur proceedings before the Supreme Court. To date, there is no record of any international arbitration award set aside by the Chilean Courts. Likewise,

case law had been consistent in rejecting the possibility of challenging an award pursuant the domestic arbitration rules. However, in a recent case, the Chilean Supreme Court permitted an appeal against an international arbitration award, departing from their previous decisions. When the defeated party appealed the arbitration award, the Court of Appeals declared the appeal inadmissible because it considered that—this being a case of international commercial arbitration—the International Commercial Arbitration Act should be applied and, therefore, an annulment claim was the only means of recourse to challenge the arbitral award. However, the Supreme Court reversed this decision concluding that it infringed the principle of good faith and that, since the parties had agreed to the possibility of appeal in the arbitration clause and the Terms of Reference, they were estopped from acting in contravention of the provisions originally agreed (Chilean Supreme Court N° 19.568-2020, September 4, 2020).

For a more detailed discussion on these issues and a broader consideration of whether arbitration is sustainable, please see Orlando Palomino's article, https://ciarglobal.com/importante-sentencia-en-chile-sobre-interpretacion-de-clausulas-de-arbitraje-por-orlando-palominos/

(d) *Colombia,* By (i) Red Juvenil de Arbitraje de la Cámara de Comercio de Medellín para Antioquia - Andrés Hurtado & Laura Isaza, (ii) Colombian Very Young Arbitration Practioners - Blanca Beltrán & Juan Camilo Fandiño, (iii) Red Juvenil de Arbitraje de la Cámara de Comercio de Cali - Luigi Lenis & Santiago Montero, and (iv) Red Juvenil de Arbitraje de la Cámara de Comercio de Bogotá - Rafael Pisso

Colombia's Council of State upholds ruling against Odebrecht.

In *Concesionaria Ruta del Sol v. Agencia Nacional de Infraestructura (ANI)*, the Arbitral Tribunal dismissed the Claimants' claims and upheld the Respondents' counterclaims, finding the contract between the parties to be null and void, on grounds of corruption, and determining the corresponding compensation and restitutions. The Claimants and the project's financers ("Petitioners") sought to set the award aside before the Council of State.

The Petitioners argued, *inter alia*, (i) that the tribunal exceeded its powers by awarding in excess of what was pleaded—determining the compensation due to the consortium upon contract nullification; (ii) that ANI's request to nullify the contract was time-barred; and (iii) that the tribunal lacked jurisdiction to decide on the project financers' rights, since they did not sign the arbitration agreement.

The Council of State dismissed the Petitioners' request. It held that, under Colombian law, arbitral tribunals have an ex-officio power—and duty—to nullify contracts tainted by corruption, and that such power is subject to a 20-year limitation. Regarding the project financers, the Council of State held that the award did not affect their rights, as non-signatories of the arbitration agreement, and that recourse under their own agreements remained available.

(e) *Ecuador, By Ecuadorian Very Young Arbitration Practitioners*

In 2019, through judgments 323-13-EP/19 and 31-14-EP/19, the Constitutional Court established that annulment proceedings for domestic arbitration proceedings must be exhausted before filing constitutional actions, whenever the claim relates to the grounds of annulment listed in the arbitration law. This seeks to prevent excessive resort to constitutional actions, which are the last possible resource to set aside arbitral awards in the Ecuadorian system.

In 2020, the Constitutional Court issued judgement 308-14-EP/20 clarifying procedural aspects of the annulment process for arbitral awards. The Court established that: i) the annulment should be brought against the non-prevailing party rather than the arbitral tribunal; ii) the arbitral tribunal is competent to establish the formal validity of the action before it is transferred to the judge that decides upon it. This is likely to improve and speed up annulment proceedings.

(f) *Paraguay, By Jorge Bogarín (Legal Advisor, PNUD Paraguay)*

Due to COVID-19, the Paraguayan Arbitration and Mediation Center of the National Chamber of Commerce and Services (CAMP) has increased the use of technology during the course of arbitration proceedings, specifically for conducting online hearings. In addition, efforts have been made to implement electronic notifications and filings starting in 2020.

