



# YAR

## YOUNG ARBITRATION REVIEW

The First Under40 International Arbitration Review

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# YAR

## YOUNG ARBITRATION REVIEW

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Women in Arbitration

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## [NOTE FROM THE DIRECTORS]

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Edition 27 is a special number. Special not only due to its size but essentially to the message it addresses and which the Founders of YAR wish to pass on to their readers: that we care about matters such as transparency, discrimination, unconscious bias and equal opportunities of women in international arbitration. Matters like these have been under discussion for many years now, more visibly since 1993, when an international non-governmental organisation called *Arbitral Women* started bringing together women practitioners and supported them in having a [stronger] voice in international dispute resolution. 24 years afterwards it still makes sense to dedicate an entire edition of an international publication like YAR to the topic. Because the topic has never been more alive. Edition 27 is about Women in Arbitration.

Catherine A. Rogers opens this number by sharing that institutional appointments of female arbitrators increased by over a third, being especially relevant the role of the parties involved in the dispute or of the respective arbitral institution in these appointments. These are good news. However, one recognises that there might not be yet enough visibility to the work and effort of so many women acting as counsels or arbitrators. It also seems that organizations, law firms, publications and arbitral institutions should promote and give more opportunities to so many talented women who seek an opportunity in this competitive world of arbitration. Despite the struggle, there is obviously a long way from 1648 when an arbitration textbook referred that “*Anyone could be an international arbitrator except those*

*of unsound mind, idiots and unmarried women*”, as Anne-Sophie Besançon explains in her article. Initiatives such as the Pledge or recent YAWP - Young Arbitral Women Practitioners, a group created by Arbitral Women in April 2016, is a sign of progress. The 8 members of YAWP explain their goals and international scope in this edition.

The 15 selected articles that comprise this edition also approach other diverse topics written by female practitioners with solid experience in commercial and investment arbitration. Breach of stabilization clauses, legitimate investor expectation, ad hoc admission of foreign counsel in international arbitration and related judicial proceedings, the exclusion of legal counsel are just some of the interesting matters addressed by the authors. Much more is written along these 135 pages. For now, we simply hope that our subscribers enjoy reading this edition as much as we did preparing it. And that it may be another step, even if small and modest, to the mission of promoting [young] women in arbitration and achieving more diversity in this world of arbitration.

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Lisbon, 31 October 2017  
Pedro Sousa Uva / Gonçalo Malheiro

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WHAT HAPPENED IN LATAM ARBITRATION IN 2017? PART II



## THE KEY TO IMPROVING ARBITRATOR DIVERSITY? MORE INFORMATION

By Catherine A. Rogers\*

Through the creativity, intelligence, and sheer perseverance, [ArbitralWomen](#) has put gender diversity on the map of international arbitration priorities. Its most potent tool has been [The Pledge](#), a formal undertaking through which individuals, firms, and institutions can commit to advancing diversity through specific actions.

Among some of the most important commitments in [The Pledge](#), signatories are to, “whenever possible,” include in women in lists of potential arbitrators to be considered, and “where they have the power to do so ... appoint a fair representation of female arbitrators.” [The Pledge](#), in other words, calls on arbitration practitioners to act on their beliefs about the importance of diversity in arbitrator appointments.

[The Pledge](#) certainly appears to have had the intended effect with respect to arbitral institutions. The percentage of women appointed as arbitrators by institutions in 2016 was, on average, around 17%, up considerably in just a year from the 2015, when the average was 12% and up dramatically from

2012, when the percentages was a mere 6%. (It is usually folly to assume statistical correlation equals causation, but [Lucy Greenwood’s scholarship](#) bolsters her statistical research with anecdotal input that seems to suggest that much of this progress is in fact tied to implementation of [The Pledge](#).)

While these numbers document impressive growth, as [Greenwood](#) comments, there is a “stark disconnect between the rate at which institutions appoint women and the willingness of the parties to do so.” The bigger problem is that in the vast majority of cases, arbitration institutions have no input into the selection of an arbitrator. For this reason, [Greenwood](#) concludes “We cannot sit back and wait for institutions to address the issue. We all have responsibility for considering a balanced shortlist every time we appoint an arbitrator”.

That makes sense, but are law firms, parties, and individuals up to the task? One snapshot that might give us some insight comes from a [survey](#) on the subject conducted by [Berwin Leighton Paisner \(BLP\)](#). On the one hand, the

BLP survey results demonstrate a clear consensus among practitioners that arbitration suffers from a discernable lack of diversity: 80% of respondents thought that tribunals contained too many white arbitrators, 84% thought that there were too many men, and 64% felt that there were too many arbitrators from Western Europe or North America.

But, curb your enthusiasm if you think these numbers suggest a readiness among respondents to take corrective action in appointing more diverse arbitrators. Other responses do not seem to sync up and instead suggest concerns about systemic lack of diversity are unlikely to translate into changes in appointment practices. For example, while 84% responded that tribunals had too many men, only 50% of respondents thought that it was desirable to have gender balance on arbitral tribunals, and 41% thought that “it makes no difference.” Responses on ethnicity and national background followed a similar pattern. 80% and 64%, respectively, said too many arbitrators were white or from Western Europe and North America, but only 54% responded that ethnic balance on a tribunal was desirable, with 31% saying that “it makes no difference.”

One possible explanation for these divergent responses on seemingly inter-related topics is that parties and arbitration specialists support diversity as a principle in the abstract. But in individual cases, they regard winning as a much more important principle. This view is understandable. But it also suggests that there may be limits to promoting diversity exclusively through awareness and invocation of people’s noble intentions.

My proposal, and one of the founding assumptions of Arbitrator Intelligence (AI), is that a uniquely effective way to improve diversity in arbitrator appointments is to provide parties the more information about newer and diverse arbitrators. In fact, in the BLP survey, a staggering 92% of respondents indicated that they would welcome more information about new and less well-known candidates whom they could appoint.

Why is information important for increasing diversity in arbitrator appointments? Let’s start with how the most critical information about arbitrators is learned during the selection process—by ad hoc, person-to-person phone calls. CVs are nice, but what parties and their counsel want is personal, anecdotal information about arbitrators from trusted sources. The reason for this preference is pretty obvious.

Going back to the BLP survey, respondents identified of expertise (93%) and efficiency (91%) as critically important in appointing arbitrators. This information is simply not on arbitrators’ CVs. This information is almost impossible to find out, except through personal phone calls. The problem is that, because of the confidential nature of arbitration, there is a limited pool of people who can provide such information. The result is an information bottleneck, which impedes information

about, and therefore appointment of, newer and more diverse arbitrators. Let’s take a hypothetical.

Imagine a young Brazilian woman has been appointed by arbitral institutions in three sizable and complex arbitrations. And she was simply AWESOME. The parties were wowed. Her co-arbitrators were impressed. And the institutions were delighted. How many people in the world now know about this woman’s excellence as an arbitrator? Maybe 30? 40? 50 tops? And what are the chances that one of those 50 people will receive an all-important phone call from parties in other cases and be able to vouch for her, be able to push her name through the bottleneck? If you answered “chances are pretty low,” you are probably right.

Arbitrator Intelligence seeks to solve this problem of an “information bottleneck” by replicating, and making generally available, the same kinds of information currently available only through personal phone calls. The means to this end is our Arbitrator Intelligence Questionnaire, or AIQ. The aim is to have parties and counsel complete AIQs at the end of each case (the AIQ and additional information about it is available on our [website](#)). The data collected from AIQ responses will then be analyzed and compiled into AI Reports on individual arbitrators, which will be made available (for a fee) through our partner, Wolters Kluwer.

Information about arbitrators that is more generally available (instead being available only through personal phone calls) will create opportunities for newer and more diverse arbitrators to develop their reputations. We believe a more open platform for arbitrators to develop their reputations will promote a more robust meritocracy in the market for arbitrator services. A more meritocratic market for arbitrators services will, in turn, allow new and diverse arbitrators to compete based on their abilities and demonstrated competences, without having to wait for reports of those abilities to squeeze through the current informational bottleneck.

AI’s ability to succeed, of course, depends on parties and counsel submitting AIQs at the end of each arbitration. The AIQ requires some time (the AIQ has 2 phases, each of which takes 15 or less to complete). Phase I asks only for objective information from arbitral awards or files, and we anticipate that young practitioners (or even interns or paralegals) could easily fill them out, then forwarding Phase II to an experienced attorney familiar with the case. This approach puts power squarely in the hands of young, new, and aspiring arbitration practitioners to help build the AI resource and thereby help promote greater diversity in international arbitral appointments.

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Catherine A. Rogers



## YAWP – EMBRACING DIVERSITY AND YOUNG TALENTS TO BUILD THE NEW GENERATION OF ARBITRATION PRACTITIONERS

By Kate Brown de Vejar, Katie Hyman, Yoko Maeda, Melissa Magliana, Annabelle Möckesch  
Claire Morel de Westgaver, Gabrielle Nater-Bass and Ema Vidak Gojkovic

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**Young ArbitralWomen Practitioners (“YAWP”) is ArbitralWomen’s below-40 subgroup.**

ArbitralWomen has come a long way from its origins in 1993, when Louise Barrington gathered 60 female dispute resolution lawyers for dinner. As many of the organisation’s early members grew into more senior roles, ArbitralWomen expanded its reach both in terms of geographical regions and roles in the arbitration community. Recognising the need to support the younger generation of women in dispute resolution just as much as the pioneers, ArbitralWomen decided to create YAWP, which was celebrated by a launch event in Zürich in April 2016.

YAWP, like ArbitralWomen, is a truly global organization with co-chairs from Latin America, North America, Europe and Asia, reflecting the below-40 group’s diverse membership.

YAWP’s primary focus is promoting young women in arbitration and achieving more diversity in the field of arbitration, including within arbitral tribunals. The group seeks to reduce and ultimately remove the imbalance that still exists in the world of dispute resolution, where women continue to represent a minority in positions of leadership, including law firm partnerships and arbitrator appointments. With regard to arbitral appointments, YAWP believes that diversity at all levels is key to the credibility and integrity of international arbitration and the quality of decisions of arbitral tribunals. YAWP – like ArbitralWomen – focuses on topics that underpin its ultimate goals and are of interest to the community as a whole, including unconscious bias and career development. YAWP’s global reach and its primary focus on diversity are what distinguish the group from other below-40 groups.

YAWP’s mission is to help young women build their



careers and fulfil their professional aspirations in the field of international arbitration and other forms of dispute resolution. YAWP aims to facilitate and empower future women leaders in this field by supporting them during the initial stages of their careers, and throughout their transition into more senior roles.

**Inclusion, Collaboration and Knowledge-sharing** is vital to bridge the gender gap in the field of international arbitration. To further these objectives, YAWP sponsors a variety of fora in which young women practitioners can share knowledge, experiences and practical advice on how to meaningfully advance their careers and accelerate their success. YAWP also wants to be a trusted resource for practical insight on building young women's careers in arbitration and other forms of dispute resolution.

YAWP's activities include organising **YAWP Events**, which focus on developing practical skills and promote learning through the sharing of experiences and best practices. Since its formation in 2016, YAWP has organized various events across the globe. Among them, events in Zürich, Hong Kong, New York, London, Singapore and Tokyo focused on effective advocacy in international arbitration and professional development issues such as how to obtain one's first appointment as an arbitrator. These events have often been combined with a so-called SpeedNet networking session, which allows the participants to expand their network across jurisdictions and seniority levels in a time-efficient format. All of YAWP's events, including conferences, knowledge-sharing round tables and other gatherings, aim at providing opportunities to build a professional network as well as mentoring relationships.

To achieve its mission, YAWP closely cooperates with its mother group, ArbitralWomen, to provide networking and mentoring opportunities. YAWP and ArbitralWomen are currently working on a maternity mentoring program to support young mothers in juggling both a family and a career. YAWP also cooperates with other below-40 organizations, such as DIS40, CEPANI40 and YMG as well as with other projects and initiatives that focus on the promotion of younger practitioners, such as the YAR.

YAWP further introduces role models through **YAWP Inspire** podcasts featuring inspiring women in the field of international arbitration who have agreed to discuss their success stories, share their practical advice and offer guidance on issues relevant to their practice and career building. The first series of YAWP Inspire podcasts are to be launched in early 2018.

YAWP's co-chairs are also currently working on **YAWP Room**, an online platform for knowledge-sharing and best-practice tips on how to deal with different situations in one's workplace. YAWP members should have access to YAWP Room from the beginning of 2018.

The YAWP co-chairs are passionate about the values of ArbitralWomen and take pride in promoting them further. They believe that with young talent and renewed enthusiasm, they can build on the existing momentum to tap on new talents and ideas, and help future women leaders have a real impact on the practice of international arbitration and other forms of dispute resolution. In this spirit, YAWP welcomes the publication of this special edition of the YAR, dedicated to women in arbitration and highlighting the contributions of young female practitioners, and is proud to support this important initiative.

Applications for membership are to be made on ArbitralWomen's website ([www.arbitralwomen.org](http://www.arbitralwomen.org)). ArbitralWomen members who are below 40 automatically become members of YAWP. The YAWP co-chairs would be delighted to meet new members at their future events.

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# GENDER DIVERSITY: DON'T COUNT YOUR CHICKENS BEFORE THEY HATCH

By Anne-Sophie Besançon

## 1) Introduction

“Anyone could be an international arbitrator except those of unsound mind, idiots and unmarried women”. This quote is from a passage of an arbitration textbook from 1648, which gives an idea on how women were seen at this time.<sup>1</sup> More recently, the situation of women in the legal profession has not been better. In 1913, four women who were declined the right to sit the law society’s examination took their case to the Court of Appeal. In the famous case *Bebb v The Law Society*, the Judge, Mr. Justice Joyce, decided that: “women were not ‘persons’ within the meaning of the Solicitors Act of 1843”. Maud Crofts, Carrie Morrison, Mary Pickup and Mary Sykes had to wait until 1922 to become the first female solicitors after the Sex Disqualification Act was passed.<sup>2</sup>

Since then, it has remained difficult for women to penetrate the legal profession. In 1957, only 1.94% of solicitors were women, 7.33% in 1977, 32.75% in 1997<sup>3</sup> and finally, in

2016, 50.2% of solicitors on the roll were women (Although only 49.5% hold practicing certificates).<sup>4</sup> In other words, it took almost a century to reach parity in the English bar. However, this satisfaction should be tempered since women still face discrimination and it is very difficult for them to reach the level of partner within firms.

Even if the situation seems, a priori, better in the legal environment, the arbitration field is an exception. Indeed, few women manage to become partners within arbitration law firms, and even fewer become arbitrators. In fact, less than 15% of arbitrators are women. The lack of diversity in arbitration, between gender, ethnicity, age and social background, has recently been criticised and discussed considerably. Consequently, it seems that the arbitration field has begun to perceive the importance of gender diversity in arbitral tribunals. Indeed, as Lucy Greenwood noticed: “One of the questions in the Queen Mary survey of 2015 about improvements and innovations in international arbitration was ‘if users could have any improvement made to

international arbitration what would it be?' - The myriad of answers included "broadening the pool of arbitrators in number as well as in ethnic and gender diversity"<sup>5</sup>

Gender diversity has been a constant concern lately not only in arbitration, but also Global businesses, educational institutions and legal practice, all of which have made tremendous efforts to improve women's representation. The topic is not only fashionable, as having a gender mix is highly beneficial for the parties, arbitrators and the legitimacy of arbitration itself.

First of all, it is a matter of legitimacy. Indeed, half of the worldwide population is female and more and more women become CEOs or own their own business.<sup>6</sup> When those women choose arbitration to settle their disputes and face only male arbitrators they might call into question the legitimacy and impartiality of the arbitral tribunal. Indeed, a woman who appears before a panel of female arbitrators will unconsciously think that her arguments were more likely to be received and considered.<sup>7</sup> Consequently, the award will be more readily accepted and enforced. As Senator Warren claimed about the ISDS dispute, people will start to believe that arbitration cases do not take place before "independent judges". She argued: "Highly-paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgment the next..."<sup>8</sup>

Secondly, one of the advantages of choosing arbitration over litigation is the supposed rapidity of the proceeding. Obviously, a small group of arbitrators cannot handle all the claims. Therefore, the immediate consequence of the lack of renewal within the arbitrator's pool is delayed proceedings.

Third of all, as Haridi, 2015, explains in her article, diversity within a team automatically increases its quality. Haridi based her argument on different studies :

- Professor Katherine Phillips' study, according to which "diverse teams are more task-oriented and more likely to solve a problem than homogenous teams confronted with the same problem". She discovered that participants who were preparing to meet with a partner of a different political affiliation were better prepared and conducted more diverse research than those who were about to meet a "similarly-minded partner".<sup>9</sup>

- The Harvard Business Review survey which "observed that employees at companies with diverse leadership were 45% more likely to report growth in the company's market share and 70% more likely to report that the firm captured a new market".<sup>10</sup>

- The National Bureau of Economic Research (NBER) which found that "papers published by ethnically diverse teams of scientific researchers in multiple locations were more likely to be published in high-impact scientific journals and received more citations than papers published by ethnically homogenous research teams".<sup>11</sup>

Regarding gender diversity specifically, another important

study, which was cast in the spotlight by Ula Cartwright-Finch, goes further and shows that the more women are represented within a group, the more this group shows a collective intelligence. Indeed, a team of scientists from MIT demonstrated that, in the same way as individuals, a team can show "a general collective intelligence that can be measured". The results of this study show that: "collective intelligence was significantly correlated with the proportion of women in a group, so that groups that included more women scored higher for collective intelligence than groups with fewer women". In reality, it is not the presence of women per se which improves the collective intelligence of a group but their social sensitivity, which is highly beneficial for a team. This study is surprising; it demonstrates that not only gender diversity has an overall positive influence on a team but also that the more women are represented, the better collective intelligence the team will have.<sup>12</sup>

All those studies apply to arbitration because most of the proceedings and the work carried out on a case are executed by a team. In fact, legal counsels rarely act alone, but with an arbitration team, arbitrators in a panel are most of the time comprised of three, people who handle an arbitration case in arbitral institutions work in team.

There is no debate regarding the importance of diversity of all kind, and almost everyone has agreed that diversity is beneficial. However, especially in arbitration, change is coming very slowly. Indeed, if women only rely on the natural growth of their representation, which has grown by 700% over the past thirty years, parity will not be achieved before 2115, according to Lucy Greenwood.<sup>13</sup>

That is why everyone; practitioners, arbitrators, and institutions must get involved in the struggle for parity without complacency towards the slight improvements that have been noticed recently. Indeed, no one should be satisfied by what the ICC called a "marked growth in the number of women arbitrators appointed for ICC proceedings", which represents an increase of 4.4% in 2016 compared with 2015 and an overall percentage of women appointed as arbitrators equal to 14.8%.<sup>14</sup>

The purpose of this dissertation is to explain that even if some improvements have been made, women have a long road ahead until they reach parity in arbitration and that the problem will not be easily solved considering several unconscious and uncontrollable factors.

This paper will start by acknowledging some of the improvements that occurred in the position of women in the legal field and especially in arbitration (2). I will go through the recent statistics released by arbitral institutions, the several initiatives taken by law firms to improve the number of female partners, the rise in discrimination claims which mean that women are not afraid to stand up for their rights anymore. It is impossible to write about gender diversity and not to mention the significant initiatives, which concretely improve women's representation, the association *ArbitralWomen* and *The Pledge*. However, those much-vaunted improvements will be put into perspective because parity is still very far from achieved.

The second part tends to demonstrate that to realise significant change it is essential to understand the underlying causes of the lack of female representation in arbitration (3.). To study gender bias and stereotypes, I will explore many different experimentations made both inside and outside the legal field. After giving an overview of the most common gender stereotypes, I will focus on female's behaviour and how women might surprisingly be their own biggest enemies. I will also base my demonstration on the study of signatories of *The Pledge*. Indeed, I reviewed every signatory one by one and classified them by gender, profession and origin (From within The UK or outside). The results are relevant and show, among other things, that more male partners signed *The Pledge* than female partners.

The last part aims to review some remedies that could be considered to fight gender stereotypes, biases, homophily and to improve gender diversity and transparency. I will consider the potential effectiveness of blind appointments and mandatory rosters, but more importantly, I will present a tool which can change the way parties and institutions select arbitrators, *Arbitrator Intelligence* (4.).

## 2) *Relative improvement in female representation in arbitration*

The recent enthusiasm for gender diversity as shown by the multiple conferences on the subject, rich literature and recent ICC statistics would have people believe that major improvements have been made. However, the reality is far from that.

However, it must be said that some improvements have been made: the multiple initiatives developed to encourage the presence of female partners and arbitrators should be underlined.

### a) *The relative improvement in numbers*

The ICC only started to release statistics on gender in 2015. The statistical data released for 2016 revealed a growth of 4.4% in the number of women appointed as arbitrators. Indeed, the percentage of female arbitrators appointed in ICC cases in 2015 was 10.4%, which increased to 14.8% in 2016.<sup>15</sup>

The growth shown within the ICC is also visible before other arbitral institutions. For example, the percentage of female arbitrators appointed in the London Court of International Arbitration's (LCIA) cases steadily increased, from 11.7% in 2014 to 16% in 2015 and finally 20.6% in 2016. Before the Vienna International Arbitration Centre (VIAC), the number of female arbitrators appointed rose from 14.3% in 2015 to 17.1% in 2016.<sup>16</sup>

As the issue of gender diversity is receiving more and more attention, other institutions started to release statistics for the first time this year. For instance, in July 2017, the German Institution of Arbitration (DIS) released data showing that in 2016, of a total of 348 arbitrators appointed in an arbitration proceeding, 13.2% were female. The DIS itself appointed 34 arbitrators and 10 of these were female (29.4%). It claimed to promote female arbitrators and boasted that "As per the most recent statistics of the German Federal Bar, 34% of lawyers admitted in Germany

(...) were women. In the pool of potential arbitrators is roughly similar, then the DIS Appointing Committee has done not too bad of a job".<sup>17</sup> The Hong Kong International Arbitration Centre (HKIAC) released its statistics as well which show a percentage of 11.5% female arbitrators appointed in 2016.<sup>18</sup> The statistics released by the Milan Chamber of Arbitration show a slight overall improvement in the number of female arbitrators appointed, from 13% in 2015 to 14% in 2016. The improvements are even more convincing in the number of women appointed as chairs, from 2 in 2015 to 7 in 2016.<sup>19</sup>

These statistics show a dual-layered improvement:

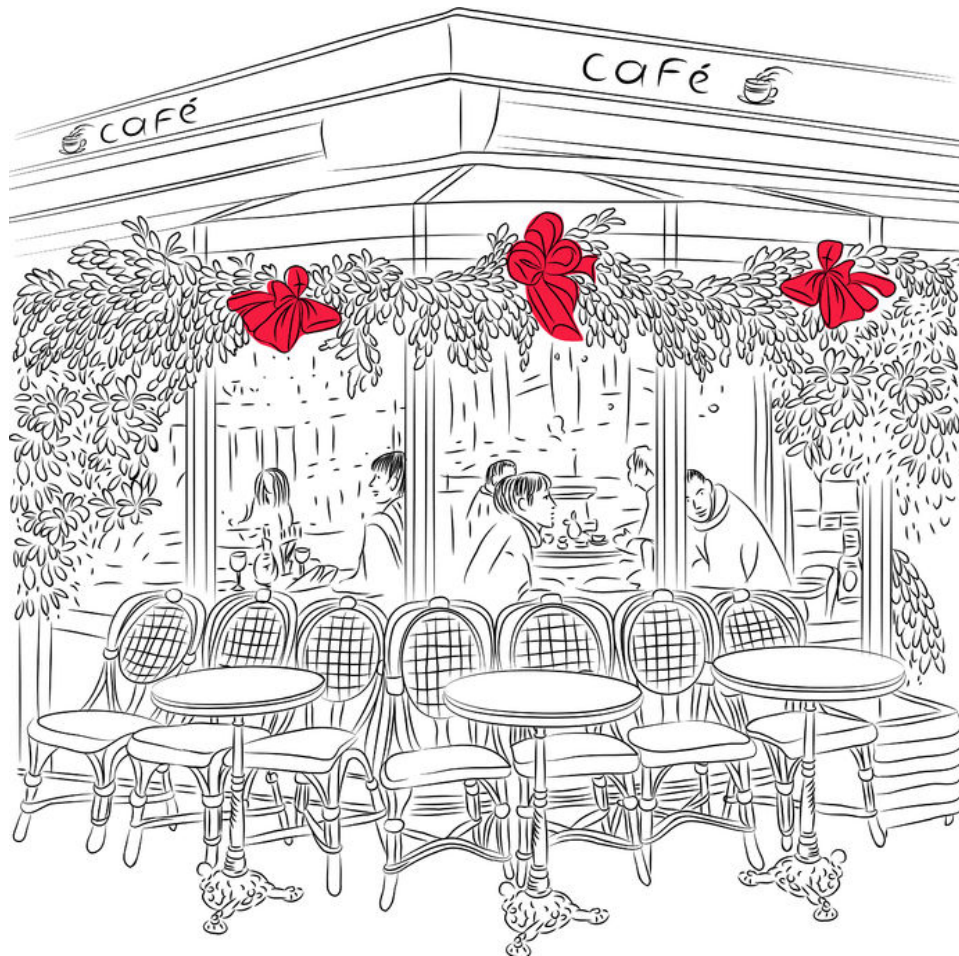
- first of all, the figures illustrate a growth in female representation in arbitral tribunal,
- Second of all, the fact that institutions started to release their statistics show an effort to ensure greater transparency and therefore improve gender diversity.

The progress observed by arbitral institutions is the reflection of an overall improvement in gender diversity. Indeed, according to the survey undertaken by *Law 360* between more than 300 US law firms, a slight growth is visible in all different categories:

- on the number of female attorneys at law firms, 34.8% in 2016 against 34% in 2015 and 33.2% in 2013;
- on the number of female partners, 23.1% in 2016 against 22.2% in 2015 and 21.2% in 2013;
- on the number of female equity partners, 19.9% in 2016 against 19.2% in 2015 and 16.9% in 2013;<sup>20</sup>

This observation is logical because most of the arbitrators were or still are partners in law firms. It is very rare for a lawyer to become an arbitrator without having been a partner in a law firm previously. Behind those figures, there are law firms, institutions and individuals who take concrete actions to promote women in arbitration and more generally in the legal field.

However, these figures must be put into perspective, because even if the number of women is improving, it is still very low. Indeed, recent statistics from all the different arbitral institutions show that overall the representation of women in arbitral tribunals is still deficient. In 2015, according to the International Chamber of Commerce (ICC), only 10% of the appointed arbitrators were women, less than a quarter before the Singapore International Arbitration Center (SIAC), only 14% according to The Stockholm Chamber of Commerce (SCC) and 6% in concluded ICSID cases up to September 2014. In the same vein, the chartered institute of arbitrators indicated that women represent only 7% of the arbitrators qualified to be on the panel from which presidential appointments are made.<sup>21</sup> The London Chamber of arbitration counts 19 members in its panel and only one woman, that is to say, female representation amounts to just 5%.<sup>22</sup> Accordingly, I counted the number of members in the SIAC panel. I found that among its 463 members, there are only 57



women which corresponds to a percentage of 2.30%. Worst, SIAC has a specific panel of arbitrators for intellectual property disputes which contains 22 members and none of whom are female.<sup>23</sup>

Moreover, it is essential to understand the difference between the number of women appointed and the number of female arbitrators. Indeed, even if there are some improvements in the number of appointments, they often concern the same women. Gus Van Harten's paper illustrates that fact perfectly. In his study, he identified all the appointments that have been made in investment treaty cases since May 1, 2010. He found that of a total of 631 appointments, only 41 were female (6.5%). He listed the cases with the names of the women appointed as arbitrators and discovered that Gabrielle Kaufmann-Kohler and Brigitte Stern captured 75% of all appointments. Worse, those 41 appointments were split between only 10 women.<sup>24</sup>

*b) The relative improvement in actions*

As the DIS and other institutions claim, most of the efforts to appoint female arbitrators are made by institutions. However, mentalities are slowly changing and different elements must be highlighted:

- the efforts made by law firms to help women reach partner level (i),
- the fact that women are more and more willing to defend

themselves and fight gender discrimination (ii),

- the recent initiatives aiming to promote women in arbitration such as *ArbitralWomen* and *The Pledge* (iii).

i) Law firms' initiatives

As Lucy Greenwood suggests, there is a "pipeline leak" in the legal field. That means that there are a lot of women who manage to become associate lawyers but they can't reach the partner level. One of the most current explanations for the pipeline leak is that the work schedule in a law firm is not flexible enough and women might give up on the prospect of partnership in order to keep a decent work/life balance for their children. Some law firms have almost managed to reach parity by setting up policies that support women's careers. For example, the American law firm, Cohen Milstrein Sellers & Toll had a rate of 46% female partners in 2016. The firm codified policies, which provide an alternative work schedule. The attorneys are then allowed to organise their schedule the way it is more convenient for them and that includes the possibility to work from home.<sup>25</sup> Other firms, such as Allen & Overy, introduced a program, which allows lawyers to work from home. The system is called "iflex," everyone is allowed to use it with no need for permission and as often as they want during the month. Pinsent Mason introduced a flexible working schedule program as well. Lawyers are allowed to come into the office from 10 am and leave from 4 pm.

In Germany, some firms such as McDermott, Will & Emery

and Baker McKenzie or Linklaters adopted another initiative: they instituted a program, which allows the members of a team to limit or reduce their work hours with salary adjustments.<sup>26</sup> In my opinion, the remaining question here is to what extent is it realistic for an associate who works less to expect to compete for partnership.

Aside from scheduling matters, several firms took other actions to support women. Pinsent Mason for instance, created a web-coaching portal for women during their family leave and mentoring schemes for parents and people who are caregivers (with a sick child or in charge of a parent). Hogan Lovells set up a similar scheme with a working family's network, which organises events on several topics such as "supporting children with exams", quarterly "new and expectant parent networking drop-ins" or "career drop-ins".<sup>27</sup> Sackers provide what they call "family friendly policies" which include "enhancements to maternity, salary sacrifice arrangements for child care vouchers, flexible working arrangements, business coaching for lawyers returning from maternity leave and an internal maternity mentoring program." Those initiatives delivered long-term results as all of Sacker's lawyers "who have taken maternity leave in the past five years [return] to work".<sup>28</sup> Indeed, Sackers already had an impressive gender diversity rate in 2015 with 58% of female partners and 61% of female associates. Today they have managed to reach an even better number with 61% female partners and 62% female associates.

Many law firms tend to show their involvement in gender diversity and are committed to improve the gender diversity of their teams. Some of them have decided on a gender diversity target. For instance, Pinsent Masons aims to have 25% female partners by 2018, Herbert Smith Freehills 30% by 2019, Linklaters 30% by 2018, Allen&Overy 20% by 2020, Addleshaw Goddard 30% by 2019 and BLP 30% by 2018. Unfortunately, the current reality is different. According to the percentage of females who were promoted to partnership in 2017, in the UK, only 3 firms out of 11 exceed parity. For instance, Pinsent Masons promoted 13 new partners in 2017, 9 of which are female (69%). In the same way, Mishcon de Reya and Clyde and Co promoted 3 partners in 2017, 2 of which are female. In contrast, Addleshaw Goddard and BLP promoted 2 partners but none are female, Allen&Overy promoted 10 new partners and only one is female, Linklaters and Fielsfisher promoted 8 partners and only 2 are female.<sup>29</sup>

Regarding gender diversity, women cannot remain inactive and wait for an improvement. Some female lawyers already understood that and dared to sue their employers when they felt unfairly discriminated against because of their gender.

#### ii) Women's claims

Female lawyers are less afraid to stand up to their law firms to fight gender discrimination. Since 2016, major law firms in the US, Steptoe & Johnson, Chadbourne & Parke, Proskauer Rose, LeClairRyan and Sedwick, have been sued by female lawyers accusing them of gender discrimination. It is interesting to underline that those claims are not only based on unequal pay but also on discriminating behaviours.<sup>30</sup> For example, in the Proskauer Rose case, the claimant argued that the firm "excluded" her from client matters and refused to allow her "to pitch or to

participate in any employment litigation matter for firm clients, rebuffed her efforts to assume a greater leadership role at the firm, tolerated and facilitated humiliation by firm leadership, and she was demeaned and belittled by her peers and clients".<sup>31</sup>

Most of these claims are still underway but Katie Tantom's case against the city law firm Travers Smith is a good example of a successful discrimination case. Katie Tantom was a trainee lawyer at Travers Smith and the firm denied her a permanent role after she announced her pregnancy during her training contract. The Tribunal recognised that Katie Tantom had the skills to get a permanent role within the firm and that its decision was discriminatory.

