Young ITA Newsletter

YOUNG ITA

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- 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 43 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.

60 Second Interview with Santiago Peña

Santiago Peña is a partner in the International Arbitration and Regulatory and Administrative Law departments at Bomchil in Buenos Aires, Argentina.

What do you find most enjoyable about practicing arbitration?

There are three things I really like about international arbitration (and I could not say that only one of them is the one I find most enjoyable). On the one hand, the possibility of getting to know different industries and businesses. In each case, you have to learn so much about the business involved, that you end up being an expert on the matter. On the other hand, the possibility of getting to know different cultures and ways of litigation. Finally, the civility that is generally appreciated in international arbitration, which distinguishes it from the standard of the judicial process.

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

Fortunately, I have had the chance to visit many places. One of my pending places to visit is Australia. I am currently a father of three very young children (4, 2 and 1 year old) and the travel time is over 12 hours, so I imagine we will be able to visit that country in a few years.

Why did you become a lawyer?

When I finished high school, I was not sure whether to study law or political science. It was only because no one in my family had done so that I decided to study law. Soon after I decided to start working and I realized that I was passionate about this career. Something similar happened regarding international arbitration. Initially, I was only involved in local, civil and commercial litigation. By chance, I was called to assist in an international arbitration for the preparation of a counter-memorial. After that, I attended the hearing and, since then, I knew I wanted to do international arbitration.

What top tips would you give to aspiring lawyers?

My top three tips I would give to aspiring lawyers are: (i) always trying to do what you like (not what you are supposed to do); (ii) be patience; and (iii) work hard.

What are the top three things visitors should do in Argentina?

First, eat asado (if possible, at a friend's house, not at a restaurant).

Second, attend a soccer game (I would suggest at the Monumental, the River Plate stadium, my favorite team).

Third, visit a place outside Buenos Aires city (like Bariloche, Iguazú or El Calafate). Argentina is a big country and there are lots of great places to know besides its capital city.

What is your favourite dish to cook?

By far, the famous asado (which is hard to define as a simple dish, since it is more like a ritual which includes friends and/or family, hours of preparation, wine and several types of meat and side dishes).

#YoungITATalks: Guadalajara

Dimes y Diretes de un Tribunal Arbitral

On 22 August 2024, Young ITA Mexico hosted a pivotal discussion titled "Dimes y Diretes de un Tribunal Arbitral", bringing together leading experts in arbitration to delve into the complexities encountered during tribunal deliberations and the challenges in managing divergent opinions among arbitrators.

Overview Session

Moderated by **Luis Eduardo de la Torre Limón** [Independent Counsel], the panel featured two distinguished speakers:

- **Cecilia Flores Rueda, FCIArb**, Founding partner, FloresRueda Abogados, Mexico.

- **José Edgardo Muñoz López**, Scholar and independent Arbitrator, Mexico.

The panel explored key issues such as techniques for improving deliberation efficiency, strategies for managing dissenting opinions, impartiality as a challenge in deliberations, the impact of arbitrators' nationalities, and the critical importance of technical legal knowledge and procedural expertise as essential skills for tribunal members.

Panel Highlights

The discussion delved into practical advice and **Cecilia Flores Rueda, FCIArb** outlined a strategic approach to enhancing the efficiency of tribunal deliberations by advocating for the preparation of a comprehensive list of discussion points before the deliberation session. This proactive measure aims to ensure that discussions remain focused and productive. She underscored the importance of fostering open and thorough dialogues, suggesting that dissenting opinions should be considered only as a last resort. Additionally, she advised revisiting initial conclusions in light of co-arbitrators' perspectives to secure a well-reasoned and balanced award.

In this regard, **José Edgardo Muñoz López** stressed the need for addressing divergent opinions during the deliberations with an open mind, advocating for multiple deliberation sessions. These sessions, he noted, should not be conducted with the sole aim of reaching consensus but rather to thoughtfully reflect on the varying perspectives and interpretations present within the tribunal. He cautioned against drafting preliminary awards prior to deliberations, recommending instead a structured yet flexible approach to addressing issues as they arise, in accordance with the tribunal's dynamics.

> "These sessions should not be conducted with the sole aim of reaching consensus but rather to thoughtfully reflect on the varying perspectives and interpretations present within the tribunal."

The panel also tackled potential challenges, such as managing informational gaps or insufficient evidence, recommending the use of

balanced questionnaires to identify key issues without revealing the tribunal's inclinations regarding the award. Additionally, the discussion explored how an arbitrator's potential bias could complicate the deliberation process.

To explore potential conflicts more thoroughly, **Luis Eduardo** asked the panelists whether the legal culture of the members of an arbitral tribunal had, in practice, influenced their decision-making. The panelists agreed that while differences in perception and style can stem from the diverse nationalities and legal traditions of tribunal members, these differences do not create significant cultural barriers. Rather, they enrich the practice of international arbitration by bringing a variety of perspectives into the process, ultimately fostering consensus-building while respecting each member's legal background.

The session concluded with a collective reflection on the need for case-by-case analysis, acknowledging that there is no single technique for managing deliberations. The strategies shared by Cecilia and Edgardo offered valuable tools for enhancing the effectiveness of arbitration processes, ensuring that all arbitrators contribute constructively. By focusing on the nuances of deliberation and conflict resolution, the panel enriched the dialogue on justice and integrity in arbitration.

By Paulina Durán Andrade

Jalisco, México

#YoungITATalks: Singapore

Navigating Cultural Dynamics in International Dispute Resolution: Perspectives from the Asia Pacific Region

On 28 August 2024, YoungITA, in partnership with the Singapore Ministry of Law as part of Singapore Convention Week 2024 and White & Case, organised a panel discussion on Navigating Cultural Dynamics in International Dispute Resolution. The panel was moderated by the Young ITA Thought Leadership Co-Chair, **Mevelyn Ong** (Special Counsel, Norton Rose Fulbright LLP), and included:

- **Dr Túlio Di Giacomo Toledo** (Senior Counsel, Permanent Court of Arbitration)
- **Earl Rivera-Dolera** (Independent International Arbitrator and Legal Counsel)
- **Yating Lin** (Young ITA Writing Competition 3rd place winner, PhD Candidate, University of Hong Kong)
- **Philip Tan** (Senior Associate, White & Case LLP, former Young ITA Asia Co-Chair and Internal Communications Co-Chair)

Kicking off the discussion on a macro level, Mevelyn Ong asked the panel how **historical legal culture** influences the present-day perception and use of arbitration and mediation by states in the Asia-Pacific region. Yating Lin, through her extensive research in her paper "China Disequilibrium' in ISDS: An Interplay of China's Trade-offs and Domestic Institutions to Investment Treaty Policy", elaborated on China's evolving views towards arbitration from past scepticism and reluctance

to its recent push to take a greater initiative in shaping the principles and norms of international systems. Earl Rivera-Dolera presented observations on the culture in Vietnam and Philippines, including how Vietnam's views of sovereignty and belief that Vietnamese Law is "*paramount*" has impacted the nation's views on arbitration and mediation whereas Philippines' history with the legal regimes of Spain and the United States have resulted in an openness to formal dispute resolution. Philip Tan noted the uniqueness of Singapore's position as a small nation and its corresponding willingness to abide by the "*international rule-based system*" as a way of navigating the complexities of international forces.