Further, one notable decision relates to an award rendered against the Municipality of Asunción (capital of Paraguay) and in favour of Parxin, a Panamanian company. The Arbitration Tribunal ruled that the commune must re-establish the license to operate the tariff parking system or pay USD 5.4 million in damages. The Municipality of Asunción has filed an appeal to annul the decision of the arbitration tribunal.

It must be noted that in Paraguay, resolving disputes through arbitration is not common practice, unlike in other Latin American countries. However, there is a growing trend to include arbitration clauses in different types of contracts in order to avoid proceedings before national courts and refer disputes to an arbitral tribunal.

(g) *Perú,* By Arbitration 360°, Lima Very Young Arbitration Practitioners and Peruvian Young Arbitrators

In 2020, the Peruvian Arbitration Law underwent significant changes, as the Emergency Decree N° 020-2020 was passed in January. Its main focus was to further regulate arbitration proceedings where public entities intervene, modifying aspects such as the confidentiality of arbitration proceedings or the prohibition of ad-hoc arbitration proceedings of disputes exceeding approx. USD 12,000.

Further, a number of important international arbitration awards were issued, such as the ICSID case *Lidercon v. Peru*, favoring Peru and ordering the investor to pay over USD 4 million in costs. This decision was followed by another arbitral award, ultimately decided in favor of one of the main toll concessionaires in Lima, *Rutas de Lima S.A.C.,* in arbitration proceedings against the Municipality of Lima, which awarded the company damages in excess of USD 60 million. Recently, the Municipality of Lima submitted an annulment application before the US District Court for the District of Columbia.

A surge in the number of investor-State arbitration cases can be expected as, in May, the Peruvian congress issued a law suspending the right of private companies to charge tolls in highway concessions, allegedly affecting their contractual rights. Although the law was declared unconstitutional, it was widely reported that private investors would be filing arbitrations against Peru.

(h) *Uruguay, By Uruguay Very Young Arbitration Practitioners - Mateo Verdías Mezzera*

On July 22, 2019, the Uruguayan Supreme Court of Justice ("SCJ") decided a case related to the extension of an arbitration agreement to a non-signatory. In that case, Distribuidora Uruguaya de Combustibles S.A. ("Claimant") had sold oil to OW Bunker (the "Intermediary"), who in turn sold it to Rohde Nielsen ("Respondent"). An arbitration clause existed only between the Intermediary and Respondent. When the Intermediary went bankrupt and failed to pay Claimant, the latter sued Respondent seeking payment. Respondent argued that Claimant's claim was covered by the arbitration clause executed with the Intermediary. However, the SCJ rejected Respondent's argument and decided that the arbitration clause had no effect over Claimant, as there was insufficient evidence that the main contract was valid.

On June 30, 2020, in the case *Queimada v. Uber V.B*, a Labor Court of Appeals ruled that arbitration clauses covering individual labor actions are contrary to Uruguayan public policy.

Finally, on August 6, 2020, a PCA tribunal declined jurisdiction over a USD 3.5 billion investment dispute initiated by R. Mehta, V. Agarwal and P. Agarwal against the Republic of Uruguay related to a failed iron mining project. The tribunal concluded that at the time of the investment, the claimants were not the owners of the project.

(i) *Venezuela, By Research and Studies Centre for the Dispute Resolution (Centro de Investigación y Estudios para la Resolución de Controversias – CIERC) and Venezuelan Arbitration Association (Asociación Venezolana de Arbitraje – AVA)*

In the past months, arbitration proceedings in Venezuela have increased due to significant delays in judicial proceedings caused by the COVID-19 quarantine. It is too early to determine the total number of arbitral clauses entered into in these times, considering the advantages of arbitration in Venezuela.

On the other hand, a decision from the Constitutional Chamber of the Supreme Tribunal of Justice accepting a request for intervening into a pending arbitration proceeding administered by the Business Centre for Conciliation and Arbitration (Centro Empresarial de Conciliación y Arbitraje – CEDCA), has given rise to rejections and concerns regarding the future of arbitration in Venezuela. Hence, institutions like the International Bar Association, the Iberoamerican Institution of Maritime Law, the Latin-American Arbitration Association and the Spanish Club of Arbitration have made public statements against this proceeding, which it is expected to be decided in favor of arbitration.

