Young ITA Newsletter

YOUNG ITA

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- Report on the Young ITA Global Forum
- Mentorship Program Highlights
- Regional Updates

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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 be sure to join Young ITA for email announcements of future events here.
- **Reporting for Young ITA** – Please see page 49 of the newsletter for information on how to get involved with preparing pieces for the newsletter, or in reporting on Young ITA events in the future.

LEADERSHIP ANNOUNCEMENT

Young ITA is delighted to announce sixteen new appointments to its leadership team

Over the past year, we have held 36 Young ITA events as well as reached a total of 3374 Young ITA members representing 122 countries. We would like to say a big thank you to our outgoing board members for their fantastic services over the past year and congratulations to our new (and returning) chairs and co-chairs. We look forward to another successful year working with the ITA and continuing to expand on educational and leadership opportunities for young arbitration practitioners. The full announcement can be read here.

While board members appointed for 2023-2025 remain in their positions, the incoming board members for 2024-2026 are:

- **Angélica María Perdomo Luna** (External Communications Co-Chair)
- **Derya Durlu Gürzumar** (Internal Communications Co-Chair)
- **Patricia Snell** (Mentorship Co-Chair)
- **Santiago Peña** (Programs Co-Chair)
- **Rob Bradshaw** (Thought Leadership Co-Chair)
- **Angelia Thng** (Asia Co-Chair)
- **Iuri Reis** (Brazil Co-Chair)
- **Tímea Csajági** (Eastern Europe Co-Chair)
- **Aayushi Singh** (India Co-Chair)
- **Dhouha Oueslati** (Africa Co-Chair)
- **Edgar Eduardo Mendez Zamora** (Central America Co-Chair)
- **Alejandro Martinez de Hoz** (North America Co-Chair)
- **Fernando Ayala** (South America Co-Chair)
- **Ana Martinez Valls** (UK Co-Chair)
- **Alexis Foucard** (Western Europe Co-Chair)
- **Louise Willneff** (Middle East Co-Chair)

60 Second Interview with Angélica María Perdomo Luna

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

That learning never stops. Each case is a new universe for you to explore.

Why did you become a lawyer? What top tips would you give to aspiring lawyers?

In law, I found a versatile and powerful tool for progress. Of course, I didn't know this when I was admitted to law school at 16, but I discovered it along the way—through my classes and as I became more aware of my country's reality. This leads to my top tip for aspiring lawyers: don't stress too much about choosing a specific path in law. Change is part of discovering what you want. For now, focus on giving your best as a lawyer and as a person, and the rest will fall into place.

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

Tanzania.

What are the top three things that visitors should do in Colombia?

Visit the old walled city in Cartagena, Guatapé lake near Medellín, and Caño Cristales, the river of seven colors.

What is your favourite dish to cook?

Corn arepas with melted cheese.

36th Annual ITA Workshop and Annual Meeting

Young ITA Roundtable: Due Process Challenges – Has it all gone too far for procedural fairness in international arbitration?

On 19 June 2024, on Day 1 of the 36th Annual ITA Workshop and Annual Meeting 2024, the Young ITA organised a panel discussion on due process challenges. The panel was moderated by Young ITA Chair, **Karima Sauma** (DJ Arbitraje, San José) and was comprised of **Ruediger Morbach** (King & Spalding, Frankfurt) and **Ricardo Chirinos** (Covington & Burling LLP, Washington, D.C.).

Ricardo Chirinos opened the discussion by addressing the evolving landscape of due process in international arbitration, emphasising the tension between maintaining procedural integrity and adapting to the increasingly complex nature of cross-border disputes. Mr Chirinos highlighted the growing concern of "*due process paranoia*", where arbitrators become overly cautious in their procedural decisions, often to the detriment of the efficiency and effectiveness of the arbitration process.

> "Mr Chirinos referred to this concept, of anxiety that arbitrators feel about being perceived as overly concerned with due process (i.e., suffering from "*due process paranoia*"), as "*due process paranoia paranoia.*"

This paranoia stems from a fear of potential challenges to the fairness of proceedings, leading arbitrators to make overly conservative decisions that can prolong the arbitration unnecessarily. This is a heightened and exaggerated concern about due process issues in arbitration, beyond what is typically understood as "*due process paranoia*." This second level of paranoia, in Mr Chirinos' view, can further complicate proceedings by

making arbitrators even more hesitant to take decisive actions, out of fear that their decisions might be viewed as insufficiently attentive to due process. Mr Chirinos' opinion was that this dual paranoia creates a significant barrier to efficient arbitration, as it can lead to excessive procedural caution and, by extension, to delays and increased costs.

Ruediger Morbach offered a different perspective, recognising the importance of addressing "*due process paranoia*" but emphasising that the focus on ensuring fair and transparent procedures is fundamental to the legitimacy of arbitration. Mr Morbach's own view was that, while the concerns raised by Mr Chirinos were valid, the solution lies not in reducing the emphasis on due process but in refining the guidelines that help arbitrators strike a balance between procedural caution and efficiency. Maintaining this balance is crucial for preserving the confidence of parties in the arbitration process.

Following these opening remarks, the panellists engaged in a dynamic exchange, with Mr Chirinos reiterating that an overemphasis on due process concerns, particular in the form of so-called "*due process paranoia paranoia,*" could hinder the arbitration process by making

arbitrators overly cautious and reluctant to take firm decisions. Mr Morbach, on the other hand, maintained that the primary concern should be ensuring that all parties feel their rights are fully respected throughout the arbitration.

The session concluded with an interesting discussion between the panellists and members of the audience. One audience member questioned whether the increasing focus on due process might lead to a rigid procedural framework that could stifle the flexibility for which arbitration is known and liked. In response, Mr Chirinos acknowledged this risk, reiterating the need for a more nuanced approach that allows arbitrators to exercise discretion without the overhang of "*paranoia*". Another audience member asked how arbitrators could better communicate their procedural decisions to avoid perceptions of unfairness, with Mr Morbach responding that transparency and clear explanations of procedural choices are key to maintaining trust.

The panel discussion underscored the challenges arbitrators face in navigating the fine line between upholding due process and avoiding procedural delays, with the active participation of the audience reflecting the collective desire within the international arbitration community to find that delicate balance.

By Harriet Gibson-Horswell (Associate at Orrick, Herrington & Sutcliffe) (hgibson@orrick.com)

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Perspectives and Crossroads from the East: Emerging Roads

The ITA's webinar series "Perspectives and Crossroads from the East" kicked off on 17 April 2024 with its inaugural panel session. The session, entitled "Emerging Roads", focused on the future of arbitration and dispute resolution in the Middle East and beyond. The panel was moderated by **Ibrahim Ati** (New York City Bar Association). Members of the panel drew on a range of experiences in arbitration and dispute resolution from different geographies and legal methodologies.

The session began with an introduction to the aim of the series: to foster a novel dialogue in arbitration across the Middle East by incorporating insights from a broad spectrum of voices, including government officials, legal practitioners, industry figures, and trade analysts.

The discussion started with **Ahmer Bilal Soofi** (ABS & Co), the former Minister of Law, Justice and Parliamentary Affairs in Pakistan and a leading jurist. He opened discussions by shedding light on the innovative application of international legal principles in Pakistan. He delved into how Pakistan has navigated complex sovereign/investor disputes amidst regional geopolitical tensions. Mr. Soofi emphasized the significance of alternative dispute resolution (ADR) mechanisms and how Pakistan has tailored these to meet its own specific challenges. He also touched upon the impact of global sanctions and the Belt and Road Initiative on dispute resolution practices. Among other things, Mr. Soofi advocated for the adoption of faith-based arbitration methods and the exploration of artificial intelligence to enhance the efficiency and fairness of dispute resolutions.