Women are more and more willing to fight discrimination even if it might jeopardise their careers. As Katie Tantom's lawyer, Elizabeth George, argued: "It takes courage and tremendous resilience to stand up to your employer, even more so when that employer is a leading City law firm and you are only just embarking on your legal career".<sup>32</sup>

However, those kinds of favorable decisions are too rare and women still face gender stereotypes when they try to fight against discriminatory behaviours. A perfect example of this is the case between Carine Benamouzig and Allen & Overy. Carine Benamouzig was an associate at Allen & Overy in Paris and she was dismissed shortly after she came back from maternity leave. She sued the firm on the grounds of gender discrimination. The National Bar Council of Paris, who acted as judges in that particular proceeding, ordered Allen & Overy to pay out €65,000. However, they refused to recognise the discrimination and only granted her damages on the fact that her dismissal did not follow the applicable procedure. The National Bar Council of Paris rendered a decision, which shows that the battle against gender discrimination is far from over. Indeed, in its ruling, The National Bar Council argued that Carine Benamouzig's "familial choices" were not compatible with the work schedule of an international law firm. In other words, according to the National Bar Council of Paris, it seems that having a child could prevent a woman from being a lawyer in an international law firm and consequently allows her employers to dismiss her.<sup>33</sup>

In and outside court, women are trying to fight gender discrimination and stereotypes. In the arbitration field, two good examples of this are the association *ArbitalWomen* and *The Pledge*.

#### iii) *ArbitalWomen* and *The Pledge*

*ArbitalWomen* is an international non-governmental organisation, which aims to promote female practitioners in international dispute resolution informally since 1993 and as a non-profit organisation since 2005. The network gathers together women with different positions, arbitrator, mediator, expert, adjudicator, surveyor, facilitator, student, from over 40 countries. *ArbitalWomen* organises many events in order to help women extend their network and provide advice on how to advance their career in arbitration. The objective is to encourage women to support each other and promote each other. Since its foundation, *ArbitalWomen* actively campaigned

for gender equality and enhanced the representation of women in arbitration.<sup>34</sup>

Another great initiative must also be mentioned, The Equal Representation in Arbitration (ERA) pledge known as *The Pledge*, which is “a call to the international dispute resolution community to commit to increase the number of female arbitrators on an equal opportunity basis with the hope to achieve a fair representation of women”.<sup>35</sup> *The Pledge* was launched on 18 May 2016 in London but the idea came from Jacomijn van Haersolte-van Fof, director general of LCIA, in 2014. Sylvia Noury, a partner at Freshfields Bruckhaus Deringer, then developed the project. Several events and dinners were launched all over the world to discuss the best way to promote female arbitrators. Male and female practitioners who promote *The Pledge* all over the world compose the steering committee. *ArbitralWomen* support *The Pledge* and has several representatives in the steering committee, Lucy Greenwood, Gabrielle Nater-Bass and Mirèze Philippe.

By signing *The Pledge*, arbitrators, lawyers, institutions, law firms and people involved in international arbitration practice commit to act for the improvement of women’s representation in arbitral tribunals. They ensure, whenever possible, the following six different measures are applied:

- “committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;
- lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;
- states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;
- where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;

- gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.”

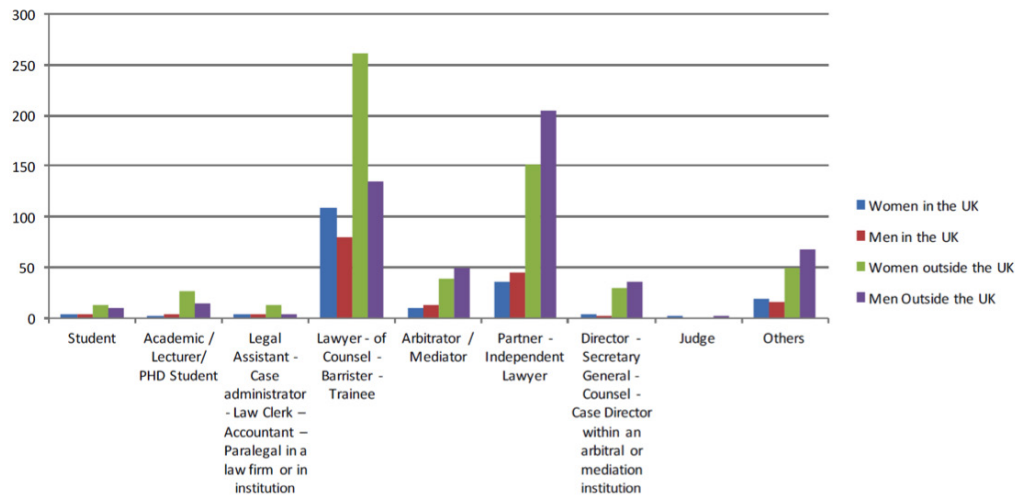
*The Pledge* has already received 1,890 signatories from individuals, arbitrators, associate counsels, partners, paralegals but also a considerable number of law firms, institutions and organisations. It has had an enormous impact on the field and was an eye-opener about the importance of the gender diversity issue.

As Rashda Rana, President of *ArbitralWomen* said: “With the pledge, the arbitration community has moved beyond merely acknowledging the problem and articulating intent to do something about it. There is increasing recognition that the pace of change is unacceptable (...) not just in the world of arbitration but in the judiciary and corporate boards”<sup>36</sup>.

As of the 26th of June 2017, 1510 individuals and 380 institutions had signed *The Pledge*. To understand what kind of audience feel the most concerned about gender diversity, I decided to analyse the signatories. I classified all the signatories into several categories: Men from the UK / Men from outside the UK / Women from the UK / Women outside the UK. Then, I separated them according to their job’s position: Associate – Of counsel – Barrister – Trainee / Student / Partner - independent / Director - Secretary General - Counsel - Case Director within an arbitral or mediation institution / Legal Assistant - Case administrator - Law Clerk – Accountant – Paralegal in a law firm or in institution / Judge / Arbitrator or Mediator / Academic – Lecturer or PhD Student.

It was not possible to classify all the signatories because for some of them I could not define either the gender or the origin of the participant (42 people). Additionally, some people signed the Pledge twice so I only counted their vote once (18 people). Consequently, the study is based on 1447 signatories and on the participants’ description of their job. When signatories described themselves as both, arbitrator and lawyer, their vote was only taken into account in the arbitrator’s category.

	Student	Academic / Lecturer/ PhD Student	Legal Assistant - Case administrator - Law Clerk - Accountant - Paralegal in a law firm or in institution	Lawyer - of Counsel - Barrister - Trainee	Arbitrator / Mediator	Partner - Independent Lawyer	Director - Secretary General - Counsel - Case Director within an arbitral or mediation institution	Judge	Others
Women in the UK	3	2	3	108	9	36	3	1	18
Men in the UK	3	3	3	80	13	44	1	0	15
Women outside the UK	13	27	12	261	38	152	30	0	50
Men Outside the UK	10	14	3	135	49	204	35	1	68



This chart shows some interesting figures, including that overall, there are almost as many women as men who took the pledge (766 Women and 681 Men). The pledge was a huge success not only in London but all around the world. Indeed there are three times more signatures from outside the UK than from the UK (345 signatures in the UK against 1102 from outside). It indicates as well that most of the signatures were made by lawyers, barristers and of counsel (70.9%).

It is undeniable that some improvements have been made and that, more importantly, people are more aware of the problem and willing to correct the imbalance in gender diversity. However, the battle for gender diversity has just started and it will be difficult since some causes of gender discrimination are elusive.

### 3) Behind the apparent causes of the lack of gender diversity

In her article, « Getting a better Balance on International Arbitration Tribunals », Lucy Greenwood explained that: “The over-riding reason for the disproportionate appointment of men is rooted in the difficulties women continue to face in reaching the senior levels at law firms: there are simply not enough women reaching the top of the profession.”<sup>37</sup>

She explained that there is a substantial gap between the number of women who graduate from law school and those who finally access partner level. The figure drops from 65% to 20%. She called this phenomenon the pipeline leak.

According to her, the leak is caused by different factors: “office climate, difficulties in managing dual careers, lack of female role models and mentors, lack of flexible work options and attitudes to flexible working.”<sup>38</sup>

These factors are objective facts and, as studied above, many law firms have already made some adjustments in order to improve the representation of women at partnership level. So, why are women still under-represented in arbitration?

There are mainly two reasons:

- First of all, these objective facts have unconscious root

causes which are very difficult to address such as gender stereotypes and biases;

- Second of all, the selection of an arbitrator is subject to the supremacy of the parties’ autonomy and selecting a woman as an arbitrator cannot be mandatory.

#### a) The impact of gender stereotypes and biases on gender diversity in arbitration

Most of the people believe they are making a decision objectively and neutrally without even realising that their decisions are guided by prejudices. Unconscious bias has a tremendous impact on the way people act, make important decisions and may also predict discriminatory behaviours.

According to Lucy Greenwood, “the main barrier to women being appointed as international arbitrators is unconscious bias.” “Gender stereotyping has been identified as one of the most powerful influences on decision making, particularly when considering women for leadership positions. The unconscious bias individuals have against appointing women as arbitrators cannot be understated and it is one of the single most influential factors for the disparity between male and female representation on international arbitration tribunals.”<sup>39</sup>

This dissertation will explain how gender stereotypes influence men and women’s choices and actions but also how some biases specifically impact women.

#### i) The most common gender stereotypes which handicap women’s advancement

Gender stereotypes, as with all kinds of stereotypes, are developed at an early stage, typically around three years old and are influenced by multiple factors such as parents, media or peers. That is how children learn very early that men “are competent, rational, assertive, independent, objective, and self-confident” and women are “emotional, submissive, dependent, tactful, and gentle”.<sup>40</sup>

Several studies on stereotypes demonstrated that they



can “affect the way people make judgments about others and even change the way people remember information” but also “facilitate the creation of false memories.”<sup>41</sup>

Pushed by unconscious bias and gender stereotypes, people may act in way that contrasts with their belief or their will. Alexander R Green’s study about implicit racial bias among physicians and their impact on decisions for white and black patients illustrates this perfectly. He discovered that high implicit racial biases have an adverse effect on the treatments given to black patients. However, that does not mean that doctors with implicit racial biases are actually consciously racist. As Green himself said: “implicit biases may affect the behaviour even of those individuals who have nothing but the best intentions.”<sup>42</sup> Munsch has a similar analysis. He argues, “Previous researchers have shown that people will act according to the majority viewpoint in order to fit in. This is important because, in situations like this, people act in ways that may be inconsistent with how they really feel. For example, they may punish people who ask for flexible work arrangements although they may privately approve flexible work and those who seek it.”<sup>43</sup> That is how a partner in a law firm might support gender diversity and has nothing against the promotion of women within his firm but acts unconsciously in an opposite way.

Justin Levinson and Danielle Young highlight the fact that there are three main themes about gender stereotypes on “the leadership progression of women”:

(1) Stereotypes linking women to the home and family affect their prospects for career advancement

Many scholars argue that the stereotype connecting women to home and family has a substantial impact on the ability of women to reach high-level positions. This stereotype will influence the way women are treated by their employers. Joan Williams illustrates that with an example of a husband and wife couple who work for the same company; “after she had a baby, she was sent home at 5h30 p.m. every night – she had a baby to take care of. He, on the other hand, was kept later than before the baby’s birth – he had a family to support”.<sup>44</sup>

Levinson and Young’s study shows the same results. They created an Implicit Association Test (IAT), an empirical test under which participants have to classify information as quickly as possible. Because the participants answered the test very quickly and without taking the time to reflect on their answers, they used their “automatic cognitive processes” which more significantly revealed the existence of gender stereotypes. Participants were asked to “group together words representing career and home with male and female names”. The results show that they associate “male” and “career” more than “male” and home and female and “home” more than female and “career”.<sup>45</sup>

Munsch; Ridgway and Williams carried out another very important study in 2014 also regarding stereotypical links between women and home. In this experiment, they asked 600 participants to evaluate a request to use company flexi time for child-care related reasons. The results showed that participants were more likely to favour the demands when it came from a

man than a woman. Indeed, when the request was made by “Kevin” around 70% of the participants approved it but the percentage dropped to 57% when the request came from “Karen”. Additionally, 15% of the participants described “Karen” as “not at all” or “not very” committed to her job after she made the request, when only 3% thought this way about “Kevin”.

The results of this experiment partially explain why even if law firms start to settle flexible work’s arrangements, in order to keep and promote its female staff, it does not eliminate all prejudices.<sup>46</sup>

(2) Stereotypes about women’s work styles, character traits, and job competencies hinder their ability to attain and advance to high-level leadership positions:

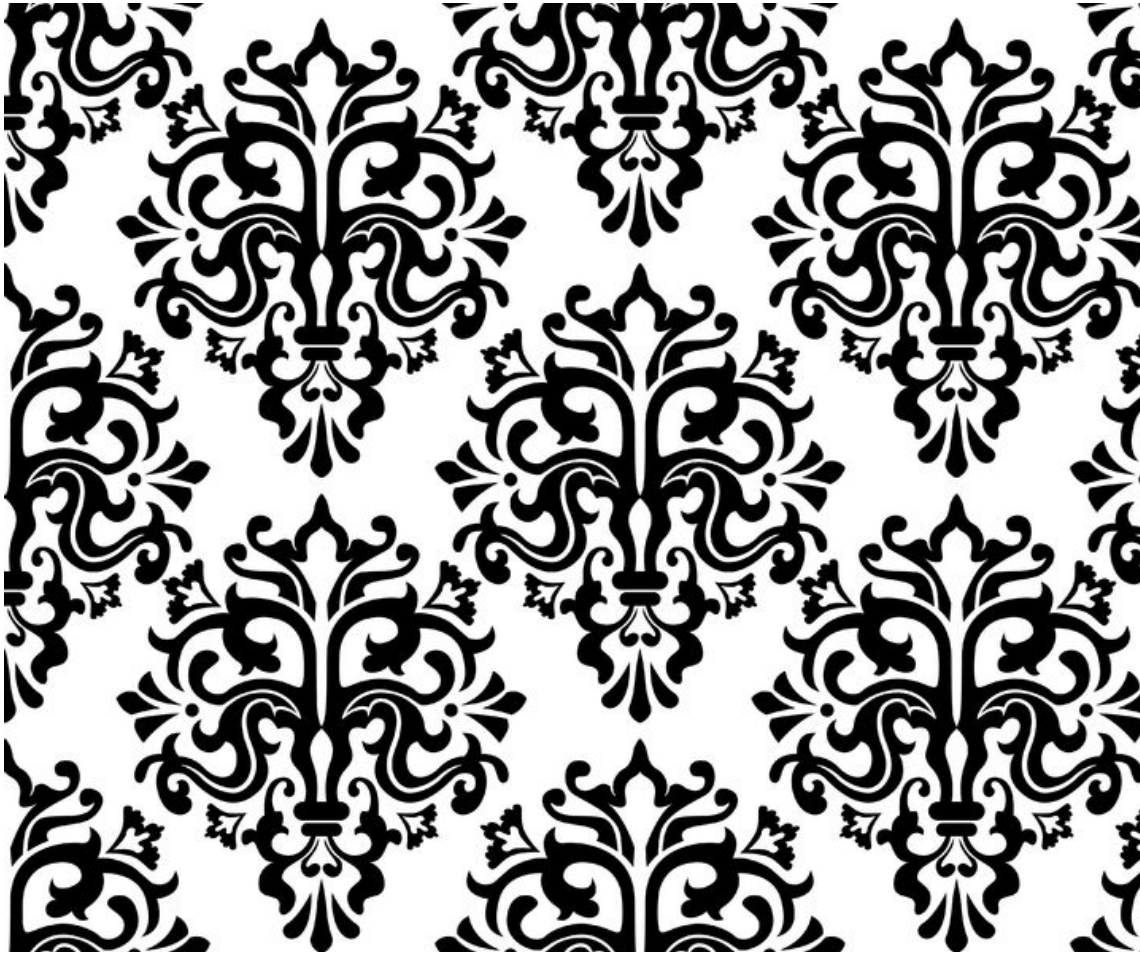
Gender stereotypes have an enormous impact on the hiring process and most of the time employers will unconsciously favour men over women for high-level positions.

Many studies have been performed which illustrate this as a matter of fact. For instance, Gorman carried out a study on the impact of gender in the hiring process. She supported the idea that the way the description of the role is written will have a bearing on the hiring decision. The study shows that the more the job’s description contains stereotypically masculine language, the fewer chances women have of being hired. This appears to be the case at both entry level and higher level hiring. Conversely, when the role is described with more feminine hiring criteria, women are more likely to be hired at the entry level. However, they are not more likely to be hired at a higher level. Gorman explained this result by the fact that “stereotypically feminine characteristics such as friendliness and cooperativeness may be more salient in lower-level positions, which often require “team play” and cheerful obedience to superiors, than in higher positions, which are seen as demanding leadership”.<sup>47</sup>

This illustrates that feminine characteristics are linked to lower level positions and that hiring partners unconsciously associate women with these lower positions. Other studies have returned consistent results. This is for instance the case in the Dodge study, where participants, male and female, associated more males with upper-level managers than middle managers. On the other hand, they associated less women with upper-level managers than middle managers.<sup>48</sup>

In Levinson and Young’s study, detailed above (iii), participants also had to “group together words representing judges and paralegals with male and female names”. The results of the test show that participants linked more significantly “judge” and “male” than “judge” and “female”.<sup>49</sup>

These stereotypes do not only apply to the legal field but to most other sectors. A study carried out in a science faculty regarding a laboratory position found similar results. In this experiment, 127 biology, chemistry and physics professors were asked to evaluate an application for a laboratory manager role. They had to rate the applicant according to competence, the amount of salary and amount of mentoring they would be willing



to offer the individual. They all received the same material. The only variable was the name of the applicants, which was either a female, or a male name. The results were significant. Professors evaluated female applicants as less competent than men, they were less willing to offer them mentoring and the starting salary offered to the female candidates was much lower.<sup>50</sup>

These experiments explain that even if law firms and arbitral institutions make many efforts, the representation of women in arbitration is still deficient. Indeed, before they even get the chance to start work, they are already considered less competent than men are. Then, if they manage to get the position, they will certainly start with a smaller salary than their male colleagues and will struggle more than men to receive career mentoring. All those biases are unconscious and apply to everyone even those who are committed to improve gender diversity or are legally required to do so.

(3) Certain jobs are consciously or unconsciously perceived as male jobs, females will be evaluated less favourably for those positions

As Williams explained: “When a task or setting is stereotypically masculine, as are most “high-powered” jobs, the setting will activate assumptions that associate competence with masculinity, thereby increasing the perceived competence of men”.<sup>51</sup>

According to Gary Blasi, those stereotypes learned as a

child might affect the way people think throughout their life. In his study, he gave a couple of examples to illustrate that fact, for instance, he asked people to picture a baseball player, a trial lawyer and a figure skater. Most of the people will portray the trial lawyer as a man.<sup>52</sup>

The way people regard a position as purely masculine or purely feminine inevitably has an impact on the gender representation within this particular profession. It is a vicious circle; the more men predominate in a profession, the more it will be seen as a position that a woman cannot handle. Indeed, as Ramit Mizrahi explained: “Expectations of the job role become infused with the stereotypical characteristics of the sex that holds the job.”<sup>53</sup>

The issue is then easily understandable, since there is a presumption that the job should be held by men. Women are consequently seen as less capable of doing it and unsuited. That is exactly what happens in arbitration; there is a presumption that an arbitrator is supposed to be a man and that women will not be able to take on the task. As Wendy Miles admits: “One of the problems is our unconscious bias: we tend to recommend and nominate white men of a certain age because that is what we and our clients are used to seeing and expect to see.”<sup>54</sup>

Those stereotypes are common and because they are unconscious, they affect most people. The aim of this dissertation is to go a little further and to analyse how those

gender biases apply particularly to women. More generally, what are the dominant women's behaviours, regarding gender diversity in arbitration.

ii) Women's specific unconscious behaviours regarding gender diversity

Ruth Bader Ginsburg said: "Women will only have true equality when men share with them the responsibility of bringing up the next generation (...) unfortunately; men are continuing to "bring up" only men in their own image at work".<sup>55</sup> That statement is right but incomplete. Indeed, gender diversity is not a male issue that has to be fixed by men. Women are not spared by gender stereotypes. They affect women as much as they affect men and sometimes even more.

Several studies illustrate the relationship between women and gender stereotypes. This paper will focus on three contrasting studies, which demonstrate four different degrees of how women are impacted by gender stereotypes.

The first one illustrates the idea that women are as much affected by gender stereotypes as men. The study, already examined above, analysed the choice of a candidate for a laboratory position and concluded that the gender of the respondents did not affect their answers. Females displayed the same amount of bias against women than men. They rated female applicants less competent than men in the same proportion than did male participants. They did not offer more mentoring than male professors or a better salary.<sup>56</sup>

As Lucy Greenwood rightly affirmed: "It is important to remember that gender stereotyping affects male and female decision makers equally. Gender imbalance is not a "women's issue", in that women do not have a greater responsibility than men to act to redress the balance, it is a global issue."<sup>57</sup>

A second study made by Levinson and Young called "Law Firm Hiring Test" tends to emphasise that women may favour other women even less than men do. In that experiment, students were asked to act as hiring partners and to choose between a Female and a Male candidate for a summer associate position. All participants get the same two resumes (A and B) but alternatively a female name appeared in resume A (Ashley) or a male name (David). The authors were expecting that men and women would be hired in an equal quantity since they believed that the pipeline leak occurs at a much higher level than summer associate level. The results of the test proved them right as women and men were hired in an almost equal amount. However, what is very interesting for the purpose of this dissertation is that the results of the study show that "male participants hired Ashley more (N=17) than female participants (N=14), while female participants hired David more (N=12) than male participants (N=7)".<sup>58</sup>

The third study has the same findings; women may be judging other women more harshly than men do. It goes a little bit further and affirmed that in some situations women are not only influenced by their own gender stereotypes but they might also act in a certain way that fits men's presumed wishes.

Indeed, Gorman's experiment shows that the gender of the hiring partner in a firm has an impact on the number of women hired. It is very interesting to see that when entry level and higher level are considered together, there are more women hired when the hiring partner is a woman than when it is a man. However, the results are different when both entry and higher level are scrutinised separately. Indeed, regarding entry-level hires, the number of females hired by female hiring partners depends on the representation of women within the firm. When the number of female partners is low, female hiring partners are more likely to hire women than their male colleagues. When the situation is reversed, when the representation of women among the partners is already high, women are less likely to hire females than their male counterparts are. Whereas in the case of higher level hiring the gender of the hiring partner does not have a significant impact on the amount of female recruits. Overall, this study shows that women are less favouring of women than men are favouring of men.

According to Gorman the most obvious explanation is that: "women in a position to make hiring decisions may find that their male peers are willing to tolerate (or even encourage) a high level of female hiring when there are few women at higher organizational levels, but become more resistant as women increasingly gain positions of power."<sup>59</sup> In other words, this study shows that women suffer from their own prejudices but they also unconsciously take into account what they think are the expectations of their male peers.

The fourth study is even more severe with respect to female behaviours. It explains how unconscious biases also lead to women adopting hostile behaviours toward each other.<sup>60</sup> According to Professor Kanter, women who have been hired in a so-called men's position might experience what he calls "the dynamics of tokenism"<sup>61</sup>. One manifestation of that phenomenon is group dissociation, which is defined by Professor Ely as an active dissociation "from members of their group by attempting to distinguish themselves as exceptional or uncharacteristically worthy in comparison with other group members". In consequence, women unconsciously evaluate outsiders of the group better than its members and start to act through the same gender stereotypes that men exhibit in order to fit in. Those token women define themselves as rare, exceptional and not similar to other women. Consequently, as Professor Kanter observed, they: "accept their exceptional status, dissociate themselves from others of their category, and turn against them."<sup>62</sup> Indeed, they enjoy the fact that they are seen as exceptions so much that they do their utmost to keep their privilege by avoiding any potential concurrence.

In a world where women think that they have succeeded in a male dominated role, every female counterpart is then seen as a potential competitor. "when there seems to be an unstated cap on the number of successful women within a workplace—say, when the number of female partners in a law firm hovers below ten percent—women will likely see each other as rivals."<sup>63</sup> In those circumstances, the competition goes beyond that which can be expected between men and becomes personal. Thus, women do not hesitate to sabotage one other and undermine them in order to keep their position and to scare off the threat.

That kind of behaviour has been observed in many fields and arbitration is not an exception. That explains why female partners are less willing to mentor younger colleagues and why female arbitrators are reluctant to appoint other women.

Indeed, most of the women appointed as an arbitrator were appointed by a man. It is of course mainly because there are more male arbitrators than female but also because women are biased as much as men and not especially keen to prefer their peers.

Several testimonies of arbitrators confirmed that statement. Rashda Rana explained that: “In the past five years, even though I have been very busy with my arbitration, litigation, transactional and teaching work as well as with my extra curricula work with organisations such as *ArbitralWomen* and the Chartered Institute of Arbitrators, I have not, in that time – in half a decade) been nominated, appointed or instructed by a woman. That is to say, all my appointments as arbitrator and instructions as counsel have been from, by or through men.”<sup>64</sup>

She went even further and argued that sometimes women are undermining each other consciously: “I have had first-hand experience of women in leadership roles doing everything possible to suppress, obstruct or hinder the advancement of other women into leadership roles. Like so many insecure people there still exists the mentality of “pulling up the drawbridge” once they have reached the safe harbour or apex of their careers in order to keep everyone else out, to exclude other women, exclude other great talent.”<sup>65</sup>

To illustrate this phenomenon even further, it is useful to examine the results obtained from the study performed of the Pledge’s signatories. In a non-surprising way, the chart shows that overall more female associate lawyers, of counsels and barristers signed the pledge (25.5%) than men from the same category (14.85%). However, I was surprised to discover that more male partners signed the pledge than female partners. Indeed, overall, 17.4% of the signatories were male partners while only 12.99% of the signatories were female partners. That tendency is confirmed in the different categories. Within the UK, only 10.43% of the people who signed the Pledge were female partners when 12.75% of male partners signed it. In the same vein, outside the UK, 18.51% of the signatories were male partners as opposed to only 13.79% women.

Those undermining behaviours are specific to women. Men have no trouble supporting and mentoring their peers. Consequently, without being as radical as Madeleine Albright who claimed that: “there is a special place in hell for women who do not help other women”, women have to understand that they are the corner stone of the battle for gender diversity.<sup>66</sup>

Unconscious biases and gender stereotypes are hard to fight because most people are not aware that they are influenced by them and honestly believe that they are already acting in an open-minded way. That is why the gender diversity issue is more complicated than it appears and it will require people to alter the way they have been taught to think since childhood. Another fact that is beyond institutions and gender diversity advocates’ control is party autonomy.

#### b) *The impact of party autonomy on gender diversity in arbitration*

Regarding the choice of an arbitrator, parties have complete autonomy. There are no quotas of any kind and no specific rules which might require them to choose a female arbitrator instead of a male one. According to the statistics, parties are much more reluctant than institutions to select female arbitrators. As Emmanuel Gaillard said: “Anecdotal evidence shows that institutions actively seek to appoint newcomers and promote diversity. It is the parties who resist change”.<sup>67</sup> That is what Lucy Greenwood called “the pipeline plug”.<sup>68</sup>

##### i) The pipeline plug phenomenon

The “pipeline plug” is a reality that is shown by institutions’ statistics. Indeed, of 20.6% of females appointed in an LCIA case only 8.8% were appointed by the parties and 78.4% by the institution.<sup>69</sup> In the same way, in 2016, the ICC appointed a higher percentage of women (46.5%) than the parties themselves (41.1%).<sup>70</sup> The same year, 22.5% of the female arbitrators were appointed by the SCC and only 11% by the parties.<sup>71</sup> The Milan Chamber of arbitration observed the same tendency and disclosed that they appointed 21 (17%) women in 2015 and 25 (23%) in 2016 while the parties only appointed 11 (10%) women in 2015 and only 6 (6%) in 2016.<sup>72</sup> The Milan Chamber pointed out that the number is much lower when co-arbitrators are called to appoint chairs. Co-arbitrators were asked to appoint 19 chairs in 2015 and 16 chairs in 2016 and they didn’t choose any women. That trend is common to all the institutions except the VIAC where, in 2016, the parties appointed more women than the institution did, 58.3% appointed by the institution against 41.7% appointed by the parties.<sup>73</sup>

However, according to the studies, parties are not consciously against the selection of a female arbitrator. As reported by the survey directed by Berwin Leighton Paisner it is even quite the opposite. This survey was conducted between 122 respondents from all over the world (Asia, Australasia, the Middle East, North Africa, North America, Latin America, Caribbean, Western and Eastern Europe, East and West Africa, the BVI/Cayman and Bermuda). Different questions were asked of the respondents, which were arbitrators, corporate counsels, external lawyers, users of arbitration and workers at arbitral institutions, regarding the impact and importance of gender and ethnic diversity in arbitration. The answers given by the participants tended to show a certain enthusiasm for gender diversity. Indeed, for instance, 56% of them affirmed that they already take diversity into account when they select the potential candidates. In the same vein, 84% of respondents affirmed that males are overly represented. Even if 41% considered that having a gender balance in arbitral tribunal is irrelevant, on the contrary for 50% who considered gender equality desirable.<sup>74</sup>

Consequently, if the parties are not consciously against the nomination of women arbitrators what might explain the lack of female appointment by the parties? The explanation is twofold. First of all parties are experiencing gender stereotypes and biases but more likely, gender diversity is perfectly inconsistent for them.

##### ii) Homophily, in-group bias and risk aversion as possible



explanations to the pipeline plug

Homophily, in group bias and risk aversion applied in arbitration, show that people usually unconsciously favour those who come from the same group and usually prefer to make the safer and less risky choice.

#### 1) Homophily and in-group bias

As Sergio Currarini and Friederike Mengel explained in their paper called “Identity, homophily and in-group bias”, homophily is when “people tend to interact with similar others” and in-group bias is when “people tend to treat others of shared social identity more favourably”.<sup>75</sup>

There is a lot of literature about homophily and in-group bias. Many scholars have consistent opinion about it, for instance:

- According to Gorman: “There are several theoretical bases for expecting that individuals making staffing decisions will tend to prefer candidates of their own gender”;

- According to Reskin: “The conflict theory tradition in sociology holds that groups deliberately take steps to obtain or maintain power and privilege for their own members at the expense of other groups, and male decision makers in particular may intentionally exclude women from lucrative

and powerful jobs”;

- According to Ibarra:” homophily processes may lead decision makers to prefer working with similar others”.<sup>76</sup>

I would like to focus on two major investigations which illustrate those phenomena.

First of all, a recent study conducted by Chris Hanretty regarding the gender homophily in the UK Supreme Court bar. Researchers looked at all the cases that appeared before the Supreme Court between 2009 and 2015 and listed the barrister in charge of every case as well as the other lawyers with who they teamed with. They identified 1,292 individual lawyers in 470 cases and looked at the composition of the team depending on the gender of its head. They concluded that: “When a male barrister headed the team, 454 of the 615 more junior barristers (74%) were also male. When a female barrister headed the team, 50 of the 95 more junior barristers (53%) were male.” The study showed that even if the results might be different depending of the area of law and depending on the whether the counsels came from the same chamber or not, “male senior barristers are one and a half to two and a half times more likely to have a male junior compared to female senior barristers.”<sup>77</sup>

Second of all, the experiment conducted by Sergio Currarini and Friederike Mengel, in which they measured the connection between homophily and in-group bias. They performed several

complex tests, some of which are very relevant for the purpose of this dissertation.

During this experiment, participants were randomly split into two groups BLUE and RED, they only knew to which group they belonged but nothing else about the other participants, in order to avoid any gender bias or stereotype. Then, participants had to answer two questions, to which group they preferred to be allocated and how much they were willing to pay (wtp) to get the group of their choice. Participants were then put into pairs with a member of the RED or BLUE group according to their initial choice or not (depending on how much they were willing to pay). Finally, the two participants were asked to play 8 different games together. Their answers to the first question showed that 72% of the participants asked for an in-group match. From their answers to the second question, three categories of people emerged:

- 45% of the participants were “strictly homophilous”, they were willing to pay in order to receive a match with their own group,
- 45% were “neutral” agents, they weren’t willing to pay anything,
- 10% were “strictly heterophilous”, they were willing to pay to receive a match outside their group.

