Young ITA Newsletter

Vol. 2, Issue 2 – Autumn 2021

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Get Involved

- **Writing Competition** – The YoungITA Writing Competition was announced on 12 November 2021. All submissions should be made by **January 17 2022**. For further information please see the Young ITA LinkedIn Page.
- **Mentoring** – Updates on the current mentoring programme will be made on the Young ITA LinkedIn Page. Details on applications for the 2022–2023 mentoring programme will be released in summer 2022.
- **Events** – Please monitor the Young ITA LinkedIn Page for details of future Young ITA events, and be sure to join Young ITA for email announcements of future events here.
- **Reporting for Young ITA**—Please see page 25 of the newsletter for information on how to get involved with preparing pieces for the newsletter, or in reporting on Young ITA events in the future.

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Young ITA Leadership Announcement

Young ITA is delighted to announce 26 new appointments to its leadership team. Despite the global, Covid-19 pandemic, Young ITA has had a busy two years of events and seen an increase in membership to over 2500 individuals across over 100 countries. Young ITA has created a number of new roles to ensure we can continue to provide our members with the most useful and interesting events, articles and workshops, across the widest range of regions.

We are excited to announce that our previous leadership positions have been expanded to include our first ever regional chairs for India, Oceania, Eastern Europe and Western Europe, alongside vice chairs for Communications and Thought Leadership Chairs, as well as for a number of regions.

We would like to say a big thank you to our outgoing leadership team for their fantastic services for the past two years and congratulations to our new chairs and vice chairs. We look forward to another successful two years working with the ITA and continuing to expand on educational and leadership opportunities for young arbitrators.

To read more about each of our new regional chairs and vice chairs please click HERE.

Fireside Chat with Ms. Lucy Reed

Young ITA Mentorship Groups in Asia host Fireside Chat with Ms. Lucy Reed

On 31 March 2021, two Young ITA Mentorship Groups based in Asia led by Ms. Chiann Bao and Ms. Mariel Dimsey, along with mentorship facilitators, Mr. Cameron Sim and Ms. Anne-Marie Doernenburg respectively, jointly held a virtual fireside chat with Ms. Lucy Reed. Ms. Reed, one of the top international arbitration specialists, independent arbitrator at Arbitration Chambers and President of the ICCA, shared valuable insights and advice with mentees on developing a successful career in international arbitration.

As a U.S. pioneer in international arbitration, Ms. Reed provided insight into her career trajectory. She explained that, while at law school, there were no arbitration courses yet available. Her first main encounter with international arbitration was thus with the Iran-US Claims Tribunal, both in private practice and with the U.S. State Department. Capitalizing on her experience there put Ms. Reed at the forefront of the practice of investment treaty arbitration as it developed. Since then, she built her practice with Freshfields in the New York, Hong Kong and Singapore offices.

When asked what skills she considered essential to thrive in international arbitration, Ms. Reed advised young practitioners to build their substantive knowledge of the law, especially of their jurisdiction. This is because arbitration is a procedural skill, akin to litigation in the interpretation and application of law to facts. Furthermore, Ms. Reed emphasized the importance of working on one's written advocacy to...

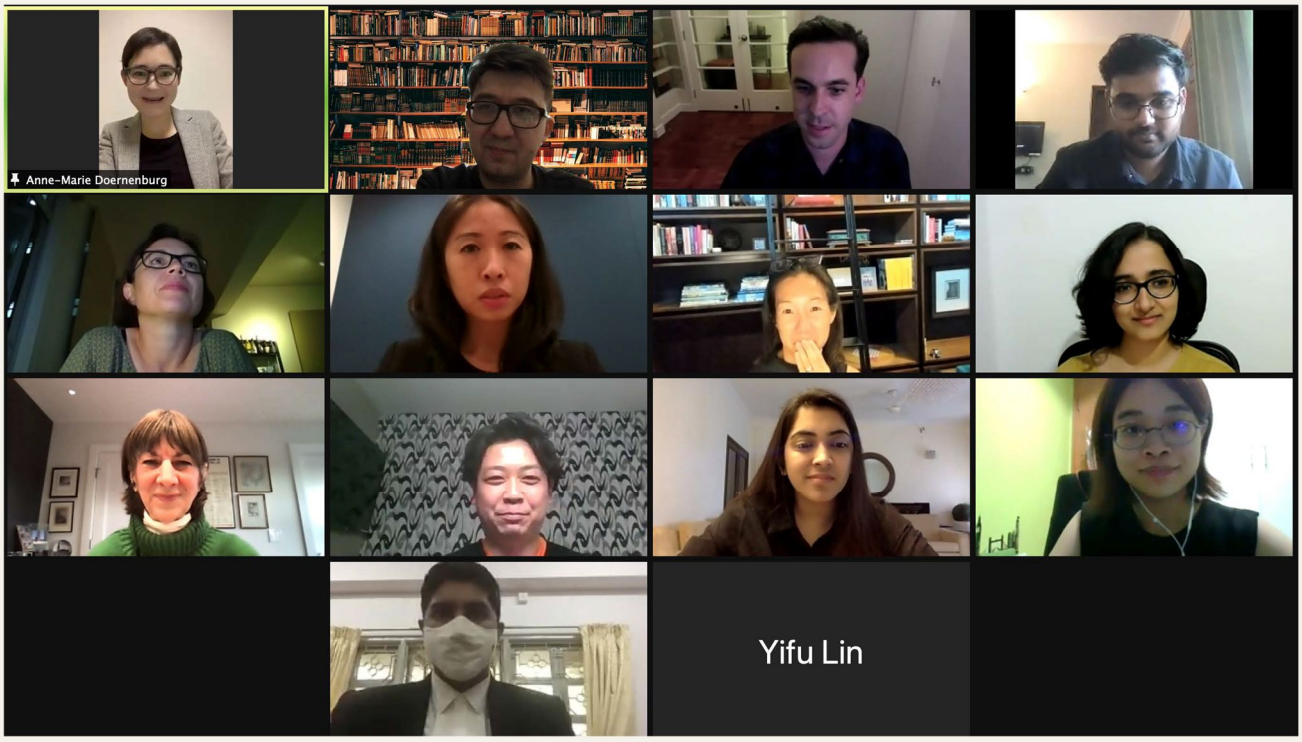
...be able to express arguments concisely and with absolute clarity. Equally, oral submissions should be streamlined and focused on helping the tribunal appreciate and understand one's case.