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Next, **Hamza Nizam Kazi** (Jaffer Brothers), with reference to the MENA region, introduced the concept of *"Greener Arbitrations"*, focusing on the need for sustainable practices within the arbitration process. He outlined the initiative's guiding principles, emphasizing the reduction of the arbitration process's carbon footprint through electronic submissions, video conferencing, and the promotion of environmentally friendly practices among suppliers and service providers. Mr. Kazi presented a compelling case for the environmental necessity and ethical imperative of adopting greener arbitration practices.

Eugenia Stavropoulou (Kim & Chang) offered a generational viewpoint on arbitration, focusing on South Korea's growing influence in the Arabian Peninsula and the importance of harmonization in international dispute resolution. She emphasised that increased time and cost for infrastructure in the region was presenting a challenge to settlement of issues under international arbitration. Ms. Stavropoulou argued for the prioritization of mediation over arbitration to maintain commercial relationships and manage rising arbitration costs.

The discussion moved to **Ank Santens** (White & Case). who explored innovative avenues in arbitration, emphasizing technology, diversity, and sustainability. She discussed how artificial intelligence could revolutionize case management, the critical importance of diversity in arbitration panels, and the push towards environmentally sustainable arbitration practices. Ms. Santens highlighted ongoing efforts to position the Middle East as an attractive venue for arbitration and called on the younger generation to lead these innovation efforts.

The session concluded with a collective reflection on the

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importance of fostering a new chapter in arbitration dialogue, marked by enriched discussions and fresh visions for legal practices. The panelists collectively underscored the significance of innovation, sustainability, and inclusivity in shaping the future of legal frameworks and dispute resolution mechanisms, particularly in the Middle East and beyond.

By Christian Amos (Ankura, London), (christian.amos@ankura.com)

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Perspectives and Crossroads from the East: Shores of the Red Sea

The ITA's webinar series "*Perspectives and Crossroads from the East*" continued on 20 May 2024 with an exceptional panel session titled "*Shores of the Red Sea*." This distinguished panel, with a keynote address by His Excellency Mr. Moustafa El Bahabety, Deputy Minister of Justice for Arbitration and International Disputes of Egypt, brought together experts in various sectors, including construction, trade, and energy. Each speaker contributed their profound insights and vast experience to the discourse on arbitration and dispute resolution in the Middle East.

The panel comprised:

- **His Excellency Mr. Moustafa El Bahabety**, Deputy Minister of Justice for Arbitration and International Disputes of Egypt
- **Mr. Ibrahim Shehata**, a prominent Egyptian lawyer specializing in international arbitration
- **Mr. Daniel J. Boyle**, an international strategist and formerly strategic planning advisor at Saudi Aramco
- **Ms. Antonia Birt**, a partner at Reed Smith with extensive experience in the MENA region
- **Dr. Talal Jaber**, Head of the Disciplinary Council at the Beirut Bar Association

Ibrahim Ati, member of the New York City Bar Association's Arbitration Committee and Vice-Chair of the American Bar Association's Dispute Resolution Committee, moderated the discussion. Mr. Ati introduced the session by highlighting the ITA's commitment to fostering a novel dialogue in arbitration across the Middle East, incorporating insights from a broad spectrum of voices.

The session commenced with a keynote address by His Excellency **Mr.**

Moustafa El Bahabety, a central and renowned figure in Egypt's international arbitration landscape. Mr. El Bahabety's address, delivered in Arabic and translated directly by Ibrahim Shehata, underscored the significant progress made under his leadership. He noted that when he assumed office, there were around 110 active cases involving Egypt; nearly nine years later, that number has been reduced to approximately a dozen, showcasing the effectiveness of his initiatives and progress made by Egypt in the international arbitration market.

Following the keynote speech, the discussion was taken up by the other panellists.

Ibrahim Shehata began with an in-depth analysis of Egypt's evolving arbitration processes. He discussed the increasing attractiveness of the Egyptian market for foreign investments, particularly highlighting the construction of a new administrative capital and important investments from the UAE and Saudi Arabia, nearing 100 billion USD. Mr. Shehata provided practical insights on navigating arbitration in Egypt and handling international cases with Egypt as the seat, emphasizing the importance of understanding the local legal landscape.

Daniel J. Boyle shared his perspectives on the energy sector, particularly within the framework of Saudi Vision 2030. He elaborated on strategic initiatives undertaken by Saudi Aramco and their broader implications for regional energy markets. Mr. Boyle emphasized the critical role of arbitration in managing disputes arising from these transformative projects, highlighting the need for robust dispute resolution mechanisms.

Antonia Birt offered valuable insights into trade disputes between the Arabian Peninsula and the African continent across the Red Sea. She explored how commercial arbitration integrates with the growing economic

relations and trade activities between the Gulf and Africa as a safe dispute resolution method, identifying common disputes and key considerations for counsels operating in this region. Ms. Birt discussed the novel influence of the Saudi Center for Commercial Arbitration (SCCA) on cross-border disputes and advocated for commercial arbitration as the preferred method for resolving trade disputes.

Dr. Talal Jaber concluded the panel with an exploration of the ethical responsibilities and obligations of arbitrators in the Middle East. He highlighted key considerations that distinguish Middle Eastern arbitration from cases in the US or Europe and stressed the importance of adhering to strong ethical standards amidst increasing stakes in the region.

The session concluded with a collective reflection on the importance of innovation, sustainability, and inclusivity in dispute resolution mechanisms in the Middle East. During a Q&A with the attendees to close the event, the panellists underscored the need for continuing these enriched discussions and fresh visions to enhance the arbitration dialogue across the region and beyond.

Overall, this session of the ITA's webinar series exemplified a high-calibre exchange of ideas and expertise, highlighting critical developments and innovative approaches in arbitration and dispute resolution. It provided invaluable insights for practitioners and stakeholders engaged in the Middle East's evolving legal landscape, reinforcing the ITA's role in promoting excellence and thought leadership in international arbitration.

By Nour Sheri, Cairo & London, (Noursherif111@yahoo.com)

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#YoungITATalks: Middle East

Continuing the successful series titled "Perspectives and Crossroads from the East"

On July 23, 2024, the Young ITA hosted a new Young ITA Talks Middle East virtual seminar, continuing the successful series titled "Perspectives and Crossroads from the East." The seminar aimed to enrich the international arbitration community by reviewing the experiences of arbitration in the global East.

Our distinguished moderator, **Ms. Nadya Rouben**, Legal Director at DLA Piper London's Commercial Litigation and International Arbitration, guided the discussion through a historic review of international arbitration in Asia and the Middle East, and the remarkable efforts of arbitration centers in the region to develop a regionally targeted experience in the arbitration industry through periodic updates of institutional rules. Speakers then reflected upon their experiences with arbitration in Asia and the Middle East to envision what future challenges and possibilities might face arbitration in the region.

At the seminar`s beginning, **Mr. Ibrahim Ati**, Young ITA Co-Chair for the Middle East region, provided a remarkable and concise introduction to the series, highlighting the remarkable success of previous seminars.

During the seminar, Ms. Nadya Rouben moderated a discussion with **Mr. Toby Landau**, an international arbitrator and legal counsel. They explored modernizing arbitration rules and their impact in the East and Middle East regions. Mr. Landau emphasized the importance of updating rules to match evolving legal and commercial landscapes. Balancing global consistency with local challenges is key. Evolving laws shape arbitration practices, and cooperation among centers fosters a global market. The profession's

challenge is maintaining prestige amidst change.