That shows the importance of homophily and how people mostly want to interact with people from the same group.

Both studies tend to demonstrate that gender homophily is most of the time innocuous and very common. By applying those mechanisms to arbitration, it is easier to understand the tendency of outside counsels to appoint arbitrators who are similar to them, namely white and male.

## 2) Risk aversion

People do not react to risk in the same way. Some are risk averse which means that when they are determining the subjective value of an option they discount its objective valuation. On the contrary, risk seeking people will rate the subjective value of the option much higher than its objective value. For example, consider a coin flip game with the following rules: if it lands tails up the player will win £100; if it lands heads up the player won’t win anything. The probability of both outcomes are equal, 50%. The expected value (EV), which is the weighted average of all possible outcomes, is £50. A risk neutral participant in the game would pay anything under £50 for the coin flip, a risk seeking person would agree to pay even more than £50 and a risk averse person would probably refuse to play.

In their study, Sergio Currarini and Friederike Mengel argued that homophily is directly linked with risk aversion. They concluded that: “Suppose agents perceived the behaviour of similar agents to be more predictable. Those who are more risk averse would end up investing more in relationships with similar others (by declaring a higher wtp), in which they expect ex ante less strategic uncertainty.”<sup>78</sup>

This phenomenon is well known in arbitration and somehow understandable. Indeed, regarding the cost of an arbitration proceeding, the amounts at stake and the profile of the clients it is legitimate to exercise caution in the selection of the arbitrators. Yet, since the pool of arbitrators is mainly composed of the famous “pale male tale” group, it is not surprising that older male arbitrators are selected in the vast majority of cases.

As Lucy Greenwood admitted: “There is as well a tendency to always choose the same arbitrators between an “elite” well-known. As counsel, it is easier to appoint an experienced and reputed arbitrator than selecting a less known one.”<sup>79</sup>

Homophily, in-group bias and risk aversion are purely unconscious mechanisms which are consequently hard to defeat. That is what Sergio Currarini and Friederike Mengel found in their experiment. They hypothesized that homophily was linked with in-group bias and that people prefer to match with similar others because they anticipate a potential better pay off in in-group matches than in out-group matches. However, the experiment proved them wrong. Homophily is not driven by the expectation of a higher pay-off. That shows the extent to which biases are unconscious and almost mechanical.

Therefore, one possible explanation is that parties do not consciously avoid appointing women but they are unconsciously driven not to. Another valid explanation is that gender is not a criterion in arbitrators’ selection.

iii) The irrelevance of gender in parties’ appointment decision

As Carol Mulcahy noticed: “For the most part, parties have one opportunity to have a dispute determined in their favour and, for wholly legitimate reasons, they will have a very short-term, self-interested view of the appointment process.”<sup>80</sup> Indeed, in most cases, parties rely completely on their counsel to select and appoint an arbitrator. Then, it is essential to understand to what extent gender is a factor that counsel takes into account when they select an arbitrator.

Four different surveys have been carried out between 2010 and 2016 on the criteria that parties take into account when choosing their arbitrators.

The first one was done in 2010 by Professor Mistelis from Queen Mary University and Paul Friedland, Head of the International Arbitration Group at White & Case LLP. In order to carry out that survey, 136 people, who were general counsel, heads of legal departments, specialist legal counsel and regional legal counsel, were asked to answer an online questionnaire. The results showed that, regarding the choice of a sole arbitrator or Chair, the respondents rated, open-mindedness and fairness (68%), prior experience of arbitration (62%), quality of awards (58%), knowledge of the applicable law (55%) and reputation (54%) as most important factor. Conversely, it is important to note that respondents rated gender as one of the least important factors.<sup>81</sup>

The second survey, entitled “the rise of a third generation

of arbitrators” was carried out by Thomas Schultz & Robert Kovacs in 2012. In that survey, 58 “experienced arbitration practitioners who have a name in the field” rated, from 1 to 10, several criteria on how they select or recommend an arbitrator.<sup>82</sup> This study determined several criteria used by arbitrators in the appointment process. It classified those factors in three categories “Primary Factors” “Secondary Factors” and “Negligible Factors”. There are more than 21 different factors and yet none are related to gender. In fact, throughout the 13 pages of the paper the authors didn’t once use the words gender or women. The results identified three attributes as the most important factors, “primary factors”, for appointing an arbitrator: “specialisation in the law and practice of arbitration, management abilities and experience as arbitrator”.

The third study was carried out in 2013 by Professor Loukas Mistelis from Queen Mary University and Gerry Lagerberg, partner at PwC. For the purpose of this dissertation we will only look at the first phase of the survey which was an online questionnaire completed by 101 participants, who were general counsel, heads of legal departments or counsel, on the authority of the general counsel. The results showed that: “The most influential factors in the appointment of arbitrators were the individual’s (1) commercial understanding of the relevant industry sector; (2) knowledge of the law applicable to the contract; and (3) experience with the arbitral process; technical (non-legal) knowledge and language were also cited but were less influential”.<sup>83</sup>

In the fourth survey, already mentioned above, the respondents were asked to classify the importance of gender in the selection of a potential arbitrator between “very important” “important” “neither important nor unimportant” “not that important” “not important at all”. The results show that 2% of the participants considered gender as very important, 22% as important, 20% as neither important nor unimportant, 16% as not that important and 52% as not important at all.<sup>84</sup>

As a result, the most probable cause for the pipeline plug is simply that parties choose the person that they expect to be the best for their case without even taking into account any gender factor. As Jan Paulsson argued, gender diversity is “the last feature on anyone’s mind”.<sup>85</sup>

The slowness in improving gender diversity in arbitration is mainly explained by the fact that counsel, arbitrators and parties are unconsciously conditioned by their biases and stereotypes to appoint a male arbitrator. Party autonomy and the fact that gender is, so far, not a criteria in the selection of an arbitrator is another reason. However, it is not impossible to fight those causes; some remedies can be found.

#### *4) Remedies to improve gender diversity in arbitration*

Institutions, some arbitrators and counsels are already involved in the improvement of women’s representation in arbitration. However, as explained in this dissertation, most of the causes of a lack of diversity are unconscious or unattainable. Consequently, in order to deeply improve gender diversity in

arbitration, a lot of effort has to be made to fight preconceptions, stereotypes and reach the point where having a female arbitrator is the norm. Several leads can be explored.

##### *a) Fight gender biases and stereotypes within law firms*

The best way to fight gender stereotypes and biases and to reduce the importance of gender in arbitration, is to radically increase the representation of women. Indeed, several studies show that a widespread representation of women reduces or removes stereotypes and unconscious biases. For instance, Paul Sackett carried out a study in which he asked 486 blue collar and clerical work groups to rate, by gender, the performances of co-workers. The study shows that the representation of women impact on the rate they received. Indeed, when the group comprised women of less than 20% their performances were rated lower than their male peers. Above 20%, female’s performances were still evaluated lower than males but not to the same extent and rated higher than males when women represented 50% of the group and above.<sup>86</sup>

Professor Eli’s study showed the same results. In sex-integrated groups, namely groups in which males and females are intermixing, mentoring is highly favoured while in male dominated groups women suffer from a lack of mentoring. In the same vein, junior women in male-dominated firms felt that they didn’t get the chance to find a role model among the senior women in their firm. On the contrary, junior women in sex-integrated firms evaluated the senior women in the firms as good role models. Finally, the study shows that junior women in male-dominated firms were more critical against senior women while junior women in sex-integrated group felt more supported by their senior peers. One woman questioned during the survey said: “Having a lot of senior women here affects all the women associates because they’re such good role models and because they’re such good standard bearers. Because of their success, we’re perceived [by the men in the partnership] as having the ability to be successful”<sup>87</sup>

Those studies demonstrate that the more women are represented within a team the less gender stereotypes are present. In that matter law firms have a huge role to play because they appear at two different stages:

- They promote lawyers becoming partners and consequently arbitrators since most arbitrators are current or former partners in law firms;
- Counsels participate and sometimes even decide of the appointment of an arbitrator.

Subsequently, firms have a double obligation: first of all, to keep promoting women within their teams and help them to reach higher positions until becoming a female partner will not be considered exceptional any longer. Second of all, they have the duty to take gender into consideration and present a balanced list of potential candidates to their clients.

Fighting stereotypes is about reversing the norm. It is

a circle which can be as vicious as virtuous. Indeed, the more women are represented, the more they will be and vice-versa. Munch's study on how women are linked with the home, perfectly illustrates that fact. It shows that if people are told that most of the high-status employees work flexibly then their bias against flexible work decreased or even disappeared.

*b) Mandatory roster system*

According to Gus Van Harten, a mandatory roster system is the best way to improve gender diversity among arbitrators. He thinks that creating a roster based on merit and competences would improve the quality of the whole arbitral system. He suggests the involvement of organisations such as *ArbitralWomen*, the International Association of Women Jurists, the International Federation of Women Lawyers in the selection of potential suitable female candidates. According to him: "A roster system would enhance the independence and public accountability of the system, especially if all arbitrators had to be selected from the roster (preferably by lottery or rotation)"<sup>88</sup>

The issue with this is that a mandatory selection goes against party autonomy. As Darius J Khambata affirmed: "Autonomy is no doubt the most cherished principle of arbitration. Indeed it encapsulates the very idea of arbitration itself."<sup>89</sup>

*c) The potential effectiveness of blind appointment*

Lucy Greenwood suggests that a list of potential arbitrators without any gender information might improve the representation of women within arbitral tribunals. She advised that in order to provide a "blind" list, institutions and counsels should remove the names of the potential arbitrators and standardize their CVs. It is only after they choose an arbitrator that parties will discover his or her gender when they will ask for access to his or her publications and awards.

The system itself might reduce biases and stereotypes. Indeed, when people are aware that they are subject to unconscious biases they are better able to fight them and take a decision against them. In that case, by simply knowing that they are involved in a blind appointment with a goal to offer them a more objective choice, parties will be more prone to make an objective and less biased choice. Indeed, as Lucy Greenwood said: "The preliminary "blind" process might have gone some way to rebalance the effect of implicit gender bias on the decision maker and certainly would have sensitized the decision maker to the gender issue and its irrelevance to the decision."<sup>90</sup>

Some experiments of this kind have already been made and the results are quite surprising. Indeed, the Dubai-based Freshfields partner Erin Miller Rankin, shared an experiment that was carried out in her office in Dubai. She gave her client a list of potential arbitrators which only included their qualifications without their gender. The client finally chose a Jewish female as arbitrator.<sup>91</sup>

In my opinion, blind appointments might be a temporary solution to improve the representation of women in arbitration.

However, the aim is to encourage parties to appoint women not to make them choose women, by accident because their names and gender were hidden.

*d) Increase the access to arbitrators' information*

Arbitral institutions are already committed to improve transparency in appointments of arbitrators. It is for instance the case of the Milan Chamber of arbitration which discloses, since 2016, the composition of arbitral tribunals.<sup>92</sup> However, according to counsels and parties the lack of information available about potential arbitrators puts a brake on women's appointments. Indeed, in the survey carried out by Berwin Leighton Paisner: "An overwhelming 92% of respondents said that they would welcome more information about new and less well-known candidates."<sup>93</sup>

Many solutions to increase transparency about arbitrators and consequently the chance for female arbitrators to be chosen have been suggested. In the White&Case's survey, participants proposed a number of ideas, for example: "a joint publication by arbitration institutions with biographies of arbitrators, a public rating system for arbitrators, published awards and published information about the enforcement of awards (if not protected by confidentiality), information available from institutions about arbitrators on request, more specific information about duration and costs, template CVs and an independent manual of available arbitrators."<sup>94</sup>

Since 2010, the date of this survey, improvements have been made to help parties access the profiles of all arbitrators easily. For instance, on *The Pledge's* website, there is a tab where people who are looking for a female arbitrator can, by filling a form, receive suggestions of potential candidates. A group of volunteers will then propose a list of several candidates anonymously and confidentially according to the criteria provided by the person who is looking for a female arbitrator. The committee send the list of the candidates through a specific email address and the latter are not contacted and are unaware that their names were proposed. The choice of potential candidates is made in accordance with the information given in the form such as the applicable law, the language of arbitration, the place of arbitration, an estimation of the amount in the dispute; any nationality that should not be considered. In order to avoid any conflict of interest, the search committee is formed of members of the steering committee but only those that come from arbitral institutions and not law firms.

There are other ways to find the profiles of female arbitrators. For example, people can look on the Who's Who or on the International Arbitrators Institute website. *ArbitralWomen* also has a tool called "Find Practitioners" to find arbitrators in its website.<sup>95</sup>

Another very important initiative, founded by Catherine Rogers, is Arbitrator Intelligence, which aims to: "promote transparency, fairness, and accountability in the selection of international arbitrators by increasing and equalizing access to critical information about arbitrators and their decision





making.”<sup>96</sup> This non-profit organisation developed different tools to increase transparency in arbitration.

The first project concluded on 14<sup>th</sup> January 2015, aimed to collect as many unpublished awards as possible. Indeed, collecting awards allows the parties to answer different questions such as: “What standard did the prior award use in granting or denying interim relief? How extensive or limited was witness testimony at hearings or document production? Was proposed consolidation permitted or prohibited? Was the contract language strictly interpreted, or did the equities of the situation seem to influence the tribunal’s analysis? How long did it take the award to be rendered after the final substantive submissions were filed?”<sup>97</sup>

The second project was designed to collect information about arbitrators’ case management and decision making through a feedback questionnaire and then to compile the data into an individual report. All the reports were made accessible on Wolter Kluwer’s website. This questionnaire was not easy to create since it had to protect confidentiality and avoid malicious feedback.<sup>98</sup> After several months of work and the comments of many arbitration practitioners, the questionnaire was launched, on the first of June in Singapore with the support of the Singapore International Arbitration Center (SIAC), on the Second of June at the Hong Kong International Arbitration Centre (HKIAC) and on the Sixth of June at the Kuala Lumpur Regional Arbitration Centre (KLRCA).<sup>99</sup>

Arbitral Intelligence’s ambition is to become a leading information platform where parties, institutions and counsels will be able to find information about a potential candidate arbitrator. The goal is to expand the pool of arbitrators by facilitating the selection of the less well known candidates and

to consequently improve diversity.

If parties, counsels and institutions work together and fill in the questionnaire, Arbitral Intelligence might be a formidable tool to improve gender diversity. As Gary Born said about the questionnaire: “counsel and arbitrators should participate because transparency and inclusiveness are irresistible movements, and failure to participate in it would result in being left behind.”<sup>100</sup> It is thus more than likely that if women arbitrators are more visible and their personal details more accessible they will have more chances of being appointed.

### 5) Conclusion

An overall look at the situation shows that there is a clear willingness to improve gender diversity. Indeed, most of the statistics released by arbitral institutions show an enhancement in the representation of women arbitrators in arbitral tribunals. This improvement goes hand in hand with the growth of female representation in law firms and especially at high-level positions. Moreover, the arbitral community shows a real passion for the topic and it is almost impossible to count the number of conferences and debates that have been organised by institutions and law firms on the subject. This sudden craze of gender diversity was also spearheaded by the initiatives of individuals such as Mireze Phillippe, Louise Barrington, Rashda Rana, Gabrielle Nater-Bass and many others who, with passion and devotion, run the association *ArbitralWomen* which aims to promote women and help them build a beneficial network; Catherine Rogers who founded Arbitral Intelligence which may revolutionise the way information flows between arbitrators, parties and counsel; Sylvia Noury and Wendy Miles who created *The Pledge* which is the written testimony of the commitment of many practitioners, law firms and institutions to the improvement of women’s

representation in arbitration.

This idealised image must be tempered, as the reality is still quite unfavourable for women especially as arbitrators. Indeed, it appears in the last survey realised by Berwin Leighton Paisner's in 2017 that some practitioners are still reluctant to promote gender diversity. Indeed, "47% of respondents said that they were likely to consider diversity more often in the future than they had in the past but 36% said that they would not do so".<sup>101</sup> However, those conscious rejections of gender diversity are not its worst enemy. Indeed, the purpose of this dissertation was to demonstrate the difficulties of changing people's behaviours when they are mostly dictated by unconscious biases and gender stereotypes. According to the several experiments that this paper highlighted, from both outside and inside the field, it is now agreed that women are usually seen as less capable than men and less suitable for high level positions such as arbitrators. This dissertation also dealt with a less commonly featured issue of women's unconscious behaviours and the assessment that a woman in a position of power, in a so called men's position, will tend to be even more aggressive and less welcoming to her female colleagues. It is only when female arbitrators become the norm that women will stop being discriminated against. Yet, the road towards this goal is still distant because, in order to reach this point, people will have to fight against their unconscious and elementary stereotypes.

In the same vein, the other principal obstacle against the appointment of women is the fact that parties are not willing to improve diversity; mainly because they face gender stereotypes as well such as homophily, which influence them in taking the safe path by appointing a well-known white male arbitrator. Moreover, diversity tends not to be parties' priority. For them, the most important consideration it is to appoint an arbitrator that will give the greatest chance of success, no matter its gender.

To conclude, the lines of this issue are moving but it might take some time before the recent initiatives such as *ArbitralWomen*, *The Pledge* or *Arbitrator Intelligence* bear fruit, especially because unconscious biases are very hard to break and the party autonomy principle allows parties to avoid being subject to any kind of mandatory appointments.

Moreover, I truly hope that the recent enthusiasm for diversity will not be a passing fad. Indeed, many promises have been made especially during the signature of the Pledge but are law firms willing to keep them? After just one year, some results are already disappointing. For example, two "magic circle" law firms have already recognised their failure to reach their objectives. It is the case for the firm Allen & Overy which had, this year,

the largest round of promotions since 2008 with 24 new lawyers becoming partners but only 2 of those were women. The senior partner confessed that: "We admit that this latest round has been disappointing compared to recent years in regard to promoting women, but as one of our top five strategic priorities that we set in 2016, we're aiming to drive change around gender diversity and LGBT inclusion. We want our firm to be talented and diverse and we are embracing significant structural change across the business." However, it is hard to believe his words when we know that Allen & Overy not only signed the pledge but also planned, last year, to increase female representation within its partners to 20% by 2020.<sup>102</sup> Furthermore, the Linklaters' example illustrates what I call the danger of a passing fad. Indeed, Linklaters was initially a pioneer and adopted a 30% gender diversity's target in 2014, which was more than achieved since 43% of new partners were female in that year. Yet, 26 new partners were promoted in 2017 but only 5 were women, a rate of only 19%.<sup>103</sup> A simple count of the number of partners from Linklaters' website, according to their gender, shows that of 489 partners only 85 are women which amount to 17.3%. It means that Linklaters will have to make tremendous effort to reach its 30% target by 2018.

What is also questionable is the justification given by the partners, according to Andrew Ballheimer, partner at Allen & Overy: "We've had a very busy year and are investing strongly across our network. Following a string of high profile lateral hires, it's fantastic to be able to promote some of our most senior lawyers to meet client demand." Charlie Jacobs, senior partner at Linklater, used more or less the same words, he said: "The exceptional quality of today's newly elected partners reflects our commitment to attracting, retaining and promoting the most talented lawyers in jurisdictions and practices around the world." Do they mean that women associates weren't good enough to become partners and that promoting women as partner wouldn't have met clients' request? Even if they both concluded by expressing their firms' disappointment and commitment in promoting diversity, proponents of gender diversity have every right to be sceptical.

It is essential to stay alert and not to take the slight improvements made for granted. The mentalities are hard to change and there is a huge difference between rhetoric and real gestures. Despite this, improvements have been made and they are a good start. Indeed, before you can count any chickens, the eggs must first be laid.

Anne-Sophie Besançon

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# BREACH OF STABILIZATION CLAUSES: WHAT REMEDY IS AVAILABLE FOR INVESTOR<sup>1</sup>

By Krystyna Khripkova

## I. INTRODUCTION

Investors' experiences of dealing with host states in the energy sector have prompted the shaping of new approaches to contract stability. The problem of non-compliance by governments to provisions of the existing international investment contracts still looms large. A stabilization clause, originating from as far back as the early 1930s, is a contractual risk-mitigation device to protect investments from variations in the legal environment. This would include risks deriving from a state's exercise of its sovereign power such as unilateral modification of the contract or taking the rights of the investor (expropriation), or any other change which the state can utilize to impose new restrictions on the investor.

While a stability mechanism in international energy contracts will not prevent a government from expropriating an investor's rights or changing the legal or regulatory framework in a way that reduces the economic value of those rights, it may entitle an aggrieved investor to compensation. The advantage of carefully drafted stabilization clauses is that they typically specify: (i) the circumstances entitling an investor to compensation as a result of the new legislation, and (ii) the damages the host state

(or state-controlled entity) must pay as a result of breaching the stabilization clause. The focus of this article is the impact stabilization clauses may have on the issue of damages.

The different categories of stabilization clauses are discussed in the first part of the article, with examples of the corresponding contractual language. The second part aims to answer the question: what remedies are available if a State (or a state entity) breaches a stabilization clause incorporated in an international investment contract?

## II. CONTRACTUAL RISK REDUCTION MECHANISM

In the international energy sector, there are four common types of stabilization tools available to investors.

### A. Freezing Clause

As defined in the seminal case of *Amoco v. Iran*, "freezing clauses" freeze "the provisions of a national system of law chosen as the law of the contract as to the date of the contract in order

to prevent the application to the contract of any future alterations of this system.<sup>22</sup> In other words, they freeze the legal regime on the day when the bargain was made and prevent any future legislative changes applying to the investor.<sup>3</sup> In *Duke Energy v Peru*, the tribunal even extended the stabilized regime to encompass *interpretation* of the law.<sup>4</sup> There is an increasing trend to move away from “traditional” freezing clauses as they are less effective.<sup>5</sup> This is because they cannot provide any guarantees against the state’s exercise of legislative power in the public interest.<sup>6</sup>

A typical example of a freezing clause can be found in the 1989 Tunisian Model Production Sharing Contract which reads: “The Contractor shall be subject to the provisions of this Contract as well as to all laws and regulations duly enacted by the Granting Authority and which are not incompatible or conflicting with the Convention and/or this Agreement. It is also agreed that no new regulations, modifications or interpretation which could be conflicting or incompatible with the provisions of this Agreement and/or the Convention shall be applicable.”<sup>7</sup>

#### B. Intangibility Clause

Intangibility clauses provide that a subsequent legislative change does not apply to a contract without the consent of an investor. Put differently, changes in the law of the host state that might have the effect of changing the terms of the parties’ contract will not apply to that contract unless the investor agrees on that.<sup>8</sup> Instead of indirectly restraining the state’s sovereign right to intervene at a later date by freezing the law applicable at the time the bargain was made, this form of stabilization tries to limit the state’s capacity directly by requiring mutual consent for legislative changes to apply to a contract.<sup>9</sup> As Cameron notes, the advantage of this approach is that “it establishes a procedural mechanism for discussion (and probably negotiation) between the parties about the future of the agreement.”<sup>10</sup> An intangibility clause is not as common in recent transactions and has generally been replaced with economic equilibrium clauses.

An example of such a clause is found in the concession agreement at issue in *Texaco v. Libya*<sup>11</sup> case, which reads:

“The Government of Libya will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties.

This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution [...] Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent.”

#### C. Economic Equilibrium / Rebalancing of Benefits / Adaptation Clause

Economic equilibrium clauses do not seek to restrain the legislative or regulatory power of the state, but they aim to maintain the financial position – the economic equilibrium – of the investor

as provided by the contract on the date it was signed. They attempt to deal with the consequences of change by providing protection through a renegotiation mechanism.<sup>12</sup> This kind of stabilization clause requires that, where the host state enacts any legislation or takes any administrative measures which increase the costs of the project, the parties will either consult to determine the economic consequences of such a change, or automatically adjust the terms of the contract, and the host state will compensate the investor accordingly. Compensation may be in a form of direct compensation, increased tariffs, tax rebates, or an extended concession term.<sup>13</sup> Therefore, these clauses do not restrict the scope of subsequent legislation, but mitigate its adverse impact on the investor.<sup>14</sup>

In drafting such clauses, the parties should consider defining: the change of circumstances triggering the clause; the effect of the change on the contract; the objective of and procedure for the renegotiation; and the solution in case of failure of the renegotiation process.<sup>15</sup>

An example of such a stabilization clause can be found in the 1997 Model Production Sharing Agreement for Petroleum Exploration and Production in Turkmenistan, which reads:

“Where present or future laws or regulations of Turkmenistan or any requirements imposed on Contractor or its subcontractors by any Turkmen authorities contain any provisions not expressly provided for under this Agreement and the implementation of which adversely affects Contractor’s net economic benefits hereunder, the Parties shall introduce the necessary amendments to this Agreement to ensure that Contractor obtains the economic results anticipated under the terms and conditions of this Agreement.”<sup>16</sup>

#### D. Allocation of Burden Clause

An allocation of burden clause is a variation of the economic equilibrium clause. Rather than requiring the parties to negotiate revisions to the terms of the contract in order to restore the economic equilibrium, this type of clause requires a state entity (or the state itself) to indemnify the foreign investor for any loss or damage resulting from a change in legislation.<sup>17</sup>

An example may be found in the Agreement on the Joint Development and Production Sharing for the Azeri and Chirug fields and the Deep Water Portion of the Gurashli Field in the Azerbaijan Sector of the Caspian Sea of 20 September 1994, Art. XXIII.2. It provides that if the rights or interests of the Contractor have been adversely affected by unilateral action by the host state with negative effect for the Contractor’s rights and interests, SOCAR (a national oil company) “shall indemnify the Contractor (and its assignees) for any disbenefit, deterioration in economic circumstances, loss or damages that ensue therefrom.” SOCAR is also charged to “use its reasonable lawful endeavours” to take appropriate measures “to resolve promptly in accordance with the foregoing principles any conflict or anomaly between such treaty, intergovernmental agreement, law, decree or administrative order and this Contract.”<sup>18</sup>

### III. DAMAGES FOR BREACH OF STABILIZATION CLAUSES



Freezing clauses have proved to be of little value in resisting expropriation,<sup>19</sup> although they may have helped investors to secure an exit on better financial terms than they would have otherwise obtained. The effectiveness of stabilization clauses does not necessarily lie in the fact that investors may resort to international arbitration. Lamb and Lee have suggested that the presence of a carefully drafted stabilization clause may provide useful leverage to an investor seeking to renegotiate contractual terms with a state.<sup>20</sup>

It has been observed that many petroleum contracts do not have stability mechanisms, yet foreign investors continue to conclude investor-state contracts. Bilder has refuted the argument that the absence of a stabilization clause is a deal breaker, because investors would still expect reasonable alterations of the fiscal and regulatory regime, i.e. “that balance of political/fiscal/regulatory risk vs. expected benefit will be reasonably maintained during the contract life-cycle.”<sup>21</sup> It is based on an idea that a host state is interested in attracting investments and will encourage exploration or high cost exploitation by making any adjustments to the regulatory regime cautiously, taking into account the relative profitability of industry.<sup>22</sup>

Commentators have suggested that investors are cautious about invoking stability protections, as it may cause a deterioration of relationships between an investor and a host state. Unless a company is planning to exit its assets in the host state, bringing claims against a government can mean that the company in question has low chances to continue its business in the country. In many cases, investors elect to live with the adverse consequences of changes in the law or regulations, or to try to negotiate a balanced outcome rather than asserting claims against the state.<sup>23</sup>

#### A. Internationalization of Contract

Respondent states have claimed that undertakings given by governments to fetter the discretion of their successors are unconstitutional.<sup>24</sup> Catula has also advanced an argument that freezing clauses violated constitutional principles on the separation of powers and on the competence of the executive to enter into commitments that prevail over legislation adopted by parliament.<sup>25</sup> Investors have responded that the presence of stabilization clauses in contracts effectively elevate the law which governs the contract from a municipal to an international level. Consequently, unilateral termination of the contract containing a stabilization clause by a state should be analyzed by applying principles of international law, and could constitute an internationally wrongful act. Investor-state jurisprudence recognizes the internationalization effect of a stabilization clause as the presence of such a clause is an important indicator that the contract is subject to the principles of international law.<sup>26</sup>

Where stabilization commitments were pleaded to be unconstitutional, investors relied upon the longstanding principle of international law whereby states cannot invoke the provisions of their domestic legal system to justify non-compliance with their international obligations.<sup>27</sup> In *Revere Copper v. OPIC*, the arbitral tribunal held that “under international law the commitments made in favor of foreign nationals are binding notwithstanding

the power of Parliament and other governmental organs under the domestic Constitution to override or nullify such commitments.”<sup>28</sup>

According to Catula, if an analogy is made between treaties and contracts with respect to Article 46 of the Vienna Convention on the Law of Treaties, a state can plead that it has been exempted from the general principle that states cannot invoke domestic law, because constitutional provisions such as the principle of separation of powers constitute “a rule of its internal law of fundamental importance.” Therefore, the host state entered into the investment contract in violation of such rules, while a diligent investor should have been aware of an exception before concluding such contracts with the host state.<sup>29</sup> Cameron, however, has pointed to a declining need to internationalize an investment contract, given the maturing of law in many host states.<sup>30</sup> However, it may be problematic for domestic courts to enforce stabilization clauses because the idea of freezing the host state’s law may be unacceptable under legal concepts embedded in the domestic legal system.

#### B. Remedy in Case of Breach

A stabilization clause cannot prevent a state from exercising its sovereign right to legislate in light of changing social and economic frameworks. There is a consensus among commentators that awarding damages is an appropriate remedy for the breach of a stabilization clause by a state or a state enterprise. The *Aminoil*<sup>31</sup> tribunal acknowledged this, stating that “these provisions [stabilization clauses] are far from having lost all their value and efficacy on that account since, by impliedly requiring that nationalization shall not have any confiscatory character, they reinforce the necessity for a proper indemnification as a condition of it.”<sup>32</sup>

The following violations of stabilization clauses, among others, may lead to investors’ claims: (i) regulatory change in breach of a freezing clause, (ii) a state’s failure to negotiate in good faith so as to restore the balance of benefits following regulatory change in breach of an economic equilibrium clause (although, parties are not under an obligation to reach an agreement), and (iii) a state’s failure to pay indemnification in breach of an allocation of burdens clause.<sup>33</sup> While failure to agree does not, in and of itself, breach a rebalancing clause, it may be a violation to obstruct negotiations, or to refuse to compensate as provided by the clause.<sup>34</sup>

The significance of a stabilization clause is that it ensures that an aggrieved party will be entitled to damages.<sup>35</sup> At the same time, Maniruzzaman has observed that in arbitration cases “where the breach of a stabilisation clause was in issue, no quantification of damages, specifically for such breach, in the total quantum of compensation awarded by the tribunal can be discerned.”<sup>36</sup>

Some commentators have held that specific performance (*restitutio in integrum*) is a proper remedy for breach of a contract containing a stabilization clause.<sup>37</sup> However, in a dispute with a host state, if a freezing clause prohibits any change in the applicable law, the tribunal will unlikely award specific performance for the breach of such a clause. This would interfere with the sovereign right to legislate. In *TOPCO v Libya*<sup>38</sup> the arbitrator ordered specific performance, i.e. ordered Libya to reinstate the contract



with the investor. Libya, however, did not comply with the order, and the parties lately reached a settlement. This illustrates the point that remedy in the form of specific performance with respect to freezing clauses may ultimately not be an effective remedy.<sup>39</sup>

### C. Damages for Breach

The analysis of arbitral jurisprudence has shown that there are two frameworks, contractual and treaty-based, within which aggrieved investors have invoked a breach of stabilization clauses. First, if there is a contractual arbitration provision, an investor can initiate a commercial arbitration for the breach of its contractual rights. Second, an investor may be able to pursue treaty claims, instead of (or in addition to) pursuing contractual claims, on the basis of an umbrella clause<sup>40</sup> and/or fair and equitable standard (FET) in the relevant treaties which have allegedly been triggered by breaches of stabilization clauses in investment contracts.