Finally, CEDCA and the Arbitration Centre of the Chamber of Caracas (Centro de Arbitraje de la Cámara de Caracas – CACC) have updated some of their arbitration rules, including online arbitration and other aspects that needed to be modernized.

F. *Asia Pacific,* By Cameron Sim (Young ITA Chair for Asia & Associate, Debevoise & Plimpton) and country authors as indicated below

(a) *People's Republic of China,* By Jasmine Feng (Associate, Debevoise & Plimpton)

When it comes to the enforcement of arbitral awards, Mainland Chinese courts have followed what is known as the institution standard, meaning the place of the arbitration institution that administers the arbitration would determine the nationality of the arbitral award. For instance, in *Wei Mao International (Hong Kong) Co. Ltd. v. Shanxi Tianli Industrial Co. Ltd*, the Supreme People's Court held that an ICC award in relation to an arbitration seated in Hong Kong is a French award, as the ICC is based in Paris (see Supreme People's Court's Reply [2004] Min Si Ta Zi No. 6). In another case, *Duferco S.A. v. Ningbo Arts & Crafts Import and Export Co., Ltd.* [2008] Yong Zhong Jian Zi No. 4, the Intermediate People's Court of Ningbo held that an ICC award in relation to an arbitration seated in Beijing was a non-domestic award.

Recently, on 28 August 2020, in *Brentwood Industries, Inc. v. Guangdong Fa'anlong Machinery Complete Set Equipment Engineering Co., Ltd. and Others* [2015] Sui Zhong Fa Min Si Chu Zi No. 62, the applicant Brentwood Industries, Inc. applied to the Intermediate People's Court of Guangzhou for the enforcement of an ICC Hong Kong-administered arbitral award resulting from a Guangzhou-seated arbitration based on (a) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and (b) the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region ("the Arrangement"). The Intermediate People's Court opted to follow the seat standard (and not the institution standard), holding that this award is a foreign-related Chinese award, and not a Hong Kong award (as the location of the administering institution) or a French award (as the main location of the ICC). Thus, neither the New York Convention nor the Arrangement were applicable. The Court stated that the applicant should initiate a separate court proceeding to apply for the enforcement of the arbitral award based on Chinese civil procedure law. This is the first reported instance in which a PRC court has deviated from prior judicial rulings in which the institution standard has been applied. It remains to be seen whether other Intermediate People's Courts and the Supreme People's Court will also follow this trend.

(b) *India,* By Trishna Menon (Senior Research Fellow, Centre for Trade and Investment Law)

India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 ("the Ordinance") on November 4, 2020, to amend the Arbitration and Conciliation Act, 1996 ("the Principal Act").

Before the amendment, the Principal Act provided that if an application to set aside an arbitral award were filed in Court, the filing itself would not cause an automatic stay on the

enforcement of the award. However, the Court could grant a stay on the award on conditions it deemed fit. The Ordinance amends this provision to provide that where the Court is satisfied that a *prima facie* case is made out that either the arbitration agreement upon which the award is based, or the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the application to set aside the award. The amendment to the provision takes effect retrospectively from October 23, 2015, the date that the original provision took effect.

The Ordinance also replaces Section 43J of the Principal Act, which had provided standards for the qualifications, experience and norms for accreditation of arbitrators to be set out in a Schedule to the Principal Act. The revised Section 43J provides, instead, that the qualifications, experience and norms for accreditation of arbitrators shall be as specified by applicable regulations. Since no such regulations are in force yet, it is likely that regulations for the accreditation of arbitrators will be proposed by India in the near future.

(c) *Singapore,* By Benjamin Teo (Associate, Debevoise & Plimpton)

The Singapore Court of Appeal's recent judgment in *BRS v BRQ and another* [2020] SGCA 108 overturned an arbitral award and remitted an issue to the arbitral tribunal for consideration on the grounds that the tribunal had failed to consider the claimants' evidence and arguments on an issue, which amounted to a breach of natural justice. The Court of Appeal also decided that the respondent's request for the tribunal to "effect corrections" in its arbitral award was not in substance a correction request under Article 33(1)(a) of the UNCITRAL Model Law, and therefore did not extend the time permitted for filing a set-aside application.

