Young ITA Newsletter

Vol. 3, Issue 3 – Fall 2022

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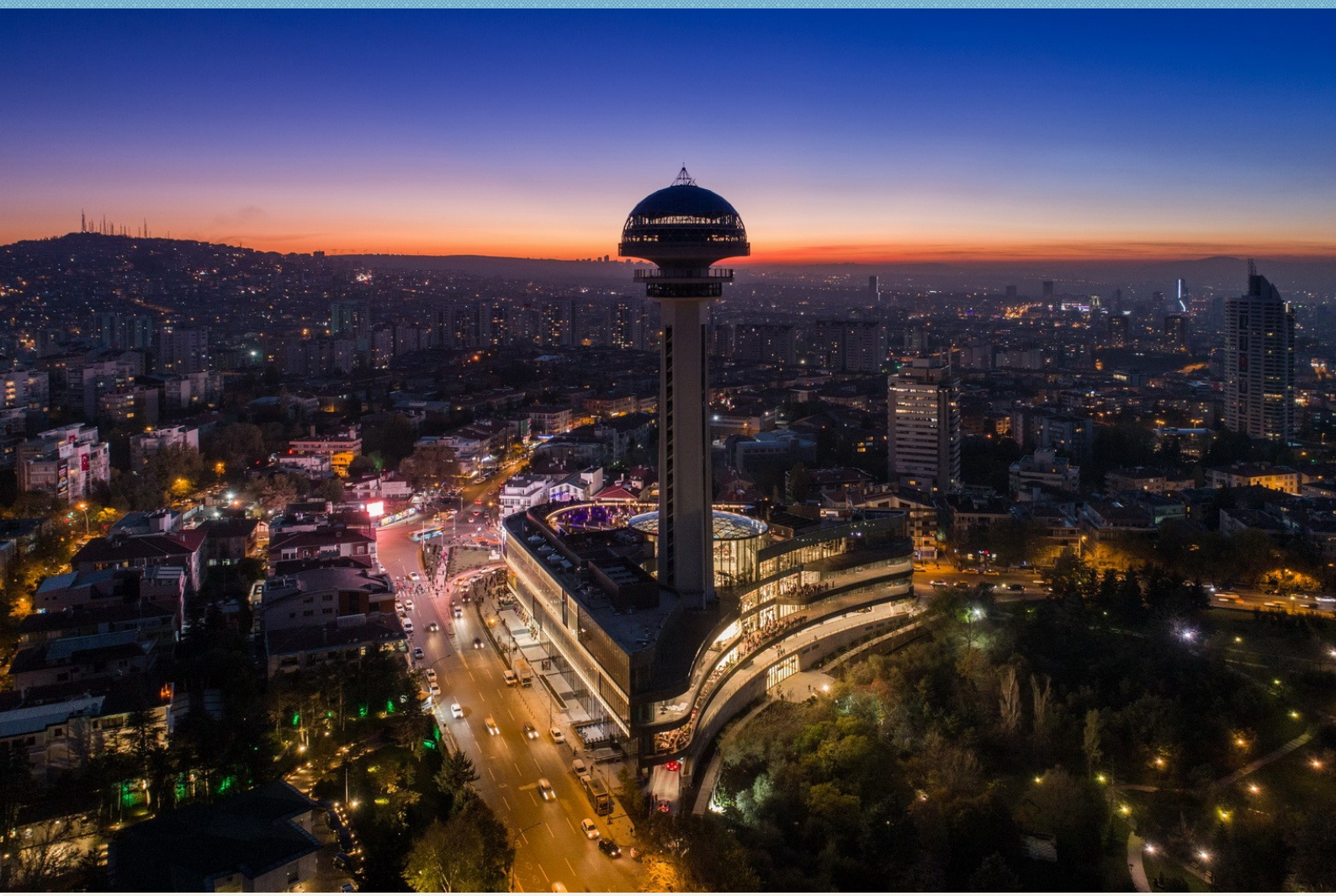
Featured in this Issue



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Contributing Editors

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- **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 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 Derya Durlu Gürzumar-

What do you find most enjoyable about the academic side of the arbitration field?

The rush that comes when you suddenly come to a logical conclusion, after reading perhaps hundreds of pages on a debated issue (that seemingly does not have a definite answer, but the relief that the clash of discourse you have encountered along the way on that particular topic has finally led you to a resolute end), is priceless. In other words, the academic conundrums – they're like puzzle pieces, waiting to be solved.

What top tips would you give to aspiring academics?

Write. Write. Write. And write some more! And also (perhaps more importantly) strive to live a multi-dimensional life. In a world where work is praised more than individual well-being, I believe the latter is what sustains and keeps us excelling through the former. Thus, the focus should be first on well-being, then on the extremely laborious academic journey you wish to embark on. Do pursue (and be very good at!) several life-long hobbies outside of your academic interest, and you'll see that they all complement each other (and even give you inspiration to write your next article).

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

Alaska. I love anything related to nature and for this reason, Alaska would be my #1 go-to place for exploring outdoor/wildlife excursions and simply devour the scenery of raw, unspoiled nature.

Why did you decide to pursue an academic interest in arbitration?

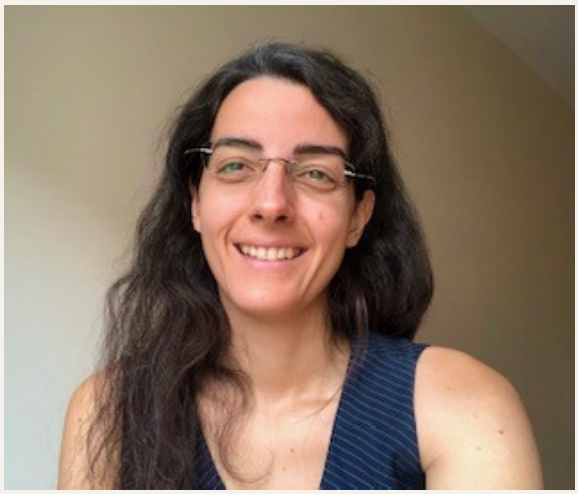
Like many areas in life, understanding the theory comes first for me before I can practice it. I have felt an intense sense of satisfaction in exploring the depths of arbitration through reading and researching, something I may not have experienced had I "learnt by doing" it first. (At least, this is how I feel at this stage of my life.) Law school had given only a glimpse of the theoretical underpinnings, but now I get to weave the research into meaningful dialectics, which is agreeably more tedious, yet immensely fulfilling at the same time.