Some commentators have suggested that stabilization clauses create a “mechanism of contracting with regard for the implication of damages for breach of obligation – a move from a predominantly public law perspective to one based primarily on commercial contract law.”<sup>41</sup> Accordingly, a tribunal will likely interpret and apply a stabilization clause on its precise terms (such clauses vary across different contracts), while the question of validity of such a clause will likely be determined in accordance with the public international law principles.<sup>42</sup> Typically, an investor would seek compensation for the loss suffered as a result of a repudiation or breach of the stabilization clause.

To determine the conditions to obtain damages, the categories of damages available and the amount of damages to be awarded, a tribunal would consult the law governing the substance of the contract.<sup>43</sup> The choice of the governing law is significant, because common and civil law jurisdictions contain a number of varying legal principles and elements of allowable damages. For example, in common law jurisdictions, damages are seen as the primary remedy for non-performance of contract,

with specific performance seen as an exception. There appear to be three basic categories of recoverable damages in common law jurisdictions: expectation damages (damages are awarded on the basis of putting the claimant in the position it would have been in, but for the breach, and include lost profits), performance damages and reliance damages. Yet, in civil law jurisdictions the primary remedy has traditionally been to have the contract performed as agreed, with damages in lieu of performance as only a secondary remedy. In most civil law countries, there are two main categories of loss: actual loss and loss of profits.<sup>44</sup>

In any case, the analysis of damages is first and foremost driven by the facts of a case.<sup>45</sup> The success of the contractual claim will likely depend, *inter alia*, on the particular language of the stabilization clause. Given the contractual background, many awards that deal with stabilization clauses are unlikely to be public. The case law known to the author provides some useful insights into how tribunals have examined stabilization clauses while assessing damages.

In some cases, tribunals have addressed the interplay between stabilization clauses and nationalization of the investment. For example, in the *AGIP*<sup>46</sup> case, AGIP and the government of Congo entered into an oil distribution agreement and created an oil company, where Congo held 50 per cent of the capital. Under the stabilization clauses, included in the agreement, the government promised not to change unilaterally the company’s articles of incorporation, even if changes were made to Congo’s company law. Moreover, Congo undertook a commitment not to apply certain laws and decrees as well as “any other subsequent law or decree that aims to alter the Company’s status as a limited liability corporation in private law.”<sup>47</sup> Congo, however, nationalized the company which led AGIP to bring contractual claims under the arbitration clause included in the agreement.

The *AGIP* tribunal held that Congo’s nationalization of AGIP’s interests constituted a repudiation of the stabilization clauses Congo freely accepted, resulting in, *inter alia*, a loss of

profit for AGIP on the venture. The tribunal found that Congo was obliged to compensate AGIP in full for breach of contractual undertakings – “distinct from the nationalization”<sup>48</sup> – not performed by the government, as well as for unlawful expropriation of its investment. Consequently, the tribunal awarded AGIP “full compensation” including *damnum emergens* and *lucrum cessans*.

In two other cases, tribunals held that measures of host states that led to nationalization of investments did not breach stabilization clauses. Therefore, investors were not entitled to damages for the breach of stability provisions.

First, in 1955, Liamco, an American company, entered into a number of Concession Agreements with the Libyan government. The Concession Agreements incorporated a stabilization clause that provided that future Libyan legislation would not affect the concession without the prior consent of all of the parties. The government promulgated several decrees ultimately resulting in complete nationalization of all of Liamco’s physical assets and concession rights in Libya. Liamco initiated arbitration proceedings requesting as a principal relief the restoration of its concession rights together with all the benefits accruing from such restoration, and as an alternative relief, the payment of adequate damages (*damnum emergens* and *lucrum cessans*) plus interest. In the *Liamco*<sup>49</sup> award, the sole arbitrator found that Libya’s nationalization was not a breach of the stabilization clause in the Concession Agreements, and that international law was not settled on the question of whether damages payable for a lawful expropriation should include lost profits. As a result, a sole arbitrator awarded Liamco damages measured by a newly-created formula, “equitable compensation,” which included \$66 million for Liamco’s loss of concession rights.<sup>50</sup>

Second, the *Aminoil* tribunal addressed the assessment of compensation for nationalization in the presence of a stabilization clause that it decided constituted a lawful act. The tribunal refused to interpret the “stabilization clause” as an outright prohibition of nationalization that would cover the whole period of the concession. It found that due to the changed circumstances and Kuwait’s development as an independent State, it enjoyed “special advantages” in the contractual equilibrium. The given stabilization clause no longer possessed its “former absolute character.” Rather, the clause impliedly prohibited nationalizations of “confiscatory character” (without proper indemnification), but did not rule out nationalization per se. Therefore, the tribunal held that the nationalization was lawful provided that it did not possess any confiscatory character.<sup>51</sup>

In substance, the tribunal decided on the monetary compensation of *restituto in integrum* for the replacement value of the assets and for Aminoil’s business as a going concern. This would include an element of lost profits. The stabilization clauses were characterized as giving rise to legitimate expectations for the investor that had to be taken into account. The tribunal decided that Aminoil was entitled to receive compensatory damages that would be equivalent to a “reasonable rate of return” on the nationalized property.

Investors can also seek to enforce contractual commitments, such as stabilization clauses, through treaty clauses requiring a host

state to observe obligations entered into with respect to investments, so called “umbrella clauses.”<sup>52</sup> Alternatively, if an applicable treaty does not contain an umbrella clause, an investor may seek treaty protections claiming the breach of FET standard, or both standards.

For example, in *CMS Gas Transmissions v Argentina*<sup>53</sup> case, CMS held equity investments in a gas transmission company that had entered into a licensing agreement with Argentina. There was an undertaking of stability that the tariff structure would not be frozen or be subject to further regulation or price control, and that the basic rules governing the license would not be changed without the licensee’s consent.<sup>54</sup> The CMS tribunal found that no expropriation had taken place even though regulatory changes affecting the gas transportation sector resulted in a *near total loss in value* of CMS’s investment.<sup>55</sup> The tribunal found a breach of the FET standard and the umbrella clause,<sup>56</sup> and held that the stabilization clauses “ensured a right that the Claimant can properly invoke,”<sup>57</sup> and were enforceable based on the umbrella clause in the relevant treaty.

The tribunal applied the fair market value measure of damages, but did not quantify the amount of compensation specifically for the breach of the stabilization clauses in the license. Arbitrators applied the discounted cash flow method to determine the fair market value of the losses, thus, applying the expropriation standard of compensation to non-expropriation claims arising out of the breach of the FET standard.<sup>58</sup>

#### IV. CONCLUSION

International tribunals tend to carefully approach a construction of stabilization clauses, focusing on the precise language agreed by the parties. They will likely examine the legality of such clauses from a public international law standpoint in order to prevent a host state from advancing arguments that stabilization clauses were – or have become – invalid as a matter of municipal law. When a state’s acts or interference with the investment contract amount to a breach of a stabilization clause, distinct from nationalization and other breaches, tribunals would likely award damages applicable under the law governing the substance of the contract. The arbitral jurisprudence shows, however, that in many instances investors simultaneously face breaches of stabilization clauses and a state’s non-compliance with its undertakings to refrain from nationalization. Under this scenario, international tribunals can direct the state to compensate the investor for breach of a stability undertaking, as well as for unlawful expropriation of its investment.

Commentators recommend that investors include a more modern rebalancing clause in their investment contracts – rather than a freezing clause. In addition, they recommend that investors specify in the clause “what consequences would flow from such violation at least in terms of indemnification, i.e. the nature of indemnification.”<sup>59</sup> The role of the stabilization clause in a contract would thus be more defined in the case of its breach.

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- 7 Tunisian Model Production Sharing Contract, Article 24.1, quoted in Cameron, at p. 71.
- 8 See R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed. (2012) (Dolzer & Schreuer), at p. 83.
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- 10 *Ibid.* See also C. Partasides QC and L. Martinez, *Of Taxes and Stabilisation*, Guide to Energy arbitrations, Global Arbitration Review (2015) (Partasides and Martinez), at p. 49.
- 11 *Texaco Overseas Petroleum Co. (TOPCO) v Libya*, Award of 19 January 1977, 17 I.L.M. 3 (1978).
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- 16 See Model Production Sharing Agreement for Petroleum Exploration and Production in Turkmenistan 1997, Art. 16.1. For other examples involving Kurdistan, Nigeria, Egypt, Vietnam, Russia, Mozambique and Kazakhstan, see Cameron 2010, at pp. 75–80.
- 17 See Bernardini, at p. 102; Cameron 2010, at pp. 80-81. See also Partasides and Martinez, at pp. 50-51.
- 18 See Cameron 2010, at p. 81.
- 19 See Cameron 2010, at p. 140.
- 20 See Lamb and Lee, at p. 118.
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- 22 Bilder, at pp. 4-5.
- 23 Mansour and Nakhle, at pp. 18-19.
- 24 See, for example, *TOPCO*. See also L. Catula, *Regulatory Takings, Stabilization Clauses And Sustainable Development*, the OECD Global Forum on International Investment VII (2008) (Catula 2008), at p. 8.
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- 26 A. Al Faruque, *Validity and Efficacy of Stabilisation Clauses*, Journal of International Arbitration, Volume 23 Issue 4 (2006) (Faruque), at pp. 326-327.
- 27 See Catula 2008, at p. 8.
- 28 *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation* (OPIC), [1978] 56 I.L.R. 257 (*Revere Copper*), at pp. 1342-1343.
- 29 Catula 2008, p. 8.
- 30 See Cameron 2010, at p. 142.
- 31 *The Government of the State of Kuwait v The American Independent Oil Company (Aminoil)* (1982) 21 ILM 976.
- 32 *Aminoil*, 21 ILM 976. See also Faruque, at pp. 329-330.
- 33 See Catula 2008, at p. 8. See also Bernardini, at p. 99 (Although, traditionally, attention has been rather paid to the investor's protection, a significant number of renegotiations of petroleum agreements have been initiated by host States or State entities.)
- 34 See Catula 2008, at p. 8. See also Bernardini, at p.105.
- 35 See Faruque, at p. 330.
- 36 See Maniruzzaman 2007, at p. 247.
- 37 See C. T. Curtis, *The Legal Security of Economic Development Agreements*, 29 Harv. Int'l L.J. 317, 361 (1988), at p. 365.
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- 41 T. W. Welde and G. Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 Tex. Int's L.J. 215 (1996), at pp. 218-219.
- 42 E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) (Gaillard and Savage), at p. 796. (The validity of stabilization clauses has traditionally been examined primarily from a public international law standpoint.) See Section A. Internationalization of Contract above.
- 43 There are some exceptions to the main rule, see *Libyan American Oil Company (LIAMCO) v The Libyan Arab Republic*, 20 I.L.M. 70–87 (1981), at pp. 149-150 (The Tribunal found that the standard of compensation should be determined according to 'general principles of law', given that international law was in a 'confused state' with regard to the question of the scope of compensation and that there was no conclusive evidence of the existence of community or uniformity in principles between the domestic law of Libya and international law concerning the determination of compensation for nationalization.)
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- 46 *AGIP Company v. People's Republic of the Congo*, Award, 30 November 1979, 21 ILM 735–738 (1982) (*AGIP*).
- 47 *Ibid.*, at para. 84.
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- 50 See Maniruzzaman 2007, at p. 248.
- 51 *Aminoil*, at paras. 88-102.
- 52 See *Burlington v Ecuador*, ICSID case No ARB/08/5, Decision on Liability, 14 December 2012, where the Claimant had raised the non-observance of the stabilization clause as a violation of the treaty umbrella clause, which was accepted by the tribunal for the purpose of determining its jurisdiction.
- 53 *CMS Gas Transmissions v Argentina*, Award, ICSID Case No. ARB/01/8, IIC 65 (2005), signed 12 May 2005 (*CMS v. Argentina*).
- 54 *Ibid.*, at paras. 145-146.
- 55 *CMS v. Argentina*, at paras. 260-264.
- 56 See N. Blackaby and C. Richard, *Regulatory Change in Oil and Gas Arbitration: The Latin American Experience*, The Leading Practitioners' Guide to International Oil and Gas Arbitration, ed. James M. Gaitis (2015), at p. 84. The tribunal's conclusions with respect to the umbrella clause were subsequently annulled, however, the findings with respect to FET remains valid.
- 57 *CMS v. Argentina*, para. 151. Although the validity of stabilization clauses was not questioned by the arbitrators, it has been noted by commentators that such clauses would not be generally enforceable under the domestic laws of common law countries and might also be difficult to enforce in civil law jurisdictions.
- 58 See Maniruzzaman 2007, at pp. 249-250. (Notably, while considering the specific circumstances of the cases concerned, irrespective of the breach of the FET principle, tribunals have applied the expropriation standard of compensation to non-expropriation claims in some cases, but not in others.)
- 59 See, as an example, the Art.43.2 of Model PSC of Gabon of April 17, 1991 between the Republic of Gabon and International Companies, which reads "Any nationalisation or total or partial expropriation of the contractor's right shall entail fair and equitable compensation in accordance with the internationally known standards and principles."



## BRIEF OBSERVATIONS ON FEMINISM AND INTERNATIONAL ARBITRATION

By Manel Chibane

If laughter is the best medicine, the Tumblr page “*Paye ta robe*”<sup>1</sup> could probably cure sexism in the legal profession by listing with a twist of humour misogynistic comments that French lawyers hear in their everyday working life. When a partner introduces his female associate to a client by bragging about how “pretty and charming” she is or when a client reassures his female lawyer before her pleadings that she will “coax the judge because [she is] beautiful”, one can tell the gender gap still exists although the profession of lawyers opened to women a century ago.<sup>2</sup>

Arbitration is no exception regarding the gender gap and lack of diversity, and is rather still seen as a world where “pale, male and stale” candidates are likely to be more successful than others. In the 2015 study conducted by Queen Mary University London and White&Case, stakeholders called for more ethnic and gender diversity in the pool of arbitrators. In 2017, 80% of respondents of the International Arbitration survey conducted by the law firm Berwin Leighton Paisner (BLP) thought that arbitral tribunals contained too many white arbitrators and

84% found that there were too many men.<sup>3</sup> Half of the 2017 BLP Arbitration survey’s respondents call for more gender balance on arbitral tribunals.<sup>4</sup>

The last ICC Statistical Report holds that in 2015, women arbitrators represented for the first time over 10% of all appointments and confirmation, with 43% of women who were either appointed or confirmed as co-arbitrators. The same progress was noted by the LCIA. In 2015, the Institution registered that 6.9% of parties suggested female candidates in the process of arbitrators appointment compared to 4.4% in 2014.

The present “women-only” YAR Issue is part of the initiatives that promote women in arbitration and is an occasion to seize and think of feminism and its impact on international arbitration.

Feminism is defined as “*the belief that women should be allowed the same rights, power, and opportunities as men and be treated in the same way, or the set of activities intended to achieve this state*”.<sup>5</sup> Like

all theories of inclusiveness, it is founded on the idea that a sexual, physical, racial, generational difference grounds an invalid differentiation and that the sole existence of that difference reveals a biased standard of analysis to deconstruct, i.e. the white privileged man standard. For some, defining feminism is in itself a failure to approach the notion by resorting to an essentialism that precisely should be avoided. The difficulty lies in the fact that the starting point of the deconstruction and de-essentialisation would be an idea shaped by men.<sup>6</sup> As Katharine Bartlett asserts “*although ignoring difference means continued inequality and oppression based upon difference, using difference as a category of analysis can reinforce stereotyped thinking and thus the marginalized status of those within it*”.<sup>7</sup>

**If there are different feminists legal approaches (I) one of them particularly focuses on arbitration and alternative dispute resolution (II), an area that dynamically engages in promoting women practice (III).**

### I. Legal language through the feminist lenses

Law is a language. Its power lies in its performative and binding function. Its legitimacy lies in its origin; as the expression of a community’s will it is the most adequate mean to regulate it. So far there is no difficulty and one wonders why feminism would be of any relevance. As simply said by Katharine Bartlett:<sup>8</sup>

*“When feminists ‘do law’, they do what other lawyers do: they examine the facts of a legal issue or dispute, they identify the essential features of those facts, they determine what legal principles should guide the resolution of the dispute, and they apply those principles to the facts.”*<sup>9</sup>

However, as there is no such thing as a monolithic community, law ends as a patriarchal system that “*has exalted one form of reasoning and called only this form ‘reason.’*”<sup>10</sup> Outside of the white privileged man referential, the person will be relegated in the category of the “others”. In the words of Lucinda M. Finley:

*“Privileged white men are the norm for equality law; they are the norm for assessing the reasonable person in tort law; the way men would react is the norm for self-defense law; and the male worker is the prototype for labor law. It is the male’s view of whether the woman consented that is determinative of consent...”*<sup>11</sup>

Not only a language but also a weapon, law reveals and serves dynamics of domination and shall be deconstructed to understand its flaws and reach wider representativity and legitimacy. It is thus an imperative task for feminists to exercise their critical sense on legal reasoning.<sup>12</sup> In the course of it, Katharine Bartlett identifies several methods used by feminists when reasoning on law. Among them, she analyses the “woman question method”. The woman question “*asks about the gender implications of a social practice or rule*”<sup>13</sup> to reveal how law contributes to women’s subordination. It seeks to identify the male-oriented features of law in order to correct them. When Myra Bradwell brought the woman question before the courts and asked the judges to tell them why married women could not practice law in Illinois, United States, she was told in the concurring opinion of Justice Bradley that “*the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for*

*many of the occupations of civil life...*”.<sup>14</sup> Examples of male domination are numerous. The Napoleonic Code held the legal incapacity of women; it was only in 1965 that the reform of matrimonial regimes allowed married women to open a bank account without their husband’s consent.<sup>15</sup> The provisions relating to the free disposition of women’s bodies are quite recent; recognition of matrimonial rape,<sup>16</sup> right to birth control<sup>17</sup> and abortion.<sup>18</sup> However, one should not stop the analysis at matrimonial matters. As noted by Martha Albertson Fineman, sexuality, violence, and family law are areas that have stereotypically been considered as a special concern to women. But gender is “*relevant beyond the sexual, the violent, and the familial*”.<sup>19</sup> It even concerns procedural matters. Male-domination is not only apparent in substantive law but it is also reflected and perpetuated in procedural features of a given legal system. In this regard, Professor Bartlett interestingly draws the attention to the system of *stare decisis* according to which judges’ decisions establish precedents that are to be followed by ulterior judges in a system that favours the *status quo* and reproduces questionable legal assumptions.<sup>20</sup> Further, as methodological principles convey substantive views, although the scope of arbitrability is circumscribed to commercial disputes, that does not preclude arbitration to be an area of law subject to a feminist method.

### II. Arbitration as seen by cultural feminism

As mentioned above, feminism cannot be reduced to a single school of thought. Partisans of a “cultural feminism” which was popularized by Carol Gilligan, argue that women have a distinctive experience and form of reasoning. They are less likely than men to privilege abstract rights over concrete relationships and are more attentive to values of care and connection.<sup>21</sup> Cultural feminism promotes the notion of femaleness as defined by man and falls into essentialism to use man-shaped concepts and divert them into freedom and integration tools.

In this respect, this biology-centered theory holds that women understanding of the world would make them ideal actors of alternative dispute resolution mechanism.

Based on such theory, Eve Hill starts to assert how the present imperfect adjudication system described as “*male-centered courts [that] produce male-centered decisions through male-centered processes*”<sup>22</sup> has an opportunity to improve through the development of Alternative Dispute Resolution (ADR). ADR allows a more adequate solution for both parties but requires a change in method. Rather than the abstract and masculine research of truth promoted by state adjudication, ADR focuses on the idea of justice and the search for a satisfactory compromise for both parties. In order to reach this objective, ADR needs to resort to another method focused on the subjective needs of the parties. As women are better at compromise and at listening, they can help the parties reach step by step an adequate solution. In this regard, Eve Hill regrets the current tendency of arbitration to join adjudication. Indeed today, the rising costs and the complexity and multiplicity of the procedures involved in arbitral proceedings can make it a heavy process. This phenomenon leads to incentives to resort to pre-arbitral negotiation agreements where cultural feminists assert women could excel at because of their naturally cooperative approach.



If cultural feminists wisely try to use their instrument of oppression to free themselves by penetrating the man shaped society where they can thus develop their qualities, it presents the pitfall of objectifying women and reducing them in their essentialist notion of femininity. It can reveal an “unconscious conditioned reflections of their oppression, complicitous in it”,<sup>23</sup> especially when their skills for ADR would only value their discretion. Women can hide behind the outcome as they are only facilitators of the parties’ solution. On top of it, such outcome would still be submitted to man-centered system approval. As an “arbitrator’s task is comparable to that of a judge although an arbitrator does not exercise the powers of government officials or occupy a public office”,<sup>24</sup> arbitral awards need to be enforced in courts, and their authoritative and normative value depends on the validation by the man-centered adjudication system who would still have the last word and perpetuate it.

### III. Women in arbitration today

There are multiple initiatives favouring women’s promotion in the arbitration today. Among them, *The Pledge* was launched in 2015 by a group of arbitration practitioners whose aim is to improve the representation of women in arbitration. *The Pledge* offers a platform that facilitates the search for female arbitrators pursuing that “women should be appointed as arbitrators on an equal opportunity basis”. On 22 August 2017, 1,967 signatories had taken the pledge.<sup>25</sup> In the network steering Committee, Mirèze Philippe, ICC Special Counsel is the founding co-President

of *Arbitral Women*. Created in 1993, *ArbitralWomen* is a non-governmental organisation that promotes women in dispute resolution through events, social gatherings, mentoring, and sponsoring to assist women law students to participate in moot courts.<sup>26</sup> Members come from all continents and from more than 40 countries. Among equality and women promotion advocates, the *National Task Force on Diversity in ADR* in the United States, *les Rencontres de Ségolène* launched by the French law firm Cohen Amir-Aslani, or *Spark21* in the UK are worth noting. *Spark21* is a charity founded to celebrate, inform and inspire future generations of women in the professions and its last initiative. Their recent initiative called the “First 100 Years” is to produce a digital museum made up of 100 video stories that tell the story of women in law and donate it to the British Library in 2019, the year which will mark the centenary of the Sex Disqualification (Removal) Act 1919 which paved the way for women to become lawyers for the first time.<sup>27</sup>

Within the arbitral institutions, the initiatives are also developing significantly. As the ICC is the preferred institution for clients,<sup>28</sup> its activism in the promotion of equality is particularly welcomed.

If the institution has a role to play, clients remain in control of the appointment of arbitrators. Parties autonomy represents the main asset of arbitration for clients who will be able to not only choose the law governing their dispute and the language of the

procedure but also to appoint their arbitral tribunal. And the parties are attached to such possibility; 92% of practitioners want to take part in the process of appointment of arbitrators either through unilateral appointment, from an exclusive list of arbitrators, or by agreement with the other party.<sup>29</sup> Hence they will choose someone who will be able to understand the industry and take a decision that appropriately fits the parties' needs. Neither employees nor public office holders, there is a great flexibility for the appointment of arbitrators and some discrimination could be justified on grounds of better understanding of the dispute, may it be an objective or subjective one. It is precisely such freedom that has led to a dispute brought before the UK Supreme Court in 2011.<sup>30</sup> The UK Supreme Court found that a litigious clause contained in a joint-venture agreement and stipulating that arbitrators should be members of the Ismaili community was enforceable and held that one cannot challenge it on the basis of anti-discriminatory labour laws<sup>31</sup> since arbitrators are not employees.

When significant amounts of money are involved, clients also tend to take the conservatist path and want "names" and well-established practitioners as arbitrators, who are not yet representative of the current diversity of arbitration practitioners. In 2015, half of the cases registered at the ICC involved a disputed amount superior to \$5 million.<sup>32</sup> A 2014 snapshot survey by the

ABA Dispute Resolution Section showed that the more high-stakes the case, the lower the odds that a woman would be involved. For cases with \$1 million to \$9,999,999 at issue, 89 percent of arbitrators were men.<sup>33</sup> In this regard, diversity of clients will likely favours diversity of arbitrators. Hence the appearance of online ADR platforms that open the door of arbitration to a more diverse range of clients in limiting time and costs of proceedings constitutes an opportunity for women and minorities in arbitration.

When talking about feminism, one should not fall into the "white solipsism"<sup>34</sup> that is again exclusionary because it analyses the issue through the experience of the white and privileged woman. One should not fall into the simplistic idea that women "share a set of common, essential, ahistorical characteristics that constitute a coherent identity".<sup>35</sup> Intersectional feminism refuses the false idea that an individual has one identity at a time; the overlapping identities make the overlapping issues equally relevant.

Manel Chibane

- 1 See website: <http://payetarobedavocate.tumblr.com/>
- 2 1900 in France; 1919 in the UK; 1896 in the United States
- 3 Annual International Arbitration Survey, Berwin Leighton Paisner, published on 10 January 2017
- 4 Ibid
- 5 "Feminism" in the Online Cambridge Dictionary
- 6 Lucinda M. Finley, "Breaking Women 's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning", Yale Law School (1-1-1989)
- 7 Katharine T. Bartlett, "Feminist Legal Methods", 103 Harv. L. Rev. 829, 888 (1990)
- 8 Katharine Bartlett is a Kenneth Pye Professor of Law at Duke University and served as Dean of Duke Law School from 2000-2007. In 1994, she won the University Scholar/Teacher of the Year Award at Duke University. She was awarded Equal Justice Works' Dean John R. Kramer Award ("Dean of the Year") for "leadership in public service in legal education" in 2006 and received an honorary doctorate from Wheaton College in 2008.
- 9 Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 888 (1990)
- 10 Ibid
- 11 Lucinda M. Finley, "Breaking Women 's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning", Yale Law School (1-1-1989)
- 12 Ibid
- 13 Katharine T. Bartlett, "Feminist Legal Methods", 103 Harv. L. Rev. 829, 888 (1990)
- 14 *Bradwell v. Illinois*, 83 U.S. (6 Wall.) 130 (1873). Bradley, J., concurring in the judgment) in Katharine T. Bartlett, "Feminist Legal Methods", 103 Harv. L. Rev. 829, 888 (1990)
- 15 French Act No.65-570 of 13 July 1965 reforming matrimony regimes
- 16 It was first recognised by a 1992 decision but the presumption of consent has only been abolished by Law No.2010-769 of 9 July 2010 on Violence Against Women, Violence Between Spouses, and the Effects of These Types of Violence on Children
- 17 In France, the Act No.67-1176 of 28 December 1967 or "Law Neuwirth" legalized the use of oral contraceptive pills
- 18 In France, the Act No.75-17 of 18 January 1975 or "Loi Veil" liberalized the abortion
- 19 Martha Albertson Fineman, "Feminist Legal Theory", 13 Am. U. J. Gender Soc. Pol'y & L. 13, 24 (2005)
- 20 Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 888 (1990)
- 21 Deborah L. Rhode, *Feminist Critical Theories*, 42 Stan. L. Rev. 617, 638 (1990)
- 22 Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 Ohio St. J. on Disp. Resol. 337, 380 (1990)
- 23 Catharine MacKinnon "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence", The University of Chicago Press, Vol 8 No.4 (1983) 635
- 24 *Judgment of 31 January 2005*, 2005 Korkeinmman oikeuden ratkaisut kommentein 101, 108 (Finnish Korkein Oikeus) in . Born, Jan, *International Commercial Arbitration* (2014) Second Edition, 1987
- 25 See website : <http://www.arbitrationpledge.com/>
- 26 See website : <http://www.arbitralwomen.org/>
- 27 See website : <http://first100years.org.uk/>
- 28 Queen Mary, University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process
- 29 Queen Mary, University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process .5
- 30 *Jivraj v. Hashwani* [2011] UKSC 40
- 31 In specie, the party sought to apply the Employment Equality (Religion and Belief) Regulations 2003, which prohibits any discrimination on grounds of religion in relation to employment at an establishment in Great Britain.
- 32 2015 ICC Dispute Resolution Statistics, *ICC Dispute Resolution Bulletin 2016 No. 1*, .13
- 33 Noah Hanft, Making Diversity Happen in ADR: No More Lip Service, *New York Law Journal* (20 March 2017) accessible : <http://www.newyorklawjournal.com/id=1202781408601/Making-Diversity-Happen-in-ADR>
- 34 Expression first used by Adrienne Rich in her book *Disloyal to Civilization: Feminism, Racism, Gynophobia*, W.W.Norton (1979)
- 35 Katharine T. Bartlett, "Feminist Legal Methods", 103 Harv. L. Rev. 829, 888 (1990)





# GENERAL LEGISLATION AND LEGITIMATE INVESTOR EXPECTATION

By Payel Mazumdar<sup>1</sup>

## I. INTRODUCTION

Can general legislation of host states give rise to investors' legitimate expectation? Recent investment arbitration cases from Italy and Spain pertaining to the renewable energy sector have put this controversial question in the spotlight. They raise much controversy because the States have devised support schemes for energy produced from renewable energy sources in their general legislations and regulations to attract foreign and domestic investment by making assurances of stability of the regulatory regime. However, they have then contended that since promises were not specific commitments, any change to the regulations does not in any event give rise to legitimate investor expectation. The arbitral tribunals have also almost in all situations concluded that the Fair and Equitable treatment ("FET") is accorded only where the promises of stability are made specifically to investor rather than through legislation or a regulation of general and unilateral character.<sup>2</sup> Those tribunals opine that unless the assurances are not specific, the expectation is in no circumstance legitimate, and any regulatory changes by host states would not amount to breach of the FET.

This article will be assessing the current state of the debate and establish that general legislation can give rise to legitimate expectations when the assurance of stability of [a certain support scheme] is sufficiently clear, specifically in relation to investors' claims arising in relation to some industries. When States make an effort to promote investment, and that effort is made through general legislation and regulatory frameworks, it is hard to see a reason why that assurance could not give rise to investors' rightful, genuine, and legitimate expectation. Even though arbitral tribunals stress on the importance of weighing other countervailing factors,<sup>3</sup> and assessing the reasonableness of the investors' expectation<sup>4</sup> in the breach of FET, both these issues are beyond the scope of the article and will not be discussed here.

## II. THE CURRENT POSITION

The predominant current position seems to suggest that States are not prohibited from changing their laws, and unless States provide specific guarantee of stability, any other general representation even if relied upon by the investor at the time of investment would not give rise to investors' legitimate expectation,

and consequently not amount to breach of FET.

#### A. States are not “usually” prevented from changing their laws

There has been a paradigm shift in the jurisprudence of stabilization. Tribunals have oscillated between the extremes going from rhetorical and boundless application of the FET doctrine to a more a coherent and restrictive interpretation.<sup>5</sup> The Tribunals in *Occidental*,<sup>6</sup> and *Tecmed*<sup>7</sup> have defined FET<sup>8</sup> expansively, and considered stability as an essential element,<sup>9</sup> to others restricting FET’s scope and allowing host states’ the right to regulate,<sup>10</sup> and investors, to have legitimate expectation only when it arises from a level of legitimacy and reasonableness.<sup>11</sup> However, the present jurisprudence seems to suggest that States are entitled to regulate and change their laws and are not prohibited from changing any or all of their regulatory framework.<sup>12</sup>

As the Tribunals presently opine, it is clear that States as sovereign entities are not prevented from altering their regulatory framework and primarily because they do so, do not *per se* give rise to breach of a FET standard.<sup>13</sup> States have the inherent right to change the regulatory regime<sup>14</sup> and domestic affairs<sup>15</sup> in “order to adapt to the changing ... political and legal circumstances”<sup>16</sup> and “evolutionary character of economic life.”<sup>17</sup> The investor cannot expect a “virtual freezing”<sup>18</sup> of the host states’ laws absent “a specific commitment”<sup>19</sup> or general legislation that could reasonably<sup>20</sup> and sufficiently clearly give rise to investors’ legitimate expectation. Thus, there is no prohibition on host states from altering their law unless commitment to that regard has been made. Whether after such commitment, any subsequent change to the regulatory framework due to some economic reason or crisis, is considered to be a breach of the FET is something for the Tribunals to consider and decide. The major contention is whether that commitment has to be specific or is it sufficient for the commitment to be made through general legislation or any other implicit manner.<sup>21</sup>

#### B. Two ways of deriving legitimate expectation

There are different ways in which an investor can derive legitimate expectation. An investor can derive legitimate expectation either from (i) “specific commitments addressed to [investors] personally, for example in form of a stabilization clause”<sup>22</sup> or (ii) “rules that are not specifically addressed to a particular investor”<sup>23</sup> and made typically through general legislation or regulatory framework of the host state or other implicit assurances.<sup>24</sup> Hence, unless a guarantee of FET has been assured by the host state in any of these forms, the investor would not have a legitimate expectation that the regulation of the host state will remain unaltered and invariable.

