Young ITA Newsletter

Vol. 3, Issue 3 – Summer 2022

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Featured in this Issue

- 60 Second Interview with Enrique Jaramillo – Young ITA Thought Leadership Chair
- Updates from the Young ITA Regional Chairs
- Reports from #YoungITATalks

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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.
- **Reporting for Young ITA**—Please see page 42 for information on how to get involved with the newsletter, or reporting on Young ITA events.

Vol. 3, Issue 3 – Summer 2022

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60 Second Interview with Enrique Jaramillo – Young ITA Thought Leadership Chair

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

At a professional level, I am a fan of the flexibility and independence that arbitration gives to the parties. It empowers them to customize a procedure that fits the unique circumstances and needs of each case, while maintaining the strategic and adversarial components involved in dispute resolution in general. At a personal level, I really enjoy meeting people from around the globe. Being a part of the ITA and the Young ITA has allowed me to meet so many interesting people with different background and points of view. I find this international/inter-cultural exchange to be very stimulating and encouraging.

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

I am a history aficionado, so I would probably pick up somewhere in Europe. Before my first visit, I was obsessed with WWII so I visited many emblematic places, especially in Berlin. Lately, I have regained an old interest for Rome, particularly for the struggles of the republic with Hannibal. I would probably visit Sicily or the south of Spain. I could use the opportunity to find a nice beach.

What top tips would you give to aspiring lawyers?

The most important qualities for young lawyers are discipline and fortitude. Discipline to devote yourself to acquire the knowledge and experience you need to become a good lawyer, and fortitude to withstand and overcome the obstacles you will find along the way.

What are the top three things people should do in Houston?

Visit a shooting range, have Texas barbecue, go see an Astros game.

Why did you become a lawyer?

The law is one of the few fields that is involved in every single aspect of life: birth, death, family, business, politics and so on. The idea of mastering this invisible halo surrounding everything was very appealing to me.

What is your favourite thing to cook ?

I love to grill steaks. It is not only my favourite thing to cook, but also the only decent meal I can make.

REGIONAL UPDATES

Middle East Update:

UAE Law on the Signing of Arbitral Awards

On 21 April 2022, the Dubai Court of Cassation (Case No. 109/2022) confirmed that the United Arab Emirates (UAE) procedural rules of arbitration require the arbitral tribunal to sign the dispositive section and the reasoning of the arbitral award.

Historically, the signature of the arbitral award was governed by Article 212(5) of Federal Law No. 11 of 1992 (UAE Civil Procedure Law), which required that the award was signed by the arbitrators. Although not expressly stated, the Dubai Court of Cassation repeatedly held that this article required arbitrators to sign the dispositive section and the reasoning and that a failure to do so would render the award invalid. The only circumstances in which the court enforced awards not signed on every page was where the tribunal had signed the dispositive section of the award which also included, on the same page, part of the tribunal's reasoning.

In June 2018, Article 212(5) of the UAE Civil Procedure Law was replaced by Article 41(3) of the UAE Arbitration Law. Again, Article 41(3) states that the award must be signed, without any further requirements. However, the Dubai Court of Cassation has maintained the established position that both the dispositive section and reasoning of the award must be signed.

More recent judgments have also confirmed that the UAE courts will apply UAE procedural rules when considering the enforcement of foreign awards.

In Case No. 403/2020, the Dubai Court of Cassation refused to enforce a foreign-seated arbitral award on the basis that the arbitrator only signed the last page and not the reasoning of the award. In reaching this decision, the court referred to Article III of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which provides for enforcement in line with the "rules of procedure in the territory where the award is relied upon". The court held

REGIONAL UPDATES

that Article 41(3) of the UAE Arbitration Law requires the dispositive and reasoning sections of the award to be signed; otherwise, the award is invalid and enforcement would be contrary to UAE public policy. The court then relied upon Article V(2)(b) of the New York Convention—which provides that enforcement may be refused where the recognition or enforcement of the award would be contrary to the public policy of that country—as a basis for refusing to enforce the award.

The Dubai Court of Cassation's recent decision in Case No. 109/2022 confirms the position and rationale previously taken in Case No. 403/2020. In this case, the court found that the arbitrator's signature on the last page of the award, which contained the dispositive section but not any part of the reasoning, was insufficient. Thus, the award was void and unenforceable as a matter of UAE public policy.

In addition to reaffirming that arbitrators must sign the dispositive section and reasoning of the award, this case highlights that UAE procedural rules not only apply to arbitrations seated in onshore UAE, but may be relevant to the enforcement of any arbitral award through the onshore UAE courts.

By Jennifer Paterson (Special Counsel in K&L Gates' International Arbitration Practice Group; jennifer.paterson@klgates.com, Dubai/ United Arab Emirates)

South America Update :

Paraguay:

In a recent court ruling, the First Chamber of the Civil and Commercial Court of Appeal of Asunción unanimously rejected a request for annulment filed against an arbitration award issued within an arbitration process before the "Centro de Arbitraje y Mediación Paraguay" (CAMP).

The Court of Appeal considered that the request for annulment was patently inadmissible because it was based on the existence of alleged errors "in judicando". The Court of Appeal emphasized that the request for annulment, in the terms of the Paraguayan arbitration

law N.°1879/2002, does not constitute an appropriate way to review or to modify the substantial conclusions of the award, nor to examine the adequate application of the law or the correct assessment of the facts. Accordingly, the Court of Appeal stated that when studying any request for annulment of arbitral awards, the jurisdictional body must limit itself to verifying that the arbitral award has been issued without violating the validity requirements established in the Paraguayan arbitration law.

The decision of the Court of Appeal is plausible as it demonstrates the strength of the arbitral process in Paraguay, due to the Paraguayan arbitration law.

By Felicita Argaña Bendlin (Altra Legal; fargana@altra.com.py Asunción, Paraguay)

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Middle East (Dubai)

Maximizing the Value of Expert Evidence in International Arbitration

Conference Report by Mina Morova, Vinson & Elkins LLP, Dubai.

On May 18, 2022, Young ITA Middle East Regional Chair **Jennifer Paterson** (K&L Gates, Dubai) introduced the #YoungITATalks panel discussion "Maximizing the Value of Expert Evidence in International Arbitration", which focused on the selection and instruction of experts, the different ways of effectively presenting expert evidence and some potential pitfalls to avoid when working with experts. Jennifer Paterson moderated the panel, with the participation of **Steve Harris** (Senior Managing Director, FTI Consulting, Dubai, United Arab Emirates), and **Conrad Bromley** (Managing Director, Secretariat, Dubai, United Arab Emirates) as panelists.

Key Considerations for Engaging an Expert

Ms. Paterson opened by asking the panel about the key considerations to take into account when selecting and engaging an expert and the factors that can set an expert apart.

Mr. Bromley noted that there are usually three factors to consider before engaging an expert: (i) price; (ii) experience; and (iii) availability. Mr. Bromley explained that price is important to contextualize and balance with the value an expert is expected to add to the arbitration. Whilst experts with more experience and strong market reputation will be higher in cost, the niche expertise they provide might not be suitable or add the most value to the case at hand.

Mr. Harris went on to add that arbitrations can entail a myriad of complex issues, including prolongation and delay, disruption, loss of productivity, change orders and pricing variations, lost profits and design changes (among others). As such, it is crucial for a legal team to determine the exact scope of the claims put forward in a given proceeding before engaging the most suitable expert with the right type and extent of expertise that will match the

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needs of the team. Additionally, Mr. Harris noted that testifying experience can also be an important factor in selecting an expert, but that it should not be a deterrent to selecting younger experts (with perhaps less testifying experience) who otherwise have the right type and extent of experience for a given case.