Moving from the general to the specific, the panel had a vibrant discussion on how the following impact the dispute resolution process: culture of parties' counsel; and culture of the arbitrator or mediator.

As regards the **culture of counsel**, Mevelyn Ong shared valuable insights, from her extensive cross-border experience in Hong Kong, the United States and Australia, on how her various colleagues approached the core tasks of document disclosure and drafting differently. Philip Tan added breath to the discussion by sharing how culture also influences the views of in-house counsels. He noted generally that in-house counsels with a common law background tend to take the view that "*it is very*

important to have the right to be heard" at a formal evidential hearing, whilst in-house counsels with a civil law background might be more open to a documents-only arbitration.

As regards the **adjudicator's culture**, the panel recognised the importance of sensitivity towards the influence of different personal and legal cultures when dealing with counsel. Dr Túlio Di Giacomo Toledo shared that the PCA, in recommending a presiding or sole arbitrator, is "*mindful of keeping that balance*" to "*recommend someone with cultural sensitivity*" and that "*neutrality and impartiality are crucial*".

"In-house counsels with a common law background tend to take the view that "*it is very important to have the right to be heard*" at a formal evidential hearing, whilst in-house counsels with a civil law background might be more open to a documents-only arbitration."

Earl Rivera-Dolera noted that while "*awareness is key with how the arbitrator interacts with the parties*", differences can be ironed out with a "*robust preliminary conference at the start*" of a dispute. Astutely, Philip Tan drew upon Earl Rivera-Dolera's insightful remarks, noting that "*because of internationalisation, arbitrators are exposed to different approaches*", and in managing culture clashes it is crucial for the arbitrator "*to stick to best practices and ensure [the arbitrator] seeks the views of both parties*". In line with this he echoed that it is "*important to set the*

tone and expectations at the first case conference – that allows the arbitration to run more smoothly".

Rounding out the discussion, the panel considered **emerging trends** from the Asia-Pacific region, including examining whether culture possibly underlies some of the key trends. Mevelyn Ong provided crucial context on the sustained usage of arbitration in the region, with the "*SIAC, HKIAC and ICC consistently report[ing] increasing caseloads each year*" and the region's historical and continued present-day affinity towards mediation, so much so that "*it is striking that almost all of Asia has signed onto*" the Singapore Convention on Mediation, whilst neither the EU, nor any Western or Northern European country are signatories. Dr Túlio Di Giacomo Toledo recognised that parties from the region are "*consistently the top two users of PCA for the past few years; there is a reasonable expectation that APAC will be the top user for PCA in the future*". He also shared an observation that tribunals and parties are warming to the use of mediation so much so that tribunals "*are feeling more comfortable proposing mediations*" to parties.

Yating Lin noted three trends in China's view towards investor-state dispute settlement:

1. China is incorporating investor-state dispute resolution mechanisms to protect its increasing overseas investments.

2. China wants to play a more prominent role as a rule-maker in the international scene.

3. China maintains that disputes concerning the Chinese government should be resolved domestically, through administrative channels and/

or through mediation, to avoid escalation to international arbitration.

Through the panel's extensive experience and research, the attendees were enriched with views from several jurisdictions such as China, Philippines, Singapore, the United States and Vietnam. The discussion highlighted the diversity in the views and culture of the Asia-Pacific region, and the corresponding importance of awareness and openness in navigating the nuances in cultural heritage as the Asia-Pacific region continues its rise in prominence on the international stage.

By Wong Yan Yee

Norton Rose Fulbright Singapore

#YoungITATalks: Washington, D.C.

The Future of International Arbitration: Arbitration, Diplomacy, & Diversity

On 28 August 2024, Young ITA, Young ICSID, and Paul Hastings LLP hosted "The Future of International Arbitration: Arbitration, Diplomacy & Diversity", a panel discussion with emerging and established professionals about the evolving landscape in international arbitration. The event took place at Paul Hasting's Washington office and combined two thought-leadership series: Young ITA's Talks and Paul Hastings' The Future of International Arbitration.

The panel, moderated by **Alejandro Martínez de Hoz**, co-chair of Young ITA North America and International Counsel at Paul Hastings, included **Celeste Mowatt** from the International Centre for Settlement of Investment Disputes (ICSID), **Soledad Peña** from the Embassy of Ecuador in the United States, and **María Cecilia Álvarez Bollea** from the Inter-American Development Bank (IDB).

Panel Overview

Paul Hastings' **Jonathan C. Hamilton**, Global Co-Chair of International Arbitration, and **Abril Villegas**, International Associate, opened the event by discussing the importance of diversity in international arbitration, including among arbitrators and experts. The panel discussed the evolving dynamic between international dispute resolution and diplomacy, and offered additional insights on global efforts to diversify the arbitration practices.

Diversity in Arbitration

Celeste Mowatt, Legal Counsel at ICSID, began the conversation about diversity. She highlighted ICSID's progress in diversifying the pool of arbitrators. Celeste noted a 29% increase in women appointed as tribunal members in 2024, emphasizing how transparency in

publishing arbitrator data has fostered dialogue about diversity. Celeste stressed that a diverse talent pipeline is crucial for the legitimacy and effectiveness of international arbitration.

Soledad Peña, Deputy Chief of Mission at the Embassy of Ecuador in the U.S., next showcased Ecuador's government, where 50% of the cabinet members are women, many of them millennials. She argued that diversity across age, gender, race, and culture is vital for inclusive policymaking, citing research that diverse teams make better decisions and drive stronger economic outcomes.

> "Celeste noted a 29% increase in women appointed as tribunal members in 2024, emphasizing how transparency in publishing arbitrator data has fostered dialogue about diversity."

Adding a regional perspective, María Cecilia Álvarez Bollea from the IDB discussed how diversity initiatives have spurred economic development in Latin America. She highlighted the IDB's focus on gender diversity and work to ensure that IDB programs reflect the diverse populations they serve, underscoring the role of multilateral institutions in advancing diversity across the region.

