Young ITA Newsletter

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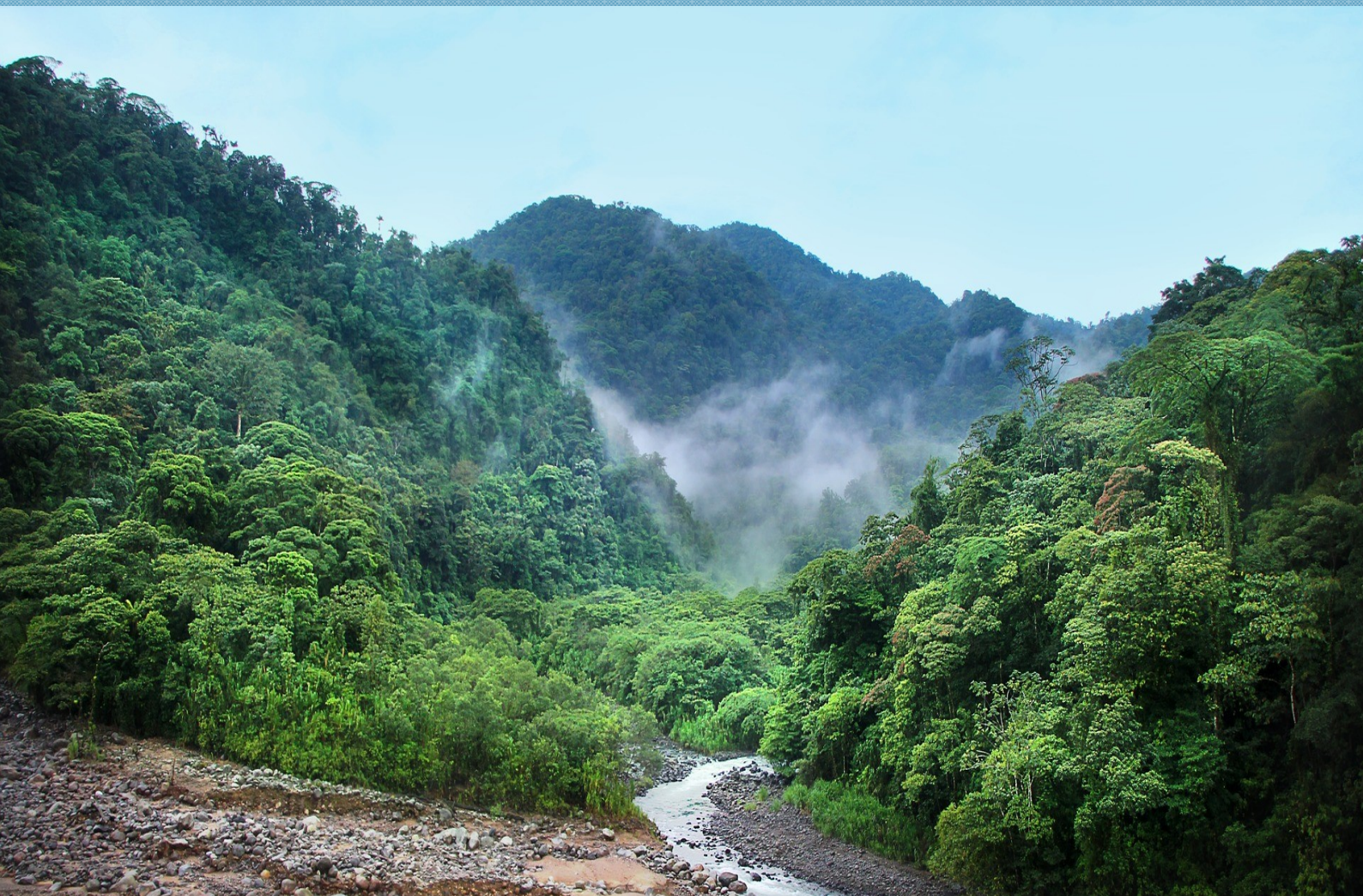
Featured in this Issue



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Contributing Editors

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Get Involved

- **Mentoring** – Updates on the current mentoring programme will be made on the Young ITA LinkedIn Page.
- **Events** – Please monitor the Young ITA LinkedIn Page for details of future Young ITA events and join Young ITA for email announcements of future events here.
- **Writing Competition** – The YoungITA Writing Competition was announced on 12 November 2021. All submissions should be made by **January 17 2022**. This is an excellent opportunity for young practitioners to be published, as well as the chance to win a cash prize and present their work at a forum amongst arbitration experts. For further information please see here.
- **Reporting for Young ITA**—Please see page 28 for information on how to get involved with the newsletter, or reporting on Young ITA events.

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60 Second Interview with Karima Sauma – Young ITA Editor

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

I have had the privilege of being a part of Young ITA for some time now in different capacities, and it has been a fantastic experience. I hope to be able to widen our reach so that more young practitioners get to know about us, get involved, and have the chance to benefit from the wonderful opportunities that Young ITA provides.

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

I am truly an arbitration nerd, so I love that it is an area of the law where you often find people practicing with similar passion and wonder. Additionally, you get to work with people from all over the world who enrich your life and practice.

I also love the fact that it involves helping people solve problems in a constructive way, so it interweaves other elements such as effective communication and negotiation.

And last but not least, I thoroughly enjoy the public policy aspect that is especially present in investment arbitration.

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

Get involved in everything that will help you learn and enrich your practice – whether it be writing an article, meeting new people, signing up for a mentorship program or volunteering for an organization. These all might seem like small steps now, but every small step makes a difference in the long term.

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

Oh so many things! I am an eternally curious creature, so I am constantly trying to learn new things. Right now, I would love to be able to play the violin and learn a couple of new languages.