Thirdly, as Mr. Bromley explained, the level of investment and availability an expert can offer throughout the preparation of the reports is also a crucial factor. However reputable or extensive an expert's experience may be, there is always a risk of the quality of their work becoming compromised if the case at hand is but one of many they are involved with.

Key Considerations Once an Expert is Engaged

Ms. Paterson then steered the discussion towards factors to consider after engaging an expert and described three elements: (i) the scope of instructions provided to the expert; (ii) how to generate a compelling expert report; and (iii) what makes an expert credible.

Firstly, Mr. Bromley explained that whilst the scope of instructions will depend on factors applicable to each case, generally there is a benefit to keeping instructions broad, which allows for flexibility and adjustments to be made to an approach during the course of proceedings. Mr. Harris noted that this approach is suitable for damages claims where the emphasis on any particular claim may shift throughout the proceedings. Mr. Bromley also emphasized that broad instructions can also facilitate discussions in instances of simultaneous exchange of expert evidence where very narrow instructions may end up being challenging and disrupt the exchange between experts.

What Makes an Expert Report Compelling and Credible?

Ms. Paterson then asked the panelists which factors tribunals normally consider when assessing how compelling and credible an expert report is.

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Mr. Harris highlighted the importance of keeping an expert report comprehensible and easy for a tribunal to follow, which is especially important for technical expert reports. Beginning with a good executive summary, emphasizing the right facts and a clear assessment of the heads of claims were noted as key points. Mr. Bromley also recommended sensible short sentences and a logical thought process, emphasizing the importance of balancing substance with clarity.

Mr. Bromley then considered what makes an expert credible and highlighted the relevance of addressing, refining and, where necessary, conceding weak points in the second and joint expert reports as a means of establishing credibility. Mr. Bromley also noted that, in order to preserve credibility, experts should avoid changing or modifying any assumptions they rely on as the case progresses unless new factors or circumstances come into play.

Lessons Learned

To close the session, the panel turned to the lessons learned on how to maintain a good working relationship between lawyers and experts. A lively discussion between the panel and the participants ensued.

Mr. Harris stressed the importance of clear communication between both lawyers and experts to ensure that they are both on the same page at all times. Mr. Bromley suggested this can be achieved through the timely exchange of information, including any changes in witness statements and draft submissions, as well as maximizing availability, to the extent that both parties are engaged and able to address concerns and questions in a timely manner.

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Prague

"Can You Handle the Truth?" Witness Preparation and Cross-Questioning in International Arbitration in CEE and Beyond

Conference Report by Kristína Bartošková, Baker McKenzie, Prague.

As part of Young ITA CEE Chair **Viktor Cserép**'s initiative to take #YoungITATalks events to new jurisdictions with local arbitration organizations, practitioners and institutions, the Institute for Transnational Arbitration partnered for an event with the Young Czech Arbitration Professionals- in Prague on 18 May 2022. The discussion revolved around the topic of witness preparation and cross-questioning in international arbitration in CEE and beyond.

The faculty consisted of **Michael Howe** (Counsel at Wilmer Cutler Pickering Hale and Dorr LLP in London), **Leon Kopecký** (Partner at Schönherr in Vienna), **Mária Poláková** (Partner at Squire Patton Boggs in Prague), **Jiří Urban** (Director and CEE Dispute Advisory Services Leader at KPMG in Prague) and Dr. **Reinmar Wolff** (Professor at the University of Marburg and Vice President of the German Arbitration Institute (DIS)). The event was hosted by Dr. **Viktor Előd Cserép** (Young ITA CEE Chair, Senior Associate at PROVARIS Varga and Partners in Budapest) and co-moderated by **Kristína Bartošková** (YCAP Co-Founder and Senior Associate at Baker McKenzie in Prague).

The moderators guided the speakers through a number of topics including the role of written witness statements, best practices for preparation of witnesses for cross-questioning and the (cross-)questioning of (expert) witnesses all from the various perspectives of counsels, arbitrators and (expert) witnesses.

The diverse backgrounds of the members of the faculty enabled the discussion to explore different approaches in both civil law and common law traditions. As mentioned by Michael Howe, the preparation of witnesses to be

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cross-examined at the evidentiary hearing could present certain complications as counsels from different legal jurisdictions can be subject to different legal and ethical obligations and practices when it comes to preparing witnesses. For example, while the preparation of written witness statements is common in international arbitration, it is very uncommon in court proceedings.

Mária Poláková described the role of counsel in the preparation of a written witness statement as "professional guidance", i.e. assisting the witness to (i) identify the proper scope of the testimony, (ii) formulate the testimony with sufficient clarity for the benefit of the tribunal and sufficient simplicity, and (iii) ensure consistency with the overall case theory and awareness of the potential weak points which could be picked up by the opposing counsel.

Leon Kopecký noted that the primary goal of cross-questioning is to help an arbitrator or a tribunal make their decision and write their award and shared a number of tips and tricks. In addition, as Reinmar Wolff pointed out, from the arbitrator's perspective the cross-questioning is often driven by the search for truth or at least establishment of factual circumstances with a sufficient degree of certainty. The speakers agreed that the personality and the style of a witness may very well influence the story line of the case, albeit unconsciously.

Jiří Urban added the perspective of an expert witness, who prepares for a direct presentation as opposed to a witness of fact who prepares for possible lines of questioning by the opposing party and/or the tribunal. Mr. Urban noted that, when the evidence gets too technical, an expert could make use of visuals and charts. The aim is to provide the tribunal with a simplified explanation of the highly complicated or technical issues.

However, the discussion went beyond the legal side of witness preparation and questioning. Cross-examination is sometimes more of a psychological ex-

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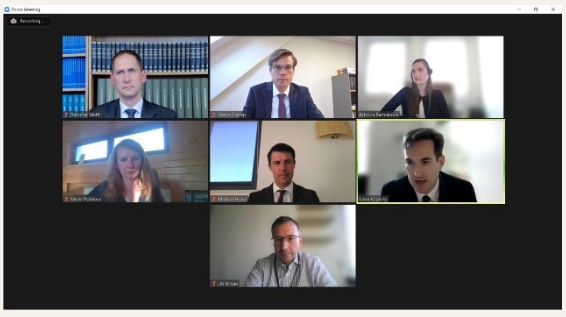
ercise than a strictly legal one. While Ms. Poláková discussed different types of psychological approaches applied by counsel in the course of a cross-examination, Leon warned against using an overly aggressive questioning style. Mr. Howe also mentioned recent research which had found that witness memory is inherently unreliable, thus the value of witness statements could sometimes be questionable.

The lively discussion ended with Dr. Wolff's and Mr. Urban's remarks on alternative modes of taking witness testimony such as witness conferencing, in particular in case of expert witnesses. They both agreed that witness conferencing could be effective and helpful from the arbitrator's perspective, though it must be properly managed and well-planned.



UK

Outer Space Disputes – The Next Frontier for Arbitration?

Conference Report by Elena Guillet, Vinson & Elkins RLLP, London.

5 April 2022

Moderators: **Katrina Limond**, Young ITA UK Chair, London; **Robert Bradshaw**, Young ITA UK Vice-Chair, London

Panelists: **Rachael O'Grady** (Mayer Brown, London); **Arthur Sauzay** (Allen & Overy, Paris; Institut Montaigne); **Viva Dadwal** (King & Spalding, New York); **Nathan Johnson** (Space Court Foundation, San Francisco)

Robert Bradshaw and Katrina Limond gave an introduction to the talk and introduced the panelists.

Arthur Sauzay started the discussion by giving an overview of the recent developments in space. He described the new activities as "new space", with the emergence of private actors such as Elon Musk and Jeff Bezos. New space has led to new markets, with new ser-

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vices and products such as communication and observation, space travel and the exploitation of resources. These new services raised new legal questions. As an example, Mr. Sauzay explained there has been a steady increase in the number of satellites providing internet access on earth. This has raised new issues such as space traffic management.