At this stage, it would be important to understand in detail the two ways that can give rise to an investors’ legitimate expectation. Tribunals adopt two different approach – the first being the “Specificity” approach and the second being the “General” one. In the former approach, the host state not only makes a specific commitment of the stability of the laws to the investors but rather make it to specific investors or specific classes of investors.<sup>25</sup> On the other hand, the latter approach is the one in which legitimate expectations arise out of general regulations

in force at the time of investment, addressed to investors in general rather than to a specific investor. Unlike the *specificity* approach, in the *general* approach there is no need for any specific commitment of stability.<sup>26</sup>

#### I. The Specificity approach

Tribunals adopting the *specificity* view argue for certainty, consistency and predictability<sup>27</sup> and thus observe that “an expectation is legitimate if the investor received an explicit promise or guaranty from the host state.”<sup>28</sup> These commitments according to these Tribunals thus must then rest on the specific representation made by the host state. The Tribunal in *Blusun v Italy*<sup>29</sup> specifically stated that “in the absence of a specific commitment, the state has no obligation to grant any [stability].” Recently resolved cases of *Eiser v Spain*<sup>30</sup> and *Isolux v Spain*<sup>31</sup> are also in line with *Blusun* determining that “absent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States’ right to modify their regulatory regimes ...”<sup>32</sup> *Charanne*, the first renewable energy arbitration also came to similar conclusion that “in the absence of a specific commitment, an investor cannot have a legitimate expectation that existing rules will not be modified.”<sup>33</sup> Tribunals like *Continental Casualty* have also gone to the extent of stating that general representation deserves the least protection.<sup>34</sup> Tribunals have gone further to say that investors are entitled to rely on representation of federal officials but that representation has to be “definitive, unambiguous and repeated”<sup>35</sup> as opposed to those that suffer from generality and vagueness,<sup>36</sup> or political statements even though made by the head of a State.<sup>37</sup> Others have also adopted the view that unless “specific promises or representations are made ..... [the investor] may not rely on a bilateral investment treaty as a kind of insurance policy.”<sup>38</sup> It appears from this, that the tribunals adopting this approach are quite orthodox and restrictive in their interpretation of specificity.

Thus, the specificity approach acknowledges unilateral promise which are made by government authorities in their official capacity, but nonetheless require clarity and a degree of specificity in order to give rise to legitimate expectation. Importantly, those statements also have to be administrative representations rather than merely being political statements.<sup>39</sup> The degree of specificity has quite a high threshold; hence, unless the statements are absolutely clear, devoid of even the slightest ambiguity, and specifically addressed to investors, tribunals following the specificity approach are less likely to categorize such representations as giving rise to legitimate expectations.

#### II. The General approach

The general approach not only presumes that legitimate expectations can arise from general regulations but that they can also arise from unilateral representations made by host states that lack clarity and specificity that is required by the specificity approach.<sup>40</sup> Some Tribunals and authorities have explicitly acknowledged that general legislation can give rise to legitimate expectation while the others implicitly support the same. The Frontier Tribunal has expressly acknowledged that undertakings and representations can be both explicit and implicit, and as

long as they are relied upon during investment they would be protected.<sup>41</sup> As Professor Walde in his dissent in *Thunderbird* also clearly stated, even though host state's statements are ambiguous, and not specific does not mean that they deprive the investor from their rightful legitimate expectation<sup>42</sup> that arise out of such representations. Some other Tribunals have also acknowledged the general approach but only implicitly. The tribunals that have made implicit recognition of legitimate expectation accruing out of general legislations have done so in light of other balancing circumstances like the sovereign's right to pass the legislation<sup>43</sup> or freezing of legal system.<sup>44</sup> Some Tribunals like *Tecmed* have even gone too far to conclude that even though investors did not rely on representations, it did not preclude them from succeeding in its claim.<sup>45</sup> This is quite an extreme view. However, the better view would be that only where reliance is placed on a host states' representation can legitimate expectation arise, not in cases where no such reliance has been made. Thus, only general legislation can give rise to investors' legitimate expectation, but they need to be relied upon by the investor at the time of investment to give rise to that legitimate expectation.

The question which then subsequently arises is, is there a basis for general legislations to give rise to legitimate expectation under public international law? The next section would also examine why and which type of general legislation should give rise to such expectations and if there are any exceptions in this regard. The question should not be whether or not the representations are specific or general, the real point of consideration should be if from the representation by host states (either explicit or implicit) it can be reasonably made out that the representation was sufficiently clear to give rise to investors' legitimate expectation.

### *C. When and why should general legislation give rise to legitimate expectation?*

Doctrines of International law make it reasonably clear that there is no reason why general legislations would not give rise to legitimate expectation. There are different ways in which States can make a stabilization undertaking or assurance. A state can make binding and internationally-enforceable commitments to investors not only crystallized in contracts<sup>46</sup> but also through "legislation, treaties, decrees [and] licenses."<sup>47</sup> Inducement of the investment through general representations is in line with domestic law system and public international law, and thus by analogy even apply to investor-State relations. Investors' legitimate expectation can arise from host states' legislative acts, the general legal framework in the host state<sup>48</sup> rather than from the "existing contractual commitments or other relation between the investor and the host state."<sup>49</sup> Host states are allowed to make assurances through explicit or implicit representations.<sup>50</sup> Since host states have the inherent power to make assurances and because they often use a non-contractual method to make such assurances there is nothing to suggest otherwise, than the mere fact that host states can make binding legislative or regulatory commitments that can indeed give rise to investors' legitimate expectation. This makes it quite evident that there is no prohibition under international law on States from making assurances through non-specific or generalized means.

Does this mean that any general legislation can give rise

to legitimate expectation? Or is there a special threshold that the general legislation has to meet in order to accord protection to investors against instability of the regulatory regime? For an investor to have legitimate expectation is it necessary that two criteria be satisfied. First it has to be sufficiently clear that an assurance was made through the legislation to attract investment;<sup>51</sup> and second that the investor actually reasonably relied<sup>52</sup> on the guarantee or assurance at the time of making the investment.<sup>53</sup> Thus any unqualified and overly-broad formulation of the guarantee is not adequate to give rise to the expectation.<sup>54</sup> As per the second limb of the test, the investors are required to rely on assurance that were made prior to the investment rather than those made after the investment has been made.<sup>55</sup> Reliance on any assurance post investment would not give rise to any legitimate expectation. It is crucial that investors actually relied on assurances at the time of investment. Only when these two criteria are fulfilled can any general legislation actually give rise to legitimate expectation.

At this point, it would be important to consider some of the general legislations that have raised this controversy in some of the most recent investment arbitration cases from Spain and Italy. For e.g., Spain provides guarantee for stability in the renewable sector through general legislation, namely Article 44.3 of RD 661/2007,<sup>56</sup> which states that:

*"During the year 2010 [...] there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to the costs associated with each of these technologies, the degree of participation of the special regime in covering the demand and its impact upon the technical and economic management of the system, and a reasonable rate of profitability shall always be guaranteed with reference to the cost of money in the capital markets. Subsequently a further review shall be performed every four years, maintaining the same criteria as previously. **The revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted prior to 1 January of the second year following the year in which the revision shall have been performed.**"*

The wordings of this general legislation of Spain quite reasonably and sufficiently clearly give rise to legitimate expectation quite contrary to what the majority tribunals held in both *Charanne*,<sup>57</sup> and *Isolux*.<sup>58</sup> It is apparent that these general legislations were used as means for inducing investment and created a reasonable expectation<sup>59</sup> in the investor, and in case these promises were relied upon at the time of investment, it is quite difficult to reason as to why this would not give rise to investors' legitimate expectation. Thus, all such general legislation being used by host state to attract investment would give rise to legitimate investor expectation.

In today's contemporary trade and finance market, general legislation is one of the most effective and straightforward way for host states to make an undertaking to attract investment. Making an assurance through a general legislation is a practical way of providing assurances in the modern investment age, avoiding unnecessary hassles and delays in negotiating a contract with the



investor providing the same assurance. The assurances in a general legislation not only guarantees fair and equitable treatment to all investors and provides reliable commitments to them but also promote an investor friendly regime, attracting greater foreign trade and international investment. States being governed and guided by the principles of rule of law distinguish themselves from those who are not by providing a non-arbitrary guarantee, the best way of achieving which is through general legislation. States would impede the task of governance, and also undermine rule of law, if they do not make an effort of committing to stability in regulatory framework in the general legislation rather than through private investment contracts or any other non-general form. Those arguing that general legislation does not provide assurance that can give rise to legitimate expectation because it is too general and not a specific commitment is not completely correct. As already stated, the actual determination is not whether the means of offering the protection is too general or not, the main question should be whether it can be reasonably and sufficiently ascertained if a promise of stability has been made by the host state, even though it is made through one of the most general forms. As long as the promise is made, which was thereafter relied upon at the time of investment, the investor has all reason to expect that the guarantee offered will not be changed or altered thereafter.

The protection accorded under the FET clause is necessary and desirable to “maintain a stable framework for investments and maximum effective use of economic resources”.<sup>60</sup> A greater and higher stability of an investment regime provides necessary incentive and guarantee to investors to invest in a host state. The

whole idea of legitimate expectation entails a balancing process between the need for a flexible public policy and the legitimate reliance on investment backed by expectations.<sup>61</sup> As the tribunal in *El Paso*<sup>62</sup> and *Toto v Lebanon*<sup>63</sup> held, the notion of legitimate expectation is an objective concept that is the result of balancing of various different interest at stakes and rights. The main concern is the balancing act; however, the balancing act does not allow abrogation of those guarantees that are provided by States to create an attractive framework of laws and regulations for foreign investors.<sup>64</sup> The purpose of these instruments is to promote and protect foreign investments, and thus the “facets of fair and equitable treatment standard [is] essential to the maintenance of an environment in which foreign investment is fostered.”<sup>65</sup> In light of the principle of good faith under international law, foreign investments must be treated in a manner that “does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”<sup>66</sup> Specifically in cases where the investors have been attracted through those legislation, it is especially more important to uphold the promise rather than abrogate it.<sup>67</sup> It is thus very important to accord a standard of fair and equitable treatment that is definitely not below a minimum standard, an international standard<sup>68</sup> rather than a domestic one.

Why is it important to accord a high protection to legitimate expectation, even if they arise from general legislation, specifically in respect of some sectors? Regulated and capital-intensive sectors like the renewables, require a substantially high up-front cost to sustain a medium to long-period of operation in order to generate a “reasonable return in investment.”<sup>69</sup> States

generally make such assurances to induce investments, and thus create a support scheme that would attract investors towards making necessary investment in those States. States probably also find it more useful and easier to make those assurances through general legislation because of its greater reach to investors rather than being addressed to a specific group of investors. States like Spain, Italy and all other EU countries are also bound by the EU Energy Directive,<sup>70</sup> and in order to meet the international policy for renewable energy, and to fulfill their international obligation to reduce non-renewable sources of energy, they have created a pro-investment framework to induce investment. Thus, in situations where to create such stable regulatory framework, States have made assurances, specifically through general legislation, even though they had an option of making specific commitments, not fulfilling those promises indicate that there is a potential breach of the FET. The only time when assurances even though made generally would not create a legitimate expectation, would be either in extreme situations where states have to alter their laws owing to an economic condition, or when the investors never actually relied upon the guarantees to make their investment. In sectors which are so highly regulated, and presuming where the investor has relied on the guarantee before investment, it would not be unreasonable for investors to have legitimate expectations arising from such general legislations or indirect assurances. If States have made such assurances and promises and those are relied upon by investors specifically in sectors that require a high upfront capital it is quite unreasonable and arbitrary for States not to honour those guarantees that they have made.

### III. CONCLUSION

There seems to be no plausible reason why general legislation would not give rise to investors' legitimate expectations. When States use general legislations to attract investors, and specifically use general representation or regulatory framework to make those guarantees (even though they have a choice of

using specific and explicit representation), it cannot thereafter assert that that representation is not sufficient to give rise to legitimate expectations.

At present, under customary international law, there is no state practice for legitimate expectation. States can provide assurances in any form (either explicit or implicit). If more tribunals adopt the specificity approach, and stop recognizing legitimate assurances made through non-specific means, it is more likely that States would always provide guarantees through general legislation in order to circumvent the possibility of a claim for the FET. In these circumstances, it is essential that Tribunals adopt a more flexible and balanced approach in order to prevent such unfair practices being adopted by host states.

It is true that States are not prevented from changing and amending their laws non-arbitrarily and non-discriminatorily in order to adapt to the socio-economic climate. Only in some extreme crisis situations is it reasonable for States not to uphold their promises of stability which reasonably does give rise to legitimate investor expectation. In all other circumstances, when States make the assurances through general legislation which investors relied upon at the time of investment even though the assurances were not specific, as long as the commitment and guarantee is sufficiently clear, that assurance would reasonably give rise to legitimate expectations. It would be extremely unfair for States to make undertakings through general legislation, which the investors have legitimately relied upon at the time of investment only to dishonor it at a later stage.

Payel Mazumdar

- 1 The author would like to thank Mr. Duncan Speller and Carina Alcoberto Llivina for their valuable comments.
- 2 *Mohammad Anmar Al-Bahloul v Republic of Tajikistan*, Partial Award on Jurisdiction and Liability, SCC Case No. V (064/2008) Final Award, para. 202; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Final Award, para. 731 ("The promise may be implicit, and it encompasses the obligation to act consistently, diligently, even-handedly and transparently.")
- 3 For e.g., prior due diligence as well as subsequent conduct is considered to be countervailing circumstances. *Bivater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Final Award, para 725; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Final Award, 25 May 2004, para 173; Investors are also expected to consider various political, socioeconomic, cultural and historical conditions prevailing in the host state before investing. On this point see *Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador* (ICSID Case No. ARB/04/19), Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Final Award.
- 4 *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Award of 25 Nov. 2015, para 7.74-7.75
- 5 Jonathan Bonnitche, *Substantive Protection under Investment Treaties – A Legal and Economic Analysis*, Cambridge Studies in International and Comparative Law, Cambridge, 2014.
- 6 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award of 1 July 2004
- 7 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 19 May 2003
- 8 *Ibid*, paras 152-156
- 9 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award of 1 July 2004, para. 183
- 10 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 140 ("The starting point for analysis is, as the tribunal in *S.D. Myers v. Canada* concluded with respect to fair and equitable treatment claims under the NAFTA, that such claims must be assessed "in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders", referencing *S.D. Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 263)
- 11 *Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 Aug. 2008, para 340 ("To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.")

- 12 Cyrus Benson, *The Energy Charter Treaty*, The Guide to Energy Arbitrations available at <http://globalarbitrationreview.com/chapter/1142572/the-energy-charter-treaty> (accessed last on 30 September 2017)
- 13 Moshe Hirsch, “Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law”, *The Journal of World Investment & Trade* 12, no.6 (December 2011): 783-806] in Teerawat Wongkaew, “The Transplantation of Legitimate Expectations in Investment Treaty Arbitration”, in Shaheza Lalani & Rodrigo Polanco Lazo (ed.) *The Role of the State in Investor-State Arbitration*, Brill|Nijhoff, 2015, p. 94, 95.
- 14 Ioan Micula, Viorel Micula, S.C. *European Food S.A.*, S.C. *Starmill S.R.L.* and S.C. *Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award of 11 Dec. 2013, para 666 (“In the Tribunal’s view, the fair and equitable treatment standard does not give a right to regulatory stability *per se*. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability.”)
- 15 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 Oct. 2006. Para 423 (“It is the Tribunal’s understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries.”)
- 16 *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award of 24 Dec. 1976, para 298
- 17 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award of 8 Oct. 2009, para 217
- 18 *Ibid*, para 217 (“The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State’s normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework. Such expectation would be neither legitimate nor reasonable.”)
- 19 Charles A Patrizia, Joseph R Profaizer and Igor V Timofeyev, *Investment Disputes Involving the Renewable Energy Industry Under the Energy Charter Treaty*, GAR available at [http://globalarbitrationreview.com/chapter/1142579/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#\\_ftn43](http://globalarbitrationreview.com/chapter/1142579/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#_ftn43) (last accessed on 21 September 2017).
- 20 *Ibid* para 47 (“This allocation of the risk of ambiguity requires that the investor did and could reasonably have confidence in the assurance, not as an ultra-perfect lawyer equipped with a hindsight vision facility; but as a reasonable businessman in the position of the investor would do in the particular circumstances.”)
- 21 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3.
- 22 UNCTAD, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II* (New York: UN, 2012), page 69.
- 23 *Ibid*.
- 24 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, para 731
- 25 *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01.
- 26 Jonathan Bonnitza, *Substantive Protection under Investment Treaties – A Legal and Economic Analysis*, Cambridge Studies in International and Comparative Law, Cambridge, 2014.
- 27 *Ibid*
- 28 *Ibid*
- 29 *Blusun S.A., Jean-Pierre Lecocq and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3
- 30 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36.
- 31 *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153.
- 32 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award of 4 May 2017, para 362
- 33 *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award of 21 Jan. 2016 (Unofficial English translation by Mena Chambers), para 499.
- 34 *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 Sept. 2008, para 261.
- 35 *Marvin Roy Feldman Karip v. United Mexican States*, ICSID Case No. ARB/AF/99/1, Award (16 Dec 2002), para. 89.
- 36 *PSEG Global, Inc., The North American Coal Corporation, and Konya İgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5 (242, 243)
- 37 *El Paso Energy International Company v. Argentine Republic*, Award dated 31 October 2011 (ICSID Case No. ARB/03/15)
- 38 *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13 (Award on 8 October (2009) at para 215, 217.
- 39 *El Paso Energy International Company v. Argentine Republic*, Award dated 31 October 2011 (ICSID Case No. ARB/03/15) para. 395: “Moreover, a declaration made by the President of the Republic clearly must be viewed by everyone as a political statement, and this Tribunal is aware, as is every individual, of the limited confidence that can be given to such political statements in all countries of the world. It might well be that these representations contributed to inducing potential investors to invest in the sectors concerned, as many of them – including El Paso – actually did. But it is one thing to be induced by political proposals to make an economic decision, and another thing to be able to rely on these proposals to claim legal guarantees.” *Also see PSEG Global, Inc., The North American Coal Corporation, and Konya İgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, Award, ICSID Case No. ARB/02/5 paras. 241, 243: “Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed... 243. Neither does the Tribunal find merit in the Claimants’ argument that the investment was actively requested by the Turkish Government. True enough, the whole BOT policy was built on the premise that foreign investments would be needed, encouraged and welcome, but this was a matter of general policy that did not entail a promise made specifically to the Claimants about the success of their proposed project.”
- 40 *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award dated 12 November 2010 para. 285: “The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment. While the host state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system’s stability to facilitate rational planning and decision making.” *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sep. 27, 2007) para 303: “The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Where there was business certainty and stability, there is now the opposite.” [DU: Not sure if this quote is relevant]. *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3) para 262: “What seems to be essential, however, is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest.”
- 41 *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award dated 12 November 2010 para. 285: “Stability means that the investor’s legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected.”
- 42 Separate Opinion of Mr. Thomas Wälde in *International Thunderbird Gaming Corporation v. The United Mexican States* para. 88 (“It is here that the legal criteria identified earlier for “legitimate expectations” need to be applied: The tribunal’s majority relies on the ambiguity and lack of clear, unconditional and un-reserved text of the letter. But if we apply the principle that the risk of ambiguity has to be allocated to the drafting government, that a government agency cannot rely on intentionally inserted obfuscation to extract itself from the key message the investor relied upon...)
- 43 *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18 para 285 (“The evaluation of the State’s action cannot be performed in the abstract and only with a view of protecting the investor’s rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard, which merits compensation, has actually occurred: - the State’s sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors...”)
- 44 *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3) para 261: “This Tribunal notes, however, that the stabilization requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State.”
- 45 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 19 May 2003
- 46 *Total S.A. v. Argentine Republic*, Decision on Liability dated 27 December 2010, ICSID Case No. ARB/04/1 para. 117 (“The expectation of the investor is

- undoubtedly “legitimate”, and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law.”)
- 47 *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award dated 12 November 2010 para. 285.
- 48 *Binder v. Czech Republic*, UNCITRAL, Final Award para 443 (“What the investor may legitimately expect must be evaluated in the light of all circumstances in each given case. The expectations may relate not only to the existing contractual or other relations between the investor and the host state, but may also concern the general legal framework in the host state.”)
- 49 *Ibid.*
- 50 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12) para 159 (Legitimate expectations may follow from explicit or implicit representations made by the host state, or from its contractual commitments.”)
- 51 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, para. 298 (Sep. 27, 2007): “This requirement to protect legitimate expectations becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations.”
- 52 *Waste Management, Inc. v. United Mexican States*, ICSID Case N° ARB(AF)/00/3 para 98 (“Taken together, the *S.D. Myers, Mondev, ADF and Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”)
- 53 *Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC Case No. 062/2012), para 495 (“A finding that there has been a violation of investor’s expectations must be based on an objective standard or analysis, as the mere subjective belief that could have had the investor at the moment of making of the investment is not sufficient. Moreover, the application of the principle accordingly depends on whether the expectation has been reasonable in the particular case with relevance to representations possibly made by the host State to induce the investment.”) *See also Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) para. 365 and *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9 para. 259.
- 54 *EDF (Services) Limited v. Republic of Romania*, Award dated 8 October 2009 (ICSID Case No. ARB/05/13), para 217.
- 55 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 para.365 (“Be this as it may, the legitimate expectations which are protected are those on which the foreign party relied when deciding to invest.”) *Also see Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9 para. 259 (“In the present case, general pronouncements are mostly at issue, predominantly of a legislative type. Moreover, the features of the legal or contractual regime at issue here were applicable or addressed either to the generality of Argentina’s public, or to a wide range of depositors and subscribers of certain financial instruments. Moreover, the general legislative “assurances” were not the basis on which Continental had relied in making its investment in Argentina, since it had entered in that market before such assurances.”)
- 56 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, para 113.
- 57 *Ibid.*, fn 33.
- 58 *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153
- 59 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, para 671 (“This promise, assurance or representation may have been issued generally or specifically, but it must have created a specific and reasonable expectation in the investor. That is not to say that a subjective expectation will suffice; that subjective expectation must also have been objectively reasonable.”)
- 60 *CMS Gas Transmission Company v. The Argentine Republic*, Award (ICSID Case No. ARB/01/8) para 274. Most BITs also have the same wordings and the same protection.
- 61 Separate Opinion of Mr. Thomas Wälde in *International Thunderbird Gaming Corporation v. The United Mexican States*, para 30 (“Such protection is, however, not un-conditional and ever-lasting. It leads to a balancing process between the needs for flexible public policy and the legitimate reliance on in particular investment-backed expectations.”)
- 62 *El Paso Energy International Company v. Argentine Republic*, Award dated 31 October 2011 (ICSID Case No. ARB/03/15) para. 358: “This means also, secondly, that legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations than can be deduced from the circumstances and with due regard to the rights of the State. In other words, a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest.”
- 63 *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12) para. 165 (“Finally, legitimate expectations are more than the investor’s subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State.”)
- 64 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability dated 3 October 2006, para 133 (“Having created specific expectations among investors, Argentina was bound by its obligations concerning the investment guarantees vis-à-vis public utility licensees, and in particular, the gas distribution licensees. The abrogation of these specific guarantees violates the stability and predictability underlying the standard of fair and equitable treatment.”)
- 65 *Binder v. Czech Republic*, UNCITRAL, Final Award of 15 July 2011, para 446. *Also see Bayindir Insaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award dated 27 August 2009 (ICSID Case No. ARB/03/29) para 178: (The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion<sup>66</sup> or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment.”)
- 66 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 154
- 67 Judgment of the Court of First Instance (Fourth Chamber) of 17 December 1998, *Embassy Limousines & Services v European Parliament*, Case T-203/96, ECLI:EU:T:1998:302, para. 8
- 68 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para 295
- 69 *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability of 12 Sept. 2014, para 564.
- 70 EU Renewable Energy Directive available at <https://ec.europa.eu/energy/en/topics/renewable-energy/renewable-energy-directive> (last accessed on 26 September 2017).



# RECENT DYNAMICS OF UNCITRAL FROM AN INSTITUTIONAL PERSPECTIVE: an incremental protagonist role through the European Union and the United Nations System

By Munia El Harti Alonso

The United Nations Commission on International Trade Law (UNCITRAL), established four decades ago, has incremented its protagonism lately in its « legal body with universal membership specializing in commercial law reform »<sup>1</sup>.

This article pragmatically aims at underlining UNCITRAL recent dynamics from an institutional perspective, focusing on the nexus between the European Union's proactive role in UNCITRAL and the Commission's normative production as well as the parallel reinforcement of UNCITRAL within the United Nations System.

The European Union is overall shaping the investment law regime, through the European Commission (EC) Trade Directorate General (DG TRADE), being the main negotiator in Investment Treaties for the 28 Member States that it represents. In the context of multilateral negotiations, the Union has benefited from a *sui generis* observer status at the United Nations General Assembly

(UNGA) since 2011<sup>2</sup>; *a priori* it does not include UNCITRAL but *de facto* the Sixth Committee of the UNGA led by the EU has had an influence on UNCITRAL negotiations where the EU took the floor as *the European Union* and not the European Commission. DG TRADE's Investment Court system implemented in CETA<sup>3</sup> as well as the Vietnam-EU and Tunisia-EU Treaty has now proceeded to be in UNCITRAL discussions. Also UNCITRAL's latest milestone, the Mauritius Convention on Transparency, is set to be ratified by the EU 28, which the Secretariat of UNCITRAL is counting on<sup>4</sup>.

In the first part of this article, the norm-making process in UNCITRAL will be analyzed, dissecting the European Union's "exorbitant" observer status. In the second part, the EU's capacity to shape norms in the investment law regime will also be considered as a path for an Investment Court System in UNCITRAL. Finally, the institutions' autonomy will be considered under UNCITRAL's efforts to increase its visibility.



## 1. The European Union's exorbitant observer status at the United Nations

Regarding the negotiation process at the United Nations, as UNCITRAL is part of the United Nations System, the Legal (6th) Committee of the General Assembly has an overview over UNCITRAL's work. On technical questions such as trade law, there is competition in order to assign a lead negotiator. Internally member states can have discrepancies between ministries, for example the Ministry of Foreign Affairs and the Ministry of Justice. This is something that has been criticized particularly in France<sup>5</sup>, due to the potential risk of fragmenting the public order ("ordre public"). The second difficulty in technical negotiations arises from the appointment of an expert that is not a diplomat, making the path to consensus more difficult. Pascal Lamy<sup>6</sup> criticized the dominance of diplomats in WTO negotiations which lack expertise, especially since the consensus practice at the WTO is a political process which deludes the substance of the negotiated text, leading to an agreement often *a minimis*.

However, it does not mean that these difficulties must apply to UNCITRAL. The preparatory work on topics of UNCITRAL's work programme is assigned to working groups. The composition of the working groups includes all member States of UNCITRAL, leaving discretion to the member states to nominate their delegation.

Indeed, in Arbitration Working Group II, states appoint Attorneys as Delegates, which at the same time are practitioners. Other states such as Spain are represented by State Attorneys from the Ministry of Justice. The difference between the professional background of these negotiators adds a dialectic difficulty to the negotiations. The European Union, being an important block of 28 member states, has an intrinsic complexity when it comes to UNCITRAL negotiations. The EU does have a *sui generis* observer status which has been qualified as a "super observer status" at the General Assembly, thus to the Sixth Committee, where it tends to extend its influence to other entities such as UNCITRAL.

The Sixth Committee has the highest participation rate of the EU where the observer Delegation spoke among other political groups, before Member States. The EU's observer status stems from General Assembly Resolution 65/276 from 3 May 2011, the EU is the only observer allowed to take the floor before member states, and among political groups such as the G77 or ASEAN. Also the European Union is allowed to negotiate resolutions on behalf of the 28 member states, although it cannot present resolutions or vote in theory. In practice, what happens is that it is a member state that acts formally « on behalf of the European Union ». It is in rare occasions that the EU observer status at UNGA has not been respected<sup>7</sup> since 2012, however it is worth noting this new observer status was faced by strong criticism from the Latin American (CELAC) and Pacific group (SIDS, PSIDS), fearing for smaller states under-representation compared to the EU 28 block. Aside political criticism, Professor Emmanuel Castellarin points out a contradiction between the practice at UNGA and the text in the Resolution, which provides for the exclusion of the subsidiary and other principal organs of the UNGA, including UNCITRAL «a consequence of the autonomy of each organ of the GA »<sup>8</sup>.

Thus the EU would formally not be in a position to represent the 28, or negotiate on their behalf at UNCITRAL, despite of the misleading title in the Resolution "Participation of the European Union in the work of the United Nations ». It seems the strategy of the EU is to establish a *modus vivendi*, considering practice can prevail over a textual provision at the UNGA. In that sense, the European Union does coordinate the position of the 28 member states and the European Commission (DG Justice « DGJUST ») takes the floor to present proposals as the « EU » appearing as the EU 28, imposing its participation as the lead negotiator, therefore extending its mandate set in Resolution 65/276.

Member States are to their sovereignty in highly strategic questions, especially on arbitration either from a macroeconomic stability perspective or due to the « two hat » nature of the state, a defense party in investment arbitration cases.

The diverse nature of negotiators, previously addressed in this article, is also notable within the European Union. The coordination taking place at the European Union Delegation is set to preserve a certain coherence on the European front, nevertheless competences are not absolutely clear between the European Commission (DG Justice) and the European Union Delegation.

Before 2012, all Delegations were under the auspices of the Commission, but since the Treaty of Lisbon<sup>9</sup> all Delegations depend on the new diplomatic service of the EU, the European External Action Service. Therefore, a double coordination is operating, one from the European Union side, and a posteriori another with the member states with the need to preserve coherence<sup>10</sup>.

The European Union through DG Justice and DG Trade has undeniably placed itself as a norm shaper in the investment law regime, as the Commission has the exclusive competence to negotiate Investment Treaties and Free Trade Agreements. Corollary, the tendency to "mega-treaties" combining both investment treaties and trade agreements, has increased the negotiating power of the EC. Yet a back pedaling to this assumption is in motion, possibly due to public opinion combined with the EC's overly ambitious approach not being compatible with Member States.

The Walloon Parliament episode on CETA, with a blocking of the adoption of the Treaty from a small Belgian region, has pointed out weaknesses in the European Union capacity to negotiate, also revealing a legitimacy crisis in the investment law regime<sup>11</sup>. The Attorney General Sharpston issued an Opinion in Opinion procedure 2/15 the 16th December 2016 about the EU-Singapore Trade Agreement which redefines competences, particularly on dispute resolution (ISDS) and the withdrawal of intra-EU BITs<sup>12</sup>. The European Court of Justice did follow the Attorney General in the Decision rendered on 16 May 2017, Investment chapters will have to be negotiated, in coordination with the EC and member states, leaving the common commercial policy as an exclusive competence of the EC<sup>13</sup>. This Decision could comfort ISDS opponents, paving the way to the adoption of an international Investment Court as envisaged by the EC, however the EC's capacity to lead negotiations has been put in question, on legal grounds in light of the Lisbon Treaty repartition of competences and for political reasons regarding the EC's



overstepping on member states.

## 2. The EU's capacity to shape norms in the investment law regime as a path for an Investment Court System in UNCITRAL

One of UNCITRAL's milestones is the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency"). Practitioners<sup>14</sup> have expressed skepticism due to the low number of ratifications, yet the Convention is set to enter into force if the provisions of Switzerland and the EU 28 member states do ratify the agreement.

Concerning an international Investment Court System, DGTRADE's "invention"<sup>15</sup> is now on UNCITRAL's Agenda and will be debated during 2017<sup>16</sup>. Professor Frank Garcia foresees that such an international investment court would be placed under the WTO or the World Bank ICSID<sup>17</sup>. Even CETA's provision point out to ICSID, which remains the traditional dispute settlement system up to date where the World Bank has established a *savoir-faire*. The United Nations through UNCITRAL does have expertise in the rule making of trade law encompassing arbitration. However, it does not have a Center to administer dispute resolution.

The decision to establish a court remains with states, UNCITRAL might not have the ICSID know how, but it does have a political impetus in its favor.