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

Travelling is one of the things that I miss the most in this new pandemic-ridden world. I was planning on going to New Zealand when the pandemic hit, so hopefully I will get to go sometime in the future.

What are your three go-to restaurants in Costa Rica?

I am always on the lookout for new and interesting places to eat. I have always liked Silvestre in San José because it uses traditional Costa Rican ingredients in innovative and creative ways. And if you are going to the beach, I like Stashus in the Atlantic side and Pangas in the Pacific.

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United Kingdom Update:

Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48

On 27 October 2021, the UK Supreme Court handed down its judgment confirming that absent an express choice, the overall law governing the contract would also govern the arbitration agreement. While in line with the decision in Enka v. Chubb ([2020] UKSC 38), this latest judgment puts English law on a collision course with French law.

Kabab-Ji SAL ("KJS") entered into a franchise development agreement ("FDA") governed by English law with Al Homaizi Foodstuff Company ("AHFC") in 2001 for a period of 10 years. The dispute resolution clause in the FDA provided for ICC arbitration "conducted" in Paris without an applicable law. AHFC became a subsidiary of Kout Food Group ("KFG") in 2005. KJS went on to initiate arbitration against KFG, instead of AHFC.

The arbitral award of 11 September 2017 held that French law applied, as the law of the seat, to determine whether KFG was bound by the arbitration agreements, and that English law determined whether KFG had acquired substantive rights and obligations under the FDA and the related franchise outlet agreements. As a matter of English law, a "novation by addition" had occurred whereby KFG had become an additional party to the Franchise Agreements by virtue of its conduct. The award then found that KFG had breached the FDA and related franchise outlet agreements.

KJS sought to enforce the award against KFG in England. Following proceedings in the High Court and Court of Appeal, KJS appealed to the UK Supreme Court for it to decide: (1) which law governed the validity of the arbitration agreement; (2) whether a court might find that KFG had become a party to the arbitration agreement under the FDA if English law governed it; and (3) whether the Court of Appeal was justified in giving summary judgement refusing ...

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recognition and enforcement.

(1) The Supreme Court held that English law governed the validity of the arbitration agreement, re-affirming its earlier decision in Enka v Chubb. Absent express law governing the arbitration agreement, the parties' general contractual choice of law clause provided sufficient indication of the law the parties chose to govern the arbitration agreement. Despite Enka v Chubb applying common law rules for resolving conflicts of laws, the Supreme Court held it would be "illogical" to conclude that the law governing the validity of the arbitration agreement differed depending on whether this question was raised before or after rendering an award. Thus, the principles for determining the applicable law to govern the arbitration agreement "should be the same".

(2) The Supreme Court held that the "No Oral Modification" clauses in the FDA, preventing the agreement from being assigned, amended or terminated, otherwise than in writing, meant that the FDA had not been novated. The "No Oral Modification" clauses in the FDA were an "insuperable obstacle" to novation by addition. Neither the UNIDROIT Principles referenced in the FDA, nor the equitable doctrine of estoppel convinced the Supreme Court otherwise.

(3) The Supreme Court held that there was no obligation in the New York Convention or English Arbitration Act for a full evidential hearing. Moreover, the Court of Appeal had justifiably overturned the first instance decision to adjourn proceedings pending the Paris Courts' decision. The New York Convention (Article VI) gives the court discretion on whether to adjourn proceedings pending the decision of a court of the seat of the arbitration. There was no benefit to adjourning English proceedings applying English law for a French court's decision and given the French courts' known approach towards arbitration agreements, contradictory judgments were unavoidable.

In clarifying the English position on ...

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...the law applicable to arbitration agreements absent an express choice, this decision highlights the risks associated with not including an express choice of law, given the potentially conflicting decisions in different jurisdictions. On the other hand, the selection of a specific law applicable to the arbitration agreement might conflict with the arbitration law at the place of arbitration.

By Eden Jardine (Associate, LALIVE LLP, London) and Hélène Taberlet (Associate, LALIVE LLP, Geneva)

Manchester City v Premier League [2021] EWCA Civ 1110] – Open Justice Scores Over Confidentiality

In Manchester City Football Club Ltd v The Football Association Premier League Ltd & Others ("Manchester City v Premier League"), the Court of Appeal of England & Wales (the "Court") decided that it has discretion to order the publication of a judgment related to arbitration claims for public interest reasons, overriding the parties' agreement it should remain confidential.

In December 2018, the Premier League commenced a disciplinary investigation into Manchester City Football Club, as part of which the Premier League issued a disciplinary complaint against Manchester City seeking disclosure of certain documents and information. Manchester City objected to the call for disclosure, and the Premier League commenced arbitration proceedings against Manchester City under the Premier League Rules.

Manchester City challenged the jurisdiction of the tribunal submitting that it lacked substantive jurisdiction and did not have an appearance of impartiality. The tribunal rejected the challenge. Following this, Manchester City filed an application to challenge the jurisdiction of the arbitrators and for their removal in the English Commercial Court. This was heard by the judge in private. The judge dismissed Manchester City's application and indicated, when sending the draft of the judgment to the parties, that she was inclined to publish ...

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...the judgment. Both parties opposed the publication, yet the judge rejected those objections and decided that the judgment should be published.

On appeal (as to the decision to publish the judgment) to the Court of Appeal, the Court weighed the factors favouring publicity against the desirability of preserving the confidentiality of the arbitration (applying the earlier case of City of Moscow v Bankers Trust [2004] EWCA Civ 314). On balance, the Court found that the publication of the judgment would not lead to the disclosure of significant confidential information, given that certain information about the dispute was already in the public domain, and the public interest in open justice regarding judicial guidance as to the interpretation of both the Premier League Rules, and challenges to arbitration awards should be favoured.