Ms. Nadya Rouben then invited **Ms. Gloria Lim**, CEO of the Singapore International Arbitration Centre (SIAC) to discuss the evolution of arbitration from SIAC's perspective. With a three-decade track record, SIAC plays a pivotal role in international trade, especially given Singapore's status as an eastern hub. During the discussion, Ms. Nadya Rouben inquired about SIAC's rule amendments to address practical needs. Ms. Gloria Lim emphasized that procedural rules must adapt to meet parties' requirements. The 2016 SIAC Rules incorporated diverse mechanisms for efficiency based on dispute complexity. Subsequently, the conversation shifted to cooperation agreements between SIAC and Middle East arbitration centers, including in Riyadh, Bahrain, and Abu Dhabi. Ms. Gloria Lim highlighted the significance of these agreements, which grant users access to multiple centers, enhancing their

arbitration experience amidst global complexities.

Ms. Nadya Rouben next invited **Dr. Hamed Merah**, CEO of the Saudi Center for Commercial Arbitration (SCCA), to discuss the significance of establishing arbitration and alternative dispute resolution (ADR) centers in the Middle East. Dr. Merah highlighted the historical development of Saudi legislation supporting arbitration and ADR since 1940. He also explained the role of the Saudi judicial system and how SCCA collaborates with the Ministry of Justice to enhance training expertise. Furthermore, he commended government support, acknowledging several legislative amendments that encourage including SCCA clauses.

Dr. Hamed pointed out that the 2023 updates to the Saudi Arbitration Rules aim to improve efficiency and enhance the overall experience for arbitral parties.

Ms. Nadya Rouben invited **Dr. Ismail Selim**, Director of the Cairo Regional Center for International Commercial Arbitration (CRCICA), to discuss recent updates to the CRCICA Rules. Dr. Selim highlighted key features, including provisions on consolidation of arbitrations, early dismissal of claims, Emergency Arbitrator Rules, online arbitration filing, and third-party funding. Technology integration enhances transparency and efficiency within CRCICA. CRCICA prioritizes maintaining its reputation and fostering judicial development. Lastly, Dr. Selim also introduced IFCAI—an international institution promoting relations among commercial arbitration centers worldwide.

Ms. Nadia then invited **Prof. Mohamed Abdel Wahab** (Founding Partner of Zulficar & partners, President elect of the Chartered Institute of Arbitrators 2025) to share his insights on arbitration in the Arab world. He praised the region's remarkable progress and highlighted its potential for stimulating the arbitration industry. Key areas include abundant resources, academic development, and specialized programs covering disciplines like engineering and energy arbitration.

Addressing challenges, Prof. Wahab emphasized the need for professional practices aligned with cultural and jurisdictional features. He also stressed measuring efficiency, enriching legal libraries, and understanding regional business practices to prevent future conflicts. He closed by commenting on the key role international centers play in knowledge transfer and training for international arbitration professionals.

By Khalaf Bandar Khalaf (Khalaf Bandar Law Firm, Riyadh) (Khalaf.b@outlook.sa)

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#YoungITATalks: Hong Kong

A Breakfast Conversation: Opportunities and Dispute Resolution in the Asia-LATAM Corridor

On 8 May 2024, a Breakfast Conversation on Opportunities and Dispute Resolution in the Asia-LATAM Corridor, presented by the ITA and co-sponsored by Herbert Smith Freehills, was hosted at Herbert Smith Freehills' Hong Kong office.

The Breakfast Conversation was moderated by **Alice Wang** (Pinsent Masons, Hong Kong, and Young ITA Asia Co-Chair) and featured a diverse line-up of speakers, including **Cecilia Flores Rueda** (FloresRueda Abogados, Mexico City), **Eduardo Damião Gonçalves** (Mattos Filho, São Paulo), **Eva Chan** (Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, New York, and Young ICCA co-chair), **Joshua Karton** (Associate Professor of Queen's University Faculty of Law, Kingston, Ontario), and **Murphy Mok** (Herbert Smith Freehills, Hong Kong).

Setting the scene

Eduardo Damião Gonçalves set the scene by commenting on the sectors that are witnessing the most Asia-LATAM arbitration activity, including mainly infrastructure, real estate, transportation, mining, renewable energy and supply of commodities.

Mr. Damião Gonçalves then discussed the impact of BITs on arbitrations and investor confidence. He noted that, while LATAM parties have been one of the major users of the arbitration mechanisms in the ICSID Convention, there has been pushback from some LATAM countries. Withdrawals from the ICSID Convention by Bolivia, Ecuador (before it re-ratified the ICSID Convention) and Venezuela were highlighted. Mr. Damião Gonçalves also commented on the status of Brazil as the largest recipient of foreign direct investment in the region despite Brazil never having signed or ratified the ICSID

Convention, and having signed or ratified very few BITs. While agreements between investors and the Brazilian government might provide for dispute resolution mechanisms, usually commercial arbitration, there is no simple answer to how investor-state disputes are resolved in Brazil in the absence of any contractual basis. However, Brazil is notably not under any significant pressure to adopt investor-state arbitration mechanisms more widely, internally or by foreign investors.

In relation to BITs, Joshua Karton explained that the economic evidence that BITs lead directly to investment growth is weak. While the availability and use of investor-state arbitrations promote the rule of law, they may not make large economic differences. This was echoed by Mr. Damião Gonçalves, who referenced China's significant investments in Brazil despite the lack of a BIT between the two countries.

“While the availability and use of investor-state arbitrations promote the rule of law, they may not make large economic differences.”

Geopolitics

The panel next held a discussion, led by Eva Chan, about how geopolitical shifts might influence Asia-LATAM arbitrations. It was noted that the answer to this reflects how geopolitical shifts influence Asia-LATAM investments. Eva explained that geopolitical shifts influencing investments can be categorised into three phases. First, there was the "oil-for-loans" push by China following the financial crisis, by which China offered enormous loans, including to LATAM countries, at a time when the capital markets were very limited. Second, the Belt and Road Initiative was launched in 2013 which linked

China and other regions of the world for investment purposes. It did not initially cover LATAM but was extended to do so as China recognised opportunities in the region, including in relation to the availability of natural resources in LATAM and the potential diversification of China's investments. The third, current and amorphous phase of geopolitical shifts affecting Asia-LATAM investments is the US-China trade war, which has affected where the US and China have focussed their respective foreign investments.

Murphy noted that, as China is now the second largest trading partner of LATAM, LATAM parties could be slower to commence arbitrations against their Chinese counterparts. Moreover, as China becomes more assertive and Chinese companies become quicker to protect their interests through dispute resolution, we can expect not only more arbitrations involving Chinese parties but also more aggressive strategies, more sophisticated tactics and potentially even greater willingness to challenge awards.

Murphy further observed that, given US-China tensions, Chinese parties will likely grow more sensitive to the neutrality of arbitrator candidates, their nationalities, and their cultural backgrounds. US-China tensions mean that these factors might impact upon the dynamics between tribunal members and, in turn, the decision-making process and outcomes in arbitrations.

Cultural differences

Finally, the panel shared their insights on how cultural and linguistic differences may impact on the management and outcomes of Asia-LATAM arbitrations.