Since it was undisputed between the parties and the judge at first instance that the tribunal had failed to consider the claimants' evidence and submissions on an issue, the Court of Appeal found that the tribunal had acted in breach of the rules of natural justice. This breach was shown to have caused "real and actual prejudice" to the claimants, and the Court of Appeal thus remitted that issue to the arbitral tribunal for its consideration, although "[a]ll other respects of the [a]ward remained intact".

Article 33 of the UNCITRAL Model Law allows a party to request that a tribunal correct errors in computation, any clerical, typographical errors or errors of a similar nature. The deadline for a set-aside application under Article 34 is three months from receipt of the award; or, where a request had been made under Article 33, three months from the date on which the request was disposed of by the tribunal. The Court of Appeal concluded that the respondent's request for "corrections" were in substance requests for the tribunal to review or revisit its decision on certain matters, rather than to correct clerical errors. The request was therefore not an Article 33 request and did not extend the time limit for an application for set-off under Article 34. Accordingly, the respondent was time-barred from applying for set-aside of the award.

The judgment demonstrates again the high threshold for a finding of breach of natural justice, as well as the potential consequences stemming from such a finding. It also makes clear the pitfalls of falling afoul of statutory time limits.

III. JOB POSTING

The job postings below are provided by #CareersInArbitration, a resource for finding and posting jobs in the arbitration field. #CareersInArbitration regularly posts openings on their LinkedIn and Twitter pages. If you have a job posting that you would like to share with Young ITA members, please email Young ITA Communications Chair Catherine Bratic (Catherine.bratic@hoganlovells.com) or Young ITA Thought Leadership Chair Thomas Innes (tinnes@steptoe.com).

Clifford Chance Paris
Stage - International Arbitration (2nd Semester 2021 and 1st Semester 2022), Paris
https://lnkd.in/dCVm23v

Herbert Smith Freehills
Summer Associate (2021 Summer Program), New York
https://lnkd.in/d84N8GG

Peerpoint
Arbitration consultants, London
https://lnkd.in/drdKFEt

Jones Day
Global Disputes Associate, Frankfurt
https://lnkd.in/dieaPTi

White & Case LLP
Junior Paralegal – Arbitration, Paris
https://lnkd.in/dcrDcuQ

Singapore International Arbitration Centre
Business Development Manager (Legal)
https://lnkd.in/dYsySxw

Knowledge Management Lawyer
https://lnkd.in/dsAt6pa

Head (Legal & Compliance)
https://lnkd.in/dZ23FV4

Liedekerke Wolters Waelbroeck Kirkpatrick
Associate International Arbitration / Litigation (Sept/Oct 2021), Brussels
https://lnkd.in/dma83yY

CMS
Associate - Contentious Construction, London
https://lnkd.in/dRQu7_S

Clifford Chance Paris
Stage - International Arbitration (1st Semester 2021), Paris
https://lnkd.in/d-mxRTw

University of Bedfordshire
Lecturer/Senior Lecturer in Law, Luton
https://lnkd.in/djA37KM

Schoenherr Attorneys at Law
Trainee International Arbitration Lawyer, Vienna
https://lnkd.in/d8HjQ-s

Freshfields Bruckhaus Deringer
Litigation / International Arbitration Associate, Madrid
https://lnkd.in/dSbsxZx

Deloitte China
Counsel at associated firm Shanghai Qinli Law Firm, Shanghai
https://lnkd.in/dWM2NDx

Linklaters
Dispute Resolution Associate, Amsterdam
https://lnkd.in/dNZah7Q

Delhi International Arbitration Centre
Invites applications from arbitrators wishing to join its panel
https://lnkd.in/dYH_pdv

Signature Litigation
Dispute Resolution Stage / Intern (6 months from July 2021), Paris
https://lnkd.in/deArdah

IV. Meet a Young ITA Member – María Lilian Franco

How did you get involved in arbitration?