As for practitioners in jurisdictions where arbitration is less developed, Ms. Reed saw this as an opportunity for such practitioners to become arbitration pioneers. She cited the example of lawyers from such jurisdictions who had gone abroad to work for international law firms for a number of years, before returning to their home jurisdictions to work on international matters as leading counsel through their unique combination of international experience and local legal knowledge. Ms. Reed also stressed the need to be flexible and sensitive to different cultural and legal backgrounds and approaches, in particular when interacting with colleagues, approaching a case, or addressing a tribunal.

Ms. Reed concluded her thoughts with the following key takeaways: while luck does often play a role in one's career, one should train and be prepared to take advantage of opportunities by adopting a "Why Not?" attitude. In particular, young practitioners should hone their international arbitration practice skills while maintaining intellectual curiosity and keeping abreast of contemporary issues. Moreover, Ms. Reed advised to exercise discretion with personal branding; when deciding to write articles or speak at conferences, these should be significant and impactful. Finally, Ms. Reed underlined the importance of networking and helping peers, which she considers is key to a successful career. She also emphasized the importance of being part of organizations such as the ITA which, in Ms. Reed's case, had connected her with the oil and gas sector and arbitration specialists in the United States.

Ms. Reed's parting advice was to be patient in waiting for arbitrator appointments, as a career covers a long time.

The Young ITA Mentorship Groups in Asia would like to extend their gratitude to Ms. Lucy Reed for taking the time to speak to our mentees.



Top to bottom, left to right: Anne-Marie Doernenburg, Asset Kussaiyn, Cameron Sim, Yashraj Samant, Dr. Mariel Dimsey, Yvonne Mak, Chiann Bao, Umika Sharma, Lucy Reed, Takashi Yokoyama, Ishita Soni, Bridget Yim, Pushkar Keshav, Yifu Lin.

Reported By: Ishita Soni (Student, Symbiosis Law School, Pune) & Yvonne Mak (Associate, Withers KhattarWong LLP)

60 Second Interview with Catherine Bratic – Young ITA Chair

What are you hoping to achieve in your tenure as Young ITA Chair?

Young ITA has experienced a lot of growth in the past five years, and we hope this term to continue to bring Young ITA into new markets, and particularly to reach areas where there are an increasing number of arbitration practitioners who have not traditionally had access to the wider arbitration community. For example, we continuing to make inroads in Asia, building on the success of our past term by appointing five Asia-based Young ITA board members, including an India Chair, which is a new position for Young ITA. We are also expanding our mentorship program to Spanish-speaking jurisdictions by offering exclusively Spanish-speaking mentorship groups. I hope these effort will allow us to expand the reach of Young ITA to people who are not traditionally represented in arbitration.

What do you find most enjoyable about practicing in the arbitration field?

The opportunity to meet people from all over the world. Particularly through Young ITA, I've been able to not only meet people in different countries but also regularly work with them. That has really helped when I have a legal issue and need someone to reach out to, or when I need travel recommendations in a new city.

What is the one piece of advice would you give to young practitioners just starting out in arbitration?

Ask for things! I always tell young people not to assume things will be given to you – people who get the best opportunities in life are the people who ask for them and are not afraid to say "I want this." It is true of anything in the world but particularly in the practice of law. You have to be aggressive about figuring out what you want and asking for it.

If you could learn to do anything, what would it be?

To be completely fluent in all the languages I have ever tried to learn.

If you could travel anywhere in the world, where would it be?

Literally anywhere right now — I can't wait until full travel resumes. But if just one place that would be new to me, Cairo.

What are your three go to restaurants in your home town of Houston?

Hugo's (for authentic Mexican food), Ninfa's (for authentic Tex-Mex food) and Coltivare (for pizza).

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United Kingdom Update : Halliburton v Chubb Bermuda Insurance Ltd

On 27 November 2020, the UK Supreme Court handed down its judgment in Halliburton v Chubb [2020] UKSC 48, clarifying the law on appearance of bias in the context of arbitration. The case attracted substantial interest in the London arbitration community and was the subject of third-party submissions from the LCIA, ICC, CIArb, LMAA and GAFTA.

In this case, the arbitrator nominated by Chubb accepted appointments in two subsequent insurance-related arbitrations, which, like Hallibuton v Chubb, arose out of the Deepwater Horizon oil spill in 2010. Chubb was a party in one of those arbitrations. Arguing that the arbitrator ought to have disclosed his subsequent appointments, Halliburton applied to the court for his removal on the grounds of appearance of bias.

The Supreme Court rejected the challenge, upholding the decisions of the High Court and Court of Appeal. In its decision, the Supreme Court confirmed that the relevant test is whether the fair-minded and informed observer would conclude there was a real possibility that the arbitrator was biased, in light of all the circumstances.

In applying this test, the Court clarified that, depending on the customs and practice of the type of arbitration, an arbitrator appointed in multiple arbitrations by a sole common party may be required to disclose the multiple appointments.

On the facts of the case, however, the Court found that a fair-minded and informed observer would not have considered there to be any real possibility of bias. Among other relevant factors, the Court noted that it was not clear at the time of the multiple appointments that there was a duty to disclose, since there was a "lack of clarity" in English case law at the time. Further, the arbitrator had provided measured responses to Halliburton's objections and offered to resign in the event the overlapping arbitrations were to proceed...