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

Ride a bike at *Eymir* lake; visit *Anıtkabir* (the mausoleum of Mustafa Kemal Atatürk); and eat *iskender* kebab at *Uludağ Kebapçısı*.

What is your favourite thing to cook?

I have a sweet tooth, so I will not miss out on an opportunity to bake chocolate chip cookies!



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United Kingdom Update:s

The Arbitration Act 1996 Under Review

On 22 September 2022, the Law Commission for England and Wales published its formal consultation paper containing its proposals to reform the Arbitration Act 1996 (AA), the primary statute which regulates arbitration in England and Wales, and Northern Ireland. As the Law Commission noted in its consultation, the AA works "very well". Therefore, are the proposals to modernise the AA an improvement on the status quo, and do they go far enough?

The Law Commission confirmed that the AA does not require "root and branch" review or reform. Nonetheless, the Law Commission found that there was scope to "modernise" it. To that end, it identified eight major topics, and proffered provisional proposals for or against reform. These topics and the related provisional proposals are:

1. **Confidentiality**: The AA does not contain provisions about confidentiality in arbitration. The Law Commission considered whether it should contain a default rule that arbitrations are confidential, subject to a list of exceptions. However, it provisionally concluded that it should not. In some arbitrations, confidentiality is not necessarily the norm. Further, it would be difficult to formulate meaningful exceptions to a general presumption of confidentiality. Therefore, it found that it was more appropriate to leave it to the courts to develop the law of confidentiality.

2. **Independence and disclosure**: The AA does not impose a duty of independence on arbitrators. By contrast, some arbitral rules and foreign legislation do. Nevertheless, the Law Commission concluded that the AA should not impose such a duty. This is because the AA already imposes a duty of impartiality on arbitrators, which "matters most". However, the Law Commission did conclude that the existing duty of disclosure, currently rooted only in case law, should be codified in the Act.

3. **Discrimination**: Currently, equality

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legislation does not extend to arbitration. The Law Commission concluded that it must, and specifically by reference to the Equality Act 2010. It proposed that: (i) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrators' protected characteristics (such as age, disability, and race); and (ii) that any agreement between parties in relation to the arbitrators' protected characteristics should be unenforceable. However, the Law Commission caveated this by acknowledging that it may be appropriate, in certain cases, to require an arbitrator to have a particular characteristic, such as a different nationality from the arbitral parties.

4. **Immunity of arbitrators**: Currently, the AA provides that an arbitrator is not liable for anything done in the purported discharge of their functions as an arbitrator, unless done in bad faith. However, the Law Commission considered whether it should extend immunity to cover arbitrators' costs in arbitration-related court proceedings. It provisionally determined that case law which holds them potentially liable for such costs should be reversed, and invited consultees to consider whether and in what circumstances arbitrators should incur liability in the event of resignation.

5. **Summary disposal**: There is no express provision in the AA to adopt a summary procedure to dispose of claims, defences, or issues which lack merit. Arguably, this power is implicitly permissible under the AA as currently in force, because the AA requires tribunals to adopt procedures which avoid unnecessary delay and expenses, and gives tribunals the power to decide procedural and evidential matters, subject to the parties' right to agree any matter. However, the Law Commission proposed to give arbitrators an express power to adopt a summary procedure in defined circumstances. This would provide greater certainty, and alleviate concerns amongst arbitrators that such procedures run the risk of giving rise to a challenge for serious irregularity.

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6. **Interim relief in support of arbitral proceedings**: The AA provides that the domestic courts have powers to order interim relief in support of arbitral proceedings, in appropriate cases. The Law Commission observed that the courts' powers to support arbitration are determined by reference to the courts' equivalent powers in civil litigation. The Law Commission invited responses on whether this needed to be explicit in the AA. Separately, it proposed that third parties, against whom an order had been made, should have a full right of appeal, as opposed to the restricted right of appeal which applies to arbitral parties. With respect to emergency arbitrators, it proposed clarifying how such a procedure interacts with a party's ability to seek interim relief from the English court. This is because case law currently suggests that interim relief may not be available from the court if it could be obtained from an emergency arbitrator. It also addressed a lacuna in the AA, whereby emergency arbitrator orders cannot be enforced. It did so by proposing two possible amendments to the AA.

7. **Jurisdictional challenges against arbitral awards**: Currently, case law states that a jurisdictional challenge gives rise to a rehearing, instead of an appeal. The Law Commission proposed, where a party has participated in the arbitration and challenged jurisdiction, giving greater deference to the tribunal's decision, such that the challenge would take place instead as an appeal.

8. **Appeals on a point of law**: The AA allows a party to appeal to the court to reconsider a point of law, in certain circumstances. However, the relevant provision is non-mandatory. The Law Commission ultimately found that this struck a "defensible compromise" between protecting finality of arbitral awards and rectifying "blatant" errors of law.

The Law Commission also considered various "minor" amendments, and included a list of topics that it did not wish to cover, such as the law governing the arbitration agreement, third

party funding, and data protection.

Finally, the Law Commission has invited responses from interested parties from 22 September 2022 to 15 December 2022, which can be done here. It will examine the responses, and publish its final recommendations for reform in mid-2023.