Cecilia Flores Rueda opened with a presentation on how cultural differences (those between Asia and LATAM, but also intra-regional differences) may feature in

arbitrations. They can take various forms, such as linguistic barriers, different expectations about the legal process and different approaches generally to conflict resolution. She took the example of a dispute regarding the *Cadereyta* refinery, which involved Mexico and a consortium of German and Korean investors, to illustrate that these differences can majorly affect arbitral processes. For example, the arbitration was conducted in English, despite that not being the primary language of any party. However, the experience was aided by the efforts of those involved to transcend cultural barriers, including by the counsel teams being alert to possible cultural nuances.

These points were echoed by other speakers. Murphy Mok referenced *The Culture Map* by Erin Meyer, which assesses cultural differences by various criteria, and noted that counsel and tribunal members may be influenced by features of their own cultures and those of others participating in arbitral processes, including, for example, in relation to assessing credibility of evidence or submissions. Mr. Karton agreed, adding that, despite cultural gaps, arbitration practitioners can take advantage of a common professional culture that has historically come from arbitration practices in London, New York and Paris. However, he emphasised that there is also an opportunity to build an arbitration system that works for, and takes into account the dispute resolution traditions of, Asian and LATAM parties.

Following the insightful panel discussion and an interactive Q&A session, the event concluded with a networking session and, of course, breakfast.

By Steven Chua (Herbert Smith Freehills, Hong Kong) (Steven.Chua@hsf.com)

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#YoungITATalks: Mexico

Arbitraje en Tiempos de Crisis: Cambio Climático, Conflictos Geopolíticos, Sanciones y Conflictos Armados

In the framework of the Second Mexico Arbitration Week, on 27 May 2024 #YoungITATalks Mexico held a conference on "*Arbitraje en Tiempos de Crisis: Cambio Climático, Conflictos Geopolíticos, Sanciones y Conflictos Armados*". The discussion was led by a diverse panel of speakers moderated by **Ana Sofía Vargas Hernández** (Member of the General Secretariat, Centro de Arbitraje de México).

Sylvia Sámano Beristain (Associate, Hogan Lovells) began the conference by explaining the fundamental differences between international investment arbitration and commercial arbitration in relation to the parties, how consent is given, the nature of the claims and the

consequences, pointing out that cases from the first receive much more publicity. In subsequent interventions, she analyzed where the effects of war are seen on arbitration and investments, namely on people, real estate/infrastructure and the reaction of States. In the case of commercial arbitration, she specified that although the cause of the dispute may be the same (in this example, war), the subject matter

will be contractual obligations, so it will be necessary to prove the unpredictable nature of the conflict in order to be able to allege force majeure. In addition, she established that each commercial arbitration must be dealt with on a case-by-case basis because its private nature limits the parties' and arbitrators' knowledge of precedents.

From a non-legal perspective, **Ricardo Smith Nieves** (Advisor, Fundación Desarrollo Humano Sustentable) discussed the current geopolitical, armed conflict and climate change risks that could affect arbitration. First, he analyzed global conflicts linked to a multipolar world, in which the United States continues to support its allies, China emerges as a major geopolitical actor producing technological tensions, and conflicts in Yemen, South Sudan and Haiti disrupt international security. Mr. Smith Nieves then spoke about climate change and the predictability of its effects, stating that the UN Intergovernmental Panel on Climate Change has studied trends that can already be considered risks that businesses can recognize and respond to. Therefore, he stated that Western companies today are subjecting themselves to the risk of regulation associated with these current developments in order to preserve supply and value chains, as well as to respond to State demands for green energy transition.

Josefina Silva Lavin (Lawyer, King & Spalding), for her part, addressed State responsibility in the context of damage to investments caused by external and internal armed conflicts. Overall, she found that States are responsible for protecting foreign investments when armed conflicts occur due to the fair and equitable treatment standard, as treaties apply even in cases of war. However, she underlined that State responsibility must be assessed on a fact-specific basis, specifically with

regard to damages incurred during internal armed conflicts. In addition, Silva Lavin stressed that investment treaties are being modernized to further detail the protections provided, as well as to reflect environmental considerations.

Finally, **Iván Esquivel** (Associate, Cuatrecasas) agreed that investment treaties do indeed protect investments from damage caused by armed conflict through a systematic interpretation. To illustrate this point, he brought up the 2014 invasion of Crimea by the Russian Federation, where Ukrainians sought to protect their investments after the invasion through international arbitration, and tribunals found that Russia violated international law in expropriating their investments. He then went on to discuss how Russian regulations were changed to prevent further arbitration, describing new rules that penalize investors who attempt to do so. On climate change, he discussed State obligations under the 2015 Paris Agreement and the 1993

Convention on Biological Diversity, noting that more and more treaties contain environmental issues.

In conclusion, the conference was an enlightening experience that deepened the understanding of the intricate ways in which the current global crises impact the field of arbitration. The diverse perspectives shared by the speakers highlighted the dynamic interplay between legal frameworks and real-world issues such as geopolitical tensions, climate change and armed conflict. This event highlighted the importance of staying informed and adaptable in the constantly evolving landscape of international arbitration, as this means of dispute resolution will continue to play a key role in the resolution of complex international disputes.

By Santiago Yarahuán Dodero (Lawyer at the Legal Office for International Trade Law of the Mexican Ministry of Economy, Mexico City) (santiago.yarahuan@outlook.com)

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#YoungITATalks: Germany

Conflict Management 4.0 for Techies and Start-Ups

On June 6, 2024, the "Conflict Management 4.0 for Techies and Start-Ups" conference in the #YoungITATalks series was hosted at WAGNER Arbitration in Berlin. The event focused on innovative approaches to conflict resolution within the tech and start-up industries. It was open for a diverse group of professionals and legal experts, to discuss the latest strategies and tools for effective conflict management.

The evening began with a warm welcome from the host, **Dr. Phillip Wagner** (Attorney at Law, New York) partner at Wagner Arbitration and **Dr. Rüdiger Morbach**, Associate at King & Spalding Frankfurt and Young ITA Co-Chair for Western Europe. They highlighted the significance of conflict management in the fast-paced and often volatile start-up environment. The welcome was followed by an introduction to **Dr. Alexander Steinbrecher**, Chief of Legal Affairs at BVG, Berlin's public transport company, who delivered an inspiring keynote speech. Known for his extensive experience in dispute resolution and innovative approaches, Dr. Steinbrecher focused on "Conflict Management 4.0," sharing ten golden rules derived from his personal and professional experiences across the legal field and various transportations industries.

Dr. Steinbrecher's discussion on the golden rules for conflict management underscored their practicality, emphasizing the importance of self-awareness and professionalism in handling conflicts, regardless of one's position within a company. He advocated for separating facts from

emotions and utilizing mediation to address emotional aspects constructively. Understanding the difference between underlying interests and stated positions was crucial in his talk, focusing on resolving these interests through deep conversations that go beyond legal stances.

> "Dr. Steinbrecher recommended using multi-tiered dispute resolution clauses to encourage structured negotiations and alternative ADR methods before resorting to arbitration or litigation."

He highlighted the significance of effective conflict closure, drawing inspiration from popular culture to stress its importance. Rational decision-making, guided by principles of cognitive psychology, such as those outlined by Daniel Kahneman in his books "*Thinking fast and slow*" and "*Noise*", allow parties to make more rational and less biased decisions.

Additionally, he suggests reference class forecasting, which involves using data analytics and historical cases, for predicting outcomes and costs of the dispute resolution processes outlined in the book "*How big things get done*" by Bent Flyvbjerg and Dan Gardener. Also, the awareness of Commercial Conflicts of Interest: Remaining vigilant about the potential for advisors to prioritize their own commercial interests over those of their clients. In his last point he mentioned the importance of being aware of potential commercial conflicts of interest among advisors and ensuring that advisors are committed to effective conflict management and genuinely invested in resolving their client's issues.