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...beyond the preliminary issue phase during which no overlapping issues would arise. Finally, the Court noted that there was no basis for inferring any secret financial benefit or unconscious ill will.

The decision provides welcome clarification and refinement of the law on appearance of bias in the context of arbitration seated in England.

By Samuel Pape (Young ITA Chair for the UK 2019-21 & Associate, Latham & Watkins) and James Mathieson (Trainee Solicitor, Latham & Watkins)

United Kingdom Update : Republic of Sierra Leone v SL Mining Limited

On 15 February 2021, in Sierra Leone v SL Mining Ltd [2021] EWHC 2866 (Comm), the English High Court held that compliance with a pre-arbitration negotiation period under a contract was a question of admissibility rather than jurisdiction.

The Republic of Sierra Leone ("Sierra Leone") and SL Mining Ltd ("SL Mining") were parties to an agreement providing that the parties were to seek to resolve the dispute through amicable negotiations for a three-month period prior to referring the dispute to arbitration. SL Mining commenced arbitration six weeks after serving its notice of dispute commencing the negotiation period.

Sierra Leone sought to challenge the tribunal's jurisdiction on the basis that the requirement for the pre-arbitration negotiation period was not complied with. The tribunal issued a partial award rejecting this jurisdictional challenge.

SL Mining then sought to challenge that award in Court on the basis that the tribunal lacked jurisdiction because of the non-compliance in relation to the negotiation period.

Rejecting the challenge, the Court found that the provision of the Arbitration Act 1996 invoked by SL Mining was not engaged on the facts. That provision confers power upon the Court to decide on whether the tribunal lacks "substantive jurisdiction" as to "what matters have been submitted to...

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...arbitration in accordance with the arbitration agreement". The Court held that this provision concerned arbitrability (i.e., the "power of the tribunal to hear a case"), whereas the challenge raised by Sierra Leone was merely whether the proceedings had been commenced too early, which was a question of admissibility.

Further, the Court found that, in any event, Sierra Leone had previously agreed to the commencement of arbitration before the expiry of the three-month negotiation period, thereby waiving the right to object to the tribunal's jurisdiction.

By Samuel Pape (Young ITA Chair for the UK 2019-21 & Associate, Latham & Watkins) and James Mathieson (Trainee Solicitor, Latham & Watkins)

United Kingdom Update : UK Supreme Court confirms diplomatic service on a State's Ministry of Foreign Affairs is mandatory when enforcing an arbitral award against a State

Section 12 of the UK State Immunity Act 1978 (SIA) governs service of process against a State. It provides for diplomatic service of "any writ or other document required to be served for instituting proceedings against the State" through the UK Foreign, Commonwealth and Development Office (FCDO) on that State's Ministry of Foreign Affairs.

The question arose in General Dynamics UK v Libya as to whether this requirement could be dispensed with in circumstances where a State faced political unrest and FCDO officials were unable to effect service. The UK Civil Procedure Rules include provisions permitting a court to dispense with service, including, for claim forms, in "exceptional circumstances".

The claimant obtained an £16 million ICC arbitral award against Libya in 2016 for breach of contract. The claimant sought enforcement in the UK. It issued an arbitration claim form and obtained a permission order to dispense with the need for formal service, in light of the circumstances in Libya...

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...(the Libyan British embassy having closed in Tripoli and uncertainty as to whether the FCDO could effect service).

Once notified (by documents couriered to its Ministry of Foreign Affairs) Libya applied to have the order set aside. Libya's application succeeded, on the basis that the method of diplomatic service under s.12 of the SIA was mandatory.

The claimant appealed, and the Court of Appeal restored the original permission order.

Libya appealed, arguing that diplomatic service by the FCDO was mandatory under s.12 SIA even if service was impossible or unduly difficult. The claimant argued that Libya's position would infringe rights to a fair trial and of access to the courts including under Article 6 of the European Convention of Human Rights.

On 25 June 2021, the UK Supreme Court confirmed (by a majority of 3-2) that, absent agreement (provided for in s.12(6) SIA), documents instituting proceedings against a State must be served through the FCDO on a State's Ministry of Foreign Affairs.

The majority found that:

A) Although Libya succeeded, Libya's reliance on the (not yet in force) United Nations Convention on Jurisdictional Immunities of States 2004 did not. The majority found that the Convention article cited by Libya was not declaratory of customary international law, as State practice was too diverse. General principles of comity and the sovereign equality of States, however, required defendant States to be given notice, and the effect of s.12(1) SIA is that notice should be given through the FCDO, unless otherwise agreed.

B) Even in exceptional circumstances, s.12(1) is mandatory primary legislation and cannot be overridden by the civil procedure rules.

C) S.12(1) SIA does not infringe rights to a fair trial, but is a proportionate means of pursuing the legitimate objective of providing a method of...

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...service consistent with international law and comity.

While practitioners who struggle to serve States via the FCDO may have preferred the minority Supreme Court view (that s.12(1) could be dispensed with in certain circumstances), this ruling (obtained three years after the claimant commenced its enforcement proceedings) demonstrates the critical importance of following notice requirements when enforcing awards against States in the UK. In the event, the FCDO did in fact succeed in serving Libya by diplomatic means shortly before the Supreme Court's judgment was issued.

By Katrina Limond (Young ITA Chair for the UK 2021-23 & Senior Associate, Allen & Overy LLP, London)

Continental Europe Updates

By Alexander G. Leventhal (Young ITA Chair for Continental Europe 2019-21 & Of Counsel, Quinn Emanuel) and country authors as indicated below

Portugal & Spain Update

On 5 March 2020, the Lisbon Court of Appeal (Case No. 415/18.8T8SNT.L1-2) upheld the principle that arbitral tribunals have jurisdiction to decide on their own jurisdiction, including the question whether the principle of access to arbitral justice may limit that jurisdiction on account of the claimant's economic situation. It found that such an objection to jurisdiction should be rejected unless the unenforceability of the arbitration agreement is manifest, in view of the evident finding of definitive impossibility, not attributable to the party, of resorting to the arbitral tribunal on account of its economic situation.