In a context of legitimacy crisis of the investment regime, the UN might be able to position itself as a legitimate entity.

In that sense, Gabrielle Kaufmann-Kohler highlighted how the UNCITRAL Convention on transparency<sup>18</sup> could lead to a permanent Investment Court<sup>19</sup>. The Convention imports transparency in an Investment Treaty system which is fragmented through a multilateral instrument.

UNCITRAL's work has been gaining visibility through the Mauritius Convention, thus the institution is capitalizing the momentum. Similarly to UNCTAD originally based in Geneva, UNCITRAL is placing itself strategically at the United Nations Head Quarters (New York). Getting out of the Geneva scope also potentiates the risk of duplication between the Secretariat of UNCITRAL and the Head Quarters of the UN. This duplication is visible in the International Trade Resolution<sup>20</sup> which was adopted in New York in order to get the GA stamp, but negotiated in Geneva.

## 3. The institutional autonomy under UNCITRAL's push for visibility: a comparative analysis with UNCTAD

UNCTAD and UNCITRAL are both subsidiary organs of the General Assembly, UNCTAD entertaining a close relation with the Economic and Financial Committee of the UNGA while UNCITRAL is followed by the Legal Committee. Those two entities similarities shed the light on UNCITRAL possible evolution into a more politically proactive body, seeking visibility in an autonomous initiative. UNCTAD opened its New York office in 1993, way after its establishment in 1964, putting the Conference in a more visible scene and closer to the political sphere<sup>21</sup>. The mandate of UNCTAD encompasses akin subjects to those of UNCITRAL, described by the Yearbook of International Organizations as "the central United Nations body concerned

with trade and related problems of development”,<sup>22</sup> producing yearly a worldwide investment report<sup>23</sup>. Concerning normative production, essentially soft law, UNCTAD delivered the Basic Principles on Responsible Sovereign Lending and Borrowing while UNCITRAL has been responsible for several model laws. The comparative analysis culminates in UNCITRAL’s latest surprising interest for sustainable development.

In fact, the Addis Ababa Action Agenda for Financing for Development mentions UNCITRAL with graces. where states have recognized « the efforts and initiatives the United Nations Commission on International Trade Law for international trade law, principal legal organ of the United Nations system»<sup>24</sup>.

UNCITRAL has even joined international organizations such as the IMF<sup>25</sup>, World Bank<sup>26</sup> and WTO<sup>27</sup> in implementing the United Nations Sustainable Development Goals (SDGs)<sup>28</sup>, concerning «only the SDGs relevant to UNCITRAL’s work ».

The SDGs relevant to UNCITRAL are the following: SDG 1 « ending poverty »; SDG 4 « Education »; SDG 5 « Gender Equality »; SDG 8 « Economic growth »; SDG 9 « Build resilient infrastructures »; SDG 10 « Reduced inequalities between countries »; SDG 12 « Sustainable consumption »; SDG 16 « Peace Justice and strong institutions »; SDG 17 « Partnerships for the goals ».

The most detailed SDGs revealing the Commission’s interest are SDGs 16 and 17 where it could reinforce its status within the UN system. For example concerning SDG 16 UNCITRAL recalls the UNGA Declaration on rule of Law of 24 September 2012<sup>29</sup> « We recognize the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship, and in this regard we commend the work of the United Nations Commission on International Trade Law in modernizing and harmonizing international trade law ».

Concerning SDG 17 UNCITRAL takes advantage of this

goal to further its cooperation with regions and states on legal capacity building. It clearly states about SDG 17 implementation UNCITRAL is seeking to « expand UNCITRAL’s regional and country presence »<sup>30</sup>

The SDG communication strategy highlights UNCITRAL’s appetite for further visibility within the UN System and a political will to tight links with developing member states. Indeed, the Commission has taken on the initiative to assist developing countries. This capacity building exercise allows UNCITRAL to extend its regional presence ; UNCITRAL Working Group II on Arbitration instituted regional UNCITRAL centers in different regions in 2011<sup>31</sup> , followed up by the launch of the UNCITRAL focal point for the Asia-Pacific Region<sup>32</sup>. Furthermore, UNCITRAL approved the Orientation Note on capacity building for developing states seeking assistance in trade law reform<sup>33</sup> , and the UNGA has mandated the UN Secretary General to diffuse this note<sup>34</sup> as much as possible. Overall the two UN Development Agendas, could potentially bring attention to the UN within Economic Governance, adding a forth pillar to the WTO-World Bank-IMF institutional tryptic.

In conclusion, within a context of a legitimacy crisis of the investment law regime rooted in an overall legitimacy crisis of institutional structures<sup>35</sup>, UNCITRAL might be able to place itself as a legitimate host of an Investment Court. The balance between expertise and political traction will be crucial, as the Commission could shift from being a “service organization” to a “fora organization”<sup>36</sup> analogously to UNCTAD. Whether the Court is set into place or not, the mere consideration of it would undeniably enhance the Commission’s focal role point on international trade law.

Munia El Harti Alonso

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3 [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf)

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7 Example of meeting report from 16 November 2015, Agenda item: Report of the Committee on Relations with the Host Country, where the EU spoke after Cuba <https://papersmart.unmeetings.org/ga/sixth/70th-session/statements/>

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  - 13 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf> Last consulted on 10th September 2017
  - 14 Comments of Ms. Achouk-Pivak at the Round Table GBLG - Reshaping Investor-State Arbitration, 14 Mars, University Paris 1 Pantheon Sorbonne
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# AD HOC ADMISSION OF FOREIGN COUNSEL IN INTERNATIONAL ARBITRATION-RELATED JUDICIAL PROCEEDINGS

By Mariana França Gouveia and Ana Coimbra Trigo

## I. Introduction

The Singapore High Court Judgment of 2 August 2016, under analysis here, decided in favour of a request for the ad hoc admission of foreign counsel in the judicial actions seeking the setting aside of an arbitral award.

The positive outcome of this application and the affirmation of Singapore as an Asian arbitral hub are not a coincidence. The possibility of admitting foreign lawyers to appear before Singaporean courts from time to time, due to the limited number of local practicing lawyers, is seen as a step towards the development of this arbitration location along with the increased confidence of parties choosing to arbitrate in this city-state.

But if today this ad hoc admission of foreign counsel is extraordinary, in Singapore as is in the rest of the world, this decision (which allowed the admission of a foreign lawyer before the Singaporean courts) raises questions about the future of international legal practice. In a globalised world, in which a

growing number of companies do business in an international market, the many barriers to be raised will be, sooner or later, with more or less ease, obstacles to easily overcome.

## II. The arbitration

In the arbitral award under analysis, a British *Queen's Counsel* ("QC")<sup>1</sup> applied to be admitted, under Singapore's *Legal Profession Act* ("LPA"), to represent Lesotho in its application to set aside an arbitral award at the Singapore High Court<sup>2</sup>. This was a final arbitral award, dated 18 April 2016, and was the outcome of an arbitration seated in Singapore that took place under the UNCITRAL Arbitration Rules.

The underlying dispute related to the alleged expropriation of mining leases granted in 1989 to Swissborough Diamond Mines (Pty) Limited (company registered under the laws of Lesotho), whose rights were assigned to other five licensee companies (also registered under the laws of Lesotho), Matsoku Diamonds (Pty) Limited, Motete Diamonds (Pty) Limited, Orange Diamonds

(Pty) Limited, Patiseng Diamonds (Pty) Ltd, and Rampai Diamonds (Pty) Limited.

The six companies commenced proceedings in the Lesotho High Court to recover damages, but were unsuccessful, as this Court held in separate proceedings that the lease and the respective licencing agreements were void *ab initio*, confirming this on appeal in 6 October 2000.

Regardless of this adverse decision, these companies tried their luck with the *Southern African Development Community Tribunal* (“SADC Tribunal”)<sup>3 4</sup> and initiated proceedings against Lesotho on 12 June 2009, claiming compensation for alleged expropriation on grounds of breach of obligations arising from the SADC Treaty as well as from international law. These proceedings were however suspended when the SADC Summit of Heads of State or Governments (“SADC Summit”) unanimously decided not to renew the terms of office of five judges of the SADC Tribunal expiring in October 2010 (at the initiative of Zimbabwe, in reaction to an unrelated case decided against it by this Tribunal<sup>5</sup>) In August 2012 the SADC Tribunal was dissolved<sup>6</sup>.

On 20 June 2012 the companies attempted an alternative measure, and filed a request to arbitrate under Article 28 of Annex I to the SADC Finance and Investment Protocol. This Article provided that all disputes emerging after the entry into force of the Protocol between an investor and a State Party, concerning an obligation of the latter in relation to an admitted investment of the former, which has not been amicably settled, and after exhausting local remedies, will be submitted to international arbitration<sup>7</sup>.

The companies asked the tribunal to recognise that it had jurisdiction and to declare that Lesotho had violated its obligations under the SADC Treaty and Protocols, and also that it award such relief and compensation to the defendants as could have been granted by the already dissolved SADC Tribunal.

In this award, dated 18 April 2016, the tribunal found it had jurisdiction only to hear and resolve the claims of the shareholders of the first company i.e., Mr Josias Van Zyl, Josias Van Zyl Family Trust and Burmilla Trust, all South African. Only these were considered “investors”<sup>8</sup>, as the “admitted investment” in question, in light of the SADC Protocol on Finance and Investment<sup>9</sup>, comprised the shares owned in the licensee and assignee companies, the mining leases and the rights arising thereunder, in addition to the money, effort and resources expended to pursue the exploitation of the mining leases in Lesotho.

In regard to the invoked SADC-related obligations, the tribunal found that Lesotho had interfered with the secondary right granted to investors to litigate in the SADC Tribunal, and thus, demarcated the shuttering of the SADC Tribunal as the dispute to be decided, rejecting jurisdiction regarding the alleged expropriation<sup>10</sup>.

The arbitral award was not reached unanimously. One of the arbitrators issued a dissenting opinion, in which he rejected the re-characterisation of the relevant dispute as the shuttering of the SADC Tribunal<sup>11</sup>. In his view, the object of the dispute

could be no other than the expropriation of the mining leases, an issue that the companies themselves admitted was not within the scope of Article 28(1) of Annex I of the SADC Protocol on Finance and Investment, as it took place before this Protocol entered into force. The arbitrator added that the shuttering of the SADC Tribunal had no connection to the investment made by the companies, as it related solely to the legality of a political decision of the SADC Summit that did not renew the terms of office of the respective judges – a decision the arbitral tribunal lacked jurisdiction to explore -, and that the companies had not exhausted local remedies in Lesotho prior to filing the arbitration claim, as legally required.

Lesotho sought an application to set aside this arbitral award in the courts of Singapore, on the basis that the tribunal did not have jurisdiction to hear the dispute, in light of the *International Arbitration Act* (“IAA”)<sup>12</sup> and the UNCITRAL Model Law on International Commercial Arbitration<sup>13</sup>.

### III. The ad hoc application of the foreign counsel to participate in the setting aside proceedings

It was in these setting aside proceedings filed in the courts of Singapore that the British QC, lead counsel in the arbitral proceedings, applied for an ad hoc appearance to represent Lesotho.

Introducing the legal framework of the problem, the *Legal Profession Act*<sup>14</sup>, which regulates the exercise of the legal profession in Singapore, provides the requirements for the local admission of advocates and solicitors<sup>15</sup>, but also for the possibility that lawyers qualified overseas petition the courts to appear as foreign counsel and litigate on issues of foreign law<sup>16</sup>.

Apart from these regimes, since 1962<sup>17</sup>, the LPA has made it possible for a foreign counsel to apply to the courts for an ad hoc admission to be allowed to appear before them in a specific case. The relevant application, provided under Article 15 of the LPA, lists three cumulative elements:

- (i) holding Her Majesty’s Patent of “*Queen’s Counsel*”<sup>18</sup> or equivalent;
- (ii) not residing in Singapore or Malaysia, but with the intention of coming to Singapore for the purpose of appearing in the case;
- (iii) having special qualifications or experience for the purpose of the case.

Certain “*ring-fenced areas of law*” are excluded from the scope of the admission regime, unless a justifiable reason is presented otherwise. These areas of law include, among others, constitutional law, public law, criminal law, property law, family law and succession law.

Pursuant to Article 15(6-A) of the LPA, the **Chief Justice** specified additional criteria that the court may consider when deciding on admitting lawyers under this section, as provided

in paragraph 3 of the Legal Profession (Ad Hoc Admission) Notification 2012<sup>19</sup>:

- (i) the nature of the factual and legal issues involved in the case;
- (ii) the necessity for the services of foreign senior counsel;
- (iii) the availability of Senior Counsel<sup>20</sup>, or another advocate or local solicitor with appropriate experience; and
- (iv) having regard to the circumstances of the case, if it is reasonable to admit foreign senior counsel.

In order to admit a lawyer under this regime the three mandatory requirements provided for in Article 15 of the LPA must firstly be met. Only after this will the court, in a second phase, look into the four elements established in the Legal Profession (Ad Hoc Admission) Notification 2012, assessing and weighting each one differently.

#### IV. The Court's judgment

As initially stated, the Court decided in favour of admitting the British QC to represent Lesotho in the proceedings to set aside the arbitral award.

##### 1. "Need" for foreign senior counsel

The judge started his analysis by setting forth the historical and systematic interpretations of the element of "necessity" of foreign senior counsel, as introduced by the 2012 amendment to the LPA. Reflecting on various considerations of the *Re Beloff* judgment, where this method was first applied, and on the logic underlying this admissions regime, the judge posited that the analysed "need" should be the guiding principle of the court but should not be considered solely within the prism of the parties, but rather more broadly as to also enlighten the court before which the case was presented.

This explains that, as it is presumed that the "ring-fenced areas of law" are directly related with the local social norms and are the result of a common base of values, the court is satisfied with the participation of local counsel. Conversely, the more esoteric and complex the *thema decidendum* is, the more relevant is the need to aid the court.

##### 2. The legal issues at hand

Turning to the LPA requirements, because the two first conditions provided for in Article 15 of the LPA were met, it was essentially relevant to evaluate whether the applicant counsel had special qualifications or experience for the purpose of the case.

The judge explained that an applicant must possess special qualifications or experience relevant to the specific **issues to be decided** in the case at hand, and not just expertise in a generic area of practice, thus, requiring that these be clearly identified and characterised in the proceedings.

The judge considered that the issues to be decided in this case were intrinsically in the realm of public international law, as the arbitral tribunal's jurisdiction was grounded on Article 28(1) of Annex I of the SADC Finance and Investment Protocol. This position was in line with the applicant's argument, as this was also the ground invoked by Lesotho on which it based its request for assistance from counsel with experience in investor-state dispute resolution. The court rejected both the defendants' attempt to characterize the issues as principally involving the interpretation of the IAA, and the position of the Law Society that demanded foreign counsel to be an expert in SADC Treaty and Protocols issues<sup>21</sup>.

The judge concluded that it was necessary – and vital – to assess whether the tribunal was correct in interpreting the term "investment" as encompassing both the right to exploit the mining leases and the right to a remedy for interference with that underlying investment (a matter which was a point of departure between the majority of the tribunal and the dissenting arbitrator)<sup>22</sup>.

##### 3. Special qualifications and experience for the purpose of the case

Turning to the **qualifications and experience of foreign counsel**, the judge concluded that the British QC satisfied the legally imposed requirement. The applicant had accompanied and led the arbitral proceedings from beginning to end (an aspect that, considered in isolation, would not have been decisive, as the judge points out and as results from case *Re David*<sup>23</sup>). This barrister was frequently appointed as counsel both on behalf of States and investors before international tribunals, such as the International Court of Justice or the International Tribunal for the Law of the Sea. He was also a Visiting Professor teaching investment arbitration at Kings College, London. More importantly, the foreign counsel had already argued about the issue at the core of the present dispute - characterisation of an "investment" - in various previous cases.

##### 4. The reasonableness of the admission

Finally, Judge Steven Chong scrutinised the four elements postulated in the Legal Profession (Ad Hoc Admission) Notification 2012.

Regarding the nature of the issues involved, it was necessary to determine if they were complex, difficult, novel, or of significant precedential value. In the opinion of the judge, because the setting aside procedure would primarily focus on legal issues (interpretation of the SADC Treaties and the application of principles of public international law), and because the decision had potential precedential value with significant public (and international) impact, he concluded that the first element was met.

Regarding the necessity for foreign counsel and availability of local counsel with appropriate expertise, concurring with the opinion of the Attorney-General and against the Law Society's protectionist position, the judge considered these elements were met. The judge reiterated that it was only necessary to make a reasonably conscientious effort to secure the services of competent local counsel (according to case *Re Caplan*<sup>24</sup>). The defendants put forth the argument that the intervention of foreign counsel



was unnecessary as a large law firm already adequately assisted Lesotho, and the proceedings would be based principally on written advocacy. The judge however dismissed these arguments as any foreign counsel admitted before the courts under this regime would be able to appear before them without limitations.

Finally regarding the reasonableness element, the judge highlighted that the argument mentioned by the Attorney-General of the public interest in promoting Singapore as an attractive venue for arbitration, although relevant, could not distort the legal concept of “necessity”.

Having considered all due requirements and elements, the judge finally admitted the British QC to represent Lesotho in the setting aside proceedings pending before the courts of Singapore.

#### V. Other decisions of the courts of Singapore on ad hoc admission applications

It has already been stated that this decision was of an exceptional nature, not only because it applied a very narrow regime, but also because most applications made under it have been rejected – this was the second decision accepting an ad hoc admission of foreign counsel since 2012, and the first addressing international arbitration. It is then critical to understand whether this decision represents a break the previous case law or if it is part of the consolidation of an established trend.

Since the 2012 amendment to the LPA, only one ad hoc admission application had been allowed - *Re Andrews*<sup>25</sup>. Although it was not an international arbitration-related case, it explained the

new criteria set forth in the LPA and respective and notification.

The underlying dispute related to the enforcement of a settlement agreement and the ownership of shares in a company. During the proceedings, two previous procedural issues had been raised before higher courts, and were unsuccessful due to the insufficiently well-founded statement of claim that was drafted by various local counsel that the applicant had had during the proceedings. Faced with this situation, and in a case considered to be of manifest simplicity, the judge concluded that the applicant had lost confidence in the possibility of resorting to local counsel and that the participation of foreign senior counsel was necessary to fill in the gaps left in the applicant’s statement of claim. The judge supported this decision on the need to allow the applicant to pursue its procedural rights in the most rapid and cost-effective way<sup>26</sup>.

In other known cases, the applications were rejected either because they pertained to areas of law where the LPA in Article 15(2) did not encourage the intervention of foreign counsel (*Re Caplan, Re Lord Goldsmith*<sup>27</sup>, *Re Fordham*), or because they addressed solely local issues (*Re Rogers*<sup>28</sup>), or because representation by local counsel was deemed sufficient (*Re Beloff*).

More recently, a new decision issued on 28 November 2016 concerning the ad hoc admission regime of Article 15 of the LPA rejected a British QC’s appeal to participate in the setting aside proceedings of another arbitral award – *Re Landau*<sup>29</sup>.

In this case, the applicant QC asked to represent the company China Machine New Energy Corporation (“CMNC”), which he had also represented during the arbitral proceedings,



against the defendants, Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd.

CMNC argued that the arbitral award should be set aside due to the breach of natural justice and rules of public order of Singapore. Because both local counsel and the Singaporean courts had experience in arguing and deciding these issues, and even though the LPA requirements were met, the High Court did not allow this application. The court did not hesitate to determine that the presence of international arbitration per se, as a legal institute, would not prompt the ad hoc admission of foreign counsel, rather the specific issue introduced as grounds to annul the arbitral award would be the key consideration.

From a case law standpoint, we would say that these decisions, although appearing to be counter-current, are in line with the previous case law that strictly applies the ad hoc admission of foreign counsel in Singapore.

## VI. Foreign counsel admission regimes around the world

Before concluding, it seems important to grasp, on the one hand, the reasons for this specific legislation as it stands in Singapore, and on the other hand, regimes regarding this topic in other jurisdictions. The problem of appearance in court of foreign counsel is truly an international matter that will be affected by overseas trends.

The Singaporean system for the ad hoc admission of foreign counsel permits the harmonisation of several relevant interests relating to legal representation. If, on one side, it allows a swift and adequate administration of justice, on the other side, it enforces the parties' choice of representation without neglecting the competence and experience of the local pool of counsel<sup>30</sup>.

When the 2012 amendment of the LPA was discussed, the Singapore Parliament debated the need to multiply the offer of lawyers for some cases in this city-state. Local counsel frequently rejected appointments to appear in commercial disputes as they were mainly clustered in a few large firms in Singapore, and were thus prevented from (unable or unwilling to) acting against local banks or corporate clients due to potential conflicts of interest<sup>31</sup>.

In this same parliamentary debate, the Minister for Law supported a broader scope for the concept of "need", allowing the courts discretion to admit foreign counsel also in specific complex or rare civil matters, where their increased expertise could contribute to the fair result of a dispute, avoiding any potential denial of justice<sup>32</sup>.

However, it seems the ad hoc admission applications regime provided in Article 15 of the LPA was implemented with great care. As stated, the issues in which foreign counsel simply cannot intervene are numerous and broad, save if a special reason justifies otherwise. Furthermore, these admission requests in Singapore are rarely granted and the criteria provided are of rigorous application.

The 2012 parliamentary discussion mentioned above also

highlighted that the choice of a QC should not be dependent on the financial means of the parties, but rather should be granted based on other relevant and fair considerations, not being a free for all<sup>33</sup>. These thoughts are directly connected with the principle of equality of arms, and the courts have made it clear that their position is that if one party is represented by foreign counsel, the other need not be, but may apply to choose one if it so wishes.

In the **global context**, as a rule, the admission of counsel before courts continues to be territorial, taking also into account the interest of protection of the parties' legitimate expectations and the interest of proper administration of justice. Therefore, very few countries allow for ad hoc regimes similar to the one that exists in Singapore.

In the **European Union**, the consideration of the freedoms resulting from the single market and legislation protecting consumer rights, generated several relevant documents<sup>34</sup> that generally speaking allow a lawyer qualified in any European Union or European Economic Area jurisdiction to practice with the title obtained in the Member State from which he or she comes from.

In **Portugal**, a lawyer qualified in these countries may only appear before Portuguese courts in representation of a client with the title obtained in the Member State from which he or she comes and under the supervision of a lawyer registered in the Portuguese Bar Association ("*Ordem dos Advogados*"). Alternatively, an establishment regime is available, by means of a prior registration with the bar association<sup>35</sup>. These rules also put forward a reciprocity regime that allows Brazilian lawyers that studied in Portugal or Brazil to enrol as practitioners<sup>36</sup>. However, Portuguese law does not provide for an ad hoc admission regime for foreign counsel, as most jurisdictions also do not.

English law establishes a similar regime to the Singaporean one named "*Temporary Call*", where foreign counsel may apply to appear before the courts of **England and Wales** through local counsel, in order to conduct a specific case. To do so, the applicant must produce evidence that he or she appears frequently in courts of the jurisdiction of origin, is of good character and repute, provide academic and professional qualifications, criminal record and any other documents relevant to support the application<sup>37</sup>.

*In tandem*, we highlight that **Hong Kong** not only provides for a regime that allows registration of foreign counsel, but also includes since 1999 an ad hoc admission regime for foreign counsel through an application to the Hong Kong High Court. The local bar association also reviews these applications, but it is the court that ultimately decides if the legal requirements are satisfied (these are substantial experience in advocacy in a court, court's consideration that the applicant is a fit and proper person to be a barrister, and the acquisition of equivalent qualification)<sup>38</sup>.

It is necessary to highlight that local case law stresses the importance of this regime, for reasons such as its inherent public interest, the balance between the right of Hong Kong residents to select their counsel and the need for continuing development of case law with the aid of the best professionals of *common law*, the continued effort to maintain its recognised quality and confidence,



the need of the bar association to preserve its independence as an institution but also to allow proper training for younger lawyers<sup>39</sup>.

Likewise, **India** offers a “*Fly-in, Fly-out*” system that allows foreign counsel to participate in local court proceedings involving foreign and international law. This relatively open system is still regarded with restraint as this country typically adopts a limitative position regarding the admission of foreign counsel and does not allow their appearance in court or the rendering of legal advice<sup>40</sup>.

In other jurisdictions, the approach is often centred on the **local rules regarding admission to practice law** and on the possibility of allowing the registration of foreign counsel (permanently, rather than in an *ad hoc* basis). The adopted solutions diverge.

For example, in the **United States of America**, each State regulates access to the legal profession differently and some States adopt a less rigid posture when it comes to registering lawyers that obtained their law training overseas or that have obtained their licence in a different State, demanding only that they take the respective bar exam<sup>41</sup>. Still, there is an application of exceptional nature named “*Pro hac vice*”, where a lawyer may apply for the courts to allow the appearance of counsel that obtained their qualification in a different State, regarding a specific case and under its guidance<sup>42</sup>.

**Japan** allows the registration of counsel qualified abroad under the respective title, if the lawyer has practiced at least three years in the jurisdiction where he or she qualified, and if the applicant is resident in Japan<sup>43</sup>.

**Russia** also provides for an enrolment regime for foreign counsel with the Ministry of Justice, so long as a request is filed with the immigration authorities. This only allows the successful applicants to provide legal advice and to appear before Russian courts when matters pertaining to the law of their jurisdiction arise, save for very exceptional cases<sup>44</sup>.

Other countries omit any possibility of registration for foreign professionals, as is the case of **Brazil**, where foreign counsel may only enrol as foreign law consultants with the Brazilian Bar Association (“*Ordem dos Advogados Brasileira*”), even though foreign law firms may open offices in the country<sup>45</sup>.

Similarly, **Angola** is especially limitative and fails to receive foreign professionals who, as such, may not perform any acts pertaining to this legal profession. Foreign citizens may enrol in the local bar association to undertake the training procedures if they have previously studied law in an Angolan university<sup>46</sup>.

In **Mozambique**, the applicable legislation provides for the possibility of foreign counsel enrolling in the Mozambican bar

association through a bilateral agreement (celebrated with their bar of origin) or by sitting exams with this body. Foreign citizens with studies in Mozambican law may also apply to undertake the full local training<sup>47</sup>.

Foreign lawyers in **Peoples' Republic of China**, provided they work with a Chinese or foreign law firm with duly authorised offices in China, may practice as foreign law consultants. Only nationals may apply to take the national judicial exam that gives full access to the profession<sup>48</sup>.

In **Turkey** foreign counsel may not appear before local courts, as the applicable rules only allow these practitioners to provide legal advice regarding foreign and international law within certain investment partnerships<sup>49</sup>.

As seen, bar associations tend to restrict access to the legal profession by foreign qualified counsel<sup>50</sup>. These protectionist regimes contrast with growing economic globalisation, and with **international arbitration** practice. The grand majority of domestic arbitration legislation is open to party representation by counsel that is qualified in a jurisdiction other than the seat of the arbitration<sup>51</sup>. This is the case in Singapore, the United Kingdom, Hong Kong, the United States of America, Japan, Russia, Brazil, China, India, Turkey and others. In the European Union, countries such as Germany, Austria, the Netherlands, Spain, Belgium, France, Switzerland and Sweden adopt a similar approach<sup>52</sup>.

However, in countries like Turkey or Thailand arbitration relating to purely domestic legal issues is reserved for local professionals<sup>53</sup>. Other countries reject the intervention of foreign counsel in all arbitrations seated in the respective jurisdiction, such as Angola, or Mozambique, due to the strict interpretation of the above-mentioned professional rules.

Curiously, Singapore's original position on this issue was prohibitive – in 1988, the case *Builders Federal (Hong Kong) Ltd. And Joseph Gartner & Co. V. Turner (East Asia) Pte Ltd.* established that the presence of foreign counsel was not welcome in arbitration proceedings seated in Singapore, a rule that was overcome by the 1992 amendment of the LPA.

Furthermore, the rules of the most reputable arbitral institutions, such as the ICC, SIAC, HKIAC, LCIA, CIETAC, and the CAC-CCIP do not impose any requirements on party representation, other than holding the necessary authority to do so<sup>54</sup>.

The *International Bar Association (IBA) Guidelines on Party Representation in International Arbitration 2013*, for example, define Party Representative as “*any person, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar*”<sup>55</sup>.

Even the New York Convention provides for the possibility of annulling an arbitral award when a violation of the right to free choice of representation takes place, in light of its article V(1)(d)

<sup>56</sup>. The relevance of avoiding internal restrictions on the choice of parties' representatives is thus of greater consequence, as it may even affect the neutrality of the proceedings and the parties' expectations<sup>57</sup>.

In sum, the national regimes regulating the appearance of foreign counsel before courts are generally restrictive while party representation in international arbitration proceedings is, as a rule, extremely broad. This difference has a number of explanations, but requires moments of interconnection. An example of this is precisely the possibility of an ad hoc admission regime like the one commented in this case note.

## VII. Conclusion

Being one of the main economic and financial hubs in Asia, the availability and diversity of legal representation must be ensured to all economic players that come to play in this city-state. As one of the biggest venues for arbitration in Asia, Singapore's concern to maintain this status and to promote it is constant<sup>58</sup>.

Considering the above, this judgment is a clear sign that parties that choose Singapore as the seat to resolve their dispute through international arbitration can trust that local courts will seek to achieve the most appropriate solution in setting aside applications of arbitral awards when the legal issues at hand are diverse and complex. This reaction fits the *ambiance* of international arbitration, which is a means of dispute resolution with special characteristics and which usually encompasses different jurisdictions. This fosters the growing internationalisation of the legal professionals present in its development.

Even though this is an exceptional regime, it allows the competent analysis of complex and novel legal issues in courts and invites the presence of jurists specialised in specific areas of law. The possibility of juggling these multiple interests benefits Singapore's legal system, and favours the status of this city-state as an arbitral hub of the Asian southeast.

The ad hoc admission regime of foreign lawyers in Singapore raises questions regarding the wanderings of international advocacy and the future of the national exercise of the legal profession, namely appearance before court. In a world where litigation is becoming increasingly global, will the exception become the rule?