Driven Exploration of Personal Experiences

Alejandro Martínez de Hoz then led a compelling discussion on the panelists' personal experiences, emphasizing how efforts to foster diversity have affected their careers.

The panel began with a discussion on the challenges facing first-time arbitrators. Celeste highlighted the importance of ICSID's mentoring programs, which help young professionals gain crucial skills and experience. She explained how these

programs, are necessary for young professionals to thrive in the arbitration field.

Soledad Peña's next discussed her diverse professional background. She explained how study and work abroad influenced and shaped her approach to diplomacy and arbitration. Soledad emphasized that diverse teams, composed of people with different perspectives and backgrounds, lead to better decision-making and more accurate, well-rounded outcomes. Finally, María Cecilia Álvarez Bollea discussed how the IDB's focus on gender and diversity has influenced her work in state modernization and anti-money laundering. Alejandro Martínez de Hoz's questions highlighted how her experiences underscore the importance of diversity in creating effective and equitable policies.

Uncovering Synergies Between Diplomacy and Arbitration

The discussion on the synergies between diplomacy and arbitration began with Celeste Mowatt. She connected her past work in private practice with her current role at ICSID. Celeste highlighted how advising private companies and governments has been crucial in maintaining neutrality and balancing in her current position.

Soledad Peña moved the discussion to the historical roots of arbitration in diplomacy, referencing the Jay Treaty of 1794 as a pivotal moment. Soledad emphasized how diplomacy continues to play a key role in arbitration, particularly in ensuring compliance with tribunal awards.

María Cecilia Álvarez Bollea outlined that diplomacy is crucial in preventing conflicts between states and private companies. Cecilia also pointed out that IDB's transparency and governance initiatives are important

to foster peaceful international relations and economic development.

The discussion brought out deep connections between diplomacy and arbitration, enhancing the audience's understanding of their interplay.

A Collaborative Vision for the Future of International Arbitration

The event brought together both emerging and experienced professionals to explore the evolving landscape of international arbitration. Through insightful discussions, this rising generation of panelists highlighted the importance of diversity and the critical synergies between diplomacy and arbitration. The fusion of perspectives from international institutions, together with perspective offered by Young ITA, Young ICSID and Paul Hastings' lawyers, offered valuable insights that reflect the future direction of the field. As it continues to adapt to global challenges, the shared experiences and expertise of this panel serves as a reminder of the ongoing need for inclusivity, innovation, and collaboration in shaping the future of international arbitration.

By Abril Villegas

Young ITA Reporter, International Associate, Paul Hastings LLP

#YoungITATalks: Turkey

Balancing Efficiency and Fairness: Overcoming Due Process Paranoia in Arbitration

During the Istanbul Arbitration Week on October 3, 2024, Young ITA Talks Turkey hosted an engaging discussion on "Overcoming Due Process Paranoia: Balancing Efficiency and Fairness in Decision-Making." The event, moderated by **Zeynep Tosyalı** from Duranay Law in Istanbul, brought together a panel of distinguished speakers to explore the roots of due process paranoia, its impact on arbitration proceedings, and strategies for achieving a balance between thoroughness and efficiency.

Natalia Andreeva from Kucher Kuleshov Maximenko & Partners opened the discussion by defining "due process paranoia." She highlighted this phenomenon, where arbitrators, fearing challenges to their awards, overly accommodate procedural demands, often compromising efficiency and increasing costs.

Natalia explained that "due process paranoia" in arbitration arises from a combination of factors: arbitrators make overly cautious case management decisions driven by a belief that such caution is necessary to avoid their awards being set aside or unenforced—referred to as the Enforcement Risk. This cautious approach is often based on an inflated perception of this risk, leading to decisions that prioritize excessive caution over efficiency, thus contributing to the phenomenon of due process paranoia.

Furthermore, Natalia noted that interpretations of "due process" vary across jurisdictions. She cited the Hong Kong case COG v ES, where the court emphasized providing parties with a "reasonable" opportunity to present their case, rather than a "full" one, underscoring that efficiency should not be sacrificed.

Hrvoje Kurelec from AKG ADVISORY further elaborated on the value of due process caution, noting that a degree of caution is necessary to prevent awards from being set aside, which can lead to significant delays and costs. He stressed the importance of transparent communication with parties and the drafting of clear procedural orders to set expectations and avoid unnecessary procedural delays.

Dr. Doğan Gültutan from Baker & McKenzie LLP explored whether due process paranoia is a myth or reality, suggesting it is a mix of both. He advocated for a robust case management approach, ensuring any procedural deviations are justified. Dr. Gültutan also emphasized the importance of drafting clear arbitration agreements and selecting impartial arbitrators to maintain process integrity.

Berceste Elif Duranay, Secretary General of EDAC, highlighted the impact of varying public policies across jurisdictions on due process paranoia. She emphasized the role of arbitral institutions in guiding arbitrators and the importance of experienced secretarial support in managing proceedings efficiently.

Tímea Csajági from Wolf Theiss Faludi Attorneys-at-Law pointed out common procedural principles across different jurisdictions, such as the right to be heard and impartiality. Awareness of jurisdiction-specific legal requirements is essential to navigating arbitration effectively.

Gwen de Vries from Wolters Kluwer Legal & Regulatory discussed tools

that help arbitrators overcome due process paranoia, such as reliable legal resources and streamlined research platforms. These tools support arbitration lawyers in making quicker, informed decisions, ensuring fair and efficient proceedings. She also addressed the importance of giving new arbitrators opportunities to gain experience, suggesting tools like the Profile Navigator to identify qualified candidates.

The panel provided valuable insights into overcoming due process paranoia in arbitration, emphasizing the need for balance between procedural thoroughness and efficiency. By leveraging clear communication, comprehensive procedural frameworks, and technological resources, arbitrators can navigate the complexities of international arbitration while ensuring fair and timely outcomes. The event highlighted the ongoing evolution of arbitration frameworks and institutional rules to meet the demands of a fast-paced legal environment, promoting both efficiency and fairness in decision-making processes.

By Sarah Bin Nasr

LLM in Private Law student at Koç University, Istanbul

#YoungITATalks: London

Key Considerations in Mining Disputes – A Case Study in Risk Management

On October 10, 2024, Young ITA, in partnership with Vinson & Elkins, organised a panel discussion on the key considerations in mining disputes. The panel was moderated by Vinson & Elkins' **Ciara Ros**, who provided introductory remarks on what critical minerals are, their central role in the energy transition and how their geographical concentration enhances their 'criticality' by opening up the political risk dimension. Further, new regulations, a rise in resource nationalism and local community concerns also contribute to making mining a ripe area for disputes. Ros then outlined the background and key issues within the fictional case study, which formed the basis of the panel discussion.