Although this judgment was in the context of an application to challenge an arbitration award, the principles would apply equally to any application to the Court under the English Arbitration Act, including enforcement. However, the Court highlighted that parties looking to preserve confidentiality should not be concerned, because English Commercial Court judges can be trusted to ensure that genuinely confidential information is not published; the publications of such judgments would confirm the English courts' pro-arbitration stance.

By Pranay Lekhi (Legal Advisor, Allen & Overy LLP, London)

Continental Europe Update:

Intra-EU Investor-State Arbitration—the End of the Road?

The Court of Justice of the European Union (the "ECJ") continues to reshape the landscape for disputes between EU Member States and EU investors under international investment treaties (so-called intra-EU disputes).

Readers will recall the ECJ's decision in Case C-284/16 Slovak Republic v Achmea [2018] ECR I-158 (Achmea), which held that the dispute resolution provision in the Netherlands-Slovak...

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...Republic bilateral investment treaty (BIT) was invalid because EU law prohibits Member States from resorting to a dispute-resolution mechanism outside the EU legal system for disputes that involve EU law.

In two recent judgments, the ECJ has expanded on this line of reasoning. Specifically, on 2 September 2021, the ECJ handed down its decision in Case C-741/19 Moldova v Komstroy [2021] 4 W.L.R. 132 (Komstroy), clarifying (albeit obiter) that intra-EU disputes also cannot be arbitrated under the Energy Charter Treaty (ECT). On 26 October 2021, in Case C-109/20 Republic of Poland v PL Holdings [2021] ECR I-875, the ECJ found that an ad hoc arbitration agreement concluded between an EU investor and a Member State on the same terms as the arbitration clause in a BIT is contrary to EU law.

What are the implications for intra-EU disputes going forwards? The majority of intra-EU BITs were terminated on 29 August 2020 by agreement between the relevant States. EU investors seeking to bring claims under those that remain in force, or against Member States under the ECT, are advised (where possible) to opt for ICSID arbitration in order to limit the risk of a review of any resulting award by a Member State court in accordance with EU law. Where no dispute is in existence or reasonably foreseeable, EU investors should consider (re)structuring their investments from outside the EU, so that any claim can be brought by a non-EU claimant entity.

In case of a favourable award in an intra-EU dispute, if the State does not comply, investors may need to seek enforcement outside the EU. It is unclear how Member State courts will approach the enforcement of awards rendered in intra-EU ICSID disputes. ICSID awards are to be enforced as if they were final judgments of a national court in ICSID Convention Contracting States (which includes most Member States). Nevertheless, complications are foreseeable.

Indeed, following Komstroy, issues have arisen in two intra-EU ICSID...

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...cases even before the enforcement phase. In RWE v Netherlands and Uniper v Netherlands (both ECT cases), the Netherlands has commenced anti-arbitration proceedings before the German courts seeking determinations that the claims against it are inadmissible because, applying Achmea and Komstroy, there are no arbitration agreements between it and the claimants.

By Naomi Briercliffe (Counsel, Allen & Overy LLP, London) and Pierre-Baptiste Chipault (Associate, Allen & Overy LLP, Paris)

Middle East Update:

Apparent Authority to Enter into Arbitration Agreements in the UAE

The onshore United Arab Emirates (UAE) Courts have long taken the view that an arbitration agreement is an exceptional arrangement whereby the contracting parties waive their right to litigate before the courts. As a result, strict requirements regarding the enforceability of an arbitration agreement and who is authorised to enter into one on behalf of a company exist, and, until now, the doctrine of apparent authority (that is, authority established by conduct) has not applied.

In onshore UAE, an individual may generally only bind a company to arbitration (by signing an arbitration agreement on its behalf) if they have legal capacity and special authority to do so. There is a long line of onshore court decisions, including the recent decision of the Abu Dhabi Court of Cassation in Case No. 922 of 2020, which confirm that special authority must be given in writing, and be clear from any ambiguity or doubt. If the signatory is not properly authorised, the arbitration agreement may be invalid and any award made pursuant to it, annulled.

The approach in the Dubai International Financial Centre (DIFC) (a financial free zone exempt from the application of civil and commercial federal law) is different, and the doctrine of apparent authority applies pursuant to articles 130 and 131 of DIFC Contract Law...

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...No. 6 of 2004. In a 2016 case regarding an application to annul an arbitral award, the DIFC Courts established that where a signatory did not have specific authority to enter into an arbitration agreement on behalf of a company, but the company's conduct caused the parties to believe otherwise, the signatory was deemed to have had apparent authority to enter into the agreement.

In light of the strict requirement for special authority to bind a company to arbitration under Federal UAE law, application of the doctrine of apparent authority has typically been rejected by the onshore UAE Courts. For example, in Case No. 182 of 2018, the Dubai Court of Cassation stated that "apparent authority is inapplicable in the context of an agreement to arbitrate…". However, the Abu Dhabi Court of Cassation recently adopted a markedly different approach. In Case No. 961 of 2021 (regarding an application to annul an arbitral award), the court held that under UAE Federal Arbitration Law authority to enter into an arbitration agreement may be explicit or implicit. Importantly, it was found that in the absence of explicit authority, the parties' conduct could be considered as evidence that the signatory had apparent authority to enter into arbitration agreements on behalf of the claimant company.

Whether this case signifies the beginning of a change in approach to the strict position typically adopted by the onshore UAE Courts remains to be seen.

By Catherine Jordan (Senior Associate, K&L Gates, International Arbitration Practice Group, Dubai)

North America Updates:

United States: Counsel's Conflict of Interest in Pending Arbitrations

An interesting new development in the region is the 12 October 2021 decision of the United States District Court for the Southern District of Florida in Tecnicas Reunidas de Talara S.A.C. v SSK Ingeneria y Construccion S.A.C. ...