Rachael O'Grady provided an overview of the existing legal framework. Ms. O'Grady explained there are five space treaties governing the international outer space order. The main treaty is the Outer Space Treaty, which is supplemented by the other four (Rescue Agreement of 1968, Liability Convention of 1972, Registration Convention of 1976 and Moon Agreement 1984). These treaties were put in place well before "new space" activities and were a product of the Cold War and the space race between the U.S and Russia. The main motivation of the spacefaring states was to protect outer space as the heritage of all mankind and to prevent land grab, including the exploitation of outer space resources for military operation. There are two main lacunas with the space treaties. The first is the prohibition against national appropriation, which has been contested in the context of privatization. The second is the definition and scope of liability in space. Governments have responded to the evolution of the space age at the domestic level by developing their own space programs and legislation. However, Ms. O'Grady notes there is a certain fragmentation in the way in which states adopt their rights and obligations under the international legal order. For example, some states have granted ownership rights to outer space resources to their nationals.

Viva Dadwal provided some insight on the choice of forum for space disputes. In the U.S., space activities are regulated and often courts are the first place disputes will go. There are other ways of resolving disputes. Ms. Dadwal shared that McGill University conducted a survey to assess preferences of forum

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for outer space disputes. The majority of the respondents valued confidentiality, expertise, timeliness – all these factors being important in the arbitration factor. A majority of respondents found that arbitration of outer space disputes would increase. There is now clear support that arbitration for outer space disputes is rising. McGill also determined which institutions were hearing these disputes: the (ICC, ICDR, LCIA).

Nathan Johnson from the Space Court Foundation shared the work his organization has been doing. The Space Court Foundation has scripted out a potential case and worked the details of the case out. The fictious scenario was: An asteroid is on a trajectory with impact on Earth, the asteroid is successfully destroyed by weapons – the destruction created debris which impacted commercial activities in space. The question is who should be liable for the damages. The Space Court Foundation invited professors to discuss the case. One of the key takeaways was that all decisions in space have vast repercussions. The second lesson was that it was difficult to apply legal standards in the physical reality of the space environment, such as the idea of foreseeability.

Finally, there was a brief Q&A session, where the following questions were posed to the panelists:

How will arbitration will play out in space disputed?

Mr. Sauzay noted that with the lack of clarity on the concept of fault under international law, it will be difficult. If there is a collision between satellites, parties will still need to show fault. This is difficult as there are no standards of care, and also in terms of evidence, how the parties can prove the location of a satellite for example. However, the space lawyers and experts are already adapting. For example, start-ups are providing services of situational awareness.

Ms. O'Grady stated that under customary international law, and ILC articles on state responsibility, the default position is that there is no requirement of

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fault. This shows how the Liability Convention is out of time. International space law needs updating quickly, but it probably will take time. However, what can happen quickly is for a dispute resolution forum to be set up to address these issues.

Ms. Dadwal responded that arbitration has already been playing out in space related disputes. Disputes are contractual and commercial, and arbitration will continue being relevant as long as parties want to involve arbitration. In terms of investor state disputes the applicability will depend on the definition of territory.

Do you think arbitration tends itself to this vast unknown of what might lie ahead for space disputes?

Ms. O'Grady stated that if some kind of private entity was created where disputes could be brought, and given the public pressure on cases such as climate change, and space which are of public interest, this entity would be very transparent. States are not signing up to these disputes because they don't want to be found liable. This is why if it was done as a convention there may be some return benefit.

Ms. O'Grady noted that the current arbitration institutions are so advanced and so well established that they are serving the current needs of the industry very well. The PCA Rules are there if needed, but there is no need for a specific new institution.

Energy Transition in the UK, Europe and Beyond – horizon scanning for potential disputes

Report by Marie Devereux, Vinson & Elkins, London.

On 15 July 2022, Young ITA and Vinson & Elkins RLLP hosted a live #YoungITATalks panel event in London on the topic of "*Energy Transition in the UK, Europe and Beyond – horizon scanning for potential disputes*". The panel, consisting of Emma Johnson (Partner at Ashurst), Laura Sochat (Associate Principal at Charles Rivers Associates) and Rob Landicho (the immediate-past Chair of Young ITA and Counsel at

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Vinson & Elkins), was moderated by Ciara Ros (Young ITA Communications Chair and Senior Associate at Vinson & Elkins).

The panel first looked at energy transition from an economic perspective, noting the significant roles of policy, technology, the market and preferences of investors, consumers and the government in driving the transition. They examined the outsized roles of policy and technology in progressing energy transition at different stages of its "life cycle" – with policy being the initial driver due to the high risks and costs in renewable energy development and government action such as feed-in tariffs (FiTs) prompting investment from private actors into renewable energies. As technology improves and drives down the costs of developing certain types of renewable energy, this in turn influences policy as governments hone in on those renewables in their strategies for decarbonisation.

The panel noted the number of disputes arising out of policy shifts due to changes in regime or adjustments in government strategy resulting in state-driven financial incentives or other measures being scaled back. For example, schemes which have been too successful have been rowed back, triggering investor-state disputes. One suggestion on how to avoid these issues was the use of technology-agnostic support to drive innovation.

Next, the panel considered the impact of the conflict in Ukraine on energy transition. The discussion brought to light the contrasting short and long term impacts of the conflict and energy security concerns on decarbonisation. In the short run, the need to quickly decrease European dependence on Russian gas combined with already high gas prices appear to be hindering decarbonisation. For example, the movement from coal to gas-based power has slowed down, with coal plants even being restarted in Germany.

In the long run, the panellists considered that the conflict (and energy security concerns more generally) would

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more likely refocus energy transition. They also noted the potential for disputes arising from the EU plan for countries to reduce gas usage and subsequent state pressure on industrials to cut gas consumption. This could result in companies failing to meet production targets potentially leading to further disputes up and down the supply chain.

The conversation moved on to the types of disputes the panellists were seeing these days and four areas were identified as the most likely to generate disputes as the energy transition gained pace: new technology, plant underperformance, supply chain issues and permits/consents. The panellists acknowledged that energy transition disputes would involve typical issues such as corrosion or welding defects, but that the use of new technology or deployment of existing technology in a novel way meant new challenges would arise. Key challenges included the lack of precedent or standardised contracts for these new technologies and the lack of expertise amongst experts and tribunals. To overcome the challenge of finding qualified experts where there were few available, suggestions included identifying open-minded experts able to engage with other technical experts to better understand new technologies and to anticipate challenges to their models in different scenarios.

The panellists noted that the energy transition would likely correlate with an increase in mining disputes, as renewable energies are more mineral-intensive than traditional power. The more narrow geographical concentration of minerals required for energy transition compared to natural gas or oil may also affect where disputes which will arise.

Ciara wrapped up the discussion with a question to the panel about what they thought the future would hold for disputes, with answers ranging from a greater emphasis on supply chain issues, to investors being tasked with greater responsibility and investor-state disputes being brought in more

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creative ways.

The panellists and the audience enjoyed a range of savory canapés after the discussion at a reception held at Vinson & Elkins' London office.

North America

Transnational Litigation & Arbitration: Managing Parallel Proceedings.

Conference Report by Giovanna Filippi Del Nero, White & Case, Miami.