Jackie Lafleur (Anglo-American, London) provided her remarks on managing community involvement in mining projects. She noted that one method of doing this is to include, as part of the contract award to the construction company, a requirement to enter into a joint venture (JV) with a local company from the community where the mine is operating. However, forcing two entities together can also give rise to its own set of issues, such as divergences in corporate governance approaches and dominance of the SMME by the larger corporation.

Lafleur also highlighted the importance of early, community-led engagement principles before reaching contract awards to allow the local community to be involved in the procurement decisions so that they understand what is required of them and how they can benefit from the arrangements. Further, more training and education around JV arrangements, so that these are well-understood, also plays a crucial role.

> "Lafleur highlighted the importance of early, community-led engagement principles before reaching contract awards to allow the local community to be involved in the procurement decisions."

Next, **Lorraine de Germiny** (LALIVE, London) offered her insights on the role of a social licence to operate. She stressed that this is not a lawyer-created term, but rather, an industry term coined by mining executives in the 90s. Germiny conceptualised this as a metaphor for the fact that a mining project needs to have a minimum level of acceptance, if not support. She explained that with respect to mining investment arbitrations, there are roughly three categories of disputes:

- Cases where there has been revocation of a permit or a concession agreement;
- Cases where there has been a change in the legal or fiscal framework;

Cases involving some form of social opposition.

Germiny then discussed the social licence issue in the case study, noting the common theme between cases that have used the social licence defence in practice. This is that these projects have usually been in the pre-operational phase, with the state being under pressure and the mining company having failed to get adequate support for the project. The tribunal response has typically been that the existence of social opposition does not excuse the state's breach of the underlying agreement with the mining company, but to take the social licence issue into consideration on the damages front through, for instance, a finding of contributory negligence.

Tiago Duarte-Silva (Charles River Associates, London) then discussed

quantification, another key issue that arises in mining disputes. He noted that there are three approaches to quantification:

- income approach, which examines what cash flows the mine can generate;
- market approach, which seeks to find comparable mines and consider what they have been transacted at, although geographical and political risk divergences can make comparability challenging;
- cost approach; which aims to pin down what it would cost to build an asset of comparable utility.

Duarte-Silva highlighted that the choice of approach largely hinges on the stage at which the mining project is at. For instance, if it is a producing asset, then the income approach is suitable as income projections can be considered. Conversely, a cost approach might be more appropriate in the case of an exploration project.

He also noted that tribunals have

tended to prefer the cost approach in cases where the mine does not have reserves, based on the rationale that there is no economic certainty on the viability of extraction.

Hugo Marshall (Litigation Capital Management, London) offered his perspectives on third-party funding for mining disputes, noting that mining companies almost always have an inflated view of what the claim is worth. He stressed that funders adopt a fairly rigorous approach to evaluating the claim, examining what valuation method has

been used, what assumptions are at play and what limitations exist. There is often a fairly large disconnect between the analysis provided in the claim materials and the conclusion reached on the claim value, so funders have to navigate this with caution.

Marshall also explained the key points in a dispute where funders can add value in addition to the provision of capital. Firstly, at the outset, they are able to provide guidance on barrister, expert and tribunal selection. Secondly, during the course of the dispute, they can advise on arbitral strategy decisions and finally, tap into their experience on what sorts of respondents are amenable to enforcement.

Next, **Robert Bradshaw**, **Ania Farren**, **Audley Sheppard KC** and **Sarah Vasani FCIArb** held a discussion on mining disputes. The panel discussed current trends through the lenses of their own practices, guidance for ensuring effective cross-examination, and practical advice for the attending Young ITA professionals on building and maintaining a successful career in arbitration.

On mining disputes, Audley Sheppard KC spoke of his experience as advocate in mining disputes around the world, including disputes on delay, disruption and contract interpretation. Ania Farren and Sarah Vasani FCIArb touched on the role of critical minerals in the energy transition and the way in which this looks to shift the balance of power to states rich in those natural resources. Sarah Vasani FCIArb mentioned that, most of the time, the mine will be state-owned, and thus it is for those states to balance its obligations to foreign investors with the necessary adherence to increasing climate regulation. For investors, consideration must be made to ensure they have adequate treaty protection.

The panel more broadly shared the view that there is also good

opportunity for states to exchange the extraction of their natural, raw materials with infrastructure development and technology-sharing by outside investors, creating a positive two-way system for all parties involved.

One attendee asked an interesting follow up question, 'we have been advising states on long-term supply agreements, especially with regard to security and materials. Have people on the panel seen the start of inter-state disputes on supply agreements, or mainly investor-state or investor-company?' Sarah Vasani FCIArb responded that whilst she had not seen many inter-state disputes in her practice, she expects these may become more common in future, especially in the context of deep sea mining and the law of the sea In such cases there may be boundary disputes between states as to who is entitled to the specific area of land or sea where the raw material is being extracted from.

Clearly there is much to consider for states and investors when it comes to mining, and this is only likely to become more apparent as the world moves towards more clean sources of energy.

Robert Bradshaw then led the discussion in the direction of practical arbitration skills, with Audley Sheppard KC providing advice on how to prepare effectively for cross-examination of expert witnesses. Conceding that this is an unavoidably difficult part of the arbitration process, Audley Sheppard advised practitioners that it might not be best practice to attempt to weaken the credibility of the expert witness, though this can be a tempting tactic. This is especially true in cases where you later intend to rely on certain submissions from them by virtue of their expertise. Sarah Vasani FCIArb supported this more measured approach to challenging expert witnesses, explaining that it is better to 'focus on narrow aspects' when finding flaws in your opponent's

arguments. There will rarely be a "silver bullet" moment in international arbitration, but rather a slow chipping away at the other side whilst presenting your case in the strongest way possible. Ania Farren concluded by explaining that in any event cross-examination should not be used as the primary means of presenting your case. It is better, if possible, to arrange for your own witness to present its findings in the initial submissions, as a means of laying the foundations for any submissions that follow.

To conclude the session, the panel invited further questions from the young professionals in attendance on careers in arbitration. On getting your first appointment as an arbitrator, Ania Farren stressed the importance of building relationships with the arbitration institutions. Simply going to events and networking can open the doors to your first appointment. If you are passionate about arbitration, this will come across in your interactions with others. Audley Sheppard KC shared the same sentiment, adding that hopeful arbitrators should publish case notes, articles and take every opportunity to speak publicly.

The panel's advice was no different for a recently graduated LLB student on how to meaningfully engage in arbitration early on in their career, with Audley Sheppard KC advising to 'do BD for arbitration, go to young arbitral events, write articles, find a mentor, be seen, have interaction, keep a broad base, learn the bread butter and get creative to get the dream job you are envisaging.'