By Bruno Rucinski (Trainee Solicitor, Allen & Overy LLP; Bruno.Rucinski@AllenOvery.com; London/UK)

Clashing Jurisprudence: the Kabab-Ji Saga and the Governing Law of Arbitration Agreements

In Enka v Chubb [2020] UKSC 38, the English Supreme Court settled an age-old question under English law that was, before then, rife with uncertainty: when parties have not expressly agreed to a governing law for their arbitration agreement, would the law of the main contract or the law of the seat govern the arbitration agreement?

This question arises whenever the law of the main contract differs from the law of the seat. In Enka, the court held that the law expressly or impliedly chosen by the parties to govern their main contract will generally govern the arbitration agreement. Where there was no such choice, the law of the seat governs the arbitration agreement.

The English Supreme Court has since confirmed these principles in Kabab-ji v Kout Food Group [2021] UKSC 48. This case involved an application to enforce an arbitral award. Enforcement was challenged on the ground that the tribunal had incorrectly applied the law of the seat (French law) to the arbitration agreement and should have, instead, applied the law of the main contract (English law), under which the award would not be enforceable as it was made against a non-signatory to the arbitration agreement.

In considering which law governs the arbitration agreement, the court held that since there was an express choice of law for the main contract (English law), this also governed the arbitration agreement. It observed that the parties' choice of a Paris-seated arbitration

alone did not displace this inference. As a result, the court refused to enforce the award.

However, the same question was very recently considered in parallel Kabab-ji proceedings before the French Cour de Cassation (n° 20-20.260, 28 septembre 2022). The French court referred to the separability of the arbitration agreement ("*indépendante juridiquement*"), and held that, where the parties have not expressly agreed to a governing law of the arbitration agreement, it is the law of the seat that governs. This is consistent with previous French jurisprudence, making the Cassation's pronouncement unsurprising. The award was, therefore, upheld under French law.

Notably, in Enka, the English Supreme Court similarly considered the separability principle but did not agree that it followed from this principle that "*an arbitration agreement is generally to be regarded as a 'different and separate agreement*". The separability principle, as seen in the English Arbitration Act, fictionally treats the arbitration agreement as a separate agreement to ensure its effectiveness in the event that the main contract is invalid. However, the principle has no relevance when determining the governing law of the arbitration agreement; in this context, the arbitration agreement should still be regarded as a part of the main contract.

There is, therefore, a clear conflict between the English and French positions, both as to the effect of the separability principle and, relatedly, how to determine the law applicable to an arbitration agreement. The practical impact of this conflict is that parties may end up with an award that is enforceable in some jurisdictions but not in others.

To prevent such a situation from arising, parties should always specify the law governing their arbitration agreement. The parties in Kabab-ji and Enka spent significant time and costs arbitrating and litigating this question when it would have been relatively straightforward to include an express governing law in their respective arbi-

tration agreements.

By Aashna Agarwal (Associate, Allen & Overy LLP; Aashna.Agarwal@allenovery.com; London/UK) and Godwin Tan (Associate, Allen & Overy LLP; Godwin.Tan@allenovery.com; London/UK)

Middle East Update:

Bahrain: **The Bahrain Chamber for Dispute Resolution Adopts New Sports Arbitration Rules**

On 17 March 2022, the Bahrain Chamber for Dispute Resolution (BCDR) published a new set of arbitration rules, the 2022 Sports Arbitration Rules (Sports Arbitration Rules), aimed at catering for the specific needs of the sporting sector in Bahrain and the wider region.

Although the Sports Arbitration Rules are stated to be effective as of 17 March 2022, the roster of sports arbitrators (Sports Arbitrators) – from which the tribunal must be appointed – was only published by the BCDR on 23 May 2022, thereby marking the actual date on which parties could commence a sports arbitration.

The Sports Arbitration Rules are available in Arabic, English and French, with all three versions being equally authoritative.

The Sports Arbitration Rules are based on the more general 2017 BCDR Rules of Arbitration (2017 Arbitration Rules); however, the two sets of rules differ in certain key respects:

- The arbitration agreement, by which parties agree in writing to refer a sports-related dispute to arbitration under the Sports Arbitration Rules, may be contained in a contract or separate arbitration agreement, or contained in the statutes or regulations of sporting bodies;
- Parties may agree to: (i) arbitrate a first instance sports-related disputes (defined as a "First Instance Arbitration"); (ii) appeal the decisions of a sporting body; or (iii) where permitted by the statutes or regulations of a sporting body, appeal an award rendered in a First Instance Arbitration (defined as an "Appeals Arbitration");

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- Parties do not need to be represented by a "legal representative", but may be represented by "any authorized representative";

- Only arbitrators listed in the approved roster may be appointed, thereby seeking to ensure that the tribunal has appropriate knowledge of and competence in sports arbitration and minimize delay in the selection and appointment process. There are currently 20 approved Sports Arbitrators, but the BCDR has stated that the roster will be updated regularly to broaden the choice of arbitrators;

- The Sports Arbitration Fee Schedule guarantees accessibility to BCDR sports arbitration to all claims, including smaller ones, with a lower non-refundable filing fee of USD 250 (instead of USD 3,000). The "Case Management Fee" – which is calculated based on the claim value – has also been reduced to USD 250 for the lowest value claims (claims up to USD 12,500 with a sole arbitrator). In contrast, under the 2017 Arbitration Rules, the lowest Case Management Fee is USD 4,000 and is applicable for all claims up to USD 75,000 (with a sole arbitrator);

- Under the 2017 Arbitration Rules, arbitrators' fees are generally capped at USD 500 per hour or a daily rate of USD 4,000. In contrast, Sports Arbitrators' fees are generally fixed at the prescribed rates, which correspond to the sums in dispute. Rates start at USD 200 per hour or a daily rate of USD 1,600 for disputes up to USD 500,000.

These new rules are a positive development as they further enhance arbitration in the Middle East, and provide a regional option for sports arbitration.