On 19 April 2022, Young ITA's first in-person event after the pandemic took place in Miami, FL, hosted by Holland & Knight. The panel discussed the management of parallel proceedings in the context of transnational litigation and arbitration involving Latin American disputes. The panel was introduced by **Lidia Rezende** (Chaffetz Lindsey) and moderated by Professor **Sandra Friedrich** (University of Miami). Professor Friedrich led the conversation and posed informative and thought-provoking questions. The panelists **Katharine Menéndez de la Cuesta** (Holland & Knight LLP), **Jorge A. Mestre** (Rivero Mestre LLP) and **Eve Perez Torres** (Chiquita Brands International Inc.) provided an insightful and rich discussion about the different types of parallel proceedings, the mechanisms to deal with them, and their use as a strategy in transnational disputes.

What Are Parallel Proceedings?

The panel started with a general overview of what parallel proceedings are and how they occur.

According to Eve Perez Torres, parallel proceedings are common in disputes where an arbitration clause covers the dispute between parties, but one of them decides to resort to the judicial courts of its own country. It is also the case when an investment treaty dispute is subject to arbitration, but administrative or criminal proceedings are also pending in relation to the same dispute. In these situations, the same set of facts and legal issues may be discussed in parallel in two or more different proceedings. As Ms. Perez Torres explained, although for corporations this may not be a desirable scenario –

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because of the risk of conflicting decisions, waste of resources, and a delay effect – it is sometimes an unavoidable consequence of our globalized world.

Katharine Menéndez de la Cuesta highlighted the difference between cases where two fora are truly available as opposed to those where only one forum is available. While in the first case parties and their lawyers may have no choice but to strategically litigate different interrelated issues in parallel proceedings, the second situation requires resources to force parties to litigate in the adequate forum.

For his turn, Jorge A. Mestre underlined that bringing parallel proceedings should be the last resort and a well-planned decision. As Mr. Mestre further explained, the venue selected by the parties to resolve their disputes may lead to administrative institutions, such as the SEC (U.S. Securities and Exchange Commission) or the DOJ (U.S. Department of Justice), bringing a parallel case.

Ms. Menéndez de la Cuesta provided some specific examples. First, she mentioned the occasional need to involve third parties which are not bound by the arbitration agreement. That may be common in construction projects, where the project owner and contractor agreed to arbitrate disputes arising from a construction project, but the contractor and its subcontractor in the same project did not. The only way to hold a subcontractor liable for a claim

of breach raised in an arbitration proceeding may be by bringing a separate court proceeding against him. A second example Ms. Menéndez de la Cuesta provided was when two arbitral tribunals are formed based on two different, but related, contracts in a complex transaction. Next, she referred to family disputes involving assets located in multiple jurisdictions as a third source of parallelism and, lastly, she commented about possible post-arbitration parallel proceedings, one seeking to enforce and another to set aside the arbitral award.

What Are the Mechanisms to Manage Parallel Proceedings?

The second topic proposed by Professor Friedrich addressed the main mechanisms to deal with parallel proceedings.

Ms. Perez Torres started by mentioning that parties always have the opportunity to draft "bullet-proof arbitral clauses." Parties may sign arbitral agreements consenting beforehand to consolidate eventual parallel proceedings. They can also agree to insert identical arbitral clauses in subsequent related contracts with third parties. Additionally, she stressed that national laws related to arbitration may interfere with parallel proceedings. She mentioned the example of Ecuador, which recently enacted a law allowing domestic and foreign arbitral awards to be enforced in the country without the need to obtain previous recognition.

Mr. Mestre brought to the discussion anti-arbitration injunctions as another relevant tool. As he explained, it is controversial whether anti-arbitration injunctions are appropriate. Usually, countries that strictly apply the competence-competence principle do not support their use. Under the FAA, U.S. courts usually compel parties to arbitration in face of an arbitration agreement. However, these courts consider to still retain the power – under the FAA itself, the All Writs Act of 1789, or state law – to decide whether there is in fact an arbitration agreement. As a result, they may order parties not to proceed

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with an ongoing arbitration. Mr. Mestre underscored as well that the UNCITRAL Model Law expressly provides that arbitrators are allowed to continue with an arbitration proceeding even after their jurisdiction has been challenged. As a result, it remains with the parties the dilemma as to whether or not to participate in the arbitration.

Ms. Menéndez de la Cuesta explored the consolidation alternative. She explained that consolidation often operates according to the arbitral rules applicable to the arbitration, as well as by any agreement made by the parties in advance or after the dispute arises. The laws of the arbitration seat can also provide guidance. Further, she emphasized that parties should always keep in mind the possibility of reaching an agreement as to consolidation, even after the dispute arises, as an efficient way to deal with parallel proceedings.

Professor Friedrich invited the panel to consider the notions of lis pendens and res judicata, which are chronological procedural rules typically adopted in civil law countries.

In Ms. Menéndez de la Cuesta's opinion, there is no single set of rules to define lis pendens and res judicata and how they apply to transnational litigation and arbitration. A party may identify a common issue that has already been litigated or is still to be decided by another tribunal. Whether this should be raised in a subsequent arbitral proceeding may be a matter of strategy. It may be necessary to relitigate the issue if, for example, a party in a subsequent dispute had no opportunity to participate in the previous or pending proceeding.

Specifically addressing lis pendens, Mr. Mestre considered that there is no such strict first-in-time rule. He thinks that deference to previous proceedings may happen based in the abstention doctrine. As he explained, most of the times, there will be a battle to establish who has the proper jurisdiction.

Ms. Menéndez de la Cuesta added that the existence of a previous final judgment or a previously filed proceeding is

certainly an element to be considered in dealing with parallel proceedings. But she agreed with Mr. Mestre in the sense that there is no strict rule that applies in this context. It is a complex situation that requires consideration of efficiency, access to evidence, and the identification of parties, issues, facts, and other elements common to the concurrent claims.

Parallel Proceedings As A Strategy

Professor Sandra Friedrich asked the panelists about the U.S. 28 USC Section 1782 and invited them to think of ways in which lawyers may strategically use parallel proceedings.

Mr. Mestre positioned himself as a strong supporter of Section 1782 proceedings. He believes it to be a powerful and quite underused tool for obtaining discovery over U.S. residents in aid of foreign proceedings. He recalled his experience in Chevron v. Ecuador, where his client Chevron had been criminally charged in relation to its oil fields in Ecuador. After a movie documentary was made portraying the circumstances of Chevron's case, Mr. Mestre's team identified Section 1782 as the perfect way to access the outtakes and get further information that could support their position. The strategy successfully revealed a major fraud that had been employed against Chevron and that changed everything in Mr. Mestre's client's favor.

Ms. Menéndez de la Cuesta agreed that Section 1782 may be a useful tool, but she expressed some concerns. She explained that the statute only allows discovery over U.S. residents. This may create an imbalance in favor of a party outside the U.S. that cannot be reached by the same mechanism. She suggested that the lack of reciprocity may eventually be neutralized by the application of other rules.

Based on his experience with disputes in Latin American countries, Mr. Mestre mentioned the "recurso de amparo" or "acción de tutela". According to him, those are extraordinary constitutional remedies provided under Colombian or Mexican law which goal is to protect

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litigants against due process rights' violations.

Ms. Perez Torres noted that it is quite common that a party to an arbitration agreement chooses to litigate a dispute covered by that arbitration agreement before the courts of that party's home country. In this case, the counterparty may move the court to compel arbitration and stay or dismiss the proceedings. However, unlike in the U.S., in some civil law jurisdictions the filing of a motion to compel may not stay the proceeding, and the respondent may still need to file an answer by the deadline under the applicable civil procedure until the court resolves the motion to dismiss. Thus, even if the lawsuit is eventually dismissed, it may be used by the claimant to learn about respondent's defense and the evidence on which respondent will rely upon.