Young ITA would like to thank Robert Bradhaw, Ania Farren, Audley Sheppard KC and Sarah Vasani FCIArb once again for their meaningful engagement. We hope to have you as guests again soon.

By **Anuja Venkataramani** (Trainee Solicitor at Vinson & Elkins RLLP, London) and **Aaron Sahota** (Trainee Solicitor at Vinson & Elkins, London)

#YoungITATalks: Houston

Same Lawyer, Different Suits: Crossover Strategies for Lawyers Bridging Arbitration and Litigation

On Monday, 11 November 2024, #YoungITA Talks Houston held the "Same Lawyer, Different Suits: Crossover Strategies for Lawyers Bridging Arbitration and Litigation" event.

The event was kicked off with introductions by Assistant ITA Director **Dr. Darya Shirokova**. Practitioners on the panel had a wide range of experience, with some specializing in arbitration or litigation, some practicing both, and one working in-house.

To warm up the panel, Moderator **Enrique Jaramillo** asked for a general comparison of arbitration of litigation. In response, the panel discussed the value of confidentiality in arbitration proceedings compared to litigation. Specifically, **Grace Haidar**, speaking from the perspective of a client, reinforced that this confidential nature highly influences client decisions to proceed with arbitration instead of litigation. **Julianne Jaquith** countered by saying that arbitration awards and the details surrounding the arbitration often eventually become public anyway. Another point she mentioned was that though many cite the speed and efficiency of the arbitral process as a benefit of using arbitration, when arbitrations get more sophisticated, the proceedings can get longer and more drawn out as well.

Moving on from that, the panel was asked to consider what practices of each dispute type would be helpful in the other. **Imad Khan** noted the limited scope and construction of discovery in arbitration would make litigation faster and less burdensome. The panelists then mentioned that witness statements in arbitrations would benefit from being more like depositions in litigation. Instead of

getting to really understand the witnesses that make or break a case like with depositions, arbitrations initially introduce witnesses through statements that are often not even written by the witness themselves. Opposing counsel then meets the witness in-person for the first time while in the arbitration, which can be risky. A "trial run" with the witness in a deposition is something the panelists mentioned would be a beneficial addition to arbitrations. Finally, **Aaron Koenck** mentioned that it is helpful that what the jury hears in litigation is filtered through the judge. Differently, arbitrators—though hopefully unbiased third parties—hear every good, bad, and ugly fact about your case, which can affect how they perceive your argument.

After that, the panel discussed the differences in jury selection and arbitrator selection. Across the board, the panel agreed that arbitrator selection was the most important aspect of the arbitral process. Different from either a bench or jury trial, **Lena Serhan** put it clearly: you have a choice in who will be both the factfinder and legal authority in your case, emphasizing how significant the decision is. Conversely, **Sagar Patel** reminded the audience that jury selection is actually a misnomer. Instead of choosing which jurors you would like to hear the case, you are deciding who you don't want to hear it. Though jury selection is an important part of the process, the amount of power parties have over this decision is limited. Arbitrator selection, on the other hand, is a process that gives complete agency to the parties to decide who will make

the decisions that make or break a case.

With arbitrator selection being the most important part of the process, the panelists gave insights on what to look for in an arbitrator. Imad Khan gave several pieces of advice on what to consider in this decision. He emphasized that its important to have an arbitrator with experience and who will be willing to stick to his or her guns on the panel, not wavering and just following the other tribunal members. Alternatively, an arbitrator who works well with others and is a consensus-builder could be helpful in swaying the other tribunal members toward the right solution. He highlighted the importance of cultural factors, like knowing what one nationality may think of another when picking an international arbitrator. Julianne Jaquith also mentioned that you can tailor arbitrator selection based on the themes of your case, for example, if you want the arbitrator to see the case from a financial perspective, go for an arbitrator with a strong financial background.

Finally, the panel ended with a discussion of what advice to give junior attorneys trying to decide between practicing arbitration or litigation. Ultimately, many panel members emphasized how seamlessly practice from one helps with the other. Some panelists highlighted how U.S. litigation experience, which can build a young lawyers confidence and give them experience speaking before a judge, can give practitioners an edge over opposing counsel from civil law jurisdictions where speaking is less emphasized.

Kenya

Recent Insights on Arbitration in Kenyan Employment Law

Arbitration in employment disputes has traditionally been embraced and protected within Kenya's legal framework. Employment laws recognize arbitration as a viable alternative dispute resolution mechanism, fostering efficiency and finality. However, a recent ruling by the Kenyan Employment and Labour Relations Court (ELRC) in *Steve Okeyo v Board of Directors, HHI Management Services Limited & Another* has stirred significant debate on the role of arbitration in employment matters.

In this case, the court declined to grant an employer's application to compel arbitration as stipulated in the employment contract. The court held that the ELRC has exclusive jurisdiction over labour disputes and questioned the effectiveness of arbitration in employment matters compared to its established success in commercial disputes. Central to this reasoning was the inherent inequality in bargaining power between employers and employees, which undermines the fairness of arbitration clauses in employment contracts.

The ruling raises important considerations regarding the balance between contractual freedom and fairness in employment relationships. On one hand, the decision could be seen as challenging the sanctity of contracts and established legal principles, such as the doctrine of

> "Central to this reasoning was the inherent inequality in bargaining power between employers and employees, which undermines the fairness of arbitration clauses in employment contracts."

freedom to contract. This doctrine emphasizes that agreements entered into by consenting parties should be upheld, with courts refraining from altering the terms agreed upon by the parties.

On the other hand, the decision highlights concern about the inherent power imbalances in employment relationships. Employees, often focused on securing jobs, may have little opportunity to negotiate or fully understand the implications of arbitration clauses in their contracts, which are frequently presented as standard, non-negotiable terms. This situation raises questions about the fairness of enforcing such provisions. Potential solutions to address this imbalance include fostering transparent pre-contractual discussions and ensuring that employees provide informed consent when agreeing to arbitration clauses.

This case marks a critical development in Kenya's legal landscape, with potential implications for arbitration in employment matters. While it challenges the traditional reliance on arbitration in such disputes, it also highlights the need for fairer mechanisms that account for the unique dynamics of employment relationships.

Despite the controversy, one thing remains clear: the resolution of employment disputes must prioritize speed, confidentiality, and finality—qualities arbitration inherently offers. The legal and employment sectors in Kenya now watch closely to see how this ruling will influence the arbitration space and shape future jurisprudence.