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

Saudi Arabia: **The Kingdom of Saudi Arabia Continues Trend to Modernize Its Legal System**

Over the last few years, the Kingdom of Saudi Arabia has sought to overhaul its

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legal system through the introduction of its new Arbitration Law in 2012 (enacted Royal Decree No. M/34), the establishment of the Saudi Centre for Commercial Arbitration in 2016, and the new Commercial Courts Law (enacted by Royal Decree No. M/93) in 2020.

As part of this continuing trend, the Kingdom of Saudi Arabia has published a new Law of Evidence (enacted by Royal Decree No. M/43), which came into force on 8 July 2022.

This new law supersedes the chapters regulating evidence under the Law of Civil Procedure and the Law of Commercial Court, and unifies the provisions and procedures of evidence under one law. Pursuant to Article 1, the Law of Evidence shall apply to civil and commercial transactions (and is potentially applicable in criminal and administrative cases, in the absence of regulating provisions in other laws). However, Article 6 permits contracting parties to agree to different rules of evidence provided they do not violate Saudi public order. Accordingly, if the governing law of the contract is Saudi law, the court or arbitral tribunal is required to apply the provisions of this new Law of Evidence unless there is a valid agreement of the parties to the contrary.

This new law codifies the law governing evidence, and provides examples of admissible evidence, with the aim of limiting the judge or arbitral tribunal's discretion and providing more certainty and predictability in judicial rulings on matters relating to evidence. Significant features of the new law include: the right to submit digital evidence, which now holds the same status as written evidence; the concept of direct examination of witnesses (previously, litigants directed their questions to the judge who had the discretion to direct such questions to the witness); the power of the court (or arbitral tribunal) to call a witness on its own volition; the prohibition on harming, intimidating or influencing witnesses; and the right to request disclosure of relevant documents in the possession of the other

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party.

This new Law of Evidence is a positive development, which should help provide confidence to entities seeking to undertake commercial activities in the Kingdom of Saudi Arabia.

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

North America Update:

United States: **Supreme Court Clarifies Scope of U.S. Discovery in Aid of Arbitration**

On 13 June 2022, the Supreme Court unanimously held that 28 U.S.C. § 1782 (a), which allows U.S. courts to assist in discovery "*for use in a proceeding or in a foreign or international tribunal[,]*" does not apply to private commercial arbitrations. In the opinion written by Justice Amy Coney Barrett, the Court defined "*foreign or international tribunal*" as an adjudicatory body that "*exercises governmental authority conferred by a single nation*" or "*two or more nations.*" Private arbitration panels do not fit that bill.

The Court ruled on two consolidated cases: (1) ZF Automotive US, Inc. v. Luxshare, Ltd. [ZF Automotive]; and (2) AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States [AlixPartners]. ZF Automotive involved a private commercial arbitration pursuant to a purchase contract between Luxshare, a Hong Kong company, and ZF Automotive, a United States subsidiary of a German company. AlixPartners involved a bilateral investment treaty (BIT) between Russia and Lithuania where parties could consent to arbitration as a form of dispute resolution. Thus, not only was the Supreme Court tasked with defining a "*foreign or international tribunal,*" but it also had to determine whether each adjudicatory body at issue fell within that definition. In both cases, the Supreme Court answered in the negative.

ZF Automotive filed its petition for a writ of certiorari on 10 September

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2021. AlixPartners filed its petition for a writ of certiorari on 5 October 2021. The Court consolidated the cases and granted certiorari on 10 December 2021. Petitioners filed their briefs on 24 January 2022. Respondents filed their briefs on 23 February 2022. Twelve Amicus Curiae filed briefs both on 31 January and 1 March 2022.

At Oral Arguments on 23 March 2022, the Justices pressed each side on how to define "*foreign or international tribunal.*" Roman Martinez, a Partner at Latham & Watkins LLP, argued on behalf of Petitioner ZF Automotive. Joseph T. Baio, Senior counsel at Willkie Farr & Gallagher LLP, argued on behalf of Petitioner AlixPartners, LLP. Edwin Kneedler, Deputy Solicitor General for the Department of Justice, argued as amicus curiae in support of the Petitioners. Andrew R. Davies, a Partner at Allen & Overy LLP, argued on behalf of Respondent Luxshare, Ltd., and Alexander A. Yanos, a Partner at Alston & Bird LLP, argued on behalf of Respondent, The Fund for Protection of Investors' Rights in Foreign States. During Mr. Baio's argument, Justice Sotomayor asked the question outright: define international tribunal. Mr. Baio's answer—which the Court ultimately adopted—was that a foreign or international tribunal must owe both its existence and its powers to an international agreement by or between or among sovereigns.

The Court's decision on the meaning of "*foreign or international tribunal*" was based on four primary grounds. First, it started with the text. Looking at "tribunal" alone, one might think § 1782(a) should apply in private arbitrations. But, as Justice Barrett wrote, "*[t]his is where context comes in.*" Two modifiers accompany "tribunal": "foreign" and "international." Of these, the Court focused on "foreign." Justice Barrett explained that "foreign" takes on a governmental meaning when it modifies a word with governmental or sovereign connotations. Thus, "foreign" suggests "*something different in the phrase 'foreign leader' than it does in*

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'foreign films." Barret next turned to the statute's neighboring language on procedure. If a court grants discovery under § 1782, it can then "*prescribe the practice and procedure, which may be in whole or part of the practice and procedure of the foreign country or the international tribunal[.]*" Barrett relied on the parallel language (i.e., "foreign" and "international" and "tribunal") to demonstrate that the statute "*presumes that a 'foreign tribunal' follows 'the practice and procedure of the foreign country.'*" In other words, the decision-making body follows the rules set by the corresponding country's government. The Court found that both the pairing of words and the surrounding text indicate that "foreign tribunal" means an adjudicatory body connected to a government or sovereign.

Second, the Court looked at the statutory history. It noted that the current version of § 1782 resulted from the Commission on International Rules of Judicial Procedure. Congress established the Commission to improve judicial assistance to foreign courts and quasi-judicial agencies. Although the Commission broadened the scope of § 1782(a) by using the word "tribunal" instead of "court," that only expanded the types of public bodies covered by the rule. The rule was never intended to include private adjudicatory bodies.