Thereafter, Ms. Menéndez de la Cuesta mentioned that parallel proceedings can also be part of a strategic decision to force a settlement or delay the enforcement of arbitral awards. She reminded the audience that, when employing these strategies, lawyers must be mindful of both their ethical obligations and their duty to work on the client's best interest. She also highlighted that parallel proceedings are not always a matter of strategy. Sometimes, some issues must be decided in different jurisdictions, such as when some property is located in a jurisdiction which courts have exclusive jurisdiction to resolve disputes over such property. As she also explained, the forum choice can be a determinative decision, as happens when there are "fork in the road" clauses.

Ms. Perez Torres continued to discuss the delay effect of parallel proceedings and more specifically about the already mentioned "recurso de amparo" and "accion de tutela" actions. She explained that these actions may be used to stay arbitral proceedings adducing violation of fundamental rights. Additionally, even after exhausting all legal proceedings to vacate or confirm an award in a jurisdiction that allows these

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types of actions, the accion de tutela can be used to further discuss the enforceability of the judgment that recognizes or vacates the award. For the foregoing reasons, those tutela actions became a matter of concern in countries that want to attract arbitrations. Costa Rica for example has enacted a law that excluded the right to tutela actions to challenge arbitral awards. Ms. Menéndez de la Cuesta added that under the New York and the Panama Conventions, an arbitral award can only be set aside by the courts of the seat of the arbitration. However, some years ago tutela or amparo started to be used to annul arbitral awards in courts which were not the seat of the arbitration. These annulments will not usually be recognized. However, they may still prevent the enforcement of that award in the jurisdiction that granted the amparo action and vacated the award on that basis.

The panel ended with two questions from the audience. The first was about dispositive issues in arbitration proceedings that depend on the decision of an administrative body. In Ms. Perez Torres' opinion, arbitral tribunals have the power to either stay or continue the proceedings, which may affect the parties' access to additional compensation based on the later administrative decision. The second question was whether there may be a lack of regulation to effectually handle parallel proceedings. Ms. Menéndez de la Cuesta noted two main challenges when regulating this field: first, enacting rules that suit the many and complex issues presented; and second, enforcing these rules. She believes that it may be more useful to have some guidance based on factors to be considered when dealing with parallelism. Mr. Mestre closed the discussion by agreeing that there are already enough rules to manage parallel proceedings in the transnational arena. However, as he pointed out, there will always be different ways in which you can apply those rules, depending on which side you are on.

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South America

"Justicia y Arbitraje en América Latina"

Informe de la conferencia por: María Lourdes Garay, Bomchil, Buenos Aires, Argentina.

El 17 de marzo de 2022, María Camila Rincón (Young ITA Chair for South America – Spanish-speaking) y Santiago Peña (Young ITA Vice-Chair for South America – Spanish-speaking) presentaron #YoungITATalks: Sudamérica, "*Justicia y Arbitraje en América Latina*". Luego de una breve introducción sobre los temas a tratar y sintetizar la labor de Young ITA, los organizadores del evento le dieron la palabra a María Belén Moreno (Altra Legal), quien ofició de moderadora.

La Srta. Moreno estuvo acompañada por los expositores del evento, **Joaquín Vallebella**, socio de Brons & Salas Abogados (Argentina), **Guillermo Sánchez Luque**, Magistrado de la Sección Tercera del Consejo de Estado (Colombia), **Estefanía Fierro,** asociada senior de AVL (Ecuador), **Javier Jaramillo**, asociado senior de Pérez, Bustamante & Ponce (Ecuador) y **Cristina Ferraro**, socia de Miranda & Amado (Perú).

La interacción entre el arbitraje comercial internacional y el poder judicial en los países de la región

La Srta. Moreno comenzó solicitando a los expositores que describan la intersección del poder judicial en cada uno de sus países con el arbitraje comercial internacional. En primer lugar el Sr. Vallebella expuso que en el caso de Argentina los laudos arbitrales son respetados por los tribunales judiciales, que

reconocen la validez y los efectos de la cláusula arbitral. Entonces , solo, en los casos en que haya un caso muy claro de nulidad del laudo el tribunal arbitral procedería a su revisión. Concluyó que la Corte Suprema de la Nación ha decidido recientemente que las causales para la revisión y anulación de laudos deben ser interpretadas de forma restrictiva.

La Sra. Fierro comento acerca de la experiencia de Ecuador, el cual no cuenta con una ley separada de arbitraje doméstico y arbitraje internacional a diferencia de otros países, mencionó, además, que la Ley de Arbitraje y Mediación dispone la actuación que deberían desarrollar las cortes locales en relación con los casos arbitrales; entre ellas se pueden mencionar que las cortes locales deberían inhibirse de conocer casos donde existe un convenio arbitral y que los tribunales arbitrales están reconocidos con facultades para dictar medidas cautelares.

Por su parte la Sra. Ferraro analizó que, en Perú, la Ley de Arbitraje ha limitado la injerencia del poder judicial en el arbitraje internacional con fines de evitar así demoras. La Sra. Ferraro mencionó que recientemente la jurisprudencia del Tribunal Constitucional de Perú ha restringido los casos en que puede proceder un amparo contra un laudo arbitral, toda vez que ha dispuesto que la vía para cuestionar la sentencia arbitral, es la solitud de anulación y que el amparo solo procederá en aquellos casos de terceros que no hayan estado involucrados del arbitraje se vean afectados con el laudo dictado.

El Sr. Sánchez Luque procedió a analizar la relación entre el poder judicial y el arbitraje comercial internacional en Colombia, donde manifestó que se ha tendido a respetar las decisiones arbitrales en los casos de arbitraje internacional comercial por parte de la cámara de comercio de Bogotá. Sin embargo, concluyó que en el Consejo de Estado de Colombia, que entiende aquellos casos arbitrales donde interviene el Estado, la tendencia no tiende a ser la más positiva, toda vez que ha procedido a

anulaciones de laudos arbitrales internacionales.

Confusiones entre arbitraje doméstico o internacional por parte de la justicia local de Ecuador

La Srta. Moreno consultó al Sr. Jaramillo si había confusión por parte de la justicia entre arbitraje doméstico o internacionales y cuáles serían las implicancias. El Sr. Jaramillo expuso que la falta de renovación de la Ley de Mediación y Arbitraje de Ecuador, hace que no se elija a Ecuador como sede arbitral toda vez que no existe una diferencia trazada en lo que constituye un arbitraje doméstico de uno internacional. Asimismo, concluyó que los jueces ecuatorianos no se inclinan a aplicar en general la ley internacional.

Criterios adoptados por los jueces ante las solicitudes de nulidad del laudo y reconocimiento y ejecución de un laudo extranjero

La Srta. Moreno comenzó la segunda ronda de preguntas, solicitando a cada panelista que exponga que criterios adoptan los jueces ante la acciones de nulidad del laudo y que criterios ha adoptado en la hora de ejecución y reconocimiento de un laudo extranjero.

La Sra. Ferraro manifestó que en Perú el poder judicial ha sido bastamente positivo en cuanto a que ha respetado las causales que pueden ser levantadas de oficio y que las causales para solicitar la nulidad son de carácter taxativo. Concluyó que la justicia ha interpretado que los laudos parciales podrán ser reconocidos en Perú.

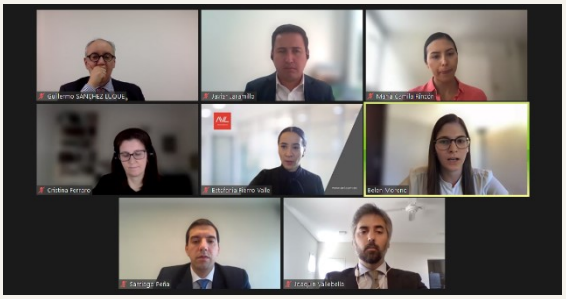
En el caso de Ecuador, a partir de lo expuesto por el Sr. Jaramillo, existen sentencias de la Corte Constitucional que han resuelto que las causales de nulidad son taxativas y que las causas de arbitrabilidad y no fundamentación del laudo no se constituyen como causales de nulidad. Asimismo, el Sr. Jaramillo, observó que la nulidad tiende a dictarse como *última ratio* y que para ello la nulidad debe ser planteada en el arbitraje y de ser posible se dictará la nulidad de forma parcial.