My interest in arbitration can be dated back to my studies in University in 2011, with a call to participate in the Willem C. Vis Moot Court in Vienna. I was very curious about the subject and by that time there was no international arbitration course offered at Universidad Marroquín law school (*my alma mater*) and I had very little notion about what this challenge would require from me. I decided to participate in this event, which proved to be more challenging than expected. This experience created in me, an interest in this field, particularly because I discovered that international arbitration provides opportunities to solve disputes in a more efficient way, the disputes are very diverse, and it involves international contracts. After my involvement in this prestigious moot court competition, I was invited to help as coach of other moot court teams at my University and in other academic institutions. This opportunity gave me the chance to learn and polish my advocacy skills and it forced me to continue updating my education in this field. This opportunity allowed me to meet and interact with lawyers from different countries, arbitrators and colleagues, but particularly it helped me to develop essential skills that I would not have learned otherwise. Arbitration competitions involved more than just skills, and I was conscious of how important is to know and understand substantive elements of the cases, so when I started my professional career, I chose to learn and gain experience in different industries that would expose me to international contracts and different industry sectors such as telecommunications before I dove into arbitration. Nowadays I am working in disputes related to the energy sector.

How did you choose your current path?

I chose to become an arbitration practitioner because I like strategy and this field combines intelligence, knowledge, analytical skills, empathy and communication. I am the type of person who questions everything I am told by the clients and the opponents so I like to verify the facts and thoroughly study the law when defending a case.

In Guatemala the field of arbitration is still growing, it is not as common as litigation. I have been lucky enough to join a firm where I have had the opportunity to work in arbitration matters focused on disputes of the energy sector, a privilege that has provided me with exposure to some of the top talent in Latin America in the arbitration field.

What is the most exciting part of your practice?

Learning from different industries and from clients who do not practice law has been the most exciting part of my practice. However, as an arbitration lawyer the most exciting part is preparing for hearings in arbitration proceedings. This stage of the process is where you have a very clear vision of the case and you work in the most important arguments to present before a prestigious arbitration panel. It is necessary to know and understand the overall strategy of the case to see where the arguments fit in the grand scheme of the process, but you also have to be prepared for the questions of the tribunal and anticipate your opponents' arguments.

Is there anyone who has mentored in the arbitration field?

In Guatemala my current boss Juan Carlos Castillo and my professors Roberto Bermejo, Milton Argueta and Eduardo Calderon from Guatemala. Recently I just finished a mentorship program where I had the opportunity to have Ms. Cecilia Flores Rueda from Mexico as mentor.

They are all outstanding practitioners, and I am very grateful for them, as they have been very supportive and always have their door open to me. They have taught me not only to learn, but they have inspired me with their example.

How long have you been involved in Young ITA? How did you first get involved?

I have been involved almost 5 years now. I started with a subscription in the ITAFOR in 2015. This is an online forum, which was designed to foster discussion on arbitration pertinent to Latin America. I had the chance to read about the experiences from the best arbitration practitioners in the region and share some thoughts with them.

Last year, I decided to apply to the mentorship program. This program allowed me to meet a diverse group of participants from different career paths from Jordania to Brazil. Our group was very diverse and we shared interesting discussions, we made publications and webinars together. I appreciate the fact that my mentor Ms. Cecilia Flores Rueda and Sylvia Sámano were very committed with the group and provided their support. I hope to meet them in person when they visit the country.

I have also participated as a reporter of #YoungITATalks, where I had the chance to strengthen my writing skills, meet various panelists and expand my network during the conference.

What have you gained by being a member of Young ITA?

I have gained a lot. Young ITA has allowed me to meet a diverse group of participants from different career paths, arbitrators who I admire and practitioners from all over the world, but particularly I appreciate the fact that they have provided us with a platform to share ideas and give space to new voices. I am grateful to have had the opportunity of helping as contributor to Young ITA, which has allowed me to engage intellectually with exceptional practitioners.

What advice do you have for other young practitioners starting a career in arbitration?

1. Find a good mentor, when you are in the professional career is important to have a leader, someone who can teach you but inspires your career and help you growing.
2. Have a proactive attitude and always maintain an intact intellectual curiosity to learn. In arbitration it is important to learn the procedural aspects, but it is also important to learn substantive law and be updated continually on the industries of most interest to you.
3. Persevere and push your limits. When you start it is always important to know all the strategy and even when assigned tasks that seem small and limited in scope, to make the simplest tasks meaningful. You can be helping with one block, but you may be helping to build a cathedral.