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...(2021 WL 5098219) ("TRT v SSK"), addressing a matter of conflict of interest of arbitration counsel in pending arbitrations. The decision confirmed an arbitral award that was rendered after a team of lawyers joined the opposing counsel's firm days before the final briefs were due.

The underlying ICC arbitration arose from a contractual dispute between the parties over a multi-million-dollar construction project at an oil refinery in Peru. The juridical seat of the ICC arbitration was in Miami. SSK was represented by a legal team from the Madrid office of the firm Cuatrecasas Gonçalves Pereira, S.L.P. ("Cuatrecasas"), while TRT was represented by Uría Menéndez ("Uría") in Madrid, and Philippi Prietocarrizosa Ferrero DU & Uría ("PPU") in Lima, Peru. TRT's legal team also included a partner from the Chilean office of PPU, Mr. Cristián Conejero Roos, and his associate, Mr. Gianfranco Lotito.

At the final hearing, which occurred on 2-6 March 2020, Mr. Conejero delivered part of TRT's opening statement and conducted the cross-examination of one fact witness and part of the cross-examination of a quantum expert. On 18 March 2021, the tribunal issued an award of 40 million dollars to Respondent.

On 23 March 2020, Cuatrecasas voted to open a Chile office and appoint Mr. Conejero as its inaugural managing partner, an offer which Mr. Conejeros accepted. TRT is said to have found out about this move at the latest on 10 April 2020. On 28 April 2021, TRT objected to prior ICC relations of the arbitrators, but made no objection to Mr. Conejero's and his associate's move to Cuatrecasas.

On 16 June 2021, TRT filed a petition with the United States District Court for the Southern District of Florida arguing that Messrs. Conejero's and Lotito's move to Cuatrecasas created a "direct, material, adverse, and non-waivable conflict of interest." TRT further argued the arbitral award resulted from a "clear violation of well-established...

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...rules of professional conduct and, therefore, must be vacated as being in contravention of U.S. and Florida public policy."

In its ruling, the Court determined that the Inter-American Convention on International Commercial Arbitration ("Panama Convention") governed the parties' dispute. The Court further accepted TRT's argument that the public policy defense under the Panama Convention applied where a party challenges an arbitral award based on a public policy consideration that affects the fairness of the arbitral proceeding.

After acknowledging that "there is no doubt that Mr. Conejero's move to Cuatrecasas without obtaining the written informed consent of TRT contravened professionalism standards in the United States," the Court nonetheless rejected TRT's challenge to the arbitral award because it had not been prejudiced and waited too long after the conflict had been known to raise the conflict issue.

The Court's decision shows that lawyers should be cautious about the potential impacts that their lateral firm moves might have on pending arbitration proceedings.

By Lidia Rezende (Young ITA Chair for North America & Associate, Chaffetz Lindsey LLP, New York) and Michael A. Fernandez (Young ITA Vice-Chair for North America & Counsel, Rivero Mestre LLP, New York)

Central America Updates:

Costa Rica: Two Notable and Recent Decisions

The most notable arbitration developments in Costa Rica relate to the following two decisions:

First, in an award dated 3 June 2021, issued under the Infinito Gold Ltd. v Costa Rica (ICSID Case No. ARB/14/5), an ICSID tribunal upheld some claims brought by Infinito against Costa Rica in relation to a concession for a gold mining project in Costa Rica. The majority of the tribunal concluded that the government's legislative mining ban, which prohibited the grant of new exploitation concessions in perpetuity ...

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...and ordered the cancellation of all pending proceedings, combined with a subsequent resolution of a government body which cancelled all of Infinito's pre-existing mining rights, was, as applied to claimant, unfair and inequitable. This was so because the application of the ban to claimant was disproportionate to the public policy pursued insofar it deprived it of the opportunity to apply for a new concession. Notwithstanding the above, the tribunal declined to award any damages as it considered that claimant did not provide elements for its quantification and, in any way, the monetary consequences of the alleged loss of chance appeared too speculative to give rise to an award of damages.

Second, in a decision dated 28 February 2021, the First Chamber of the Supreme Court of Costa Rica recognized a US$ 23 million ICC arbitration award rendered by a tribunal seated in Panamá in relation to a construction dispute. In issuing the judgement recognizing the award, the Court limited its scope of review to the restrictive grounds upon which a foreign award can be denied recognition. It is worth noting that while the Court indicated that the award complied with the "International Arbitration Act and the conventions ratified by the country on the recognition and enforcement of foreign judgments and awards", the analysis it carried out was based exclusively on the Code of Civil Procedure of Costa Rica.

By Diego Alexandre-García Fernández (Deputy Counsel, ICC International Court of Arbitration, Paris/France)

Guatemala: New ICSID Case Over Hydropower Projects

The International Centre for Settlement of Investment Disputes ("ICSID") registered a new treaty arbitration claim on 15 November 2021 by Energía y Renovación Holding, S.A., a hydroelectric company incorporated in Panama, against Guatemala. Claimant is relying on the Central America – Panama Free Trade Agreement entered into force in November 2009 ("FTA Central ...

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...America – Panama").

The request for arbitration has not been made public, and details surrounding the dispute are scarce, but the dispute is to be linked with the hydropower projects that claimant is currently developing in the department of Huehuetenango in northwest Guatemala (projects San Mateo and, San Andrés). It has been reported that the Inter-American Development Bank has financed a portion of the projects.

The location of the projects has been historically marked by social conflict. Local communities have generally opposed to the development of megaprojects in the area. In addition, armed groups have been reported in the area.