Por su parte el Sr. Vallebella explicó que Argentina actualizó su legislación

de arbitraje, dando más claridad a las facultades del juez respecto de esta materia. Agregó que en Argentina, la motivación es un elemento fundamental toda vez que se han anulado laudos por faltas de motivación en los casos de arbitrajes de derecho. Observó que en su país se les da el poder a los árbitros, en la medida en que se les permite apreciar el derecho y solo en casos excepcionales se podría proceder a anular la resolución dictada.

Desafíos y oportunidades de ecuador en materia de arbitraje comercial

Estefanía Fierro, ilustró que Ecuador está dando pasos positivos al arbitraje toda vez que, ha vuelto a ser parte de la Convención CIADI, emitió el reglamento de Ley de Arbitraje y Mediación y que en el último tiempo ha incorporado en los modelos de contratos públicos cláusulas arbitrales como reglas obligatorias. La Sra. Fierro concluyó que el desinterés de la función judicial en relación con la promoción del arbitraje así como también la seguridad jurídica Ecuador, ha mejorado en los últimos años pero sigue siendo un reto constante del Estado lograr que la intervención de la cortes locales sea mínima, pero que sin embargo, Ecuador está dando los pasos para convertirse en una sede de arbitraje internacional.



Brazil

Arbitration and M&A: Hot Topics Under Brazilian Law and Beyond

Conference Report by Gabriela Ribeiro Leite de Almeida, Pinheiro Neto Advogados, São Paulo.

On 12 May 2022, Young ITA Vice Chair for Brazil **Guilherme Piccardi** (Pinheiro Neto Advogados) introduced the #YoungITATalks Brazil webinar "Arbitration and M&A". Mr. Piccardi welcomed the event speakers **Mariana França Gouveia** (PLMJ), **Giovana Benetti** (Federal University of Rio Grande do

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Sul), **Jair Gevaerd** (Gevaerd & Associates), **Renato Stephan Grion** (Pinheiro Neto Advogados).

"Importing" North American Law Concepts as a Fertile Ground for Disputes

Mr. Piccardi opened by asking the speakers to address the difficulties caused by "importing" legal concepts from countries with different legal systems and how this could lead to disputes. As an example, Mr. Gevaerd explained that in common law, discussions concerning contract formation turn on precedents and practicality, whereas in civil law jurisdictions, contract formation depends on the theory of obligations.

The discussion then moved towards which cultural divergences tend to appear in disputes and arbitrations. Mr. Grion explained that companies are often unaware of the far-reaching consequences of choosing the law applicable to a contract how it can impact the desired legal effects of many contractual provisions. In Brazilian legal practice, some of the clauses usually included in M&A agreements that need to be taken into account for these purposes deal with exclusion of damages, non-compete obligations, derogations from the legal statute of limitations, penalty provisions and the duty of good faith.

The effects of willful misconduct in the formation of the M&A contract

Mr. Piccardi then asked Ms. Benetti to address the effects of willful misconduct in the pre-contractual stages of a deal. Ms. Benetti explained the importance of identifying which legal regime is applicable. In Brazil, there are two kinds of misconduct: the "accidental deceit" leads to the payment of an indemnity, whereas the "main deceit" may annul the contract altogether. Pleadings of accidental deceit are more frequent in M&A disputes.

Mr. Piccardi followed by asking Ms. Gouveia about the legal status of sandbagging clauses in M&A contracts governed by Portuguese law. Ms. Gouveia explained that Portuguese law is similar to Brazilian law in that it is based on theories rather than precedents. She

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then noted that there is no case law addressing sandbagging clauses, but they are presumably valid under the legal concepts of good faith, abuse of rights and the early waiver of rights.

The Challenges Arising from Operations with Multiple Instruments

Finally, the speakers referred to operations involving multiple instruments (i.e. main and ancillary agreements). In such scenarios, Mr. Grion emphasized the importance of ensuring that the relevant arbitration clause covers all parties and all disputes that arise from the main contract. To achieve this, all related contracts should have an arbitration clause that is at least compatible with the one contained in the main contract. As an example, the arbitration clause in the memorandum of understanding should be compatible with the one in the share and purchase agreement.

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India

BIT Arbitration in India: Developments, Trends and Predictions

Conference Report by Yash Shiralkar, Shardul Amarchand Mangaldas & Co., Mumbai.

On March 2, 2022, Young ITA hosted a live webinar discussion on India and its investment treaty arbitrations, chaired by **Juhi Gupta** (Shardul Amarchand Mangaldas & Co./ Young ITA, India Chair).

The speakers at this webinar comprised investor-State dispute settlement (ISDS) practitioners, based both in India and abroad. During this discussion, the speakers discussed the adverse arbitral awards that India has had to deal with, its approach in doing so, its general attitude to investment treaties and finally a look at what the future for aspiring investment treaty arbitration practitioners may hold.

General Overview of Investment Treaty Arbitration

The webinar began with **Niyati Gandhi** (Shardul Amarchand Mangaldas & Co.) setting out what investment treaties and their dispute settlement mechanisms entail. Ms. Gandhi briefly discussed the substantive protections investment treaties often offer and drew parallels with the writ jurisdictions of India's constitutional courts – where one could impugn certain State actions, such as revocation of concessions, statutory measures such as retrospective tax laws. Ms. Gandhi proceeded to then set out in brief the factual context in which some of the recent cases against India, such as Cairn and Vodafone, came into being.

The Retrospective Tax Saga and India's Muddled Approach

Haaris Fazili (DMD Advocates) led the discussion on the Vodafone case, which

in his view, highlights the power of investment treaty protection. He set out the brief facts of the case: Vodafone sought to challenge a retrospective tax amendment that was introduced (dubbed 'clarificatory') despite the Indian Supreme Court having held that Vodafone had no such liability. Vodafone ultimately succeeded in its BIT claim. Mr. Fazili noted other investment treaty arbitrations like Cairn also impugned the same tax statute.

Mr. Fazili also set out India's changing yet paradoxical approach to investment treaty arbitration over the past decade: (a) where since the White Industries award, a barrage of investment treaty claims against India have followed; (b) following which, India terminated almost all of its BITs and released a new Model BIT – that had a carve out for tax disputes; (c) India also signed new BITs, such as one with Brazil that oddly had no ISDS provision; and (d) India's defensive approach against enforcement proceedings in the Vodafone and Cairn cases, where significant costs have been incurred but despite that, only a few months settlements were agreed. India's approach could thus eventually lower investments and, secondarily, opportunities for lawyers to partake in investment treaty arbitration.

The Devas Arbitrations and India's Continued Staggered Plan

Harshad Pathak (University of Geneva/ Mayer Brown), agreeing with Mr. Fazili, explored how India's approach in the Devas arbitrations have been characteristically defiant. Mr. Pathak also added that legacy issues, owing to a change in the government since 2014 have contributed to India's muddled approach, and discussed this in the context of the Devas arbitrations. India's acts subsequent to the issuance of these awards – (a) investigative actions against Devas' Indian subsidiary; (b) the court's winding up of that Indian subsidiary, that was the holder of a sizeable related commercial arbitral award; (c) specific amendments to the arbitration statute, allegedly aimed at Devas – have led to a new BIT claim by

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Devas, that was filed in February 2022. Unlike the Vodafone and Cairn cases, this new Devas case seeks to implicate acts of all organs and has at its crux extremely novel issues in the realm of investment treaty arbitration. Mr. Pathak finally observed that the last time the acts of Indian court were brought in question in an ISDS case (White Industries), India had overhauled its approach to investment treaty arbitration, and wondered if the future would hold something similar.