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- 1 Samuel Sherratt Wordsworth QC.
- 2 On 14 August 2017 this application succeeded, being the first investment treaty award on the merits to be set aside in Singapore, in a judgment issued by Singaporean High Court judge Kannan Ramesh – see *Josias Van Zyl v Lesotho* [2017] SGHC 104 decision 14 August 2017.
- 3 The SADC is an international organization established by the Windhoek Treaty, signed on 17 August 1992 and in effect since 1 September 1993. At its origin were concerns to reduce the dependence of its Member States on South Africa, which, at that time was still under the Apartheid system, and to promote an integrated regional development. Its Member States are Angola, Botswana, Democratic Republic of Congo, Kingdom of Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.
- 4 The SADC Treaty provides in its Article 9 for the creation of a Tribunal to judge all cases that may be submitted to it under the Treaty. The SADC Tribunal Protocol, signed in Windhoek (Namibia), on 7 August 2000, in effect since 14 August 2001, establishes the composition, powers, jurisdiction and procedures for the SADC Tribunal.
- 5 Case *Mike Campbell (Pvt) Ltd v Zimbabwe*. For official information by the SADC see: <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>. In this action, the SADC Tribunal concluded that the government of Zimbabwe had breached provisions of the SADC Treaty by denying access to courts and performing acts of racial discrimination against white farmers, whose lands were confiscated in the process of an agricultural reform in the country.
- 6 The SADC Summit adopted a new protocol governing the functioning of the SADC Tribunal on 19 August 2014. However, it has not yet come into force.
- 7 Article 28 of Annex 1 of the SADC Protocol on Finance and Investment, signed in Masedu on 18 August 2006. With the most recent amendment of this annex, dated 17 May 2017, this article has disappeared.
- 8 However, this tribunal issued an interpretation award on 27 June 2016 adding that the licensee and assignee companies were not prevented from applying to participate in the subsequent arbitration proceedings.
- 9 According to Article 1(2) of the SADC Protocol on Finance and Investment and Article 1(2) of the Annex to the Protocol. This last section defines investment as “the purchase, acquisition or establishment of productive and portfolio investment assets, and in particular, though not exclusively, includes: (...) (b) shares, stocks and debentures of companies or interest in the property of such companies; (...)”. The same section also defines investor as “a person that has been admitted to make or has made an investment”.
- 10 The arbitral tribunal decided it had jurisdiction to determine the violation of the SADC Treaty and Protocols, as this violation had occurred (in August 2012) when the SADC Protocol on Finance and Investment was already in force (since April 2010), but that it did not have jurisdiction to decide on the merits (the alleged expropriation) as it pertained to a time (1991) prior to the SADC Protocol on Finance and Investment taking effect. On this topic, the arbitral tribunal added that the parties should begin new arbitral proceedings - which is in fact currently on-going with seat in Mauritius -, to hear the claims the shareholders previously made before the SADC Tribunal. The arbitral tribunal concluded that it could not order the reestablishment of the SADC Tribunal, as it was not an enforceable measure under the local courts of Lesotho.
- 11 This arbitrator was the South-African Petrus Nienaber, appointed by Lesotho. The other arbitrators were Doak Bishop and David A. R. Williams QC (president).
- 12 Article 10(3) of IAA.
- 13 Article 3(1) of IAA, read together with Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration.
- 14 As amended in 2012.
- 15 Articles 11 to 18 of the LPA provide the following requirements: to be over 21 years old, to be of good character, to have undertaken a six-month pupillage, to have attended courses and to have passed the examinations prescribed by the Singapore’s Board of Legal Education, and to have petitioned the court to be admitted as an advocate or solicitor. Good character is assessed on the basis of two “*Certificates of Good Character*”, drafted and signed by two people that swear to know the applicant, and inform the court since when and how they are acquainted, as well as provide situations whereby they could assess his or her character, respectability and adequacy to practice law in the jurisdiction of Singapore. To access a draft see: <https://www.mlaw.gov.sg/>.
- 16 Singapore has a specific regime to welcome lawyers qualified overseas, allowing their registration with the local courts as foreign counsel (which permits them to advise clients on matters of foreign law) and also the enrolment as foreign counsel able to practice in some areas of Singapore law, after completing an exam for this purpose.
- 17 This was an amendment introduced in 1962 to the *Advocates and Solicitors Ordinance*, which regulated the legal profession at that time, through *Bill 174/1962*. This was analysed in detail in *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012, §21 and following.
- 18 *Queen’s Counsel*, as opposed to *junior counsel*, is an honorific title granted by the Crown to barristers, rewarding excellency as demonstrated before the higher courts to professionals of over 10 years of experience. This is an appointment that is autonomous from the *Bar Council* (entity that represents barristers) and from the *Law Society* (entity that represents solicitors). Very often these professionals are referred to as “*silks*”, as their professional garment consists of a silk gown of a particular design.
- 19 Notification S 132/2012, effective 1 April 2012.
- 20 In Singapore, Senior Counsel are lawyers with 10 years plus experience that obtain this title after being appointed for their experience and abilities. This title is the result of British influence, and is equated to that of *Queen’s Counsel*.
- 21 §§44 and 45 of the judgment under analysis, *Re Wordsworth Samuel Sherratt QC* [2016] SGHC 172, decision of 2 August 2016.
- 22 In the judge’s view, this issue would also raise three subsidiary questions of public international law for the court analysing the setting aside application to consider, which are: (i) whether there is retroactive application of the SADC Finance and Investment Protocol contrary to Article 28(4) of Annex 1 to the Protocol, (ii) the liability of Lesotho for the acts of the SADC Summit, and (iii) whether and how the requirement to exhaust local remedies can apply in the circumstances of the dispute (§43, *Re Wordsworth*).
- 23 *Re Joseph David QC* [2012] 1 SLR 791, decision of 12 December 2011.
- 24 In this case, the court established that full details of efforts to secure local counsel had to be furnished in the affidavits supporting the application for ad hoc admission, including the nature of contacts between the party and local counsel, the form of contact, the dates and duration of any meetings and a summary of the discussions with local counsel. In addition, the date of local counsel’s refusal to take up the case and the reasons given should also be specified. Thus, it would be insufficient for the applicant to simply assert before the court that it had considered the available local counsel to discharge it of its burden of proof. Only then could would the court be able to verify whether the legally imposed requirement of “*reasonably conscientious search for local counsel*” had been met. Curiously, in the case at hand, the judge admits that these formalities were omitted, but also admits the present case they would have been of little utility, as he was already cognisant of the lack of available local counsel in the field of public international law (§§63 and 64, *Re Wordsworth*).
- 25 *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012.
- 26 §§73 and following, case *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012.
- 27 *Re Jonathan Michael Caplan QC* [2013] SGHC 75, decision of 8 April 2013; *Re Lord Peter Henry Goldsmith PC QC* [2013] SGHC 181, decision of 19 September 2013. The latter mentioned case related to the appeal at the constitutional level of a criminal law rule, in Singapore.
- 28 *Re Heather Rogers QC* [2015] SGHC 174, decision of 8 July 2015.
- 29 Toby Landau QC - see *Re Toby Thomas Landau QC* [2016] SGHC 258, decision of 28 November 2016.
- 30 Balance mentioned in §66 of case *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012.
- 31 §35 of case *Re Wordsworth*.
- 32 *Idem*.
- 33 §§31 and 32 of case *Re Geraldine Mary Andrews QC* [2012] SGHC 229, decision of 15 November 2012.
- 34 Council Directive of 22 March 1977 77/249/EEC sets out the regime for establishment of lawyers, in order to facilitate the effective exercise by lawyers of the freedom to provide services, and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 is intended to facilitate practice of the legal profession on a permanent basis in a Member State other than the one in which the qualification was obtained (enacted in Portugal in Law no. 9/2009 of 4 March, amended by Law no. 41/2012 of 28 August and Law no. 25/2014 of 2 May).
- 35 Articles 203 to 207 of the Portuguese Bar Association Statute. Available at: [www.aoa.pt](http://www.aoa.pt).
- 36 Article 201 of the Portuguese Bar Association Statute.
- 37 In order to establish that a person is of good character and repute, the applicant must provide documents such as a certificate of the Senior Judge, Attorney

- General or Senior Law Officer of the Superior Court in which the applicant has practised showing that for a period of not less than three years he or she has regularly exercised rights of audience in that court and that he or she is a fit and proper person to be called to the Bar. For more information, see: <https://www.barstandardsboard.org.uk>. All the mentioned information regarding different jurisdictions rules may be checked at the IBA page, where the *Cross Border Legal Services Report 2014* is available: [http://www.ibanet.org/PPID/Constituent/Bar\\_Issues\\_Commission/BIC\\_ITILS\\_Map.aspx](http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map.aspx).
- 38 The legal basis for this regime is section 27(4) of the Legal Practitioners Ordinance (Cap 159), available at: <https://www.elegislation.gov.hk/>.
- 39 These criteria were developed on the basis of case *Re Flesch* QC [1999], 1 HKLRD 506, and others that followed. For a further analysis, see the guidelines for admission of overseas counsel dated July 2015 of the *Hong Kong Bar Association*.
- 40 This is the case since the *Chennai High Court* decision of 2012; for more information, see Brendan K. Smith, *Protecting the Home Turf: National Bar Associations and the Foreign Lawyer*, in *Indiana Journal of Global Legal Studies*, Vol. 21, Iss. 2, Article 11, 2014, p. 674. Malaysia previously provided this limitation, but since 2013, the said rule has not applied to arbitrators and to counsel representing all parties in an international arbitration (see the Kuala Lumpur's arbitration centre communication on this issue: <https://www.klrca.org/>).
- 41 Examples of States that allow law graduates from overseas to take their Bar Examination are New York, California, Alabama, New Hampshire and Virginia, see "*Comprehensive guide to Bar Admissions Requirements 2016*", National Conference of Bar Examiners and the American Bar Association, p. 12 and 13.
- 42 See also the American Bar Association's on this topic, available at: [https://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/rreport\\_201f.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/rreport_201f.authcheckdam.pdf).
- 43 See the webpage of the Japanese Bar association, available at: <https://www.nichibenren.or.jp/en/>.
- 44 See webpage of the Russian Federation Bar association, available at: <http://www.en.fparf.ru/documents/test/21156/>.
- 45 Note no. 91/2000, document issued by the Brazilian Bar Association (OAB).
- 46 Article 98 of the Angolan Bar Association Statutes, and Law of Advocacy (Law no. 1/95 of 6 January).
- 47 Article 150 of the Mozambican Bar Association Statutes. In 2009 this institution signed a Protocol with the Portuguese Bar Association that does not establish the possibility of enrolment of foreign counsel. This is relevant as the previous Cooperation Protocol concluded between these institutions related to the provision of services and enrolment of lawyers dated of 1996 did provide for that possibility, which as of now collides with the Statute of this institution.
- 48 For more information, see the page of the Chinese Ministry of Justice, available at: <http://www.moj.gov.cn/>.
- 49 Brendan K. Smith, *Protecting the Home Turf: National Bar Associations and the Foreign Lawyer*, in *Indiana Journal of Global Legal Studies*, Vol. 21, Iss. 2, Article 11, 2014, pp. 681 and 682.
- 50 *Idem*.
- 51 As Gary Born mentions in *International Commercial Arbitration*, 2<sup>nd</sup> edition, Kluwer Law International, The Hague, 2014, p. 2839.
- 52 German Code of Civil Procedure (ZPO) §1042 (stating that counsel cannot be excluded as representatives of the parties), Austrian Code of Civil Procedure (ZPO) §594(3) (providing that parties may be represented by a person of their choosing, without that right being excluded or limited in any way), Dutch Code of Civil Procedure Article 1038(1) and (2) (establishing that parties may appear in court represented by a lawyer or any other person with power of attorney), Law 60/2003 of 23 December regarding Arbitration in Spain (does not set any limitation), Swiss Code of Civil Procedure Article 373 (indicating that parties may be represented in arbitral proceedings), French Code of Civil Procedure Article 1481 (providing that an award must indicate the names of counsel or other representatives of the parties). In regard to Belgium, the restrictions regarding foreign counsel existing in judicial proceedings do not apply to arbitration. Looking in more in depth at the Swedish regime, its Code of Civil Procedure merely provides in chapters 11 and 12 for principles that may justify rejection of a party representative by an arbitral tribunal. However, the domestic arbitration law omits any kind of formal limitation on this issue. For more information, see Gary Born, *International Commercial Arbitration*, 2<sup>nd</sup> edition, Kluwer Law International, The Hague, 2014, p. 2834.
- 53 *Legal representation in arbitration – Interview with Gary Born*, 14 July 2014, available at Lexis Nexis; see: [https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/legal-representation-in-arbitration-gary-born-14-July-2014.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/legal-representation-in-arbitration-gary-born-14-July-2014.pdf).
- 54 Article 17 and 26(4) of the ICC Arbitration Rules 2012 (mentioning only the need of authority by the party representative), Article 23 of the SIAC Arbitration Rules 2016 (stating that parties can appear represented by legal practitioners or any other authorised representatives), Article 13(6) HKIAC Administered Arbitration Rules (allowing parties to be represented by persons of their choice, making reference to the demand for the need for a fair and efficient conduct of the arbitration), Article 18(2) of LCIA Arbitration Rules 2014 (requiring an authorised legal representative), Article 22 of CIETAC Arbitration Rules 2015 (stating the need to have a Chinese or foreign authorised representative), Article 17 of the Arbitration Rules of the CAC-CCIP (establishing the free choice of legal representation).
- 55 See: [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)
- 56 Gary Born explains that that may happen in cases where a party is forced to continue to arbitrate with representation it does not desire, which differs from the situation where a State imposes specific limitations regarding the qualification of party representatives, as is discussed in this case note – see Gary Born, *International Commercial Arbitration*, p. 2845 and 2846.
- 57 Gary Born, *International Commercial Arbitration*, p. 2844.
- 58 See the new SIAC rules that entered into force on 1 July 2016, the new Investment Arbitration Rules also from SIAC that entered into force on 1 January 2017. Also, as an example, the efforts to regulate the phenomenon of *Third-Party Funding*, and others.



# TRANSPARENCY AND WOMEN ARBITRATORS: A TECTONIC SHIFT IN EQUAL OPPORTUNITY

By Veronica Sandler

## I. INTRODUCTION

For decades, the world of international arbitration has criticized the absence of opportunities for women arbitrators at the highest levels of the arbitration practice.<sup>1</sup> The standard explanation for this imbalance has focused on supposed bias, male domination, and “tradition,” which no doubt could well have been the root causes for the absence of women in the field of arbitration in ages past. However, I do not believe that this explanation suffices to explain the imbalance today. Rather, I submit that the lesser role that women play in arbitration is a problem rooted in the costs of acquiring information about new and experimental arbitrators, a problem that has been common to arbitration. It is not really bias or male domination that has kept women and other new entrants diminished among the ranks of arbitrators, but the indisposition of arbitration users to “pay” the costs of gathering information about unknown arbitrators or to “risk” the appointment of new entrants in the absence of full information about them.<sup>2</sup>

My central thesis is that a tectonic shift in this state of affairs

is about to take place because of the brewing perfect storm of the “two TTs”: Transparency and Technology. Women, I believe, will be the principal beneficiaries of this change.

In short, the advance of technology and the pursuit of transparency in the world of arbitration are now dramatically (a) expanding the demand and supply of information about arbitrators and (b) lowering the costs of distributing that information among arbitration participants. Thus, the barriers that have kept women underrepresented are in the process of crumbling rapidly. This will improve the situation of women in arbitration most particularly.

This mutation will positively impact women<sup>3</sup> in arbitration in three fundamental aspects: (i) it will reduce the financial costs of “becoming known,” as women will much more easily be able to raise their profile without, for example, paying the expensive costs and spending the time necessary to being physically present at the numerous conferences worldwide which are one of the principal mechanisms by which users interact with potential arbitrators, or being noted in some of the rankings that have become *de rigueur* in judging arbitrator quality. It will allow women to showcase their

output as arbitrators, academics, and case managers, making explicit the type of results, the nature of the disputes at issue, the amounts at issue, and often the clients involved; and (iii) it will expand the available information about the work women do in arbitration, thus allowing users to rely on actual information. As in all instances in which information becomes more accessible and cheaper, the beneficiaries are typically new entrants—women in this case.

## II. THE HISTORICAL STATE OF AFFAIRS

For many decades, it has been apparent that the ranks of top international arbitrators have been populated by the same, small “select group” of men. In large international commercial arbitrations, a relatively small number of arbitrators are habitual repeat performers. In investment arbitration, at least one of a group of perhaps twenty or thirty arbitrators can be found in virtually 80 percent of reported cases.<sup>4</sup> And so, complaints have grown that women are systematically excluded from the ranks of arbitrators. As noted, this phenomenon is, in my view, the result of an absence of “mobility,” the consequence of a bias against a regular renewal of the ranks of top arbitrators stemming from a very significant cost that users were not historically willing to pay to drive a change in this state of affairs. The low participation of women appears therefore to be a particular manifestation of this immobility, so the problem lies with information costs rather than with bias.

Let me offer some observation to this effect. From comparing my professional and academic experience in other fields of law—commercial law, intellectual property law—I note that arbitration practitioners meet much more frequently than practitioners in other fields in congresses, meetings, and seminars in which the same faces (typically top arbitrators) make a regular appearance.<sup>5</sup> In other words, my observation is that this “select group” members tend in arbitration to meet much more frequently with users (counsel and clients) of the arbitration system than other groups in the legal profession. My suggestion is that counsel and arbitrators continually need to “check each other out” or interact with the arbitrator herds from which they are probably select for their next case. Indeed, new or inexperienced arbitrators, often women, find essential to be invited or attend at these expensive and geographically distributed congresses, to penetrate the perception of users and more established colleagues, which is sometime a virtually impossible task for young and female professional full times worker participants. In short, the knowledge gained in these meetings and other informal interactions is precisely the asset which experienced counsel brings to the table when asserting that its most significant contribution to a client in an arbitration lies in the selection of the best or most suitable arbitrator.

All this, in my view, is about to change dramatically, and produce a real change in the sources of information to be consulted in the selection of arbitrators and, consequently, in the number and percentage of women represented in an ever-expanding group of suitable candidates.

## III. TECHNOLOGY AND TRANSPARENCY

For the moment, it suffices to say that change is in the air, triggered by technology and by discontent with state of affairs

in which the group of top arbitrators seems to remain static, including the low participation of women in that group, or most likely by the confluence of both. There is now a perfect storm of “transparency” and “technology” brewing in arbitration. Women will likely be one of the main beneficiaries.

“Transparency” has been used in arbitration in a myriad of contexts and dimensions. For example, we speak of transparency when third parties (NGOs and others) demand that the record in investment arbitrations (or other arbitrations having significant public policy consequences) are made public, and not kept confidential.<sup>6</sup> We speak of transparency when third parties demand status as *amici* in such arbitrations. We speak of transparency when bar associations such as the IBA or others take the lead in creating soft law, regulating the obligations of counsel or arbitrators to disclose actual or possible conflicts which historically had remained undisclosed or starting a soft discussion.<sup>7</sup> Here, more specifically, I speak of transparency in the sense of the broad range of exchanges of information about the character, background, decisions, availability, and performance of arbitrators in international arbitration, as well as the rules and technological means to effect the dissemination of this information – precisely the type of information about arbitrators to which historically only counsel “in the know” was privy as a result of personal and social interactions among a limited group of arbitrators and colleagues. Technology and the demand for transparency may cause this treasure trove of information no longer to remain in the hands of a few insiders.

In this context, “technology” means not only the means to disseminate such information, but the new rules and practices that have led to the collection of information about arbitrators and their performance formerly unavailable.<sup>8</sup> Expertise in any field historically was tied to the possession of data or information—scholars were those with access to obscure libraries or texts unavailable to others. The cost of collecting information is now plummeting and the availability of information is now exponentially greater than ever before. So is the case regarding information about arbitrators. As noted, this is the result of the confluence of “technology” and “transparency” in arbitration.

It is therefore not surprising that users have now demanded a change of paradigm, or that users are now faced with a change of paradigm triggered by competitive forces that have recognized that the “old ways” no longer work and that we have the technology and the information for the old paradigm to be reversed. Arbitral institutions demand that arbitrators divulge conflicts, declare their time availability to deal with cases, and make such information public.<sup>9</sup> Soft law requires de dissemination of information about conflicts that was never divulged previously.<sup>10</sup> Participants in the arbitration industry such as GAR and others now make available to users databases about arbitrators, including their background, decisions, affiliations, third party anonymous commentary about arbitrators and their performance, and an increasing array of information that may bear on the selection of individuals by users of the arbitration system. And this trickle of information, still in its early stages, is likely to become an avalanche with the passage of time.



I venture to suggest, moreover, that “big data” methods of analysis and “artificial intelligence” will soon intrude in this process as well. It will not take long for information relevant to the choice of arbitrators to combine historically traditional information about arbitrators in electronic form with much broader sources of real-time and historical data concerning all manner of information relevant to the selection of arbitrators. There is really no reason for the GAR data base about arbitrators not to be “merged” with LinkedIn, Facebook, online academic journals, etc. Indeed, why stop there? Why not police and personal records, travel information, phone records, purchase habits, vacation habits, etc? Why not create artificial intelligence algorithms to analyze this avalanche of data or determine the most suitable arbitrator (or arbitrators) for specific cases, circumstances, parties, and governing legal system? All of this, if relevant to the selection process for arbitrators, is likely to become soon available on-line and perhaps real-time as well (subject perhaps to cultural or legal restrictions, but not technological limitations).<sup>11</sup>

#### IV. THE CHANGE IN PARADIGM – ITS EFFECT ON WOMEN AS ARBITRATORS

For all the mentioned reasons, I propose that users will demand and be faced with a wider range of much less expensive information about arbitrators available for selection or appointment, and about new entrants from the arbitration field.

Users may enjoy soon a much broader range of information about a much bigger set of possible candidates than ever before. The cost and availability of information about arbitrators will ease

dramatically, and users may no longer be “trapped” with the “old” names, but will be able to access information about new (and existing) entrants in the arbitration market at a much lower cost than in the past. I do not mean to suggest that the well-known names will suddenly cease to be selected—important cases both in terms of amounts involved or the policy matters to be addressed will continue to call for the expertise of a select group. But that set is unlikely to remain as protected as it has been historically by barriers to entry erected by the difficulty associated with accessing information about them. And they are not likely to be able to “rest on their laurels” either. For example, arbitrators too “busy” to take yet another case, may find themselves substituted by others who are more available. Indeed, issues of availability had become a general concern as better-known arbitrators could take many overlapping cases without regard to the effect this had on users precisely because statistics were so difficult to come by and to disseminate, and therefore their tardiness was not “punished” by more limited appointments. This clearly will no longer be the case. And arbitrators will be more readily matched to the size and importance of cases than before. Women and other underrepresented groups among current arbitrators will likely fare best in this process of “democratization” of information and arbitration selection. Indeed, those with the most to gain – such as women – are the least likely to object to, and most likely to cooperate with, the supply and dissemination of this vast array of new information available to the market.

Second, moreover, I believe women should understand that they are facing three developments that will change and improve their role dramatically in the near future as a result of



the process I have described. First, women arbitrators will have unprecedented access to potential users and to the market as a result of this confluence of transparency and technology. Search engines will soon permit women of all experience, or even of cognate experience, to be exposed to users and decision-makers in arbitration, both domestically and internationally. Women will have to learn how to apply their marketing talents and their practicality about how to handle what are soon to become (or have become already) arbitration “social networks” to promote their presence in the arbitration world. This gives the young, and women in particular, access to an extraordinarily disruptive platform to which they could never aspire in the past and which is likely to benefit them disproportionately.

Third, transparency and technology will permit the broad dissemination of women’s accomplishments in the law and in arbitration despite their low their currently low participation at the highest levels of the practice. Women will be able to disseminate their written work, professional achievements, academic positions, and all manner of information that they believe may relevant to users of the arbitration process in selecting counsel or arbitrators.

Fourth, transparency and technology (and the possible application of the tools of artificial intelligence – a subject beyond the scope of this short essay) will soon offer users more reliable and economical means for selecting arbitrators without regard to gender, focusing only on those characteristics that bear on the cases for which counsel and arbitrators are being selected. Women are most likely to do much better in this process than they have done historically, where the risk and cost of selecting an unknown as counsel or arbitrator (particularly if the candidate was a woman) were unacceptable to users.

## V. CONCLUSION

In sum, I posit that the observed under-representation of women among top ranked arbitrators (and arbitration counsel) is not, in my view, the result of animus or intentional discrimination, even if it might have been so decades ago. Rather, such under-representation is tethered to the same factors that have historically led to the immobility of the cadre of top arbitrators – namely, the unacceptable cost associated with identifying new or untested candidates as arbitrators or counsel.

I have also observed that the costs perpetuating this imbalance is in the process of being significantly reduced, for the reasons explained above. If both the above hypotheses are correct, then it stands to reason that women (and other untested participants) will in the future have much greater access than ever before to the selection process by which they will become recognized arbitrators and counsel. Women are likely to benefit disproportionately from this process, precisely because they start from such a relatively low base of representation. Young women in particular will benefit most if they show the initiative and marketing savvy necessary to embrace the process, participate actively in it, and use it to its fullest potential.

Veronica Sandler

- 1 The statistics confirm the extent of the current imbalance: SIAC’s Annual Report for 2015 reports that the number of women appointed as arbitrators accounted for just under a quarter of appointments. ICC statistics for 2015 indicate that women represented 10% of all appointments and confirmations, and that women were more frequently appointed as co-arbitrators (43%) rather than sole arbitrators (32%) or tribunal presidents (25%). ICC data on arbitral appointments for 2016 shows that, to November 2016, only 20% of arbitrators appointed were women. LCIA statistics are more encouraging. In 2015 (compared to 2014) there was an increase in the number of female candidates put forward by the parties (6.9% compared to 4.4% in 2014) and selected by the LCIA (28.2% compared to 19.8% in 2014). SCC statistics indicate that, in 2015, 14% of arbitrators appointed were women, although the percentage fell to 6.5% where the parties themselves made the appointment.
- 2 POSNER, Richard, *Economic Analysis of Law*, Wolters Kluwer, (9th. Ed.), 2014, pp. 449-457 (discussing the effect of information costs on various forms of employment discrimination).
- 3 What I say about the impending change in the participation of women is, therefore, equally applicable to the underrepresented men for whom breaking into the circle of repeat arbitrators has been extremely difficult historically as well.
- 4 It must be noted, at any rate, that this small group includes some notable women.
- 5 MOXLEY JR., Charles J. *Selecting the Ideal Arbitrator*, Dispute Resolution Journal, (August/October 2005) available at [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_003897](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003897)
- 6 LEVINE, Eugenia, *Amicus Curiae in International Arbitration: The Implications of an Increase in Third-Party Participation*, 29 Berkeley J. Int’l Law, 200 (2011); ISHIKAWA, Tomoko, *Third Party Participation in Investment Treaty Arbitration*, Int. Comp. L. Quartely 59/2, pp. 372-412 (2010); KELLER, Joseph, *The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments*, 33 Int. J. of Legal Info., Iss.3, Art. 7 (2005).
- 7 See IBA Guidelines on Conflicts of Interest in International Arbitration (2014); IBA Guidelines on Party Representation in International Arbitration (2013).
- 8 See GAR’s ART [GAR Arbitration Research Tool] Goes Live!, available at <http://globalarbitrationreview.com/article/1138706/gar%E2%80%99s-art-goes-live>, visited on September 20, 2017.
- 9 See ,e.g., ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence form, available at <https://iccwbo.org/publication/icc-arbitrator-statement-acceptance-availability-impartiality-independence-form/>
- 10 See note 9, supra.
- 11 MARR, Bernard, *How Big Data is Disrupting Law Firms and the Legal Profession*, Forbes, January 20, 2016, available at <https://www.forbes.com/sites/bernardmarr/2016/01/20/how-big-data-is-disrupting-law-firms-and-the-legal-profession/#1e46a45a7c23>



# THE ROLE OF THE COURTS IN SUPPORTING ARBITRATION IN BOSNIA AND HERZEGOVINA – OVERVIEW OF THE LEGAL FRAMEWORK AND LEGAL PRACTICE

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## Abstract

The Civil Procedure Codes applicable in Bosnia and Herzegovina embody a simple arbitration framework. Within this framework, the national courts have a supportive and supervisory role. An emerging body of case law shows that the courts generally adopt a pro-arbitration approach. This is particularly evident in cases where the courts, deciding on the issue of jurisdiction, also decide on the validity and legal effects of arbitration agreements. The present paper builds on the existing case law, providing an overview and analysis of the relevant legal framework with an aim to assist practitioners by fostering an in-depth understanding of the relationship between the arbitration and courts in Bosnia.

**Keywords:** *arbitration agreement, arbitration, Bosnian lex arbitri, New York Convention, court assistance*

## INTRODUCTION

For the first time since the financial crisis in 2008, the flow

of foreign investments in Bosnia and Herzegovina (hereinafter *Bosnia* or *BiH*) shows an increase.<sup>2</sup> The analysts praise the business reforms that eased the burden of doing business by, for example, reducing the time-frame for incorporating a company. At the same time, recent data of the World Bank and the Foreign Investors Council (FIC) cautions against an overly optimistic outlook. After being ranked at 79th place, in just one year, Bosnia fell down to 81st place in the World Bank's most recent Doing Business report.<sup>3</sup> Moreover, the majority of investments concerns mergers and acquisitions, while there is a lack of green and infrastructure investments.<sup>4</sup> Foreign investors continue to stress the overly burdensome bureaucratic procedures for obtaining necessary permits and licenses and the need for further reforms in this respect.

Arbitration, as a part of the rule of law framework that ensures access to justice, plays an important role in the efforts to attract foreign investment.<sup>5</sup> When deciding on their dispute resolution mechanism, foreign investors look into the arbitration framework of the host state. The relevant factor in this assessment

is not only the compliance of the legal framework with the modern trends but also the approach of the courts in support and supervision of arbitration.<sup>6</sup> In that sense, the Bosnian judiciary shows positive results. The High Judicial and Prosecutorial Council (HJCP) sees arbitration, together with other forms of alternative dispute resolution, as a tool to ease the burden of the courts and thereby increase the efficiency of the judiciary.<sup>7</sup> Moreover, the emerging arbitration related case law shows that the courts, when faced with a valid arbitration agreement as a jurisdictional objection, passively enforce arbitration agreements, i.e., the courts do not compel the parties to arbitration, but decline to adjudicate the dispute due to lack of jurisdiction.<sup>8</sup>

The present discussion builds on the existing body of case law, with a goal to foster further understanding of the Bosnian *lex arbitri* in two respects: the validity of an arbitration agreement and the supportive role of the courts. Thus, I will begin with a brief overview of the Bosnian *lex arbitri* (Part I) and then will analyze the six recent arbitration-related court decisions (Part II). As these cases are factually and legally rather simple, in the prospect of assisting practitioners facing more complex disputes, I will provide an overview of the legal framework concerning the effects of a valid arbitration agreement on the jurisdiction of the courts (Part III).

## I. OVERVIEW OF THE BOSNIAN *LEX ARBITRI*

Bosnia is a country of complex political, territorial and legal structures.<sup>9</sup> It consists of two entities – Federation of Bosnia and Herzegovina (FBiH) and Republic of Srpska (RS) - and one autonomous unit under the sovereignty of the state – Brčko District (BD). Except for the nine areas of law that fall under the exclusive competence of the State,<sup>10</sup> all other areas are left to the entities and the district. Consequently, different legal regimes apply in all three units. The area of civil law is largely harmonized, with almost identical laws enacted in FBiH, RS, and BD.<sup>11</sup> Unlike most jurisdictions, Bosnia's *lex arbitri* consists of several laws, which in conjunction form the country's national arbitration legal framework.

The starting point is the Codes of Civil Procedure of FBiH, RS, and BD that govern the civil procedure and arbitration (*hereinafter* the *Civil Procedure Code* or the *Code*).<sup>12</sup> The Civil Procedure Code classifies arbitration as a *special procedure* and places it together with other types of special procedures such as employment and labor disputes.<sup>13</sup> The nineteen provisions governing arbitration are not based on the UNCITRAL Model Law. This very simple framework defines the basic elements of an arbitration proceeding, such as arbitrability, the formal validity of an arbitration agreement, constitution of an arbitral tribunal and challenge of an arbitrator, general power of the tribunal, the form and legal effects of an arbitral award, and the grounds and the procedure for setting aside an award.<sup>14</sup> Some of these provisions are in line with internationally accepted standards,<sup>15</sup> while others are not.<sup>16</sup>

To complete the outlined framework it is necessary to look into the supplemental domestic acts: (a) the Law on Contracts and Torts concerning the substantive validity and other contractual aspects of an arbitration agreement;<sup>17</sup> (b) the Law on Private International Law (*henceforth PIL Law*) to the extent that it is relevant in the process of recognition and enforcement

of foreign arbitral awards or foreign court judgments related to arbitration proceedings (if any);<sup>18</sup> and (c) the Enforcement Acts of FBiH, RS and BD (*henceforth Enforcement Act*) concerning the enforcement procedure of a domestic and a recognized foreign arbitral award.<sup>19</sup> International treaties - the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*henceforth the New York Convention*)<sup>20</sup> and the European Convention on Human Rights (*henceforth ECHR*)<sup>21</sup> - also form a part of this framework.

The Bosnian *lex arbitri* prescribes a supportive and supervisory role for the national courts. As a support to arbitration the courts, for example, decide on a motion for annulment of an arbitration agreement due to untimely appointment of an arbitrator (Art. 442), decide on a party's challenge of an appointed arbitrator (Art. 442) or assist the arbitration in collection of evidence (Art. 443). In their supervisory role, the courts decide on motions for setting aside the awards rendered in Bosnia (Arts 450-452).

The emerging body of case law mostly concerns cases where the defendants challenge the jurisdiction of a court due to an existing arbitration clause. Consequently, the courts had a chance to elaborate on the legal nature and effects of a valid arbitration clause. The result is a passive enforcement of arbitration agreements: in all the decisions reported thus far, the courts decided they do not have jurisdiction to adjudicate, dismissed the claim and annulled all procedural actions taken up to that point in the proceedings.