The Spanish Constitutional Court issued a ruling on 15 June 2020 (ruling 46/2020) that reinforced the attractiveness of Spain as a seat of arbitration with a decision on the limited scope of judicial review of arbitral awards. In that case, the High Court of Justice of Madrid refused to withdraw jurisdiction even after both parties sought to withdraw annulment proceedings; it...

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...claimed that issues of public policy and general interest merited its deciding the annulment claim nonetheless. The Constitutional Court found that the High Court had improperly sought to broaden the scope of public policy and was infringing on the arbitrators' ability to decide on their own jurisdiction.

By Leonor van Lelyveld (Associate, Miranda & Associados)

France Update

On 17 November 2020, the Paris Court of Appeal annulled a €452 million ICC award issued against the State of Libya in an arbitral proceeding initiated by a French company, on the grounds that it gave effect to a settlement agreement procured by corruption.

The Court began by stating that allegations of corruption are a matter of international public policy and that, as such, they may be invoked before the annulment judge for the first time. Prior decisions had indeed underlined that in order to preserve the French conception of international public policy, the annulment judge can hear allegations of international public policy violations even if these have not been previously made before the arbitral tribunal.

The Court then held that the award must be set aside if there are "sufficiently serious, specific and consistent" indicia that the agreement was obtained illegally and that the award would conceal corruption. Applying the "red flags" method and taking into consideration the political situation in Libya, the procedure for the conclusion of the agreement and the terms of the agreement, the Court concluded that such indications were present and annulled the award. Finally, noting that the validity of the latter determines the validity of the subsequent final award which related to its enforcement, the Court also issued a second decision the same day setting aside the final ICC award.

By Eung-Kyung Suyeonne Cho

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Eastern Europe & CIS – Belarus Update

On 8 January 2021, Belarus faced the 4th investment arbitration in Belarusian history (two of four are based on the 2014 Treaty on the Eurasian Economic Union, concluded between Armenia, Belarus, Kazakhstan, Kyrgiz Republic, and Russia).

The Lithuanian investors, who had invested in a Belarus hotel construction project near Minsk city airport, UAB Pavilniu saules slenis 14 (Lithuanian) and UAB Modus grupe (Lithuanian), registered a claim in Washington. Investor-state arbitration was commenced under BIT Belarus – Lithuania 1999 and ICSID Convention – Arbitration Rules. The remarkable issue is that the investors sue not the Republic of Belarus, but jointly the President of the Republic of Belarus, the Prime Minister of the Republic of Belarus, and the Minsk City Executive Committee.

It is the 3rd ICSID case, following the 2018 Grand Express JSC claim under the Treaty on the Eurasian Economic Union, brought by a Russian investor (pending), and the 2019 Delta Belarus Holding Bv claim under BIT Belarus – Netherlands 1995 (pending). The very first claim against Belarus appeared in 2017 when the Russian investor Manolium Processing brought its claim to the PCA (still not concluded).

By Young ADR – Belarus

Eastern Europe & CIS – Poland

On 30 March 2020, an SCC arbitral tribunal rendered the award in the gas pricing dispute between the Polish state-controlled gas company PGNiG and the Russian gas company Gazprom, in which it ordered the latter to pay $1.5 billion to the former. The tribunal also ruled that a gas pricing formula in the long-term contract between the parties (signed in 1996, due to expire in October 2022) should be amended to take into account natural gas market quotations.

At the end of June 2020, Gazprom paid the sum awarded to PGNiG by the SCC tribunal. In November 2020, the negotiation on the gas price under the...

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,,,contract started.

By Young ADR – Belarus

Eastern Europe & CIS – Russia: Amendments to the Code of Arbitrazh (Commercial) Procedure

On 19 June 2020, the Federal Law "On Amendments to the Code of Arbitrazh (Commercial) Procedure of the Russian Federation" entered into force, which may have a significant impact on the place and procedure for resolving disputes with the participation of Russian and foreign persons.

By virtue of the new provisions of the Code of Arbitrazh Procedure, the exclusive competence of Russian state courts includes disputes with the participation of Russian and foreign persons, in respect of whom foreign sanctions (restrictive measures) have been introduced, as well as disputes arising out of the foreign sanctions against Russian persons.

In addition, the Code of Arbitrazh Procedure of the Russian Federation now explicitly provides for the possibility of a Russian state court to ban the proceedings in a foreign court or international commercial arbitration tribunal with a place of arbitration outside of Russia in relation to these disputes.

Refusal to recognise and enforce LCIA award containing error

In November 2020, the Arbitrazh Court of St. Petersburg and the Leningrad Region refused to grant the application of Caledor Consulting Limited for the recognition and enforcement of the award of the LCIA tribunal dated 21.01.2020 in case No. 183883 on grounds that the Tribunal made a mathematical error in the calculation of damages. The LCIA tribunal acknowledged this mistake, but did not correct it directly in the award. Because of that, this arbitral award, in the opinion of the Russian court, contradicted the fundamental legal principles of the Russian Federation and the constitutional and legal guarantees of judicial protection of the rights of citizens of the Russian Federation.

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Order of the Supreme Court of the Russian Federation dated 21 October 2020 N 305-ES20-15345

In this ruling, the Supreme Court refused to consider the appeal against the decisions of the lower courts that refused to consider the dispute related to the execution of the subcontract agreement due to the fact that the agreement contained an arbitration clause.

Article 39.2.3 of the agreement provided that "all disagreements arising out of this agreement or related to it and its execution, at the written request of either Party, are subject to settlement according to the Rules of Arbitration of the International Chamber of Commerce (in force on the date of receipt of the notice of arbitration) An arbitration tribunal shall consist of three members appointed in accordance with the said Rules. The place of arbitration is Stockholm (Sweden). The language of the arbitration is English."