Contesting Enforcement

Trisha Mitra (LALIVE) began her discussion by setting out the facts underlying the Cairn case and award, as well as those that set it apart from Vodafone – (a) Cairn sought more than declaratory relief; (b) the tax demand was about 9 years subsequent to Cairn's domestic subsidiary being set up; (c) Cairn's shareholding and dividends were seized upon its failure to pay under the demand; and (d) Cairn did eventually pay and hence its BIT claim sought recovery of this amount as damages. Consequently, a substantial award was to be enforced. Ms. Mitra discussed the enforcement proceedings in New York (where Air India's assets were proceeded against) and Paris. Ms. Mitra highlighted India's recalcitrant approach, specifically, in ordering Indian public sector banks to withdraw funds overseas – but somewhat surprisingly, after years of battling it out, as of February 2022, India settled with Cairn and paid it approx. USD 1 billion as India sought settlements in the retrospective tax cases.

Ms. Mitra also discussed the enforcement proceedings in the far-from-settled Devas arbitrations, where proceedings are ongoing in at least Paris, New York and Quebec. Interestingly, in the proceedings in Quebec, assets of Air India were seized – however, this may now become a futile exercise since Air India was taken over by India-based Tata Group in January 2022. Ms. Mitra concluded by noting that while these proceedings are ongoing and will be interesting to follow, India's actions in

the aftermath of the first set of Devas arbitrations have effectively led to the commencement of a new BIT claim by Devas, and consequently Devas' battle against India is certainly not over.

What Does the Future Hold?

With uncertainty looming, not just in India but globally, **Asha Rajan** (Dentons/Young ITA, Western Europe Chair) offered to look through the crystal ball. Ms. Rajan noted that most studies, in countries such as Ecuador, South Africa, Bolivia, etc., have found that terminating BITs have had little deterrence on the extent of foreign investment and in fact, for prospective foreign investors the foremost consideration with respect to legal disputes pertain to the efficacy, reliability and stature of the domestic judiciary and not potential ISDS. Ms. Rajan also agreed with the speakers on the oddities in India's approach to investments treaties – where only two BITs based on India's Model BIT have been signed and the Brazil-India BIT's unusual lack of an investor-State dispute settlement provision and its attempts at reverting back to the erstwhile practice of diplomatic protection – which might make the future in India a little unclear.

Realistic Career Path?

At this point, Ms. Gupta opened the floor to questions, most of which focused on potential careers in investment treaty arbitrations. Despite the lack of clarity for the future, Ms. Rajan believes that there is plenty of reason for aspiring investment treaty lawyers to not be dismayed and reiterates that termination of BITs is unlikely to have a significant impact. Ms. Gandhi chimed in noting that a better perspective would be to look at a career in investment law generally and related fields like political risk insurance; it would also be prudent to follow related global developments, such as the UNCITRAL Working Group III's attempts at setting up a standing multilateral investment court and what they would have to offer. Ms. Mitra also noted that ISDS does not need to be reliant on BITs and can arise out of investment contracts or

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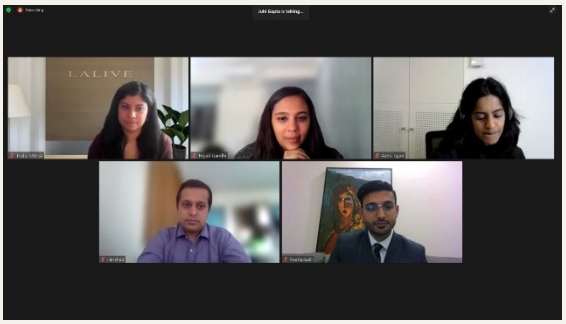
commercial contracts with State entities. Mr. Pathak also added that we must not forget sunset clauses, that can hold protections granted under BITs valid often several years after their termination, and that India's approach, at the end of it, is not antithetical to investor-State arbitration but merely reactionary. India is not looking to withdraw from the practice ISDS, but simply reassess it.



Asia

An Unruly Horse or A Crown Jewel: Working Effectively with Expert Witnesses

Conference Report by Anna Cho, Dentons Kensington Swan, Auckland.

On 10 March 2022, Young ITA Asia Vice Chair, **Philip Tan** (White & Case) introduced the #YoungITATalks webinar "An Unruly Horse or A Crown Jewel: Working Effectively with Expert Witnesses". Mr. Tan was joined by two lawyers and two experts as the event's speakers: **Gerui Lim** (Drew & Napier), **Arthi Anbalagan** (Rajah & Tann), **Petros Karalis** (Kroll), and **Miao Gu** (Secretariat).

Mr. Tan opened the webinar by introducing the phrase "unruly horse" which was used in Richardson v Mellish, an 1824 English decision, where Justice Burrough famously remarked that "*public policy is an unruly house and when you get on it, you never know where it will carry you*". Mr. Tan likened this to a situation where lawyers are working with experts, who have their own independent views formed based on years of experience working in a particular industry. If lawyers did not do things correctly, the experts could go down an entirely different path to what one might expect. Mr. Tan gave an overview of the event, inviting the speakers to discuss how to avoid this unruly horse situation and instead make the expert an effective weapon in

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making your case.

Choosing an Expert

Mr. Tan opened the discussion by asking Ms. Anbalagan when and why she would recommend engaging an expert. Ms. Anbalagan explained that the first step is to identify whether there are disputed issues that require input from someone more specialized or familiar with a specific industry. The timing would depend on your role in the arbitration. As a claimant, it is common to engage an expert early on to assess where the merits lie, and to the extent that your case prevails, the anticipated recovery. As a respondent, you ordinarily engage an expert as soon as you anticipate a technical issue arising, or alternatively following review of the pleadings.

Ms. Lim summarized the key considerations for choosing an expert, being independence and subject matter expertise, which can sometimes not be as clear cut. Ms. Lim also emphasized the importance of doing your due diligence, and checking whether the expert has had good things said about him or her in a public forum. Experience as a witness and the number of cases he or she has been engaged on is also an important consideration, as the cross-examination process can be difficult for first-time witnesses. Mr. Karalis added that experience in the particular type of project that is subject to the proceeding also needs to be factored.

How to Effectively Work with the Experts Throughout the Arbitration

Mr. Tan steered the discussion to experts' reports. Mr. Karalis and Mr. Gu each briefly explained what expert reports would look like for a delay expert and a damages expert.

Sharing from her experience, Ms. Lim explained that engaging with experts from the start and maintaining a close working relationship throughout the process will enable you to understand the experts' thought process and how the report will be presented, avoiding any surprises when the report is finally issued. Ms. Anbalagan agreed that a

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close collaboration with the expert is critical, and also recommended asking as many questions as possible where there are technical jargons that are difficult to understand, so that the final report can be understood by a lay person.

Mr. Tan shared his experience of involving the experts directly with the client where the client is more familiar with the information that the expert requires. Ms. Lim agreed that it is useful to put them in direct contact or in the same room, especially where the information sought is highly technical and it is better communicated directly rather than through counsel.

Mr. Gu echoed that working with the client directly has been very useful, especially to be able to hear the client's perspective before making his own independent assessment. Mr. Gu also discussed his practice of sharing his report skeleton with counsel at the outset, outlining the proposed methodology, and getting counsel's input before going full speed. Mr. Karalis added that the experts should stay focused on the instruction and keep the report simple and concise.