Local sources reached out to Guatemala's Minister of Energy and Mines, Alberto Pimentel, enquiring about the dispute. Mr. Pimentel commented that the Panamanian hydroelectric company was not able to move forward with certain hydroelectric projects due to social conflict, and now they are arguing that those problems arise due to breaches by Guatemala of the FTA Central America – Panama. Mr. Pimentel revealed that claimant is arguing that Guatemala granted differential treatment to their investment project in comparison to other projects. According to the official source, "that is not true" and the social conflict surrounding the project at issue, as in many other projects, is real. Mr. Pimentel added he did not believe that the problems faced by claimant arise from Guatemala's wrongdoing or omission. Claimant's arguments remain undisclosed.

By Ana Rocio Monzón Woc (Associate, Eversheds Sutherland LLP, New York)

Mexico: Mexico Wins the Latest ICSID Case in Eutelsat, S.A. v United Mexican States

Mexico prevailed in an ICSID arbitration against a French company that claimed compensation under a RPPI Agreement being this condemn to pay reasonable arbitration costs.

On 12 November 1998 in Mexico City, Mexico and France signed an ...

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… agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investment, which entered into force by the end of 2000.

Under the agreement, Eutelsat, S.A., which is one of the world's leading satellite operators headquartered in Paris, initiated an arbitration, claiming violations to the principles of fair and equitable treatment; most favored nation treatment, and the restrictions on expropriation. The case was registered by ICSID on 16 August 2017 (ICSID Case No. ARB(AF)/17/2); the Tribunal was constituted on 8 June 2018, and finally, the award was recently rendered on 15 September 2021.

Brief context

In mid-2013, Mexico enacted a series of constitutional amendments, among others, in the field of economic competence and telecommunications. These reforms were aimed at opening the national market, establishing competence conditions for telecommunications and broadcasting services, and increasing foreign investment in the sector.

Under this context, Eutelsat, S.A. acquired the shares representing the capital stock of the Mexican company "Satmex", and with that, Satmex's concessions, in January 2014. Satmex was a company established in Mexico in the 1990s that operated space communication satellites, providing services to the Americas.

However, after the investment was made, Eutelsat faced what it considered heavy regulatory burdens that eventually led it to initiate an ICSID arbitration against Mexico. Eutelsat claimed around USD $120 million in damages.

Main arguments

In the arbitration, Eutelsat argued that the Mexican Communications and Transportation Ministry, with authority over the programs for satellites' positions and capacity allocation, had committed arbitrary acts.

The main controversy referred to a regulatory requirement to reserve a …

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...number of megahertz of capacity to be used by the Mexican government. Eutelsat claimed that the restriction on other competitors' capacity was lower than Eutelsat's, violating the principles of fair and equitable treatment, most favored nation treatment, and the restrictions on expropriation. In fact, the reserve for the Mexican government's use amounted to approximately 7% of the company's total capacity, which has a very high market value.

Eutelsat argued that Mexico affected its investment expectations, since it was, allegedly, treated unfairly, and received a discriminatory treatment compared with the other competitors.

Resolution

The Arbitral Tribunal, chaired by Alfredo Bullard, dismissed all of the claims and ordered Eutelsat to pay proportional costs and expenses of the arbitration.

By Juan Pablo Sandoval (Associate, COMAD, S.C., Mexico City)

South America Update:

Argentina:

Awareness of arbitration in Argentina has continued to develop in recent years and, as a result, the incorporation of arbitration clauses in supply, construction, energy, and merger and acquisition contracts, among others, is 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 commercial arbitrations through law No. 27,449. 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. While some courts have had a restrictive ...

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...a request for enforcement of an arbitral award, the Argentine Supreme Court of Justice recently overturned a lower court's ruling that rejected the enforcement of an award on grounds of public policy (see Case No. 1460/2016, Milantic Trans S.A. v Ministerio de Producción – Astillero Río Santiago– y otro). In the August 2021 decision, the Argentine Supreme Court established limits to the ex officio intervention of Argentine courts in enforcement proceedings. Further, in October 2021 the International Council for Commercial Arbitration hosted a conference in Argentina on the enforcement of arbitral awards, with the participation of prominent members of the judiciary as panelists.

As further evidence of the growth of arbitration in Argentina, since opening its first office in Latin America in October 2019, the Buenos Aires office of the Permanent Court of Arbitration has increased the awareness of arbitration in the country and is providing appointing authority and registry services to an increasing number of arbitrations related to Argentina and Latin America.

By Manuela Díaz (Argentina Young Arbitration Practitioners, Buenos Aires) and Laura D. Jaroslavsky Consoli (Argentina Very Young Arbitration Practitioners, Buenos Aires)

Bolivia:

In a divided decision of March 2020, the Departmental Court of Justice of La Paz assumed jurisdiction over an *Amparo* claim in an emergency arbitration where the seat was Santiago de Chile. The Court established it had jurisdiction since Bolivian Law was applicable to the merits.

Additionally, the Court reasoned that the subsidiarity condition was fulfilled even when the resource provided in Article 5 (8) of Appendix V of the ICC Rules (2017) was not submitted by Claimant. The argument raised by the Court was that Bolivian law does not foresee any resource against interim measures.

By Nicolás Wayar (Sociedad Boliviana ...

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...de Arbitraje – 40, La Paz) and Najwa Nemtala (Sociedad Boliviana de Arbitraje – 40, La Paz)

Colombia:

Investment arbitration in mining matters: Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia (ICSID Case No. ARB/16/6)

The Glencore Case is the first award about investment arbitration in Colombia. This case stands out because it clarifies the following: (i) the application for annulment is not an opportunity to re-examine the facts or considerations of the tribunal, and (ii) the tribunal has discretion in determining whether evidence obtained through the use of force can be or not admitted in the process.