Third, the Court considered the overall context of the statute and a perceived tension with the Federal Arbitration Act (FAA). It explained that the FAA, which applies to domestic arbitrations, only allows the arbitration panel to request discovery. Parties cannot seek judicial assistance. Interpreting § 1782 to allow parties in private international arbitrations to seek judicial assistance would "*create a notable mismatch between foreign and domestic arbitration.*" Accordingly, the context of the statute indicates that a narrower reading of the term "foreign or international tribunal" is to be favored, encompassing only tribunals with a governmental or sovereign link.

Lastly, the Court focused on the

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"*animating purpose*" of § 1782: comity. It reasoned that it does not serve comity to assist "*purely private bodies in adjudicating purely private disputes[.]*" Therefore, the statute's purpose also indicates the necessity of a governmental or sovereign connection.

Once it defined that a "foreign or international tribunal" meant an adjudicative body that owes both its existence and its powers to an international agreement by or between or among sovereigns, the Court proceeded to apply the definition to the two cases before it. The private arbitration in ZF Automotive easily fell outside the bounds of the Court's new definition because no international agreement nor sovereign created the arbitral panel nor gave it its power. Instead, the arbitral tribunal drew its powers from the parties' contractual agreement. In this respect, private commercial arbitrations cannot receive the assistance of U.S. district courts.

The trickier issue was whether the ad hoc arbitration panel created through the BIT in AlixPartners met the statute's newly delineated requirements. The Court found it did not. Barrett emphasized that the ad hoc arbitration panel was one of several dispute-resolution options provided by the BIT, which also included typical courts. Because the BIT gave parties a clear public option for dispute resolution, the ad hoc arbitration panel must have been meant as a private option. The Court thus concluded that the BIT at hand did not create nor empower the arbitration panel but merely gave parties the opportunity to use one. Therefore, such panel was outside the newly set boundaries of § 1782.

Because of the particularities of the BIT it analyzed in AlixPartners, however, the Court may not have completely shut the door for the use of § 1782 in treaty arbitrations. While in AlixPartners, the arbitration panel did not fit the bill of being intended to "exercise governmental authority," the question still remains as to whether other arbitration panels deriving for treaties might. In sum, while the Court's clarification cer-

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tainly narrows the scope of § 1782, parties to treaty arbitrations may still find a way to use it.

By Allison Scott, (J.D. Candidate, Fordham University School of Law; acscott1430@gmail.com; New York, NY/USA)

Central America Update:

Guatemala: **Foreign Capital Investment Promotion Law**

"*Like fire and passion, taxation can bring ruin as well as blessing*"

In 2020, an economic recession due to Covid-19 affected the world economy, decreasing production, creating disruptions in the supply chain, and generating financial impacts on companies; situation that was not foreign to Guatemala.

To promote the economic development of the country, promote the attraction of Foreign Direct Investment and guarantee the retention of reinvestments of foreign capital, the Congress of the Republic of Guatemala approved, by means of Decree 46-2022, the Law for the Promotion of Foreign Capital Investment which was published on 19 September 2022 and entered into force on 27 September 2022.

This law establishes conditions for the approval of tax benefits for investments, which must be equal to or greater than eight hundred thousand Investment Units (IU) so that investors can adopt this special treatment for a period of three to ten years, from the notification of the approval resolution of the investment project.

In this way, the foreign investor is assured of enjoying preferential tax treatment during this time and that there will be no change in their tax situation even if there is a legislative change that harms their economic interests, without any state liability. In other words, this law contemplates a kind of Tax Stability Agreement for certain investors.

Notwithstanding the tax implications, this law may have repercussions in the context of international investment arbitrations for Guatemala. This is because it contains a definition of

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"investment" and a brief reference to the "investors" to whom the tax benefits apply and those who are it excluded.

Regarding the definition of "investment", art. 3 establishes that it should be understood as: "*(...) capital of foreign origin, which is used for the acquisition of property, plants and equipment of a productive nature destined for the production, intermediation or transformation of goods; as well as in the provision and intermediation of services in the territory of the Republic of Guatemala (...).*"

Also contemplating a special tax treatment for capital income or reinvestment if they refer to new projects in the field of different economic activities.

Finally, regarding investors, the law establishes that regulated tax benefits will not be applicable to investors in the mining and energy sectors, as well as to exporters and activities in the maquila sector.

In this sense, it is known that under international investment law, a state can adopt regulatory measures, including taxes, without affecting the investors' guarantees. However, the derogation of tax benefits to specific sectors, as is the case here, could violate the standard of Fair and Equitable Treatment if there are commitments by the State. In addition to the fact that the legal framework does not detail what the tax incentives will be and, consequently, the exclusion of specific productive sectors is it not justified.

By Romar Miguelangel Tahay Batz (Universidad Rafael Landívar - Guatemala Very Young Arbitration Practitioners (GTVYAP); rmthay@correo.url.edu.gt, gtvyap@gmail.com; Guatemala/ Guatemala)

South America Update:

Paraguay:

Special Edition of the Latin American Arbitration Conference (CLA)

The upcoming General Congress of the International Academy of Comparative

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Law (IACL) will take place in Asunción, Paraguay on 23-28 October 2022. In this context, a special edition of the Latin American Arbitration Conference (CLA), focused on the interaction between investment arbitration and comparative law, will take place on the 24th and 25th of October 2022. More information on the IACL General Congress and the CLA is available at https://aidc-iacl.org/.

The Centro de Arbitraje y Mediación Paraguay (CAMP) updated its list of arbitrators

On 1 August 2022, the Board of Directors of the Centro de Arbitraje y Mediación Paraguay (CAMP) – the main arbitration institution in Paraguay – officially incorporated 50 new professionals to the institution's list of arbitrators. The selection process considered the skills, trajectory, experience, and academic training in arbitration of the applicants.