Turning away from the expert report, Ms. Anbalagan discussed some of the other tasks for experts. She explained that their input can be very useful for building your own case and/or developing your response. Such input can help you identify gaps in your own case and any missing key facts that need to be addressed, and also any gaps in the opposing party's case, so you have a better sense when making document production requests. Ms. Lim added that it is common to have experts sit in at the hearing while the opposing expert gives evidence, so that he or she can give feedback on technical aspects.

Mr. Gu commented on the use of rebuttal reports and joint expert reports, and explained that joint expert reports can be useful if the experts are able to identify and focus on key areas of disagreement. Mr. Karalis agreed that joint expert reports are also common for delay experts, and can be used to narrow

down the scope of issues. Ms. Lim made the point that the joint expert report is where the quality of the expert shines through, as it requires the experts to set out his or her reasons for any disagreement.

Hearing

Ms. Lim then discussed how she would go about preparing the expert for the hearing, including holding a mock presentation session. Ms. Anbalagan added that she tries to help the expert to give a summarized position of where he or she stands, given the past reports that have been exchanged.

Mr. Karalis commented that presentations are the last opportunity for experts to highlight key takeaways to the tribunal, and that experts should try to keep the presentations short and focus on key points. Mr. Gu echoed those views and observed that it is important to strike the right balance between presenting his or her own case against rebutting the opposing expert's views.

Ms. Anbalagan and Ms. Lim shared their thoughts on how to best prepare an expert for cross-examination. They advised testing the expert's conclusions in a practice session to make sure that he or she can defend his or her conclusions and the position taken. Some other tips for experts in a cross-examination included: i) keep the answer short and simple; ii) if you need an opportunity to explain, ask for that opportunity before launching into a long dialogue that may open up further cross-examination; iii) stick to what is known and documented, and try not to go into conjecture or speculation.

Mr. Tan shared his experience on hot tubbing and invited the speakers to share their thoughts. Mr. Gu commented that hot tubbing has become increasingly common for damages experts over the recent years. He outlined the different types of hot tubbing: i) tribunal-led, which has been most commonly used; ii) expert-led and iii) counsel-led. Ms. Anbalagan commented that hot tubbing works well if the tribunal is well-prepared, and for sea-

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soned experts who can anticipate where the tribunal is going and what the Tribunal is looking for. Ms. Lim shared her experience of expert-led hot tubbing and its usefulness.

The session concluded with a roundtable networking session, with attendees being put into smaller breakout rooms.

Job Opportunities

in collaboration with Careers in Arbitration

Employer	Role	Location	Link	Deadline
Obeid & Partners	Senior International Arbitration Lawyer	Paris	https://lnkd.in/etUiHhEq	Not Stated
Selvam LLC	Legal Associate (Dispute Resolution)	Singapore	https://lnkd.in/gETtVwQr	Not Stated
Mayer Brown	Intern / Stagiaire	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6962884763820953600	Not Stated
Addleshaw Goddard	Construction Lawyer	London	https://lnkd.in/e24Kytf9	Not Stated
Freshfields Bruckhaus Deringer	Intern	Vienna	https://lnkd.in/ecUjdwSx	Not Stated
Norton Rose Fulbright	Associate	London	https://lnkd.in/eCfvfRMC	Not Stated
VIAC	Deputy Secretary General (Maternity Cover)	Vienna	https://lnkd.in/dpnVA_7R	Not Stated
ICC	Intern	Paris	https://iccwbo.org/careers/internship-opportunities/internship-opportunity-dispute-resolution-services-german-team-paris/	Not Stated
SIAC	Finance Officer / Senior Finance Officer	Singapore	https://lnkd.in/ehRy5Sdr	Not Stated

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Employer	Role	Location	Link	Deadline
SIAC	Deputy Counsel	Singapore	https://lnkd.in/eVcQFSdG	Not Stated
Herbert Smith Freehills	Intern	Hong Kong	https://lnkd.in/ehD45dVu	August 31, 2022
Arias SLP	Junior Associate	Madrid	https://www.linkedin.com/feed/update/urn:li:activity:6959810475115040768	August 31, 2022
Shearman & Sterling	Legal Assistant	Washington, DC	https://lnkd.in/eWYt9e_Y	Not Stated
Jus Mundi	Freelance Arbitration Content Analyst (Chinese Speaker)	Remote	https://lnkd.in/e4PSUJzR	Not Stated
Jus Mundi	Freelance Arbitration Content Analyst (Portuguese Speaker)	Remote	https://lnkd.in/eRheT5kz	Not Stated
Kennedys	Senior Associate	Singapore	https://lnkd.in/ei6p7F66	Not Stated
ArbDossier	Intern	Mumbai	https://lnkd.in/e4ssTni5	Not Stated
Arent Fox	International Attorney	Washington, DC	https://lnkd.in/eBY4WSbB	Not Stated
White & Case LLP	Student Worker – Arbitration	Frankfurt	https://lnkd.in/e4_hCD6a	Not Stated
Jones Day	Global Disputes Associate	Tokyo	https://lnkd.in/evmrUTNp	Not Stated
Jones Day	Global Disputes Associate	Taipei	https://lnkd.in/evmrUTNp	Not Stated

Job Opportunities

in collaboration with Careers in Arbitration

Employer	Role	Location	Link	Deadline
Jones Day	Global Disputes Associate	Sydney	https://lnkd.in/evmrUTNp	Not Stated
Jones Day	Global Disputes Lawyer	Frankfurt	https://lnkd.in/evmrUTNp	Not Stated
Jones Day	Junior Associate	Dubai	https://lnkd.in/evmrUTNp	Not Stated
Cleary Gottlieb Steen & Hamilton LLP	Junior / Mid-Level Associate	Palo Alto / San Francisco	https://lnkd.in/ea-6s8Jv	Not Stated
Sidley Austin LLP	BD and Marketing Specialist – Global Arbitration, Trade and Advocacy	New York	https://lnkd.in/eV8GUjhq	Not Stated
Skadden, Arps, Slate, Meagher & Flom LLP	Associate	London	https://lnkd.in/eS9sydw8	Not Stated
Clifford Chance	Junior Litigation and Dispute Resolution Lawyer	Amsterdam	https://lnkd.in/ebCtHjrt	Not Stated
Clifford Chance	Mid-Senior Litigation and Dispute Resolution Lawyer	Amsterdam	https://lnkd.in/eAKUQD3w	Not Stated
Schellenberg Wittmer	Associate	Geneva	https://www.swlegal.ch/en/career/open-positions/job/associate-international-arbitration-july22/	Not Stated
Laborde Law	Legal Intern	Paris	https://lnkd.in/e-vKa_bQ	August 31, 2022
Gurbani & Co	Associate	Singapore	https://lnkd.in/eZDJerxm	Not Stated

Job Opportunities

in collaboration with Careers in Arbitration

Employer	Role	Location	Link	Deadline
Farallon Law Corporation	Associate	Singapore	https://lnkd.in/e3ZAikz6	Not Stated
Hogan Lovells	Associate	Madrid	https://lnkd.in/eC_tUZw4	Not Stated
Jaguar Land Rover	Supply Chain Litigation Lawyer	Gaydon	https://lnkd.in/eYj2cpaV	Not Stated
HKA	Forensic Accounting & Commercial Damages Consultant	Paris	https://lnkd.in/eP-wPb_V	Not Stated
Hogan Lovells	Senior Associate	Miami	https://lnkd.in/ea7jXZCx	Not Stated
Addleshaw Goddard	Lawyer	London	https://lnkd.in/eZA_wzdf	Not Stated

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 (jorgearturogonzalez31@gmail.com)