Claimant argued that the fact that the dispute should be resolved in accordance with the ICC Rules does not mean that the parties have agreed on a specific institution. Therefore, the company had applied to the Russian court with a claim in this case.

This position of the claimant was not supported by the Russian courts of several instances, including the Supreme Court.

Refusal to recognise and enforce decision of the Sports Arbitration Court

On 2 December 2020, the Supreme Court of the Russian Federation refused an appeal against the decision of the lower court on refusal to recognize and enforce the decision of the Sports Arbitration Court.

The agreement, which was the basis for the dispute, contained the following dispute resolution clause: "All disputes under this Agreement shall be resolved through negotiations. If it is impossible to resolve disputed issues through negotiations, they are transferred to the Moscow Arbitrazh (Commercial) Court at the choice of the plaintiff. When...

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...submitting a case to CAS, the dispute will be resolved in English by the sole arbitrator. The parties initially determined that the law of the Russian Federation applies to the relationship of the parties under this agreement."

The Supreme Court held that there were no grounds to reconsider the decision, since the courts of previous instances concluded that the agreement concluded by the parties did not contain a clear provision on the court or arbitration tribunal that was competent to consider disputes, the arbitration clause itself was vague, with indefinite the wording, did not contain indications that would allow the clause to be interpreted in favor of the claimant. Consequently, the enforcement of the decision of the Court of Arbitration for Sport would be contrary to the public order of the Russian Federation, since the dispute between the parties was resolved by an incompetent arbitration tribunal.

By Young ADR – Belarus

Mexico and Central America Updates

By Sylvia Sámano Beristain (Young ITA Chair for Mexico and Central America 2019-21 & Secretary General at the Arbitration Center of Mexico) and country authors as indicated below

Costa Rica Update

For the first time, the Supreme Court of Costa Rica recognized a foreign award under the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Back in July 2020, Spanish company Acciona Agua secured a $6.7 million award in an arbitration proceeding against the Costa Rican water and sanitation public utility ("AyA", per its acronym in Spanish) over a cancelled construction project. The in-house legal team representing AyA faced criticism for the entity's defense, which the arbitral tribunal described as "reckless". The award includes $2 million in legal fees, which the tribunal calculated on an ad-valorem basis (10%) from AyA's $20 million counterclaim. The Costa...

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...Rican entity, reportedly facing financial difficulties, is conducting an internal audit to evaluate the performance of its legal team. The Congress of Costa Rica is further launching an investigation committee on several matters concerning AyA, including the management of the aforementioned arbitration case.

By Jorge Arturo González C. (Young ITA Communications Vice-Chair for 2021-23 & Aguilar Castillo Love, San José)

Guatemala Update

In Guatemala, both domestic arbitrations centers (CRECIG and CENAC), attorneys and arbitrators have adapted fairly well to the new online format, which was definitely not customary in pre-pandemic times, and average duration of processes have apparently not been affected. Although, for many practitioners, there is still an evident preference for in-person sessions when it comes to questioning witnesses or experts.

The pandemic has foreseeably triggered disputes in different areas, such as energy and construction. In late 2020, Guatemala was reportedly favored in the investment arbitration brought forward by IC Power Asia Development LTD. The investor sought up to US$ 117 million in compensation for alleged damages resulting from local procedures related to tax matters. The award and further details have not yet been released.

Recently, the Leasing Law was approved by the Guatemalan Congress. Although it was not technically necessary, the law explicitly states that disputes arising from the agreements regulated by the law can be submitted to arbitration.

By Ignacio Grazioso (Associate at QIL+4 Abogados and Board Member at CRECIG)

Honduras Update

Due to the COVID-19 sanitary emergency in Honduras, new amendments related to arbitration have been adopted. In this report, I will focus particularly on the Center for Conciliation...

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...and Arbitration, which is administered by the Chamber of Commerce and Industries of Tegucigalpa (CCA-CCIT).

Firstly, the CCA-CCIT amended its rules on 8 December 2020, stating that both conciliation and arbitration proceedings could be held virtually. Thus, enabling the interested parties to submit their disputes virtually and to hold virtual hearings.

The aforementioned amendments are highly attractive because they do not require the party's physical presence but they also reduce time and costs.

Finally, as for proceedings that were already taking place before the pandemic, the amendments allow for parties to mutually agree to resume their hearings virtually whilst restrictions dwindle.

By José Emilio Ruiz Pineda (Jr. Associate at CENTRAL LAW in Honduras & Vice-President of Honduran Young Arbitrators)

Mexico Update

The most recent decision from the Supreme Court of Justice regarding arbitration was issued on 14 October 2020.

By this decision, it was determined that in the procedure of enforcement of the award, the requirement of submitting the authenticated award was fulfilled by presenting either the original award or a certified copy.

Consequently, the "authentication" requirement content in Article 1461 of the Mexican Arbitration Law is unconstitutional, as it imposes excessive formalism for the enforcement of the award, contravening Article 17 of the Constitution.

By Sylvia Sámano Beristain (Young ITA Chair for Mexico and Central America 2019-21 & Secretary General at the Arbitration Center of Mexico)

Panama Update: Arbitrators in Panama Canal Case Survive Challenge – ICC Case No. 20910/ASM/JPA (C-20911/ASM)

A challenge against the tribunal chair...

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Pierre-Yves Gunter and his co-arbitrators Claus von Wobeser and Robert Gaitskell QC arose in an ICC case between Grupo Unidos por el Canal (GUPC), Sacyr, S.A., WEBUILD S.P.A. and Jan De Nul, N.V. ("Claimants"), against the Panama Canal Authority. The ICC Court dismissed the challenge at its session of 17 December 2020, and issued its reasons for the decision on 29 December 2020. The challenge arises in a case where the three arbitrators issued a US$265 million award in favor of the Panama Canal Authority, in a dispute involving cost overruns on the project.