The event concluded with a dynamic discussion offering attendees a

valuable opportunity to engage directly with the panellists. Within this discussion, Dr. Steinbrecher stressed the use of different tools depending on the case specifics, emphasizing teamwork with the proverb "Two heads are better than one."

Prof. Dr. Jörg Risse, Partner at Baker McKenzie Frankfurt, who joined the event as a special guest, highlighted that generally lawyers are trained to argue rather than negotiate. "*Negotiation involves finding mutually agreeable solutions, unlike arguing which often does not lead to satisfaction" – he emphasized. Professor Risse agreed with Dr. Steinbrecher on the need for more negotiation skills among lawyers and added that merely knowing about biases and noise is not sufficient but discussing these issues with others is what truly makes a difference. He agreed with the opinion of selecting three arbitrators instead of one sole arbitrator to benefit from diverse perspectives.*

During the further discussions, Dr. Morbach raised concerns about managing relationships with advisors who may prioritize their own interests over collaborative efforts. This issue is particularly challenging for external counsel who need to demonstrate their value to the client while managing liability concerns.

Key points discussed included the importance of clear communication and understanding each other's roles, the need for external lawyers to demonstrate expertise without fostering competition, and the benefits of ADR methods in terms of cost and time efficiency, particularly for tech startups. Presenting data and case studies can help in-house counsel become more familiar with ADR. Addressing internal resistance requires diplomacy and a focus on shared goals. External lawyers should build trust and show their commitment to the client's interests. The dynamics differ between startups and established companies, with

startups prioritizing efficiency and established companies requiring navigation through internal politics.

The insightful discussions were followed by a networking session, creating a vibrant platform for the professionals to connect, exchange ideas, and share their experiences.

By Mohammed Keshtari (LL.M. Candidate at Humboldt Universität zu Berlin, Berlin)

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#YoungITATalks: Buenos Aires

Due Process Paranoia and Efficient Dispute Resolution

On June 13, 2024, Santiago Peña (Young ITA South America Co-Chair) and Pablo Jaroslavsky (ICC YAAF Representative for Latin America) presented the latest event in the series of #YoungITATalks South America entitled *"Due process paranoia and efficient dispute resolution"*.

The very well-attended conference was overseen by **Mr. Juan Ignacio González Mayer** (Senior Associate at Dechamps International Law, Buenos Aires) as moderator and three prominent speakers: **Mr. Federico Campolieti** (Member of the ICC International Court of Arbitration and Partner at Bomchil, Buenos Aires), **Ms. María Alejandra Etchegorry** (National Deputy Director of the International Affairs and Disputes Area of the Argentine National Treasury Procuration) and **Ms. María Inés Sola** (Legal Manager at Pan American Energy, Buenos Aires). The speakers discussed the so-called "due process paranoia" in international arbitration and the challenge of balancing efficiency with parties' due process rights, providing different perspectives based on their extensive experience and diverse roles in international arbitration.

First, the speakers addressed the existence of the "due process paranoia" phenomenon and whether it can be qualified as a real problem in international arbitration. The panel were asked about the findings of the 2021 International Arbitration Survey conducted by Queen Mary University of London and White & Case, regarding the arbitral tribunal's powers to conduct the proceedings and how these powers could address due process paranoia, as well as procedural misconduct from the parties and/or their representatives. The speakers also discussed if there is a genuine need for rules expressly

recognising the arbitrator's power to sanction the parties and/or their representatives for procedural misconduct, and whether arbitral tribunals would act differently if such rules were in place

> "A consensus emerged that, despite the existence of a "model" recommended good practice for proceedings, not all procedures should be identical."

Next, the discussion moved to the limits of arbitral reasonableness, particularly regarding parties' requests to submit comments on several issues throughout the proceedings. A consensus emerged that, despite the existence of a "model" recommended good practice for proceedings, not all procedures should be identical. Thus, while a request for an extension of time to file a submission would not be problematic *per se*, it would be if it is aimed at obstructing the proceeding, in which case the arbitral tribunal should act to prevent such conduct.

The panel further examined whether remote hearings could affect due process and recalled the virtual experience during the pandemic, noting the practical difficulties it presented. The benefits of the hybrid mode, particularly for procedural hearings, were recognized for reducing costs and saving time. However, the speakers concurred that virtual hearings still need refinement, as not everyone is adequately prepared or has the necessary support to conduct them efficiently. There was a general preference for in-person hearings for evidentiary hearings on the merits.

Finally, the panel discussed the reasons why arbitral tribunals may end up acting so cautiously. In particular, tribunals may fear the possibility of annulment by courts at

the seat, even though the annulment of awards due to procedural decisions seems to be rare in practice.

The event concluded with questions from the audience to all the panelists. After the conference, Bomchil sponsored a cocktail for all the attendees to continue the discussion.

By Agustina Lucía Tawil (Bomchil, Buenos Aires, Argentina)

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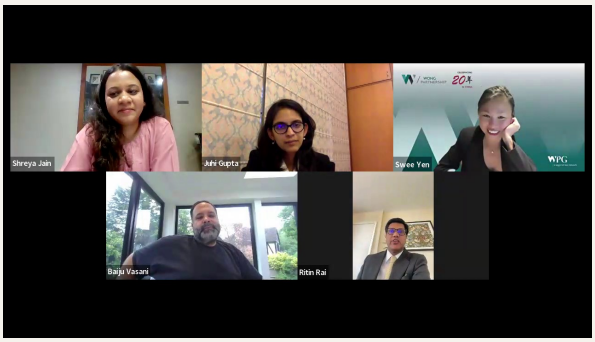
#YoungITATalks: India

Non-Signatories in International Arbitration

The #YoungITATalks India webinar on "Non-Signatories in International Arbitration," held virtually on June 17, 2024, provided an insightful discussion on a critical and complex topic, offering a comparative analysis from three different jurisdictions: India, Singapore, and the United Kingdom. The panel of esteemed speakers included **Ritin Rai** (Senior Advocate at the Supreme Court of India), **Koh Swee Yen** (Senior Counsel and Partner at Wong Partnership in Singapore), and **Baiju Vasani** (Barrister and arbitrator at Twenty Essex).

Juhi Gupta and Shreya Jain, India Co-Chairs of Young ITA and Principal Associates at Shardul Amarchand Mangaldas & Co, moderated the session. They began by welcoming participants and introducing the esteemed panelists. The session aimed to unpack both the theoretical



concept and their practical application in relation to binding non-signatories in international arbitration.

To kick off the session, the panel briefly provided background on binding non-signatories to arbitration agreements in their respective jurisdictions. They highlighted various legal bases for binding non-signatories, such as piercing the corporate veil, principles of agency, apparent authority, doctrines of estoppel, and considerations related to joint ventures and succession.

A significant part of the discussion centered on the "group of companies" doctrine, a controversial topic. According to the doctrine, an

arbitration agreement made by a company may legally bind non-signatories within its group of companies. Mr. Rai explained that in India, the application of the group of companies doctrine has been upheld by the Indian Supreme Court in a recent decision, which ruled that non-signatory group companies can be bound by an arbitration agreement if it can be shown that there was a mutual intention to bind both the signatories and the non-signatories.

The approach taken by Indian courts leans towards being more pragmatic, aiming to avoid multiplicity of proceedings and fragmentation of disputes.