In the award issued on 27 August 2019, a tribunal decided that Colombia violated the prohibition of arbitrary and discriminatory measures, and the standard of fair and equitable treatment. For the tribunal, the Contraloría General de la República used an unreasonable method to calculate the detriment to the State resulting from amending the concession contract. Therefore, the award ordered Colombia to return to the investor US$ 19.1 million imposed by the Contraloría to the investor as a sanction. However, the tribunal denied several of the investor's claims, which were estimated at US$ 500 million.

On 23 December 2019, Colombia requested the annulment of the award, arguing that the tribunal excluded the documents proving corruption in the signing of the amendment to the contract, which proved the illegality of the investment that would have resulted in the tribunal's lack of jurisdiction under the Colombia-Switzerland BIT. On 22 September 2021, the ad hoc Committee issued its decision denying Colombia's request.

By Luisa Jiménez Mahecha (Red Juvenil de Arbitraje de la Cámara de Comercio de Medellín, Medellín) and José David López Montoya (Red Juvenil de Arbitraje de la Cámara de Comercio de ...

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...Medellín, Medellín)

Ecuador:

Presidential elections took place in Ecuador in early 2021. The newly elected government has approved two major changes concerning arbitration.

First, Ecuador executed –and returned to– the ICSID Convention. Then, following the domestic procedure to execute and ratify international treaties, the Constitutional Court determined that the Convention did not require the approval of the legislative power prior to its ratification (opinion 5-21-TI/21). As a result, the ICSID Convention entered into force on 3 September 2021. However, the same Court is still pending to rule definitively on whether the ICSID Convention is compatible with article 422 of the Constitution, which was the ground to denounce this instrument back in 2008 as well as the bilateral investment treaties in force at the time.

The second relevant event is the issuance of Decree No. 165 on 31 August 2021. This instrument comprises the Regulations to the Arbitration and Mediation Law for the first time since the law entered into force in 1997. Amongst the main topics developed by the Regulations are: confirming arbitration and mediation in public procurement, regulating the prior approval by the Attorney General as requirement to execute arbitral agreements with state entities for domestic and international arbitration, flexibility of the arbitral process and the power of the arbitral tribunal to conduct an efficient process, independence of arbitration and mediation centers from the judiciary, the annulment action and the applicable principles and the enforcement of foreign arbitral awards.

By Lorena Barrazueta (Ecuadorian Very Young Arbitration Practitioners (ECUVYAP), Quito) and Michelle Vasco (ECUVYAP, Quito)

Paraguay:

Arbitration in Paraguay is gaining popularity. This situation is reflected, for instance, in the statistics provided by the Paraguayan Arbitration and ...

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...Mediation Center (CAMP, for its Spanish acronym), recording 61 new cases filed between 2018 and 2021.

Recent developments include a renowned Supreme Court decision and renewed arbitration rules recently launched by the CAMP.

On 8 March 2021, the Paraguayan Supreme Court ruled that unless previously agreed upon by the parties, legal fees are not part of the costs awarded on arbitration proceedings. Consequently, the victorious party must bear its legal fees unless agreed otherwise. This decision aligns with the Paraguayan arbitration law and the CAMP Arbitration Rules that were in force up to 11 November 2021, which required a previous agreement on the matter.

The novel changes worth noting in the new CAMP Arbitration Rules -in force starting 12 November 2021- include multi-contract arbitrations, arbitrator nominations in multi-party arbitrations, consolidation of multiple disputes, the inclusion of case-management conferences, emergency arbitrators, time to render the award, publicity of awards, and the inclusion of legal fees among the costs of the proceedings.

By Belén Moreno Bendlin (Altra Legal; bmoreno@altra.com.py; Asunción, Paraguay)

Uruguay:

Uruguayan jurisprudence remains steadfast in its arbitration friendly tradition.

Following an award issued in New York under the Arbitration Rules of the Society of Maritime Arbitrators, which upheld Company A's claim involving contract termination, Company B sought to bring new arbitral proceedings in Uruguay, alleging that: (i) the arbitration conducted in New York had to be disregarded as it applied US Maritime law in breach of Uruguayan conflict of law rules, and (ii) that the arbitration clause reserved arbitral jurisdiction in Uruguay (not New York) for claims below a certain monetary threshold.

Company A refused to participate in the new arbitration, and Company B sued...

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...before Uruguayan courts to compel arbitration.

The First Instance Civil Court Term 16 rejected Company B's request, reaffirming in principle the validity of the award rendered in New York, and leaving its enforcement in Uruguay ultimately up to the Uruguayan Supreme Court. The Court also noted that: (i) Company B should have brought annulment proceedings in New York, which it did not; (ii) the arbitration clause carved out from the jurisdiction of an arbitral tribunal in Uruguay claims involving "termination," such as the one brought in New York; and (iii) in any event, it was Company A, as claimant in New York that was the party entitled to set the monetary value of its claim, which exceeded the threshold for arbitration in Uruguay.

By Martín Rosati (Uruguay Very Young Arbitration Practitioners (URUVYAP), Montevideo) and Ignacio Tasende (URUVYAP, Montevideo)

Venezuela:

Due to COVID-19 restrictions, various arbitration centers of the country and the region have migrated to digital platforms for the administration of procedures and for carrying out activities to promote ADR mechanisms in the last two years. This has allowed the Arbitration Center of the Caracas Chamber ("CACC") to carry out activities with other institutions, as well as to know the trends in arbitration and mediation in the region.

In addition to this, the CACC has been oriented to encourage the participation of women in arbitration, through talks about the importance of the role of women in arbitration and seeking gender equality in our academic activities and the promotion of ADRs; this has caused an increase of 40% in the number of female arbitrators appointed in arbitration procedures administered by the CACC.