The updated list of CAMP arbitrators is available at https://www.camparaguay.com/en/professionals/umpires/nationals.

By Lucía Elena Cazal Zaldivar (Altra Legal; lcazal@altra.com.py; Asunción, Paraguay)

Argentina:

Since our last report, Argentine courts have continued to embrace a *pro arbitri* approach when analyzing contracts providing for arbitration, as set forth in Article 1656 of the Argentine Civil and Commercial Code (CCC). In Texas Gulf v. Eco Energy and others, one party brought an action before the commercial courts requiring the respondents to render accounts for certain payments due under a contract relating to the production and sale of hydrocarbons. Article 12.2 of this contract provided that "*[a]ll disputes arising out of –or in connection with– [the contract], (…) which cannot be settled amicably, shall be finally settled by arbitration in accordance with the Rules of Conciliation and [A]rbitration of the International Chamber of Commerce [('ICC')]*". In view of the latter, on 14 February 2022, the First Instance Commercial Court No.

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15 declared that it lacked jurisdiction to hear the case. On 2 March 2022, the claimant appealed this decision before the Commercial Court of Appeals, arguing that the parties waived their right to arbitrate since they participated in several pre-judicial mediation hearings and, in particular, since "*[the respondents] did not depart from [the pre-judicial mediation hearings]*", but rather "*[c]ontinued [them] for five months*". The appellant also stated that arbitration clauses must be interpreted restrictively. On 22 March 2022, the Commercial Court of Appeal's General Attorney suggested to uphold the First Instance decision, remarking that "*[t]he parties resolve to confer jurisdiction to an arbitral tribunal*", and specially "*taking into account [Article] 1656 of the [CCC], which establishes that, in case of doubt, the effectiveness of the arbitration contract must be granted*". On 19 April 2022, following the Opinion of the General Attorney, the Commercial Court of Appeals upheld the First Instance decision. In particular, the Commercial Court of Appeals first considered that, since the contract provided for arbitration under the ICC Rules (which was not disputed by the appellant), they "*voluntarily decided to decline the intervention of the state courts in favor of the arbitral tribunals*". Moreover, the Commercial Court of Appeals reasoned that the fact that the parties had held several pre-judicial mediation hearings "*does not per se imply a tacit waiver by them to enforce the arbitration clause*"; "*[o]n the contrary, such attitude could be interpreted as validating the [arbitration] clause, insofar as it provided for the attempt of an 'amicable solution' prior to the submission to arbitration*". Lastly, the Commercial Court of Appeals noted that the fact that the parties were assignees of the contract containing the arbitration clause was irrelevant, since the assignment of a contractual position places the assignees in the same position as the assignors within the relevant contract and, thus, the assignees undertake all the rights and obligations

arising from such contract.

By Florencia Wajnman (Associate, Dechamps International Law, fwajnman@dechampslaw.com; Buenos Aires/ Argentina) and Juan Jorge (Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP; jjorge@curtis.com; Buenos Aires/ Argentina).

Asia-Pacific Update:

India: Supreme Court of India Invalidates Unilateral Determination of Fees by Tribunals in Domestic Ad-Hoc Arbitrations and Clarifies Tribunal's Fees Entitlement Under the Indian Arbitration Act

On 30 August 2022, a majority bench of the Supreme Court of India (SC), in ONGC v Afcons, held that the arbitral tribunals in ad-hoc domestic arbitrations cannot unilaterally determine their fees. Given that ad-hoc arbitrations continue to remain the predominant mode of arbitration in India, this ruling assumes immense significance. This is because it makes the determination of a tribunal's fees consensual between the tribunal and parties. In ruling so, the Court emphasised the cardinal principle of party autonomy and clarified critical aspects of determining the fees of both, party-appointed and court-appointed arbitral tribunals, which were hitherto varyingly interpreted by different High Courts

Facts

The matter before the SC arose out of four petitions filed by various Public Sector Undertakings (PSUs), namely Oil and Natural Gas Company (ONGC), National Thermal Power Corporation (NTPC) and Rail Vikas Nigam Limited (RVNL).

1. In ONGC v. Afcons Gunanusa, the tribunal fixed its fees at a rate higher than the rate prescribed under the Fourth Schedule of the Indian Arbitration and Conciliation Act 1996 (Act), and passed a procedural order, dismissing ONGC's objections to the tribunal's unilateral determination of fees.
2. In NTPC v. Afcons-Shetty Private

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Limited JV, the tribunal fixed separate fees for the claim and counterclaim on the basis that both were separate proceedings.

3. In RVNL v. Simpex Infrastructure Limited, the tribunal fixed its fees on the basis that the ceiling of INR 3 million in Serial No. 6 of the Fourth Schedule (Serial No. 6) only applied to the variable fees (i.e., "*plus 0.5 per cent of the claim amount over and above INR 200,000,000*") and not the stipulated base fees of INR 1,987,500/-.

The PSUs challenged the above orders in their respective proceedings by filing applications to terminate the tribunal's mandate before the respective High Courts. The High Courts dismissed the PSUs' applications. Following this, the PSUs filed petitions before the Court, challenging the orders of the High Courts.

Issues:

Issue (i): Can an arbitral tribunal unilaterally fix its fees?

Issue (ii): Does "*sum in dispute*" in the Fourth Schedule mean that the claim and counterclaim (if any) are to be calculated separately or cumulatively?

Issue (iii): Whether the ceiling of INR 3 million stipulated in Serial No. 6 is the cumulative ceiling applicable to both, the base and variable fees, or is it only applicable to the variable fees?

Issue (iv): Is the ceiling of INR 3 million applicable to each arbitrator individually or to the tribunal cumulatively?