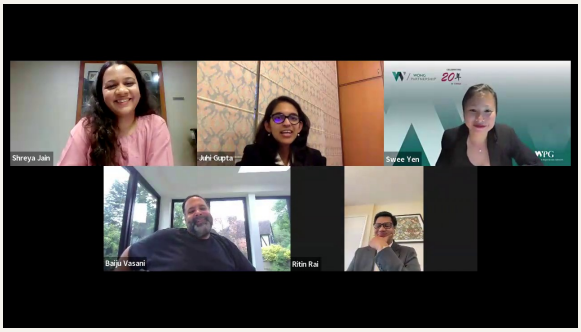
However, the situation is different in the United Kingdom and Singapore. Ms. Koh Swee Yen and Mr. Vasani explained that both the United Kingdom and Singapore had rejected the application of the group of companies doctrine or a "similar single economic entity" doctrine to bind non-signatories to arbitration, as it contradicts the fundamental principles of consent and party autonomy, as well as the concept of an entity being a separate legal entity.

"The approach taken by Indian courts leans towards being more pragmatic, aiming to avoid multiplicity of proceedings and fragmentation of disputes. However, the situation is different in the United Kingdom and Singapore."

The discussion then shifted from theoretical exploration to practical considerations, especially in situations where interim relief is sought from courts before an arbitral tribunal is constituted. A critical question arises about the appropriate forum—arbitral tribunal or courts—for deciding the binding of non-signatories and at what stage this determination should be made. The

panel agreed that the principle of kompetenz-kompetenz should be adhered to, with courts in each jurisdiction typically deferring such matters to the tribunal once it is constituted.

Another practical aspect discussed was the enforcement of arbitral awards against non-signatories who have never participated in the arbitration proceedings. Mr. Vasani highlighted that considering the very strict principles adopted by English courts regarding the group of companies doctrine, they will be reluctant to enforce an award against a non-signatory, especially when the non-signatory has never had a chance to present its case during the arbitration proceedings. In Singapore, Ms. Koh Swee Yen noted that Singapore Courts have dealt with a situation where there was an attempt to enforce awards against a group company using the single economic entity doctrine, but it was unsuccessful. Regarding the Indian position, the Indian Arbitration Act allows enforcement of awards against parties and "persons claiming under them," which leaves scope for enforcement of awards against third parties. Indian courts have previously allowed enforcement of awards against third parties by determining the intent of the non-signatory to be bound by the arbitration agreement. Mr. Rai, however, cautioned that such an approach creates uncertainty for multinational corporations.



The panel highlighted the significant implications for both transactional and dispute lawyers when drafting dispute resolution clauses, taking into account how different jurisdictions handle the binding of non-signatories to arbitration agreements. Mr. Vasani offered a practical tip for navigating complex transactions: he suggested that

corporate lawyers carefully choose the governing law of the arbitration agreement based on which party is likely to be involved in a dispute, in order to effectively protect their client's interests. For instance, selecting English law can provide certainty and protection by explicitly binding only the signatories to arbitration agreements and rejecting doctrines like the group of companies doctrine. Additionally, Mr. Vasani recommended that transactional lawyers clearly specify in contracts that the arbitration agreement applies only to the signatories and not to any related or group companies. This proactive approach is intended to prevent future disputes over the inclusion of non-signatories and make it difficult for tribunals or courts to disregard the parties' explicit intentions.

The session concluded with a vote of thanks from Shreya Jain, who extended gratitude to the distinguished panelists for their insightful discussions and to the audience for their participation. The panelists examined the different approaches taken by courts in the UK, India, and Singapore and provided a comprehensive understanding of the intricacies surrounding arbitration and the binding of non-signatories, offering valuable insights and practical advice for legal professionals.

By Prachi Gupta (Shardul Amarchand Mangaldas & Co., Mumbai)

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#YoungITATalks: Turkey

Global Supply Chains: Navigating Sanctions

On April 19, 2024, #YoungITATalks Turkey, "Global Supply Chains: Navigating Sanctions" was held. In the highly informative first session, **Esen Irtem Karagöz** (TÜPRAŞ, Istanbul) and **Emre Alpman** (TURKCELL, Istanbul) discussed sanctions from in-house counsel perspective. In the second session, **Maria Fogdestam Agius** (Westerberg & Partners, Stockholm), **Robert Bradshaw** (LALIVE, London) and **Roman Zykov** (Mansors, Moscow) shared their valuable insights on navigating sanctions and their effect on global supply chains.

During the first session, the panelists explained the significant effects of sanctions imposed by third countries on business in Turkey, which is a non-sanctioning country but does a lot of business with both sanctioned and sanctioning countries. As an example, it was pointed out that compliance with Swiss sanctions regulations is required, but sometimes not sufficient to conduct banking transactions with Swiss banks as they are very prudent taking part in any payment even regarding transactions allowed under general licenses. Similarly, it was noted that contractual obligations arising from contracts, such as foreign law governed credit agreements and bond issuances that include Turkish parties and which stipulate compliance with EU, UK, or US sanctions regimes have a significantly restrictive impact on business life in Turkey.

The speakers also highlighted that given the vague language of sanctions regulations and the very fine line between sanctions optimization and sanctions violation, companies have to constantly seek the right balance between the two by inventing innovative solutions and mechanisms that do not amount to circumvention of sanctions. Finally, they discussed how they have

implemented sanctions compliance programs in their own companies to overcome all the difficulties posed by sanctions, how they train their employees to increase their awareness and create an accurate risk perception by on-site trainings and how they use digital, AI assisted solutions in many stages of their work including KYC procedures.

> "Given the vague language of sanctions regulations and the very fine line between sanctions optimization and sanctions violation, companies have to constantly seek the right balance between the two."

The second session started with the introduction of the 4 general types of sanctions: asset freezes, import and export prohibitions and restrictions, prohibition on certain types of services such as brokering, financing, insurance etc. and transport sanctions. Subsequently, the ripple through effects of sanctions on supply chains were covered. Effects on currency, problems encountered when it is impossible to obtain a unique product subject to the import ban from other sources, blocking of transactions by the over-cautious and over-compliant actions of some actors, such as banks, partly due to the bluntness of sanctions regulations, the deterrent effect of sanctions on commercial decisions due to the coerciveness of sanctions compliance, the disruption of the deal equilibrium due to factors such as sanctions-induced rise in energy costs were explained and exemplified among such effects. The speakers then outlined what needs to be done by a business to ensure that a deal or transaction is not subject to any sanction. In this context, they underlined the importance of staying informed and up-to-date on sanctions, reading the guidelines

issued by relevant authorities, understanding the scope of sanctions and their application to the relevant transaction, being mindful of the territorial nexus, doing sanction mapping exercises, education of employees, adopting rigorous due diligence procedures and being assisted by digital solutions etc.

The speakers also addressed sanctions as a potential force majeure ground. In this respect, force majeure regime under the United Nations Convention on Contracts for the International Sale of Goods (CISG) was analyzed with its 5 main elements: 1) burden of proof of the impediment resting with the affected party relying on force majeure, 2) the affected party's onus of proving the unforeseeability of the impediment, 3) impediment being beyond control of the affected party, 4) duty to overcome the impediment lying with the affected party, and 5) the affected party's duty to notify the counterparty of the impediment. All of these elements were then examined in a mock case in which a Russian seller of chemical products and a Dutch buyer sign a sales contract, the seller subsequently ships the products to the buyer, the buyer then becomes sanctioned and the seller therefore is prevented from paying the contract price. The CISG approach was compared to the force majeure regime under EU Regulation, where the party seeking performance (sanctioned party) must prove that there is no impediment, there is no need to prove the unforeseeability of the impediment, the control element is irrelevant, it is prohibited to evade sanctions in an attempt to overcome the impediment and there is no duty to notify the counterparty. Finally, the sanctions-related application of force majeure clauses and the duty to overcome the impediment in particular, was concretized by a UK Supreme Court Case example.