By Euribel Canino (Centro de Arbitraje de la Cámara de Comercio de Caracas (CCC), Caracas)

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Asia-Pacific Update:

India: Enforcing Foreign Awards Against Non-Signatories Under the Indian Arbitration Act

In its decision in Gemini Bay Transcription Pvt. Ltd. v. Intergrated Sales Services & Anr., on 10 August 2021, the Supreme Court of India held that a foreign award can be enforced against non-signatories to an arbitration agreement under Part II of the Indian Arbitration and Conciliation Act, 1996 (Act).

Facts

The foreign award in issue arose out of an arbitration seated in Kansas City, USA with Delaware law as the governing law of the underlying agreement and the arbitration agreement contained therein. The arbitration concerned a claim raised by Integrated Sales Services Ltd. (ISS), a Hong-Kong based entity, against DMC Management Consultants Ltd. (DMC), an Indian Company, in respect of disputes arising out of a representation agreement between them.

In the arbitration, ISS brought claims against DMC and other parties that were not signatories to the arbitration agreement, including two Indian parties – DMC's Chairman and Gemini Bay Transcription Pvt. Ltd. (GBT), an Indian company controlled by DMC's Chairman (collectively non-signatories). ISS' main allegation for binding the non-signatories to the arbitration agreement was on the basis of the alter ego doctrine – that DMC's Chairman completely controlled and dominated DMC, and the "correlation existing between DMC and GBT, is also, not the result of mere coincidence". Hence, the corporate forms of DMC and GBT were used as mere façades by DMC's Chairman to divert customers and funds from ISS through GBT.

Upon considering the facts, the sole arbitrator held that these non-signatories could be bound to the arbitration agreement under Delaware law on the basis of the alter ego doctrine. Accordingly, the arbitrator found in favour of ISS and rendered an award of USD …

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...690 Million against DMC and these non-signatories. ISS sought to enforce the foreign award before a Single Judge of the High Court of Bombay against DMC and the non-signatories. However, the Single Judge refused enforcement against the non-signatories on the ground that they were not parties to the arbitration agreement.

The Division Bench of the High Court overturned the decision of the Single Judge on the ground that none of the conditions for denying enforcement of a foreign award under Section 48 under the Act was present. Following this, the non-signatories appealed the Division Bench's decision before the Supreme Court of India.

Decision

The Supreme Court's analysis began with satisfying itself that the award in question was a 'foreign award' under Section 44 of the Act. Having answered this in the affirmative, the Court then considered the principal argument of the non-signatories that the foreign award could only be enforced against them if ISS proved that they were bound by the arbitration agreement. This argument was rejected for the following reasons:

(i) Section 47 of the Act only stipulates three procedural pre-requisites to enforcing a foreign award, which are that the enforcing party must produce: (a) the original or authenticated copy of the award; (b) the original or authenticated copy of the arbitration agreement; and (c) evidence that it is a foreign award.

(ii) The last requirement was explained in reference to Section 44 of the Act, which characterises a foreign award as one made in a New York Convention jurisdiction, to which the New York Convention applies, and which decides differences between persons (both contractual or otherwise) that arise out of commercial legal relationships.

(iii) Therefore, the Supreme Court held that there was no additional requirement under Section 47 for ISS to prove that the alter ego doctrine was satisfied.

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...Next, the Supreme Court considered whether Sections 48(1)(a) and (c) of the Act presented any grounds for refusing enforcement against the non-signatories and held that they did not for the following reasons:

(i) Section 48(1)(a) specifically deals with the incapacity of parties to the arbitration agreement and/or the invalidity of the arbitration agreement under the applicable law and extending its application to non-signatories issues would be "*to try and fit a square peg in a round hole*".

(ii) The award sets out detailed reasons for applying the alter ego doctrine. Hence, it was not appropriate for the non-signatories to re-litigate the issue on merits before the Supreme Court under the guise of Section 48(1)(a).

(iii) Similarly, Section 48(1)(c) does not apply as it is limited to scenarios where the subject matter of the award is outside the scope of the arbitration agreement and therefore, has no bearing on whether "*a person who is not party to the agreement can be bound by the same*".

Lastly, the Court noted that Section 46 of the Act stipulates that a foreign award is binding on the "persons as between whom it was made" and concluded that the binding nature of the award was not limited to just "parties" to the arbitration agreement. In doing so, the Supreme Court reiterated that foreign awards are enforceable against non-signatories under the Act.

Implications

This decision reaffirms India's commitment to aligning itself with the international arbitration regime on enforcing foreign awards and exemplifies how enforcement courts could approach non-signatory issues determined by an arbitrator under the applicable foreign law. It also provides impetus to foreign investors and parties to transact and do business with Indian parties.

Additionally, multi-party / multi-contract arbitrations are on the rise due to the ever-increasing complexity of commercial transactions. This would ...

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... in turn, make arbitrating with non-signatories a more frequent occurrence. This decision underscores that arbitration awards that emerge from such proceedings could most likely be enforced against non-signatories to an arbitration agreement, subject to the applicability of the various doctrines binding non-signatories under the applicable law in question. In turn, this decision serves as a useful reminder for commercial parties to be aware of such an eventuality in their commercial transactions, particularly where the contracts involved stipulate arbitration as the method of dispute resolution.

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

<u>South Pacific Update:</u>

Progress in International Arbitration Reforms

Comprised of small island nations, the South Pacific region is heavily reliant on growth in international trade and foreign investment for economic development.

A major barrier, however, in attracting foreign direct investment and stimulating cross-border trade is lack of investor confidence in effective and efficient ways to resolve commercial disputes and enforce resulting decisions.