The ICC Court applied the following two prong test: (i) whether the facts at issue should have been disclosed by the relevant arbitrator, and, if so, (ii) whether the facts that the arbitrator failed to disclose are of such nature that the challenge is well founded.

In its decision, the ICC Court made clear that:

A) In regards to GUPC's challenge against Gunter, which considered his ties with arbitrator Bernard Hanotiau who sits in a related ICC arbitration between the same parties, the ICC Court reasoned, among other things, that their relationship created no more than a "theoretical opportunity for them to discuss issues relevant to the Panama Canal arbitrations" and that the presumption of a violation of their confidentiality obligations "has no basis".

B) In regards to GUPC's challenge against Gaitskell, which considered his failure to make timely disclosure of the fact that he was sitting as president of a tribunal in another case with a counsel for the Panama Canal Authority, among other things, the Court found that the relationship, although it should have had been disclosed, did not justify his removal.

C) In regards to GUPC's challenge against von Wobeser, which considered his failure to make timely disclosure of the fact that he was sitting in an unrelated ICSID case with a counsel for the Panama Canal Authority among other things, the Court found that the...

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relationship, although it should have had been disclosed, did not warrant disqualification.

By Christopher Glasscock (Associate, LOVILL)

Asia Pacific Update: Emergency arbitration awards are directly enforceable under the Indian Arbitration Act in India-seated arbitrations

In a landmark and much-awaited judgment in Amazon.com Investment Holdings LLC v. Future Retail Limited & Ors., on 6 August 2021, the Supreme Court of India held that an emergency arbitration (EA) award constitutes an enforceable interim order under the Indian Arbitration and Conciliation Act, 1996 (Act).

Facts

This verdict was yet another decision in the much-publicised dispute between Amazon, and Future Coupons Pvt, Ltd. (FCPL) and Future Retail Ltd. (FRL) under a shareholders' agreement. Alleging breach of the agreement, Amazon commenced SIAC arbitration proceedings against FCPL, FRL and their promoters (collectively, Future Retail) last year. The agreement designated New Delhi, India as the seat of arbitration. Amazon obtained an EA award in its favour in October 2020 by which Future Retail was restrained from taking any further steps with respect to the disputed transaction (EA Award).

Future Retail, however, proceeded with the transaction, adopting the position that the EA Award is a nullity. Amazon sought to enforce this Award in India under the Act. Amazon received a favourable verdict from a single judge the High Court of Delhi in March 2021, by which the High Court also imposed costs of INR 2 million on Future Retail for deliberately violating the EA Award. Future Retail challenged the single judge's decision before a Division Bench (two judge bench) of the High Court of Delhi, which found in favour of Future Retail and stayed the operation of the order of the single judge. Amazon challenged this decision of the Division Bench before the Supreme...

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...of India.

Decision

In order to understand the Supreme Court's decision, it would be necessary to refer to Section 17 of the Act. Section 17(1) entitles a party to seek interim relief from an arbitral tribunal "during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced". It also states that the tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it. Section 17(2) makes any such order passed by a tribunal enforceable as if it is an order of a court.

With this in mind, the Supreme Court's decision can be distilled as follows:

A) EA is not expressly or impliedly prohibited by the Act. Therefore, if provided for by the applicable institutional rules that have been agreed between parties, then EA would be covered by the Act.

B) Party autonomy is the bedrock of arbitration. A necessary implication of the autonomy of parties under the Act to agree on institutional rules is the autonomy to make use of EA provisions in such institutional rules, notwithstanding the absence of the words "emergency arbitration" or "emergency arbitrator" or "emergency award" in the Act.

C) EA furthers the objectives of the Act, including decongesting the judicial system and giving parties urgent interim relief in cases warranting such relief.

D) Nothing in Section 17(1) interdicts the applicability of institutional rules that have been agreed between the parties.

E) Based on a conjoint reading of several provisions of the Act, as far as at least Section 17(1) is concerned, an 'arbitral tribunal' would include an emergency arbitrator appointed under the agreed institutional rules, notwithstanding that the definition of 'arbitral tribunal' in the Act does not expressly mention an emergency arbitrator.

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F) The words "arbitral proceedings" in Section 17(1) encompass EA proceedings. Under both, the Act and the SIAC Rules, arbitral proceedings are considered to have commenced from the date on which the request of arbitration is filed, which is prior to the constitution of an arbitral tribunal.

G) Therefore, an emergency arbitrator's order is analogous to an arbitral tribunal's order under Section 17(1) and is consequently, enforceable under Section 17(2).

Implications

This decision is significant and is likely to provide considerable impetus in enhancing the status and position of India as a credible seat of arbitration and in promoting arbitration in India. It also means that parties in India-seated arbitrations would no longer have to adopt the rather circuitous and prolonged route of enforcing an EA award by seeking interim relief under Section 9 of the Act in terms of the EA award. Instead, a party can now directly enforce an EA award under Section 17(2) of the Act. Moreover, the Supreme Court also held that orders enforcing EA awards under Section 17(2) will not be appealable.

Having said this, it is important to keep in mind that this decision is limited to India-seated arbitrations; it remains to be seen how EA awards in foreign-seated arbitrations can be enforced in India for which there is currently, no statutory guidance and only limited judicial guidance.

This decision is also likely to promote institutional arbitration in India and the uptake of EA by parties given that the rules of several domestic arbitral institutions in India provide for EA.

By Juhi Gupta (Young ITA Chair for India 2021-23 & Senior Associate, Shardul Amarchand Mangaldas & Co)

Middle East

The Middle East has established itself as a centre of confluence in the international dispute resolution world. Its geographical placement and ties to business across the world make it an...

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...attractive venue for dispute resolution. It has a number of its own arbitral institutions, and in January 2021, the ICC International Court of Arbitration opened a case management office in Abu Dhabi – with operations set to commence in April. Abu Dhabi's free-zone (the ADGM) already has a partnership with the ICC as the preferred institution, and this move serves to strengthen that tie along with promoting the UAE's capital as an international arbitration hub.