Judgment

Issue (i): The SC ruled that arbitral tribunals cannot unilaterally or arbitrarily determine their fees in domestic ad-hoc arbitrations in light of the principle of party autonomy and the contractual nature of the relationship between the tribunal and the parties. With this as the premise, the SC issued directives governing the determination of the fees of both, party-appointed and court-appointed tribunals. Further, the SC distinguished the 'fees' payable to the tribunal from the 'costs' of the arbitration – fees is the contractual remunera-

tion for the tribunal's services, whereas costs refer to the determination of expenses *inter se* the parties. Therefore, the tribunal cannot determine its fees without the consensus of the parties. In the absence of consensus, any unilateral determination of fees by the tribunal cannot be enforced.

The SC also clarified that the Fourth Schedule is directory, i.e., the fees stipulated in the Schedule can be deviated from as long as there is consensus between the tribunal and the parties. Having said that, where there is lack of consensus, it is open to the tribunal to determine the fees in accordance with the Fourth Schedule given that it is the statutory model fees that serves as the default fees. Any fees determined in terms of the Fourth Schedule is binding and cannot be objected to by the parties.

Issue (ii): The Fourth Schedule prescribes rates based on the "*sum in dispute*". The SC held that this refers to the claim and counterclaim separately, i.e., the tribunal is entitled to separate fees for determining the claim and the counterclaim. The SC's rationale was as follows:

(1) The claim and the counterclaim are separate proceedings since they involve separate examination of witnesses and could arise out of different causes of action.

(2) The counterclaim is not a defence to the claim and its outcome is independent of the outcome of the claim.

(3) Under Section 38 of the Act, the tribunal may require separate deposits to be made in respect of the claim and the counterclaim while determining the costs of the arbitration (which includes the tribunal's fees).

Consequently, the SC held that the ceiling of INR 3 million in Serial No. 6 applies to the claim and the counterclaim separately.

Issue (iii): The SC interpreted Serial No. 6 in light of the legislative intent behind enacting the Fourth Schedule. The 246th Law Commission Report had recommended prescribing a fees ceiling to

reduce incidents of arbitrators charging exorbitant fees. Considering this, the SC held that the ceiling of INR 3 million in Serial No. 6 applied to the base fees and variable fees cumulatively.

Issue (iv): The SC also clarified that the ceiling in Serial No. 6 applies to each individual arbitrator separately as opposed to the tribunal as a whole. The SC explained that the latter interpretation would create an inconceivable disparity wherein a sole arbitrator would earn triple of what each individual arbitrator in a three-member tribunal would earn. In any event, the Fourth Schedule already compensates sole arbitrators for the extra work they may have to do by entitling them to receive an additional amount of 25% of the fees payable to them.

Analysis

The SC's decision has significant implications for ad-hoc domestic arbitrations in India. This is because it makes the determination of a tribunal's fees consensual between the tribunal and parties, failing which consensus, the Fourth Schedule is to apply, should the tribunal be so inclined.

The Court also conclusively clarified the Fourth Schedule to be directive; however, since it is the default statutory model for fees, it is open to the tribunal to determine its fees in terms of the Schedule where there is no consensus, and such fees would be binding on the parties.

Significantly, the SC issued instructive directives in exercise of its discretionary powers under Article 142 of the Indian Constitution, to guide the determination of fees of both, party-appointed and court-appointed tribunals. By virtue of these directives, *inter alia*, the tribunal needs to frame clear Terms of Reference (ToR) within the first four preliminary hearings. The ToR must reflect the agreed fees and if there is no agreement, then the tribunal (or individual member) is at liberty to decline the assignment. The SC also directed the High Courts to frame rules under Section 11(14) of the Act for fixing the fees of party-appointed and

court-appointed tribunals in domestic ad-hoc arbitrations.

Therefore, while a lot would be left to the actual implementation of the SC's directives, this decision is definitely a step in the right direction of making arbitration in India more accessible and cost-efficient. It would also hopefully mitigate the pendency of cases on issues that have now been adjudicated by the SC, such as the meaning of "*sum in dispute*" and the treatment of a claim and counterclaim to calculate a tribunal's fees. Although this decision effectively raises the maximum fees for claims higher than INR 200 million under the Fourth Schedule from INR 3 million to INR 6 million (on account of the ceiling being made applicable to claims and counterclaims separately), the clarity is still welcome.

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#YoungITATalks

South America

Oral advocacy skills workshop: examination and cross-examination

Conference report by Candela Rodríguez Misol, Bomchil, Montevideo, Uruguay

On August 4, 2022, **María Camila Rincón** (Young ITA Chair for South America – Spanish-speaking jurisdictions) and **Santiago Peña** (Young ITA Vice-Chair for South America – Spanish-speaking jurisdictions) presented #YoungITATalks South America, "Oral advocacy skills workshop: examination and cross-examination".

María Camila Rincón and Santiago Peña acted as moderators and the event was attended by the following speakers: **Eduardo Zuleta Jaramillo** (Partner in Zuleta Abogados); **Gaela Gehring Flores**

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(Partner at Allen & Overy); and **Ignacio Minorini Lima** (Partner at Bruchou & Funes de Rioja).

The workshop was divided into two sections: a theoretical and a practical session. In the theoretical session, the speakers addressed the main notions and objectives of witnesses' preparation for their examination at a hearing, and direct and cross examination of witnesses. In the practical stage, the audience was divided in groups (each one led by a mentor –i.e., an advance practitioner on international arbitration from ECUVYAP, LVYAP, Red Juvenil de Arbitraje de Bogotá and Red Juvenil de Arbitraje de Medellín) in order to prepare and carry out a cross examination of a witness in a mock case (in which Eduardo Zuleta Jaramillo acted as arbitrator and gave his feedback to the participants).

The First Section of the Event (Speakers' Presentations)

The first part of the event was conducted by the speakers, who addressed the main objectives of preparation of witnesses for their examination at an arbitral hearing, as well as the preparation and execution of direct and cross examination of witnesses in international arbitration proceedings.

The speakers gave recommendations and advice to the attendees based on their professional experience. In particular, the speakers focused on the relevance of a deep analysis of the case evidence, both for witness' preparation and for its examination at a hearing, as well as on the way in which the questions should be made at a direct and cross examination of a witness.