By Zeynep Nazlı Tosyalı (Associate at Duranay Law, Istanbul)

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#YoungITATalks: Mexico (Indigenous Consultation)

Intersection between the right to indigenous consultation and investment arbitration

On July 9, 2024, the #YoungITATalks series continued in Mexico at the offices of Von Wobeser y Sierra. A panel of Gloria Álvarez, Ricardo Mier y Téran, and Carlos López-Córdova, moderated by Rodrigo Barradas, analyzed the intersection between the rights of indigenous communities and the protection of investments.

Rodrigo Barradas (*Von Wobeser y Sierra, Mexico*) introduced the debate, noting that the rights of indigenous peoples could be the next big issue in investment arbitration in the coming decade, especially in Latin American countries.

Beginning the panel discussion, **Carlos López-Córdova** (***Von Wobeser y Sierra, Mexico***) explained that the right to indigenous consultation is a "protectionist guarantee" of other rights rather than a right in itself.

This consultation guarantee protects the territorial rights of indigenous people around the world, seeking to safeguard the relationship between an indigenous community and the environment in which they exist, and in particular, their relationship with their land that gives them their identity as a community and has relevant cultural significance, as part of their self-determination.

He added that when a state implements an administrative action that may significantly impact an indigenous community, that state has the obligation to consult the indigenous people in the understanding that such consultation

must be (i) prior to the execution of works, (ii) free of interference, (iii) in good faith, and (iv) culturally appropriate.

Mr. López-Córdova (*Von Wobeser y Sierra, Mexico*) noted that indigenous rights were first recognized internationally through the UN Declaration on the Rights of Indigenous Peoples, the American Declaration on the Rights of Indigenous Peoples, and other relevant recommendations of international organizations. He then highlighted that the right to prior consultation has been specifically recognized in binding international instruments, the most important being the Indigenous and Tribal Peoples Convention No. 169 of 1989.

Gloria Álvarez (*University of Aberdeen*) questioned the evolution of the role of local communities in investment arbitration, considering that such proceedings arise from a purely bilateral relationship and a third party would not have a right to bring a claim. Mrs. Álvarez added that states have used such rights of third parties as an "escape valve" and that these disputes have become more sophisticated, forcing us to question whether there should be a space for claims by local communities in investment arbitration.

Ms. Álvarez underscored that the approval of projects by indigenous

people through their right to consultation is not merely an additional regulatory measure. Rather, its significance is reflected in the concept of a "social license to operate". This concept goes beyond the formal state authorization to operate and requires the social acceptance of a project to be implemented.

Ricardo Mier y Terán *(Curtis, Mallet-*

Prevost, Colt & Mosle, Mexico) explained that the relevance of indigenous consultation in investment arbitration will depend on how it is regulated in local laws. He observed that if the investor has an obligation to implement indigenous consultation, its non-compliance could give way to an objection against jurisdiction or admissibility from the state, arguing that for an investment to be protected it must have been made in compliance with local law. In this vein, the panelist also addressed the possibility of states bringing counterclaims against investors for damages caused at the domestic level. This is relevant considering recent treaties that have incorporated an obligation for investors to respect human rights, such as the case of treaties entered into by the Netherlands.

Mr. Mier y Terán further explained that prior consultation typically arises in investment arbitrations as the cause invoked at the domestic level to revoke an investor's rights, titles and/or licenses, which gives rise to claims of (i) expropriation, (ii) fair and equitable treatment, and (iii) full security and protection, derived from the state's obligation to protect the investment.

During the discussion, the panelists discussed leading cases on this topic, including *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, and *Glamis Gold, Ltd v. United States of America*, (UNCITRAL, *ad hoc*).

The panelists agreed that the key to address indigenous rights is the existence of adequate and clear legislation, and recommended investors to perform adequate due diligence before executing a project, to verify whether the applicable regulatory framework envisages the obligation to conduct prior indigenous consultation.

Overall, the panelists concluded that the intersection between investment

arbitration and the rights of indigenous peoples, and in particular, the right to prior consultation, is an increasingly relevant issue for Latin American countries, which have significant populations of indigenous and native people, and growing economies that continue to attract foreign investments.

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#YoungITATalks: Singapore

Fireside Chat with Professor Stavros Brekoulakis

On 22 February 2024, **Nicholas Lingard**, the Asia Task Force Chair of ITA Executive Committee, hosted a fireside chat with **Professor Stavros Brekoulakis**. The event was moderated by **Anne-Marie Dornenburg**, the Asia Chair of Young ITA.

During the event, the speakers discussed the evolution of international arbitration as a field of law, and Singapore as a growing arbitration centre.

When asked to speak about the evolution of international arbitration, Professor Brekoulakis accounted that, 40 years ago, international arbitration was not a standalone academic field. Only in 1985 was the first LLM in international arbitration established. Now, hundreds of universities around the world provide international arbitration courses to students. Most international law firms have a specialised international arbitration group. Professor Brekoulakis noted that the reason for the thriving nature of international arbitration is that it is an exciting and dynamic field that cuts across multiple areas of law and jurisdiction. International arbitration lawyers routinely deal with many legal issues that remain unsettled.

Professor Brekoulakis noted that perhaps a downside of international arbitration as a dispute resolution mechanism for investor-state disputes is that questions remain as to whether tribunals should adjudicate states. Professor Brekoulakis emphasised the need to hold states accountable through ISDS and said that, to do so, justice needs to be delivered outside of their state courts so as to bring a sense of fairness to the foreign investor claimants.

> "Justice needs to be delivered outside of their state courts so as to bring a sense of fairness to the foreign investor claimants."

Nicholas Lingard and Professor Brekoulakis then zoomed into Singapore as a hub for international arbitration. When Nicholas Lingard asked what sets Singapore apart from other centres for international arbitration in Europe or the United States, Professor Brekoulakis noted Singapore's strong legal communities, the strong and independent judiciary, the highly competent academic institutions and the overarching sense of self-improvement. Professor Brekoulakis said that he was excited to be the inaugural Michael and Laura Hwang Chair in International Arbitration at the National University of Singapore. He said that he would want National University of Singapore to be the centre of innovative ideas for international arbitration in Singapore.

Nicholas Lingard mentioned Professor Brekoulakis' research project on impartiality of arbitrators. When asked his views on what arbitration practitioners normally mean by "impartiality", Professor Brekoulakis said that according to his empirical studies, the overarching theme was "trust" – arbitration practitioners prefer to appoint arbitrators that are trustworthy. When asked further whether "trust" is a truly transnational norm or one that has culturally determinative factors, Professor Brekoulakis noted that context matters to the notion of "impartiality" and emphasised that when delivering justice, it is important to embrace cultural differences in impartiality.

As a closing remark, Nicholas Lingard asked Professor Brekoulakis for "words of wisdom" to the young arbitration lawyers. Professor Brekoulakis' advice was to work hard, go through all the steps, as this will

lead them to success given that this is a fair field.

Professor Stavros Brekoulakis is the inaugural Michael and Laura Hwang Professor of International Arbitration at National University of Singapore. Professor Stavros is an arbitrator practicing at 3 Verulam Buildings (Gray's Inn). His professional expertise focuses on both contract and investment treaty arbitrations in major infrastructure and investment projects, energy and natural resources projects, corporate and M&A disputes and commercial disputes. He has been appointed in more than 80 arbitrations (investment and commercial).