The annual ICC MENA Conference took place on 24 February 2021 virtually, with more than 1,000 participants from across the world. Some of the highlights included an avid discussion around the judicial approaches to arbitration in the region, and whether there was a more open approach (particularly with respect to enforcement). The majority of participants responded in the affirmative, noting that judicial use of the public policy argument to set aside or refuse enforcement of arbitration awards was becoming less restrictive than a decade ago. Arbitration continues to remain under close scrutiny of the national courts, but numerous countries in the region have adopted new modern arbitration laws (modelled on the UNCITRAL model). However, practitioners agreed that there is certainly scope for improvement with respect to the curial approach to handling aspects of arbitration in order to facilitate a smoother dispute resolution process for all.

The DIFC-LCIA Arbitration Centre issued updated Arbitration Rules which came into force on 1 January 2021, and replace the 2016 Rules. The updates mirror some of the changes made in 2020 to the LCIA's Arbitration Rules, and so, whilst there are no drastic overhauls, parties can expect a more expeditious process in the future. Some of the significant changes include: arbitrators to be given the tools to expedite proceedings, including an early determination procedure. This will enable tribunals to rule that any type of claim is either outside its jurisdiction,...

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...or is inadmissible or without merit. This will undoubtedly assist in ensuring that parties bringing weak and/or vexatious claims will have those dismissed or excluded prior to the parties incurring too much time and costs. In focusing on increasing procedural efficiency, some other updates include: limiting the length of pleadings and witness testimony; dispensing with pleadings and/or a hearing; employing technology to enhance the speed and efficiency of proceedings; and determining the state of the arbitration at which any issue shall be determined and in what order. In addition, the new Rules enable the tribunal to make any procedural order it deems fair, efficient and expeditious with respect to the conduct of a case. There are some significant other changes including enhanced electronic protocols to promote transparency and the signing of awards electronically, as well as broader powers of a tribunal's ability to conduct arbitrations. Confidentiality has always featured in the DIFC-LCIA arbitrations, but the 2021 Rules have underscored their importance by applying the same requirements to tribunals, tribunal secretaries and any tribunal-appointed expert. Parties are also required to seek the same confidentiality undertaking from all those they involve in an arbitration (be they service providers, witnesses of fact and experts).

Saudi Arabia has been making significant strides to establish itself as an arbitration friendly jurisdiction. 2021 will see the first major commercial judgments under the new Commercial Courts Law (and its implementing regulations). This is a significant move as the decisions from the courts will drive the direction of how the judiciary interpret and apply the significant amendments, including: the introduction of remote litigation, notification procedures, statute of limitations, new expedited procedures (which will adjudicate urgent requests within three business days), and the recognition of foreign evidentiary procedures.

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With the impact of COVID-19 and the systematic lockdown across the Middle East, the region has seen a real difference in how international arbitration has taken place. There were challenges with the holding of hearings, meeting of tribunals and signing of in-person awards, so changes implemented such as those in the DIFC-LCIA 2021 Rules will be welcomed. A similar approach has also been adopted by the Dubai International Arbitration Centre (DIAC) in the course of this pandemic. Generally speaking, the Middle East has discovered it is well positioned to host virtual arbitrations and case management conferences. However, care has been needed in order to ensure that the national courts are on board with the novel practices of oath administration, and the conduct of virtual hearings and witness testimony. Support has been issued from territories such as the UAE, which adopted a new arbitration law in 2018 which permits hearings to be held through modern means of communication (without the physical need for parties to be at the hearing). The fallout of the pandemic has come with a silver lining that has demonstrated the robust efficiency of the Middle East's approach to technology and embrace of change, to make it a very attractive place to conduct international arbitration disputes generally.

By Dilpreet K. Dhanoa (Young ITA Chair for the Middle East 2019-21 & Barrister, Field Court Tax Chambers)

Job Opportunities

in collaboration with Careers in Arbitration

Organization	Position	Location	Link	Deadline
SIAC	Associate Counsel	Singapore	https://www.siac.org.sg/open-position/job-opportunities/464-associate-counsel	No deadline identified
SIAC	Knowledge Management Lawyer	Singapore	https://www.siac.org.sg/open-position/job-opportunities/682-knowledge-management-lawyer	No deadline identified
SIAC	Deputy Head (China)	Shanghai	https://www.siac.org.sg/open-position/job-opportunities/700-deputy-head-china	No deadline identified
SIAC	Business Development Manager	Singapore	https://www.siac.org.sg/open-position/job-opportunities/717-business-development-manager-legal	No deadline identified
SIAC	Legal and Compliance Officer	Singapore	https://www.siac.org.sg/open-position/job-opportunities/720-legal-and-compliance-manager	No deadline identified
ICC	Deputy Director – Arbitration and ADR – South Asia	Singapore	https://iccwbo.org/careers/job-opportunities/deputy-director-arbitration-and-adr-south-asia/	November 31, 2021
ICC/SICANA	Deputy Director – North America	New York City	https://iccwbo.org/careers/job-opportunities/vacancy-with-sicana-inc/	ASAP
Global Arbitration Review	News Reporter	London	https://jobs.theguardian.com/job/7578552/news-reporter-global-arbitration-review-/	December 9, 2021
Wilmer Hale	Internship	London	https://www.wilmerhale.com/en/careers/law-students/	Rolling