By Patricia Mukala

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REGIONAL UPDATES

Asia Pacific

India

India Overhauls Arbitration and ADR Legislation

India is continuing its comprehensive reform of dispute resolution mechanisms, including by actively advancing arbitration and other forms of Alternative Dispute Resolution (ADR). Over the past year, India has taken significant steps by proposing amendments to the Arbitration and Conciliation Act and by enacting a new Mediation Act.

Draft Arbitration and Conciliation (Amendment) Bill, 2024

On 18 October 2024, India's Department of Legal Affairs published the draft Arbitration and Conciliation (Amendment) Bill, 2024 ("Bill"), amending the Arbitration & Conciliation Act, 1996. The Department has sought public consultation and comments on the draft Bill.

The Bill is another step to bolster India's effort to promote arbitration, and to align arbitration practices in India with international standards. It proposes significant changes to the existing arbitration framework in India, the most notable being the recognition of emergency arbitration and the introduction of appellate tribunals.

The Bill proposes to recognise emergency arbitral tribunals, both by defining an 'emergency arbitrator' in statute and by providing for a mechanism to enforce its orders. The proposed amendment allows parties to appoint an emergency arbitrator for the purposes of granting interim measures prior to the constitution of the arbitral tribunal in an Indian-seated arbitration. Further, the order passed by an emergency arbitrator shall be enforced in the same manner as an interim order passed by an arbitral tribunal. The Bill gives legislative sanction to the Indian Supreme Court's previous ruling in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors*

(2021 SCC OnLine SC 557) that recognised emergency arbitration in India-seated arbitrations. In line with the Court's ruling, the Bill proposes to recognise an order passed by an emergency arbitrator akin to an interim order passed by the Tribunal under §17 of the Arbitration & Conciliation Act, 1996. However, there continues to be uncertainty regarding whether orders passed by Emergency Arbitrators in foreign-seated arbitrations will be enforceable in India, and if so, in what manner.

With the aim of reducing the time taken for arbitral awards to attain finality, the Bill also proposes to introduce an 'appellate arbitral tribunal'. As per the Bill, arbitral institutions will be permitted to provide for an *appellate* tribunal to entertain applications made for setting aside an arbitral award (thus removing such a challenge from being made before the seat court).

The Bill states that arbitral institutions 'may' provide for an appellate arbitral tribunal, thereby making this mechanism optional. Further, even if an institution provides for such a mechanism, party autonomy *allows* parties to opt out of the same, and retain their ability to petition the seat court to set aside an award. Further, it remains to be seen how the appellate tribunal while be composed. If domain experts are appointed, it could enhance the efficiency of the process. However, if the trend of appointing only retired judges persists, this provision may not yield the results it promises.

Mediation Act, 2023

India's Mediation Act, 2023 ("**Mediation Act**") received presidential assent on 14 September 2023 and some of its provisions have been brought into force on 9 October 2023. Since the Mediation Act is at the nascent stage of its implementation, including establishment of the Mediation Council of India, the time frame for the Mediation Act's full implementation is at present

uncertain. Pertinently, all the provisions mentioned below are yet to be enforced.

Salient features of the Mediation Act include the following:

Matters not fit for mediation: The First Schedule to the Mediation Act lists matters which may not be submitted to mediation. This includes disputes relating to claims against minors, prosecution for criminal offences, disputes having effect on rights of a third party, disputes relating to levy/collection/penalties/ offences in relation to any direct or indirect tax or refunds, proceedings before the Securities and Exchange Board of India or Securities Appellate Tribunal, land acquisition, etc.

Court's power to refer parties to mediation: The Mediation Act provides in §7(1) that at any stage of proceedings, the court or a tribunal may refer the parties to undertake mediation, irrespective of whether a mediation agreement exists or not.

Interim protection: The Mediation Act provides in §7(2) that the court or tribunal may allow for interim orders in court/tribunal-referred mediations to protect the interest of any party if deemed appropriate, though without clarifying the nature of such orders

Timelines: The Mediation Act provides under §18 for the completion of mediation within 120 days from the date fixed for the parties' first appearance before the mediator. This period can be extended by a further 60 days with the consent of the parties.

By Shaneen Parikh, Drasti Gala and Anjali Kumari
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Costa Rica

New Costa Rican Arbitration Law Will Prevent Dilatory Tactics and Reduce Court Backlogs

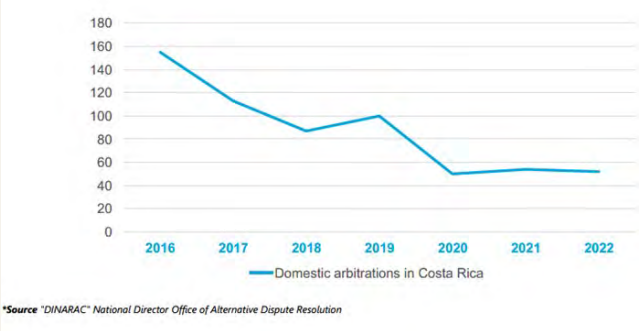
On 10 September 2024, the Costa Rican Congress unanimously approved an arbitration bill (No. 23.259) to encourage parties to resolve their commercial disputes through arbitration rather than civil court actions. Two Congresswomen (a Certified Public Accountant and a criminal lawyer) from two different opposition political parties submitted this bill to Congress on July 28, 2022. The bill was the first to be introduced since the 1990s to reform Costa Rica's domestic arbitration legislation. In Congress, arbitration was referred to as a means to reduce public spending because "one case in arbitration is equivalent to one case off a judge's desk." The new legislation was published in the Official Gazette on 1 October 2024 and will enter into force on 2 April 2025.

Background

In the mid-1990s, Costa Rica's Congress enacted a domestic arbitration law (*Ley de Resolución Alternativa de Conflictos* or the "ADR Law") in the hopes that more parties would settle their disputes outside of civil courts to reduce their case load. Over the 27 years of its existence, the ADR Law has fallen short of meeting this objective.

In the past decade, civil cases before the Supreme Court have skyrocketed and it now takes civil judges several years to render a final decision on civil matters. By contrast, the number of domestic arbitrations has dropped, as shown below:

The ADR Law's main flaw is a provision that allows respondents in



*Source "DINARAC" National Director Office of Alternative Dispute Resolution

arbitration to obtain an automatic stay of the proceedings by challenging the arbitrator's jurisdiction. The Supreme Court must decide those (often unmeritorious) jurisdictional challenges, adding to the Court's already heavy case load. On average, the Supreme Court takes more than two years to resolve jurisdictional challenges against arbitral tribunals. Respondents often abuse this loophole to delay the arbitration and pressure claimants to settle. This practice discourages the use of arbitration and has driven parties back to the courts.

> "The ADR Law's main flaw is a provision that allows respondents in arbitration to obtain an automatic stay of the proceedings by challenging the arbitrator's jurisdiction."