Nicholas Lingard is the head of Freshfields Bruckhaus Deringer's international arbitration practice in Asia, and an experienced international arbitration counsel and advocate. He leads one of the most active treaty arbitration practices in Asia, representing both investors and states, in high-profile, politically complex cases around Asia and the world. Nick also represents clients in commercial and construction disputes across a variety of industries.

The moderator, Anne-Marie Dornenburg, is a counsel at Nishimura & Asahi (Gaikokuho Kyodo Jigyo). She specialises in international arbitration, public international law and cross-border dispute resolution. She represents clients in commercial and investment arbitrations under major arbitration rules, advising both corporations and governments.

By Yoonji Lee (Freshfields Bruckhaus Deringer, Singapore)

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Wolters Kluwer White Paper

Institute for Transnational Arbitration and **Wolters Kluwer** are proud to share a Thought Leadership and Technology Partnership.

Wolters Kluwer white paper '**Checking the Boxes: Confidentiality and Data Protection in International Arbitration**' provides key insights for arbitration practitioners who are increasingly exposed to and find themselves handling large volumes of client data. It focuses on confidentiality and data protection requirements, and highlights the approaches adopted by several key jurisdictions and arbitral institutions. Learn more about:

- What is the duty of confidentiality in international arbitration?
- How can data protection best practices be integrated into international arbitration to preserve confidentiality and serve other important business goals?
- Confidentiality and data protection requirements
- Jurisdictions and arbitral institutions in the spotlight

Download your free copy: https://www.wolterskluwer.com/en/solutions/kluwerarbitration/checking-the-boxes-confidentiality-and-data-protection-in-international-arbitration

India

Decoding Stay Provisions: Bombay HC's Ruling on Bank Guarantees v. Cash Deposits

Background

The Bombay High Court in the matter of *Balmer Lawrie & Co Ltd v. Shipli Engineering Pvt Ltd* recently dismissed an application to allow for furnishing bank guarantee for securing the stay on the operation of an award. This is a significant ruling on (i) whether 100% cash deposit was required to be made for stay of an award and; (ii) the parameters for operation of stay under Section 36(3) and Section 37 of the Arbitration and Conciliation Act, 1996 ("**A&C Act**").

Background to the Dispute

The dispute arose from an interim application to seek a stay on the arbitral award issued by an arbitrator on 5 July 2018. The applicant, earlier having sought the stay on execution of award in the Calcutta High Court, furnished a bank guarantee for the awarded amount before that court. Upon the provision of the same, the execution was not proceeded with. However, the Calcutta High Court directed that as the proceedings for setting aside the award under Section 34 of the A&C Act were pending before the Bombay High Court, the application for stay on the enforcement of the award should also be before the same court.

The applicant before the Bombay High Court requested that it be allowed to furnish a bank guarantee for 100% of the award amount, as it had done before the Calcutta High Court and accordingly, the enforcement of the award may be stayed. The applicant, in a related argument, sought for the court to examine the power of the enforcement court to stay an award under Section 36 as being wide and hence called for a liberal view in allowing for a bank guarantee.

Intersection of CPC and A&C Act

The Bombay High Court's decision addressed whether applicants could secure a stay on the operation of an award by furnishing a bank guarantee rather than a cash deposit, ruling definitively against such requests in the absence of demonstrated financial hardship. The court's rationale delved into the nuanced interplay between the A&C Act and Code of Civil Procedure ("**CPC**"). While the A&C Act provides flexibility under Section 36(3) for imposing conditions for granting a stay, it mandates a stricter approach for money awards akin to CPC's requirements for stay of money decrees under Order XLI Rule 5(3). This distinction raises pertinent questions about the binding nature of CPC provisions in an application seeking a stay of an arbitration award and the interpretation of "due regard" used in Section 36(3) of the A&C Act being pivotal in shaping court decisions on stay applications.

In this context, the applicant placed reliance on *Pam Developments Private Limited v. State of West Bengal*, where the Supreme Court ("**SC**") considered the words "having regard to" the provisions of the CPC to interpret that they were only directory as a guiding factor in the application of Section 36. On the other hand, the respondent relied on *Srei Infrastructure Finance Limited v. Candor Gurgaon Two* and *Manish v. Godawari Marathwada Irrigation Development Corporation*, where the SC had directed that the full award amount be deposited for stay of the award. The Delhi High Court decision of *Power Mech Projects Ltd. v. Sepco Electric Power Construction Corporation* also relied on these two SC decisions to hold that 100% of the award amount must be deposited. The court, in its ruling, observed based on the precedents brough forth to decide that there was a consistency in the approach in of the SC in granting 100% deposits in money decree awards and same was to be followed in the present factual scenario too.

The Bombay High Court rejected the distinction sought to be drawn by the applicant against these decisions on the basis that those were decisions under Section 37, whereas the present was one under Section 36(3). The court emphasized that there was nothing in the provisions that warranted taking such a view. The court also disagreed with the Calcutta High Court's view in *Kolkata Metropolitan Development Authority v. South City*, which differentiated between the two sections based on the ground that in an application under Section 36, the court is looking at an award against which proceedings under Section 34 have been initiated, whereas under Section 37, the challenge has resulted in a decree of the court. The Bombay High Court held that once an award is passed by an arbitrator, the award is in the form of a decree and can be executed in that form. Therefore, whether a Section 34 proceeding is pending or has been dismissed, uniform parameters would apply for stay of the award. Finally, the Bombay High Court held that a liberal view is not contemplated under Section 36(3) of the A&C Act and directed a stay on the award, subject to the deposit of the award amount along with interest.

Key Takeaways

The decision clarifies that the courts will not take a liberal view for imposing conditions under Section 36 (3) and will instead impose 100% cash deposit as a condition for the prayer of stay of an award in the nature of a money decree. While returning the finding on facts, the decision considered how financial hardship was not a viable argument put forth while seeking the bank guarantee option. An interlink between these two observations shows how the same might be a relevant factor for the court in other cases, where the court may be inclined to allow the applicant to furnish a bank guarantee in such cases. While the judgment restricts the discretion of the court in imposing conditions in the money

award stays; in the author's view, there is a place for flexibility offered by the facts and circumstances of the matter.

The view of the court, while relying on application of precedents, would have benefitted from greater clarity of the conceptual application of CPC on the provisions of A&C Act in interpreting conditions for stay of money decree award.

However, it is imperative to pay heed to the beneficial outcomes of the ruling. As the court set similar criteria for Section 36(3) and Section 37 stay, the multiple moves by the applicants to the court for obtaining a stay takes the award holder one step closer to receipt of the award amount, once the proceedings for setting aside under Section 34 of A&C Act or appeal under section 37 of the A&C Act are dismissed. The decision's impact of laying similar parameters and full deposits could lead to much needed dissuasion of chance claims.

By Kartikey Mahajan (Partner, Khaitan and Co, India); Swastika Chakravarti (Senior Associate, Khaitan and Co., India); Aayushi Singh (Associate, Khaitan and Co., India)

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Associate, Grimaldi Alliance, Milan

Counsel, Implenia Germany Gmbh, Raunheim

Deputy Counsel, Singapore International Arbitration Centre, Singapore

Executive Counsel, Litigation, GE Aerospace, Washington, DC

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Newsletter Guidelines

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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 two months prior to the publication month of the next issue (e.g. submissions for the Winter 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 the Young ITA Thought Leadership and Internal Communications Co-Chairs.

Young ITA also welcomes volunteers to act as reporters for future Young ITA events. Please contact our External Communications Co-Chairs 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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