The Second Section of the Event (Mock Case)

The second part of the event consisted in the development of a mock case by which the attendees were divided in groups (half acted as claimant and the other half as respondent) to prepare the cross examination of a fictional witness.

The mock case concerned a dispute arisen between a company domiciled in

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the US (as claimant) and a company domiciled in Argentina (as respondent) regarding a contract for the purchase of vaccines for the COVID-19 virus.

The exercise consisted in the preparation and execution of the examination of witnesses called by the parties, for which the participants had to consider the recommendations previously given by the speakers.

Each group was assigned with a mentor for guidance during the preparation of the examination of the witness. The mentors were advance practitioners on international arbitration from ECUVYAP, LVYAP, Red Juvenil de Arbitraje de Bogotá and Red Juvenil de Arbitraje de Medellín (i.e., relevant young arbitration associations from Ecuador, Perú and Colombia).

The teams first discussed and prepared the possible questions for the witness in private and, afterwards, selected one member to carry out the examination.

The attendees proceeded with the examination of the witnesses, and later received feedback from Eduardo Zuleta Jaramillo, who acted as arbitrator.

The event had a large number of attendees and was very well received by the public.

The opinions expressed in this article are solely the authors' and do not reflect the opinions and beliefs of Allen & Overy LLP or its clients.

ZF Auto. US, Inc. v. Luxshare Ltd., 142 S.Ct. 2078, 2089 (2022).

142 S. Ct. at 2086.

Id. (citing Brief for Petitioners in No. 21-401; Brief for Respondent in No. 21-401, pp. 7-8).

Id. at 2087 citing § 1782(a) (emphasis in opinion).

Id.

Id. at 2088.

Id.

Id.; see also Brief for Petitioners in No. 21-518, p. 18.

142 S.Ct. at 2088.

Id.

Id.

Id. at 2089.

Id. at 2090.

Id. at 2091.

Park, William W. Arbitrability and Tax, in: L. Mistelis & S. Brekoulakis (eds). Arbitrability: International & Comparative Perspectives, 179-205, Kluwer Law International, Netherlands, ¶10-14.

See First Instance Commercial Court No. 15, Case No. 23006/2021, Texas Gulf Holdings LLC v. Eco Energy CDL OP. LTD Sucursal Argentina and others.

Job Opportunities

in collaboration with Careers in Arbitration

Employer	Role	Location	Link	Deadline
Freshfields	Associate	London	https://www.linkedin.com/feed/update/urn:li:activity:6994110877822054400	Not Stated
Herbert Smith Free-hills	Intern	Singapore	https://www.linkedin.com/feed/update/urn:li:activity:6994110077691465728	Not Stated
Linklaters	Associate	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6993686884589658114	Not Stated
Allen & Overy	Intern/Stagiaire	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6993392917109186560	Not Stated
ICC	Deputy Director	New Delhi	https://www.linkedin.com/feed/update/urn:li:activity:6992863750236028929	Not Stated
AFFAKI	Associate	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6992830326251081728	Not Stated
King & Wood Mal-lesons	Solicitor	Sydney	https://www.linkedin.com/feed/update/urn:li:activity:6991142087492575233	Not Stated
Kennedys	Senior Associ-ate	Singapore	https://www.linkedin.com/feed/update/urn:li:activity:6991138546111631360	Not Stated
King & Wood Mal-lesons	Litigation Asso-ciate	New York	https://www.linkedin.com/feed/update/urn:li:activity:6991134623443361793	Not Stated

Job Opportunities

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Employer	Role	Location	Link	Deadline
ICC	Counsel	Abu Dhabi	https://www.linkedin.com/feed/update/urn:li:activity:6991130855519723520	Not Stated
ICC	Intern (Middle East Team)	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6991127717492498432	Not Stated
ICC	Intern (Common Law Team)	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6991127068386197504	Not Stated
ICC	Intern (Eastern European Team)	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6991126517653078018	Not Stated
ICC	Intern (Italian-Switzerland Team)	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6991125660400246784	Not Stated
ICC	Intern (LatAm Team)	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6991125196694765569	Not Stated
Mumbai Centre for International Arbitration	Case Manager	India (Remote)	https://www.linkedin.com/feed/update/urn:li:activity:6991046875604729856	Not Stated
Eversheds	Intern	Paris	https://www.linkedin.com/feed/update/urn:li:activity:6990294187296333824	Not Stated
WilmerHale	Associate	New York/DC	https://www.linkedin.com/feed/update/urn:li:activity:6989022654527590401	Not Stated
Omnia Strategy	Contract Lawyer	London	https://www.linkedin.com/feed/update/urn:li:activity:6989022055773917184	Not Stated
Clifford Chance	Senior Associate	Perth	https://www.linkedin.com/feed/update/urn:li:activity:6989021156829716480	Not Stated

Job Opportunities

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Employer	Role	Location	Link	Deadline
Omnia Strategy	Contract Lawyer	London	https://www.linkedin.com/feed/update/urn:li:activity:6989022055773917184	Not Stated
Clifford Chance	Senior Associate	Perth	https://www.linkedin.com/feed/update/urn:li:activity:6989021156829716480	Not Stated
Centinel Law Firm	Associate	Istanbul	https://www.linkedin.com/feed/update/urn:li:activity:6989020657791418368	Not Stated
SIAC	Deputy Counsel	Singapore	https://www.linkedin.com/feed/update/urn:li:activity:6989020139274825728	Not Stated
Bird & Bird	Associate	London	https://www.linkedin.com/feed/update/urn:li:activity:6989019372493119489	Not Stated
Mayer Brown	Global IA Knowledge Specialist	London	https://www.linkedin.com/feed/update/urn:li:activity:6989018946481856512	Not Stated
AGA Partners Law Firm	Associate/Senior Associate	Kyiv	https://www.linkedin.com/feed/update/urn:li:activity:6988918039773618176	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.

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- **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)