The new legal framework

To solve the current situation, Costa Rica's new law aims to reduce court backlogs by modernizing its arbitration framework to make it more attractive.

The newly approved law abrogates the ADR Law and transitions to a single framework governed by Costa Rica's international arbitration law, which Costa Rica enacted in 2011 based on the UNCITRAL Model Law on International Commercial Arbitration (with the 2006 amendments).

The Congress's Permanent Committee on Legal Matters discussed the arbitration bill for two years. In the end, it only introduced minor modifications to the text of the 2011arbitration law (e.g., extension of the arbitration agreement to non-signatories, different terms for domestic and international proceedings, emergency arbitration, virtual hearings). As a result of negotiations with local stakeholders, domestic arbitrations must be conducted exclusively by members of

the local bar with at least five years of experience but need not be conducted in Spanish.

The new arbitration law represents a major improvement because, among other innovations, it includes a new Article 16(3) for both international and domestic arbitrations that replaces the previous automatic stay in case of jurisdictional challenges, thus precluding the dilatory tactics previously permitted by the ADR Law. Stakeholders hope that this reform will reduce civil dockets, promote access to justice, and improve the overall dispute-resolution environment of Costa Rica.

By Felipe Volio Soley (White & Case, New York), **John Dalebroux** (White & Case, Washington DC), **Ricardo Cruzat** (White & Case, New York)

Arbitration Over Geothermal Plant Results in €6 Million Award Against The Costa Rican Electricity Institute

A construction arbitration has concluded with a €6 million award against the Costa Rican Electricity Institute (Instituto Costarricense de Electricidad, or "ICE"), one of Costa Rica's largest state-owned entities, in favour of the Spanish company Initec Energía S.A..

The dispute arose from the construction of the Planta Geotérmica Pailas II, a geothermal power plant located in Guanacaste, Costa Rica. ICE awarded the construction contract for the Las Pailas II plant to Initec in 2016 through a public bidding process. It encompassed the design, provision of electromechanical equipment, and commissioning of the powerhouse, with technology supplied by Mitsubishi Hitachi Power Systems. Inaugurated in 2019, the Las Pailas II power plant is noted in Central America and the Caribbean for its advanced technology and

contribution to Costa Rica's renewable energy generation. The project won the award for "Best Geothermal Project in the Region" at the 2019 Geothermal Congress for Latin America and the Caribbean (Geolac) in Santiago, Chile. The plant is Costa Rica's seventh geothermal facility, with an installed capacity of 55 megawatts, meeting the energy consumption of 137,000 homes per year.

Disputes during construction, however, resulted in a commercial arbitration administered by the International Chamber of Commerce. The Miami-seated arbitral tribunal, composed of Valeria Galíndez (chair - Brazil), Salvador Fonseca González (Mexico), and Roberto Yglesias Mora (Costa Rica), issued its final award on 16 July 2024. The final award held ICE liable to Initec for over €6 million after concluding that ICE had improperly applied penalty clauses and fines during the execution of the contract. Additionally, it found that several costs incurred by Initec during construction were not adequately compensated.

The tribunal's decision sets a significant precedent for Costa Rica's energy sector and public institutions, underscoring the importance of transparent and fair practices in public procurement.

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REGIONAL UPDATES
South America

Argentina

On 13 August 2024, the National Court of Appeals in Commercial Matters (the "CAC") rendered a new ruling ratifying the validity of arbitration clauses contained in standard form contracts ('*contrato de adhesión*' in Spanish) between sophisticated parties. This decision reinforces Argentinian courts' pro-arbitration stance.

In *Infomedia Consulting S.R.L. v. Voith Hydro Ltda.,* Infomedia Consulting S.R.L. ("Infomedia") sued Voith Hydro Ltda. ("Voith") for unpaid invoices in relation to the provision of consulting services regarding an expansion of the Yacyretá hydroelectric plant, which is co-owned by Argentina and Paraguay. The consulting agreement between the parties included an arbitration clause submitting any disputes to arbitration under the ICC Rules, with Sao Paulo, Brazil, as the seat of arbitration. In spite of this, Infomedia brought its claim before the commercial courts of Argentina. Voith objected to the commercial courts' jurisdiction based on the ICC arbitration clause.

The First National Instance Court in Commercial Matters upheld Voith's objection and referred the dispute to arbitration. Infomedia subsequently filed a motion to appeal this decision before the CAC. Infomedia argued that the dispute should not be brought to arbitration because (i) the arbitration clause did not include disputes regarding lack of payment of an invoice; and (ii) the arbitration clause was contained in a standard form contract and was thus invalid under Article 1651 (d) of the Argentine Civil and Commercial Code.

In its ruling, the CAC first acknowledged that an arbitration clause constitutes a contract in itself and, since it reflects the parties' will, it must be interpreted restrictively. Second, the CAC rejected Infomedia's position that an invoice-related

dispute is independent from the underlying contract, as invoices do not create an independent debt, and thus concluded that such dispute was covered by the arbitration clause in the contract. Third, the CAC addressed Article 1651 (d) of the Civil and Commercial Code, which excludes from arbitration standard form contracts. Following prevailing case law, the CAC concluded that this restriction does not apply to transactions between businesspeople with sufficient negotiating power, legal representation, and financial capacity.

Lastly, Infomedia also argued that the arbitration clause was abusive because of the high costs of pursuing arbitration in a foreign jurisdiction. The CAC rejected this argument noting that such potential expenses were foreseeable at the time of contract negotiation and that Infomedia believed that this contract was an exceptional commercial opportunity, which would naturally entail greater business risks. Accordingly, the CAC referred Infomedia and Voith to arbitration.

This decision underscores the consistent approach of Argentine courts in upholding the right of private parties to arbitrate, even in cases involving standard form contracts, invoices related to the contract containing the arbitration clause, and where foreign-seated arbitration may be costly.

By Renzo Favilla and María Luz Atala
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REGIONAL UPDATES

South America

Brazil

Brazilian Superior Court of Justice Reaffirms the Inapplicability of Civil Procedural Rules to Arbitration

On 21 August 2024, the Brazilian Superior Court of Justice, responsible for ensuring consistent interpretation of federal law across the country, reaffirmed that the Brazilian Civil Procedure Code is not automatically or subsidiarily applicable to arbitration (Superior Court of Justice, Special Appeal No. 1851324/RS, Third Panel, Rapporteur Justice Marco Aurélio Bellizze). By endorsing the application of the procedural rules elected by the parties in their agreement to arbitrate, rather than applying civil procedural rules, the Superior Court of Justice further strengthens the autonomy and the flexibility of arbitration in Brazil.