Increasingly, foreign investors rely on international arbitration as an effective, fair and timely way to resolve commercial disputes and produce awards that can be enforced globally. For many sectors that invest in the South Pacific, particularly mining, oil and gas, international arbitration is the preferred choice for dispute resolution. The absence of effective legal frameworks to facilitate international commercial arbitration and the recognition and enforcement of arbitral awards has therefore been identified as an impediment to the growth of investment and trade in the South Pacific.

Recognising the importance of an ...

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...effective commercial dispute resolution regime for boosting investor confidence, the Asian Development Bank (ADB) has invested in a regional capacity development technical assistance program aimed at establishing an effective commercial dispute resolution regime in Pacific countries through international arbitration reform. ADB sees the promotion of international commercial arbitration in the region as crucial to creating a better investment climate, facilitating more cross-border trade and investment to accelerate growth, and reduce poverty and economic disparity. Since 2016, ADB has collaborated with UNCITRAL to facilitate commercial law reforms, legal harmonization and implementation of arbitral frameworks in the South Pacific region. The ADB program also involves capacity building through regional awareness-building and tailored training programs for potential and practicing arbitrators, lawyers and judges.

Fiji acceded to the New York Convention on 27 September 2010, and enacted their International Arbitration Act in 2017. Papua New Guinea acceded on 17 September 2019, and is currently taking steps to enact domestic legislation that implements the UNCITRAL Model Law. Palau acceded on 31 March 2020 and enacted their domestic regime in 2021. Tonga acceded to the New York Convention on 10 June 2020 and their International Arbitration Act was enacted in 2020. Legislators in Fiji, Papua New Guinea, Palau and Tonga have all expressed confidence that their respective international arbitration laws fully implement the UNICTRAL Model Law, and are now among the most advanced and comprehensive in the world. Fiji, Palau and Tonga have also borrowed provisions from the Australian, Singaporean and Hong Kong laws to ensure an attractive national arbitration framework.

Nauru and Samoa are currently engaging with the ADB and UNCITRAL to develop a modern national arbitration law. At the time of writing, Kiribati, Niue, Tuvalu and Vanuatu are yet to ...

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...embark on the wave of reform rip-
pling in the region related to interna-
tional arbitration.

By Mrithula Shanker (Associate, Norton Rose Fulbright, Sydney)

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Job Opportunities

in collaboration with Careers in Arbitration

Employer	Role	Location	Link	Deadline
Pinsent Masons	Commercial Litigation and International Arbitration Lawyer - 1-3 years' PQE	London	https://www.linkedin.com/jobs/view/2823196556/	Not stated
LexisNexis	Professional Support Lawyer	London	https://www.linkedin.com/jobs/view/2736687447/	Not stated
White & Case LLP	Associate: International Arbitration - EMEA	Moscow	https://www.linkedin.com/jobs/view/2812759952/	Not stated
Squire Patton Boggs	Spanish and English Speaking International Arbitration Lawyer	Paris	https://www.linkedin.com/jobs/view/2802533246/	Not stated
Deloitte	Assistant Director / Director Forensic & Disputes Services - Disputes and International Arbitration	Paris	https://www.linkedin.com/jobs/view/2812207519/	Not stated
ICC	Deputy Director Arbitration & ADR North America	New York	https://www.linkedin.com/jobs/view/2834208722/	ASAP
Asian International Arbitration Centre	International Case Counsel (Middle East)	Kuala Lumpur	https://www.linkedin.com/jobs/view/2842051542/	15 January 2022

Job Opportunities

in collaboration with Careers in Arbitration

Employer	Role	Location	Link	Deadline
Kennedys	Senior Associate	Singapore	https://www.linkedin.com/jobs/view/2799550194/	Not stated
Clifford Chance	Mid-Senior Litigation & Dispute Resolution Lawyer (Associate)	Amsterdam	https://www.linkedin.com/jobs/view/2804629833/	Not stated
DAC Beachcroft	Solicitor / Associate - Commercial Litigation	London	https://www.linkedin.com/jobs/view/2834865567/	Not stated
Secretariat	Associate - Dispute Advisory - Economic Damages / Forensic Accounting	London	https://www.linkedin.com/jobs/view/2828809949/	Not stated
Shehata & Partners	Junior Associate	Egypt	https://f0bzzfxqulz.typeform.com/to/t8aFZZ1t	Not stated
De Brauw Blackstone Westbroek	Law Assistant – Arbitration	Amsterdam	https://lnkd.in/gq6R6_aJ	Not stated
Seven Summits Arbitration	Research Associate	Munich	www.7summits.law | welcome@7summits.law	Not stated
Three Crowns LLP	Intern	London / Paris	https://www.threecrownsllp.com/careers/law-students/	Not stated

YOUNG ITA

Writing Competition – Call for Submissions

The Young ITA Writing Competition was announced on 12 November 2021. All submissions should be made by **January 17 2022**, and winners shall be announced no later than May 2 2022. This is an excellent opportunity for young practitioners to contribute actively to the research of international arbitration and to be recognized as qualified voices in this area, as well as to get involved in the activities of the Institute for Transnational Arbitration.

The submitted papers must be in English, original, not submitted or published here or elsewhere, have between 5,000 and 15,000 words, including footnotes, and should address issues related to the topic announced or to any other topic in the field of international commercial or investment arbitration.

The winning author(s) will receive a prize of **USD $3,000, selected books published by Wolters Kluwer and up to USD $1,500 reimbursement for reasonable expenses to travel to Dallas to receive the award at the ITA Workshop and Annual Meeting in June**. The winning paper will be published in the ITA journal ITA in Review. The second, third and fourth best papers will also be submitted to the ITA in Review and, if approved by the Board of Editors, published in subsequent issue(s) of the journal.

For further information please click here.

YOUNG ITA

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)