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Organization	Position	Location	Link	Deadline
Debevoise & Plimpton	Internship	London	https://www.debevoise.com/careers/london	Application cycle will be open from February 1 to March 31, 2022
Dechamps	Internship	London / Buenos Aires	https://dechampslaw.com/careers/	Rolling
Kennedys	Associate, International Arbitration & Litigation	London	https://fsr.cvmailuk.com/kennedys/main.cfm?page=jobSpecific&jobId=57011&rcd=2910084&queryString=srxksl%3D1	No deadline identified
Clyde & Co	International Arbitration Associate (Spanish speaking)	London	https://fsr.cvmailuk.com/clydecocareers/main.cfm?page=jobSpecific&jobId=57052&rcd=2910359&queryString=groupType%5F21%3D%26groupType%5F33%3D3496%26groupType%5F8%3D%26groupType%5F4%3D%26groupType%5F6%3D3509%26x%2Dtoken%3DD5744E955392DC804F526DC2D7441C753F850EA3	No deadline identified
DLA Piper	Commercial Litigation Associate	Leeds	https://careers.dlapiper.com/jobs/210000sf-commercial-litigation-mid-associate/	No deadline identified

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Organization	Position	Location	Link	Deadline
DLA Piper	Rechtsanwalt, Litigation & Arbitration	Munich	https://careers.dlapiper.com/jobs/210000s5-rechtsanwalt-m-w-d-litigation-arbitration/	No deadline identified
DLA Piper	Commercial Litigation Associate (NQ)	Birmingham	https://careers.dlapiper.com/jobs/210000qp-commercial-litigation-nq-associate/	No deadline identified
LALIVE	Associate, International Arbitration	Geneva, Zurich or London	https://www.lalive.law/careers/	No deadline identified
LALIVE	Associate, International Arbitration (Swiss Qualified)	Geneva or Zurich	https://www.lalive.law/careers/	No deadline identified
LALIVE	International Trainee (Intern)	Genenva	https://www.lalive.law/careers/	Rolling - next start date January 2023
Allen & Overy	Assistant Senior Paralegal, Arbitration	London	https://krb-sjobs.brassring.com/TGnewUI/Search/home/HomeWithPreLoad?partner-id=30147&siteid=5040&PageType=JobDetails&jobid=47836	No deadline identified
Allen & Overy	Senior Associate, Litigation	Sydney	https://krb-sjobs.brassring.com/TGnewUI/Search/home/HomeWithPreLoad?partner-id=30147&siteid=5040&PageType=JobDetails&jobid=46952	No deadline identified

Job Opportunities

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Organization	Position	Location	Link	Deadline
Clifford Chance	Junior Litigation Lawyer	Luxembourg	https://opportunities.cliffordchance.com/jobs/lux-junior-litigation-lawyer-4355	No deadline identified
AAA-ICDR	Case Administrator, NYSI	New York	https://careers-adr.icims.com/jobs/1825/case-administrator%2c-nysi/job	No deadline identified
AAA-ICDR	Case Assistant	Johnston	https://careers-adr.icims.com/jobs/1832/case-assistant-%28legal-services-administrative-support%29/job	No deadline identified
Herbert Smith Freehills	International Arbitration Paralegal	New York	https://krb-sjobs.brassring.com/TGnewUI/Search/Home/Home?partner-id=30009&siteid=5116#jobDetails=264359_5116	No deadline identified
Herbert Smith Freehills	Paralegal, Disputes	Kuala Lumpur	https://krb-sjobs.brassring.com/TGnewUI/Search/Home/Home?partner-id=30009&siteid=5116#jobDetails=266240_5116	No deadline identified

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Organization	Position	Location	Link	Deadline
Herbert Smith Freehills	Paralegal, Disputes	Hong Kong	https://krb-sjobs.brassring.com/TGnewUI/Search/Home/Home?partnerid=30009&siteid=5116#jobDetails=264714_5116	No deadline identified
Herbert Smith Freehills	Associate, Disputes	Kuala Lumpur	https://krb-sjobs.brassring.com/TGnewUI/Search/Home/Home?partnerid=30009&siteid=5116#jobDetails=263554_5116	No deadline identified
Herbert Smith Freehills	Solicitor, Dispute Resolution	Perth	https://krb-sjobs.brassring.com/TGnewUI/Search/Home/Home?partnerid=30009&siteid=5116#jobDetails=260191_5116	No deadline identified

Newsletter Guidelines

The Young ITA Newsletter is the quarterly publication of Young ITA, and has a global readership of students, young practitioners, academics, and professionals from different sectors.

Young ITA welcomes written content covering recent developments, new laws or regulations, recent court cases or arbitral awards in your region, webinar/conference reports or any other material that may be of interest to Young ITA readership.

All content submitted must:

- not have been previously published;
- include the author(s)'s name, email address, firm/affiliation and city/country; and
- be authored by members of Young ITA.

Written content submitted must:

- be between 300-500 words;
- be submitted in MS word format;
- acknowledge all sources, while keeping endnotes to a minimum; and
- include a short abstract of one/two sentences and up to five keywords.

Contributors are encouraged to submit their contributions at least one month prior to the publication month of the next issue (e.g. submissions for the January issue should be delivered by the end of November). Factors considered for publication of the respective contribution include, among others, relevance, timeliness, quality, and consistency with these guidelines.

Content should be submitted to Young ITA Thought Leadership Chair, Enrique Jaramillo and Young ITA Thought Leadership Vice-Chair, Derya Durlu Gürzumar.

Young ITA also welcomes volunteers to act as reporters for future Young ITA events. Please contact our Communications Chair, Ciara Ros and our Communications Vice-Chair, Jorge Arturo Gonzalez for more information about, or to register your interest in, acting as a reporter for a future Young ITA event (whether virtual or in-person).

Contact Information

Please contact any of the following Young ITA Board Members if you wish to provide any comments, contributions or material for the Young ITA Newsletter.

- **Thought Leadership Chair** – Enrique Jaramillo (enrique.jaramillo@lockelord.com)
- **Thought Leadership Vice-Chair** – Derya Durlu Gürzumar (deryadurlu@gmail.com)
- **Communications Chair** – Ciara Ros (cros@velaw.com)
- **Communications Vice-Chair** – Jorge Arturo Gonzalez (jgc@aguilarcastillolove.com)