The background of the decision involved an award rendered in an arbitration seated in Porto Alegre. The claimant sought to annul the arbitral award, alleging a due process violation due to the alleged lack of impartiality of the interpreter for the respondent's Chinese witnesses. The interpreter also served as the legal representative of the respondent, the party that had put forward the witnesses.

In this scenario, the claimant alleged that the Brazilian Civil Procedure Code, in Articles 148, II, and 149, extends the requirement of impartiality applicable to judges to court officers, such as the interpreter. The claimant argued that, although the parties had not chosen the Brazilian Civil Procedure Code as the applicable procedural rules for the arbitration, the Brazilian Civil Procedure Code was subsidiarily applicable to arbitration. The claimant further argued that, since the interpreter was allegedly partial, the arbitral award should be annulled.

The lower court and the appellate court granted the claimant's request to annul the award, which was reversed by the Superior Court of Justice. In upholding the award, the Superior Court of Justice confirmed its understanding decisions (e.g., in cases no. 1.903.359/RJ, 1.519.041/RJ and 1.903.359/RJ) that the Brazilian Civil Procedure Code is not automatically or subsidiarily applicable to arbitration, and only the rules agreed by the parties are applicable.

According to the Superior Court of Justice in its judgment, "*the arbitration procedure inherently embodies flexibility, which has the power to adapt the procedure to the case to be decided, according to its particularities, as well as to the convenience and needs of the parties (including the costs they are willing to bear to decide the dispute), thereby reducing any potential differences in procedural culture inherent to the judicial systems adopted in their countries of origin.*"

The Superior Court of Justice's judgment is further supported by Articles 5 and 21 of the Brazilian Arbitration Act, which provides that the arbitration will be initiated and conducted in accordance with the rules stipulated in the arbitration agreement.

This discussion reaches the Superior Court of Justice from time to time with parties seeking to have the decision annulled – in some cases contradicting the behavior they have adopted during the arbitration. However, the Brazilian Superior Court of Justice has maintained a firm position in favor of the autonomy and inherent flexibility of the arbitral process, which is not only acknowledged but also cherished by the arbitral community.

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REGIONAL UPDATES

Europe

England and Wales

Navigating Arbitration and Sanctions: Insights from *O v C* [2024] EWHC 2838 (Comm)

In the recent case of *O v C* [2024] EWHC 2838 (Comm), the English High Court dealt with the complex intersection of arbitration and international sanctions through an application for interim relief under Section 44 of the Arbitration Act 1996.

Despite a risk of contravening US sanctions, the Court ordered that the sale proceeds of naphtha cargo be paid into Court. Such a payment would risk contravening the license issued by the US Office of Foreign Assets Control ("**OFAC**") – this license had required the proceeds to be paid into a blocked account. The decision demonstrates that the English Court will not shy away from deploying its discretion, even where making an order entails a low (but potentially real) risk of prosecution for violating sanctions for one of the parties.

Background

The subject matter of this case was the proceeds from a sale of naphtha cargo loaded onto a vessel in Singapore in February 2023. Shortly after loading, OFAC added the Respondents (the Charterers) to its List of Specially Designated Nationals. This listing had the effect of classifying the naphtha as "blocked property" pursuant to US sanctions, as well as prompting the Claimants (the Owners) to terminate the charterparty and refuse to discharge the cargo to the Respondents. The naphtha cargo therefore remained on board the vessel, in the South China Sea, for more than 20 months.

Due to the Claimants' termination of the charterparty, the Respondents initiated arbitration proceedings, seeking damages for the conversion of the naphtha cargo. Meanwhile, the

Meanwhile, the Claimants sought an order from the English High Court, pursuant to Section 44 of the Arbitration Act 1996, permitting it to sell the cargo and deposit the proceeds of sale into a blocked account with a US bank, in compliance with the OFAC license. However, the Respondents argued that the proceeds should be paid into Court to ensure the funds would be available if they won the arbitration.

Key Takeaways from the Commercial Court

The Court, accepting the Respondents' argument, endorsed the following principles that it would apply to determine the basis on which a party would be ordered to do something that could fall foul of foreign law (quoted from Judgment):

- **Judicial discretion**: "*an English court can order a party to do something that is (or may) be contrary to a foreign law, including a foreign criminal law…it is a question of discretion*".

- **Comity caution**: "*an order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind*".

- **Minimal (yet real) risk of prosecution**: the party resisting such an order has to show that there is a "*real risk of prosecution*" for breaching the relevant, foreign law. However, "*if a real risk of prosecution is established, the Court must then conduct a balancing exercise, weighing the risk of prosecution with the importance of the relief sought by the order…The greater the risk of prosecution is, the more weight is to be given to that factor*".

- **Assessment of Expert Opinions**: if the parties' experts have divergent views on the risk of prosecution (as was the case here), "*the Court should exercise care when approaching the issue of foreign law.*" If there is a real

doubt about the law, this may suggest that prosecution is 'relatively' unlikely.

- **Minimising Concerns**: "*the Court can fashion the order that reduces or minimises the concerns under the foreign law*", and considerations of comity may influence the foreign state "*in deciding whether or not to prosecute the foreign national for compliance with the Court's order*".

- **Enforcement of Court Orders**: "*once the Court has decided to make the order, the fact that compliance would or might constitute a breach of a foreign law does not excuse non-compliance, as the Court must be able to enforce its decision*".

In its final decision, the Court ordered that the proceeds from the cargo sale be paid into the Court. Based on the facts and US sanctions guidelines, the Court determined that there was no real risk of prosecution, as the Claimants had done all they could to comply with US sanctions and were making the payment not wilfully or recklessly, but in compliance with a court order. Notably, the Court also passed comment on the fact that the payment of sale proceeds into the Court was not inconsistent with the underlying objectives of US sanctions. Rather, payment into Court was simply a way of holding the proceeds until the arbitral tribunal determined whether the Claimants were subject to US sanctions and therefore legally obliged to "block" the cargo. The Court went on to say that, if it were wrong and there was a risk of prosecution, it would be necessary to conduct a "*balancing exercise*". In this case, the importance of the order to pay into Court would outweigh the low risk of prosecution.

This decision, amidst a complex backdrop of widespread international sanctions, including from the United States, demonstrates the Court's pragmatic and proactive approach in supporting the arbitration process. More broadly, such exercises of Court

discretion are likely to become increasingly important as the sanctions landscape continues to evolve and change rapidly.

By Joel Othen-Lawson
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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 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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- **External Communications Co-Chair –** Meredith Craven (meredith.craven@chevron.com)
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- **Internal Communications Co-Chair –** Derya Durlu Gürzumar (deryadurlu@gmail.com)