## II. ROLE OF THE NATIONAL COURTS IN PROVIDING ASSISTANCE TO ARBITRATION IN BiH

The analysis of the arbitration-related case law focuses on six final and binding decisions that illustrate different scenarios where the court decided on challenges to its jurisdiction due to an arbitration agreement.<sup>22</sup>

### II.1 Overview of the arbitration-related jurisprudence in Bosnia

#### II.1.1 Municipality Court in Sarajevo no 65 0 PS 307722 12 PS dated 2 October 2013

Two companies from Turkey and Bosnia entered into a distribution agreement in 2012. The arbitration clause provided that any dispute, controversy or complaint that may arise from the Parties' Distribution Agreement or in relation to it will be subject to an arbitration court in Turkey; the decision of such court will be final and binding to both parties. In the course of the parties' negotiations that led up to the signing of the Distribution Agreement, the Parties entered into two sales agreements. The Turkish company, as the seller, delivered the goods. Although the Bosnian company, as the buyer, received the goods and did not object to the quantity or quality thereof, it did not pay the price. The seller initially sought to amicably settle the dispute; as there was no response from the buyer, the seller filed a suit before the Municipality Court in Sarajevo.

The buyer, the defendant in the proceedings, challenged



the jurisdiction of the court over the dispute due to an existing arbitration clause in the Parties' Distribution Agreement. The defendant argued that this clause was agreed upon between the parties at the beginning of their relationship in 2011 and as such has been reflected in the Distribution Agreement. Thus, the arbitration agreement should apply from the very beginning of their relationship and cover the dispute in question. Consequently, the court should decline jurisdiction under Art. 438 of the Civil Procedure Code, dismiss the claim and annul all procedural actions taken up to that point.

The plaintiff's counter-argument essentially was that the arbitration clause concerns future disputes that might arise out of the Distribution Agreement. Such clause does not, nor can it encompass the disputes that arose from the earlier sales agreement. Therefore, the court should reject the defendant's objection, and continue with the proceedings.

The court ruled that it does not have jurisdiction since (a) the existence of the arbitration clause is undisputed between the parties and (b) the plaintiff did not provide evidence to contradict that of the defendant. It dismissed the claim and annulled the procedural actions taken up to that point in the proceedings.

#### **II.1.2 Municipality Court in Sarajevo no. 65 0 Ps 014258 13 Ps 2 dated 12 March 2013**

A German company entered into the Agreement for the First Construction of the Future German Embassy (Construction Agreement). The Construction Agreement provided for an arbitration clause: the disputes arising out of or in relation to the Construction Agreement were to be settled either amicably or by an arbitration commission. The Parties also agreed on the number of the members of the tribunal, form of selection and appointment of the arbitrators and the mode of selecting the chair.

The contractor completed the construction work but never received payment for this. Thus, she initiated court proceedings before the Municipality Court in Sarajevo seeking payment of price as per the Construction Agreement. The defendant challenged the jurisdiction of the court due to an existing arbitration clause. Moreover, the defendant stated that Arts 434-453 of the Civil Procedure Code regulate the arbitration proceedings in detail and that institutional and *ad hoc* arbitration for the settlement of commercial disputes is present in BiH.

In her response, the plaintiff stated that the arbitration agreement is not an issue. The issue between the parties is the scope of the arbitration clause, i.e. the parties did not explicitly waive their right to go to court. The arbitration clause does not exclude the jurisdiction of the court, nor does it contain a provision that the arbitration commission can render decisions nor what binding effect such clause has on the parties. On several occasions the plaintiff sent letters to the defendant, seeking explanations why is defendant not willing to pay the price and attempting to amicably settle the dispute without initiating court proceedings; the defendant, on these occasions, did not mention forming the commission in Art. 12 of the Construction Agreement.

The Municipality Court in Sarajevo, as the first instance court, initially rejected the defendant's objections. The Cantonal Court in Sarajevo, deciding on the appeal, reverted back the decision to the first instance court for retrial. Consequently, the Municipality Court in Sarajevo reassessed the Construction Agreement and determined that Art. 12 is a valid arbitration clause. The parties may agree to settle their disputes in arbitration (Art. 434 of the Civil Procedure Code), and if they do so, the court lacks jurisdiction to hear the case and should dismiss the statement of claim and annul all the undertaken procedural actions (Art. 438 of the Civil Procedure Code). Within this framework, the court further elaborated that the provisions of the arbitration agreement

ought to be interpreted literally (Art. 99 of the Law on Contracts and Torts). Given that the claim concerns payment of the price for construction work, it falls within the scope of the arbitration clause. As the defendant raised the objection concerning the competence of the court in a timely manner, and as the conditions out of Art. 438 (1) and (2) and Art. 434 of the Civil Procedure Code have been met, the court dismissed the plaintiff's claim, declared it does not have jurisdiction to entertain the present case and annulled all procedural actions taken until then.

### II.1.3 District Commercial Court in Bijeljina decision no. 59 0 Ps 018507 12 Ps 3 dated 17 September 2012

A Slovenian company filed a claim against a Bosnian thermal power plant asking for (1) compensation of the investments made in the construction of the defendant, the maintenance of the joint operation of the defendant, damages suffered for non-delivered electricity from 2005 to 2008 with corresponding interests, (2) delivery of 1/3 of the produced electricity in accordance with the internally agreed price; and (3) compensation for procedural costs.<sup>23</sup>

The relationship between the parties dates back to 1981 and 1988, where they entered into two autonomous agreements concerning the construction of a thermal power plant, production, and delivery of electricity. At this time, both Slovenia and Bosnia were part of the Former Yugoslavia and the investments made until the dissolution of the country in the 90's were essentially a form of domestic investment. Upon dissolution of Yugoslavia and after the end of the war in Bosnia, the two companies continued their, now cross-border, business. The problems began in 2005 and ultimately led to the court proceedings before the District Commercial Court in Bijeljina.

The court decided on the claim in 2012; however, the High Commercial Court in Banja Luka annulled the decision and remanded the case back for a retrial. The arguments raised by the parties appear to be the same in both proceedings and revolve around the following question: does the District Commercial Court in Banja Luka have the jurisdiction over the present case? Since the High Commercial Court in Banja Luka did not resolve this question on appeal, on retrial, the District Commercial Court held the preliminary hearing to hear the arguments and evidence of both parties.

The defendant challenged the jurisdiction of the court due to an existing arbitration clause in the autonomous agreements. In Art. 118 of the said agreement, the Parties agreed to resolve all disputes and controversies in the course of the construction and joint use of the thermal power plant amicably using a joint board.<sup>24</sup> In the event such dispute resolution process fails, the Parties can bring their dispute to the arbitration of the Joint Community of Yugoslav Electric Power Industry. Consequently, as the defendant argued, the court cannot disregard the existence of this clause but has to dismiss the claim, annul all procedural actions and decline jurisdiction (Art. 438 of the RS Civil Procedure Code). Although the Plaintiff raised a counter-argument that the arbitration clause is no longer valid, as the designated arbitration institution no longer exists, the defendant argued that the arbitration clause

is pathological only with respect to the designated arbitration institution. The intent of the parties to arbitrate their dispute, and not litigate, however, has remained untacked.

The court engaged in in-depth analysis of its competence to decide on the validity of the arbitration agreement insofar as it affects its own jurisdiction. As a result, the Court discussed the validity of the disputed arbitration agreement under the Bosnian legal framework (which includes both national and international legislation).

The court began explaining, from the stance of the Civil Procedure Code, why the question of jurisdiction is at issue and why, despite an existing decision of the second instance court, it has to decide on its jurisdiction *de novo*. First, the court stated that it does not decide on its jurisdiction *ex officio*, but only if the defendant raises a procedural objection challenging the jurisdiction of the court based on an arbitration clause. Thus, as the defendant duly raised its objection, the court has to decide on this issue, before getting into the merits of the case. Second, although the court decided it does not have jurisdiction in its first decision, the second instance court remanded the case for retrial. In doing so, however, the second instance court did not decide or instruct the first instance court on how to decide on the objection. Therefore, the defendant's objection still remains. Third, at the preliminary hearing, the defendant specifically asked to court to decide on its objection.

Given the arguments raised, the court assessed the effects of the arbitration clause on the jurisdiction of the court. In this respect, the court explained that a valid arbitration agreement has prorogation and derogation effect on the jurisdiction of the court. However, the arbitration agreement bars the jurisdiction of a court only if the defendant objects in his response to the statement of claim; otherwise, there is a presumption that the parties terminated the arbitration agreement and are in agreement to litigate their dispute. Moreover, the prorogation and derogation effect of an arbitration clause to the jurisdiction of a court is not absolute; under the Civil Procedure Code, the courts can decide on a number of issues related to arbitration, e.g., decide on the termination of arbitration clauses, examine the validity thereof, and so on. The parties may also decide not to arbitrate their dispute but litigate it.

Lastly, the court analyzed the validity of the present arbitration agreement in light of both the national arbitration framework and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

As a preliminary matter, the court explained that arbitration is an alternative dispute resolution mechanisms that draw its powers from parties' agreement (arbitration clause). As the basis of arbitration is an agreement between the parties, it is questionable to what extent the court may decide on the competences of an arbitration tribunal. Given the power of the parties to dispose of with their agreement, one of them raised an objection concerning the validity of the arbitration agreement. The national legislation does not regulate this matter; however, the New York Convention gives the national courts the power to decide on the validity of an



arbitration agreement in the pre-arbitration stage, i.e., where the parties did not initiate the arbitration proceedings. In this respect, the court analyzed the validity of the arbitration agreement under Art. II of the New York Convention in conjunction with the relevant provisions of the Civil Procedure Code. As a result, the court ruled that the arbitration agreement was concluded in written form, that the dispute is arbitrable and that there are no grounds under which the agreement may be declared null and void.

Turning to the disputed question regarding cessation of the institutional arbitration clause, the court essentially adopted the defendant's line of reasoning. Notwithstanding the fact that the relevant arbitration institution ceased to exist in 2009, the court found that it is crucial to examine the intent of the parties with respect to their arbitration agreement. Examining the wording of the arbitration clause, the court concluded that the parties agreed to exempt disputes concerning the joint construction and use of the thermal power plant from the court jurisdiction. Moreover, the arbitration institution stipulated in the agreement is not a proper arbitration institution but practically operated as an *ad hoc* arbitration of the Yugoslav Electric Industry. Therefore, the Parties agreed to arbitrate; and now they need to design the mechanism for conducting the arbitration, e.g., the number of arbitrators, appointment process, applicable rules, and so on. Lastly, the subsidiary jurisdiction of the courts in the present case is evidenced in the Law on Policy of Foreign Direct Investment (Art. 17), under which disputes arising out of foreign investments are subject to court jurisdiction only in the absence of an agreement or another form of dispute settlement, including arbitration.

#### II.1.4 Municipality Court in Sarajevo decision no. 65 0 Ps 197771 11 Ps dated 24 May 2012

The Parties entered into an agreement for sale of electricity and incorporated an arbitration clause therein subjecting their future disputes to Regulatory Commission for Energy in Federation of Bosnia and Herzegovina (FERK) as a specialized arbitration body.<sup>25</sup>

The plaintiff delivered the electricity as agreed, but the defendant never paid the agreed price. Consequently, the plaintiff brought a claim before the Municipality Court in Sarajevo arguing that the jurisdiction of the court stems from General Terms for Delivery of Electricity.<sup>26</sup> Thus, the court should continue with the proceedings and adjudicate the dispute.

The defendant, in her response to the statement of the claim, challenged the jurisdiction of the court arguing that the Parties entered into a valid arbitration clause. The court should, therefore, dismiss the statement of claim due to lack of jurisdiction, and annul all procedural actions it undertook. The Parties did not provide further evidence or claims at the preliminary hearing.

The court analyzed the relevant provisions of the Civil Procedure Code and ultimately ruled in favor of the defendant. First, the court stated that where the parties agreed to arbitration, the seized court in the same case among the same parties as envisaged in the arbitration agreement should dismiss the claim due to lack of jurisdiction, and annul all the procedural actions. The court rejected the plaintiff's argument concerning the jurisdiction of arbitration since the Arbitration Agreement is essentially *lex specialis* and has priority in the application. As the parties did not ask the termination or annulment of the arbitration agreement under Art. 441 of the Civil Procedure, the court decided in favor of the defendant.

#### II.1.5 Cantonal Court in Mostar decision no. 58 0 Ps 059934 11 Pz dated 17 November 2011

In its decision, the Cantonal Court in Mostar (as the second instance court) re-enforced the rule in Art. 438(1) and (2): where the parties have agreed to settle their dispute in arbitration and where the defendant raised an objection challenging the jurisdiction of the court in her response to the statement of claim, then the court ought to rule that it does not have jurisdiction over the case, annul the procedural actions taken up to that point in the proceedings and dismiss the claim.<sup>27</sup>

The Cantonal Court in Mostar reasoned in the following manners. First, it found that the existence of an arbitration agreement is not disputed among the parties. The fact that the plaintiff in his response to the appeal stated that “there was no dispute or any controversy among the parties concerning the content or interpretation of the provisions of the Contract” evidences the court’s conclusion. Second, the court ruled that the issue raised by one of the parties as to the necessity of a third neutral person is of no relevance to the issue of jurisdiction. Third, although it is true that the details of the procedure are not resolved in the arbitration agreement, the rules of the Civil Procedure Code (Arts 434-453) serve as default rules precisely for this purpose.

The court also found it to be evident that the defendant used dilatory tactics; however, the plaintiff had available recourse to prevent the defendant from delaying the procedure. More precisely, the plaintiff should have suggested the appointment of an arbitrator (Art. 439), asked the court to make an appointment (Art. 440(1)) or asked the court to terminate the arbitration agreement (Art. 440 (5)).

In any event, the parties agreed on an arbitration clause and the criteria in Art. 438 (1) of the Civil Procedure Code were met for the first instance court to find that it does not have jurisdiction over the present case, annul all the procedural actions undertaken up to that point in the procedure and dismiss the statement of claim.

#### **II.1.6 Municipality Court in Sarajevo no. 65 0 Ps 106510 09 Ps dated 1 December 2010**

The Parties in the present case entered into a Construction Agreement. The contractor performed the construction work as agreed. Upon examination of the performed work, the employer identified certain deficiencies in the work that needed to be remedied. Notwithstanding the performed inspection, the employer did not pay for the delivered work. Thus, the contractor brought the claim to the Municipality Court in Sarajevo.

In her response, the defendant raised the objection of the absolute court jurisdiction due to an existing arbitration clause. The plaintiff, in turn, disputed this argument stating that the arbitration agreement is a multi-tier clause that encompasses amicable settlement of disputes concerning the performance of construction work; the arbitration panel ought to be formed only in case such disputes cannot be resolved amicably. In this case, however, the plaintiff performed all the construction work as agreed (i.e., as per the quantity, quality and value) and which the plaintiff confirmed in the final certificate (*okomčana situacija*). Thus, the subject matter is payment of debt and interest due to delay in payment on the side of the defendant; hence, defendant’s arguments on the lack of jurisdiction are not founded and the seized court has subject matter and territorial jurisdiction in the present case.

The court’s decision is three-fold. First, it found that the Construction Agreement contains a multi-tier dispute resolution clause, under which the parties need to resolve amicably and in case such resolution fails, the parties should form an arbitration commission. Second, the court found that the plaintiff did not prove that it removed the deficiencies in the construction work.

Third, the plaintiff did not prove that the parties attempted to resolve their dispute amicably or via arbitration. Consequently, the court, on the basis of Art. 438 of the Civil Procedure Code and in relation to Art. 67(1) of the Civil Procedure Code and Art. 99 of the Law on Contracts and Torts, found that it does not have jurisdiction over the case, dismissed the plaintiff’s claim and annulled all procedural actions undertaken up to that point.

## **II.2 ANALYSIS OF THE DECISIONS**

The analysis of the relevant case law shows three trends.

First, with the exception of the Bijeljina case, the plaintiffs do not generally engage in the specifics of the substantive validity of an arbitration agreement. Rather, when responding to the jurisdictional challenge, the plaintiffs focus on the scope of the agreement in relation to the dispute. In doing so, the plaintiffs often do not provide further supporting evidence, but rely on the interpretation of the agreement. This line of arguments led to little success; the courts in all cases sided with the defendants that merely pointed out that an arbitration agreement exists.

The second trend shows that the courts resort to a different rule of interpretation depending on the plaintiff’s argument. Where the plaintiffs dispute the scope of the agreement, the court interprets the agreement literally. In those cases, the use of the words arbitration or to arbitrate appears to be sufficient for the courts to determine the subject matter of the obligation. In the Bijeljina case, however, where the plaintiff argued the impossibility of the obligation, the court went a step further and sought to identify the underlying intent of the parties.

The third trend shows that the courts, notwithstanding the parties’ arguments, find support in their decision in the fact that the plaintiffs did not seek termination of the agreement. While the Civil Procedure Code envisages several situations in which the parties may do so,<sup>28</sup> the courts seem to indicate a liberal approach in terms of grounds for termination. Thus, following the line of reasoning in the six decisions above, the parties may seek annulment due to any lack of formal and substantive validity of an arbitration agreement. The courts, therefore, appear to adopt a wholesome approach to the dual nature of an arbitration agreement, allowing its termination due to cases of procedural obstacles (that may also lead to dilatory tactics), as well as the grounds of general contract law.

Notwithstanding the positive trends, the factual and legal issues are simple and straightforward. In the prospect of case law that may involve more complex disputes, an overview of the legal framework would assist the practitioners in their approach to strategic litigation.

## **III. Arbitration Agreement and its Effects on the Jurisdiction of National Courts**

A valid arbitration agreement, under Art. 438 of the Civil Procedure Code, operates as a prorogation clause. By agreeing to arbitrate their dispute, the parties derogate from the jurisdiction of the national courts.<sup>29</sup> To have such an effect, however, the

arbitration agreement must meet three main conditions. *First*, it has to be formally and substantively valid. *Second*, it must encompass the same parties and the same dispute as for the one brought before the seized court. *Third*, the defendant must challenge the jurisdiction of the court at latest in his response to the statement of claim. The national court must assess whether all of these requirements are met, before it dismisses the claim, annuls all procedural actions and declares it does not have jurisdiction to entertain the case.

### III.1 Validity of an arbitration agreement under the bosnian law

An interplay of Civil Procedure Code and the Law on Contracts and Torts define the validity requirements of an arbitration agreement; in doing so, the existing framework adopts the contractual and procedural nature of an arbitration agreement.

#### III.1.1 Formal validity of an arbitration agreement

Bosnian contract law stands on the principle of contractual informality; as a result, the parties do not have to conclude their agreements in a particular form.<sup>30</sup> An exception exists where principles other than that of contractual informality ought to be protected. A typical example of such an exception is sales of land. To safeguard the transfer of ownership, the Bosnian property laws require the parties to sign such contracts before a notary in form of a notarial deed before a notary.<sup>31</sup>

In the context of arbitration, the legislator deemed it necessary to prescribe the written form in light of procedural effects of an arbitration agreement. An arbitration agreement is valid only if made in writing and signed by all parties involved.<sup>32</sup> The written requirement may also be satisfied by (a) exchange of letters, telegrams, telex or other means of telecommunication that allow a written trace; (b) exchange of statement of claim and statement of defense, if the defendant does not raise any objections in its statement of defense; or (c) if an arbitration clause is contained in the general terms and conditions.<sup>33</sup>

The outlined requirement is in line with Art. II of the New York Convention and Art. 7 of the UNCITRAL Model Law. Nonetheless, an arbitration agreement is also contractual in nature and must also comply with the validity requirements set out in the Law on Contracts and Torts.

#### III.1.2 Substantive validity of an arbitration agreement

The parties may enter into an arbitration agreement concerning their current or future disputes, as long as such dispute stems from a particular legal relationship.<sup>34</sup> The parties are further free to regulate in their agreement the procedural aspects of the arbitration as they deem appropriate; however, in doing so, they must adhere to three fundamental rules of contract law.

*First*, the subject matter of an arbitration agreement – the obligation to arbitrate the dispute arising out of or in relation to the underlying agreement – must be *permissible*, *possible*, and at least *determinable*.<sup>35</sup> The absence of any of the three requirements

makes the agreement null and void.<sup>36</sup> The assessment of the three requirements in the context of arbitration agreement stems from its procedural nature.

An obligation is permissible if it does not contradict the BiH Constitution, the mandatory laws and the moral of the society.<sup>37</sup> Applying this rule to arbitration agreements turns the permissibility requirement to question of arbitrability. The Civil Procedure Code incorporates this requirement by equalizing the arbitrability with the principle of disposition.<sup>38</sup> Consequently, the parties may dispose of their rights as long as it is not contrary to the mandatory norms of the Bosnian legal system.<sup>39</sup> This would be the case, for example, in family-related matters or transactions concerning the immovable property. In any event, examining this rule happens on the case by case basis. This further puts a burden on the courts and ensures their active role; namely, the courts have an *ex officio* obligation to assess the relevant laws that the parties invoke and determine whether they can, in fact, seek court protection. By ensuring that the parties do not violate the mandatory norms at any point of litigation, the courts safeguard the legal system of the country.

The *possibility* of arbitrating a dispute is a question of the practical execution of the obligation.<sup>40</sup> Consequently, this criterion may become relevant if an arbitration institution no longer exists. Depending on the parties' intent, the answer may be either to uphold the agreement or to annul it. On one end, the Bosnian theory of contract law adopts the position of absolute impossibility.<sup>41</sup> Thus, as long as it is objectively possible to arbitrate the dispute, the arbitration agreement is valid. Put differently, as long as there is an arbitration institute that can administer the arbitration, the agreement is valid.

As a matter of practice, the parties choose the arbitration carefully, taking a number of factors into account. The parties, therefore, often design their entire dispute resolution mechanism with a particular arbitration institution in mind. Cessation of an arbitration institution may amount to a fundamental change of circumstances that affects the execution of the agreement and, therefore, constitutes a ground for its termination. The latter is possible, if the agreement no longer fulfills its intended purpose and, in general view, should not remain in force.<sup>42</sup> However, a party may, to keep the agreement in force, proposes or agrees to change the terms of the agreement.<sup>43</sup>

The court should, in any event, examine the parties' intent to determine the parties' intent and the time of the contract conclusion and whether they would have concluded an arbitration agreement knowing that the designated institution no longer exists.<sup>44</sup> The rules of interpretation in this regard are twofold: (a) the courts examine the literal meaning of the contract, and (b) in case of disputed terms, the court ought to interpret the agreement in line with the intent of the parties and in accordance with the principles of contract law.<sup>45</sup>

It is possible to determine the scope and content of an obligation if the parties have provided sufficient information in the agreement.<sup>46</sup> The Bosnian legal theory generally differentiates between specifically identified goods (*species*) and the type of goods





that can be easily replaced (*genus*).<sup>47</sup> The content of obligation to arbitrate does not necessarily fit within such traditional concept. Thus, the appropriate interpretation should determine whether the parties have, in their arbitration agreement, provided sufficient information that shows their intent to arbitrate and the manner in which this obligation will be carried out. The latter includes the essential elements of an arbitration agreement, such as the identification of the underlying agreement, the composition of an arbitral tribunal, any limits or conditions concerning the commencement of an arbitration. As such, this requirement ought to be fairly straightforward: the arbitration agreement is an evidence of the parties' intent to arbitrate.

Nonetheless, badly drafted arbitration clauses may leave room for interpretative problems in terms of determining whether the obligation was to arbitrate, and if yes, under what conditions (if any). In terms of latter, the conditions may be a duty to attempt amicable settlement, negotiation or mediation before resorting to arbitration; this issue has arisen mostly in relation to construction agreements that contain a multi-tier dispute resolution clauses.<sup>48</sup> The possibilities in terms of pathological clauses are broad; nonetheless, the Bosnian legal theory adopts the principle that the obligation should be at least determinable.<sup>49</sup> Therefore, as long as the rules of the interpretation result in deducing the bare elements of an arbitration, the arbitration agreement should be upheld.

*Second*, the agreement must be concluded between the parties freely. In the event an agreement was concluded due to fraud (*prevara*), deceit (*zabluda*) or duress (*prijetnja*), a party may ask its annulment before the court.<sup>50</sup> In these cases, however, the affected party must request the court to declare the agreement as null and void.<sup>51</sup> Otherwise, the agreement remains in force.

*Third*, the parties executing an arbitration agreement must have the legal capacity or authorization to do so.<sup>52</sup> A vast majority of parties to the agreements are companies, the general rule is that

only the legally authorized representative of the company can sign an arbitration agreement. This is typically the managing director (CEO) of a company; however, it can also be a *procura* holder or a proxy (e.g., authorized attorney). In any event, the relevant information concerning the authorized person (persons) and the limitations to their authorizations are registered in the competent court register. The information is publicly available. In the event this rule is violated, the affected party may seek termination of the agreement or the parties may agree to remedy the deficiencies.

### III.2 Scope of arbitration agreement and the statement of claim

The commentaries on Civil Procedure Code do not elaborate further on the scope of the second requirement.<sup>53</sup> The underlying reasoning can be found in the general rules of civil procedure. More specifically, the court, when assessing the statement of claim, or at any later stage of the procedure, ought to respect *lis pendens* and *res judicata* rules.<sup>54</sup> In the event there is a pending dispute between the same parties in the same dispute before another court, then the second seized court ought to dismiss the claim and declare it does not have jurisdiction. The same result would happen if there is a court decision settling the same dispute between the same parties on the same legal and factual grounds. Thus, the Civil Procedure Code aims to prevent parallel proceedings and to ensure full respect with the *res judicata* principle. A broad interpretation of the said principle found its place in the context of the arbitration: the court will not adjudicate a case if the arbitration clause encompasses the same parties in the same dispute that has been brought before it.

### III.3 Challenging the jurisdiction of the court - overview of procedural rules

The civil procedure in Bosnia is implemented in three main stages: the preliminary assessment of the statement of

claim, notice of the defendant and schedule of the preliminary hearing and the trial. The third requirement, therefore, concerns the phase in the procedure when the defendant may challenge the jurisdiction of the court.

Already at the first stage, the court may, *ex officio*, dismiss the claim due to lack of jurisdiction. The Civil Procedure Code puts forth a list of criteria that the court examines; in doing so it ensures the respect of one of the fundamental rules of civil procedure: only the court that has jurisdiction can adjudicate a dispute. The list of these *ex officio* criteria include, *inter alia*, the existence of an ongoing case concerning the same claim and the same parties (*lis pendens*), the existence of a final and binding judgment concerning the same claim(s) and between the same parties (*res judicata*) and lack of absolute court jurisdiction.<sup>55</sup> The latter criterion, however, does not encompass the assessment of an arbitration agreement. In other words, a valid arbitration agreement is not an *ex officio* criterion that the court must take into account at this stage. Even if the plaintiff's supporting evidence contains such a clause, the court cannot take into account. Therefore, it is only the defendant who can challenge the jurisdiction of the court, and she can only do so at latest in the response to the statement of claim.

The second stage covers the notice to the defendant and her response to the statement of claim and scheduling of the preliminary hearing. The defendant is required to file a statement of defense within 30 days upon receiving notice on the statement of claim.<sup>56</sup> Aside from challenging the main claim, the defendant is also required to raise all procedural objections in its statement of defense.<sup>57</sup> The Code does not list the objections; thus, the defendant may raise (a) any of the *ex officio* criteria discussed earlier, (b) as objections any of the procedural irregularities that may also operate as grounds for an appeal or other remedies,<sup>58</sup> and (c) other objections envisaged in the Code.<sup>59</sup> Where the defendant raises several objections to the claim, the court should apply the principle of the most efficient objection. In other words, the court should accept the objection that is, compared to other objections, the most "appropriate" one to lead to the rejection of the claim.<sup>60</sup> Time-wise, the defendant is generally required to raise all of his objections in the response to the statement of claim, or at latest, at the preliminary hearing.

The defendant, therefore, may challenge the jurisdiction of the court due to an existing arbitration clause. Unlike with objections that court monitors *ex officio*, the challenging jurisdiction due to a valid arbitration clause only has effects if raised by the defendant in her response to the statement of claim. In the event the defendant does not do so, it is deemed that she tacitly agreed to terminate the arbitration agreement and has, in fact, expressed the intent to litigate the dispute.

Notwithstanding the above, the outcome of the case depends not only on the parties' arguments but also their procedural behavior and ability to present enough evidence to allow the court to decide. In certain cases, it may be possible that the court decides in favor of arbitration not because the interpretation necessarily supports such decisions, but due to the standard of proof rules or the procedural behavior of the parties. Specifically, the Civil Procedure Code adopts the principle of factual truth: the

court decides only within the scope of the parties' arguments and presented evidence. The court does not have an inquisitorial role and, therefore, cannot order the parties to produce evidence where it may be necessary. Therefore, the parties have an important role to ensure that their case is presented fully. In the event a party makes an argument without providing sufficient evidence (or no evidence at all) to support it, the court will not take those arguments into account when rendering its decision. The example of this is the decision of the Municipality Court of Sarajevo no. 65 0 Ps 307722 12 Ps from 2 October 2013.

As the analysis of the relevant case law indicates, these fundamental principles play an important and in certain cases the decisive, role in the decision-making process.

### CONCLUDING REMARKS

The analysis of the relevant case law in conjunction with the analysis of the relevant legal framework on the validity of an arbitration agreement, its nature and procedural effects on the jurisdiction of the courts, generally shows that it is rather difficult to challenge the validity of an arbitration agreement under Bosnian *lex arbitri*.

As almost all contracts are concluded in written form, the parties will most likely not be in a situation where they can successfully challenge the formal validity of an arbitration agreement. Challenging the substantive validity due to lack of intent to arbitrate or unclear scope of an arbitration agreement will most likely be equally challenging. As the case law shows, the courts find the written form sufficient evidence of an intent to arbitrate. Even in cases where the designated arbitration institution seized to exist, the courts sought to determine the broad intent of the parties to arbitrate. Therefore, there appears to be a tendency to support enforcement of arbitration agreements. The same result would likely happen where parties challenge an arbitration agreement on the grounds of arbitrability. As the concept is rather broad in the Civil Procedure Code and supported by the Law on Contracts and Torts and the Law on Foreign Direct Investment, the courts would follow the liberal interpretative trend and rule in favor of arbitration. There may be one potential 'soft spot' allowing the parties to challenge the validity of an arbitration agreement: lack of authorization for the conclusion of an arbitration agreement. The plaintiffs that opt for this challenge should provide all the supporting evidence allowing the court to decide.

Irrespective of the strategy the parties opt for, it is paramount that they present supporting evidence. Otherwise, they face the risk of their arguments being dismissed, although they may have merits.

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- 2 According to the report of the Federal Agency for Promotion of Investment (FIPA), in the first quarter of 2017 there is an increase of foreign investment of 28,7% compared to the same period of last year. The overview of the flow of foreign investments is available at the following address: <<http://www.fipa.gov.ba/informacije/statistike/investicije/default.aspx?id=180&langTag=bs-BA>> and <<http://www.cbbh.ba/press/ShowNews/1151>>.
- 3 See World Bank, *Doing Business 2017: Equal Opportunity for All*, available at the following address: <<http://www.doingbusiness.org/reports/global-reports/doing-business-2017>>.
- 4 See, for example, the report at the following address: <<http://ba.ekapija.com/news/1880150/sta-bi-bih-mogla-da-uradi-na-povecanju-stranih-investicija-proizvodno-izvozna>>.
- 5 See recommendations for business reform of the Foreign Investors Council (FIC), available at the following address: <<http://www.fic.ba/uimages/udocs/Bijela%20knjiga%202015-16.pdf>>, pp. 80-81.
- 6 See, for example, the Queen Mary University of London, *2015 Survey: Improvements and Innovations in International Arbitration*, available at the following address: <http://www.arbitration.qmul.ac.uk/research/index.html>, p. 7.
- 7 See HCJP's Project *Improving Court Efficiency and Accountability of Judges and Prosecutors in BiH - Phase 2* available at the following address: <<http://vstv.pravosudje.ba/>>. HCJP also co-operated with the Association ARBITRI on the project aimed at collecting and analyzing arbitration related court decisions, *infra* note 9.
- 8 The Association ARBITRI, an association of young professionals for the reform of the arbitration framework in Bosnia, recently published a report on arbitration-related court decisions. Out of 97 reported decisions, only 7 were related to arbitration (7,2%). This was mostly due to wrongly registered cases in the court system. Thus, the Association ARBITRI, with the support of the High Judicial and Prosecutorial Council, proposed a series of short-term and long-term measures to further build the capacity of the judiciary. The full report is available at the following address: <[http://associationarbitri.com/?page\\_id=1256](http://associationarbitri.com/?page_id=1256)>.
- 9 On 21 November 1995 in Dayton (Ohio, the U.S.) the presidents of Croatia, Serbia, and Bosnia and Herzegovina signed the General Framework Agreement for Peace in Bosnia and Herzegovina, which marked an end to the four-year civil war. This international treaty, also known as the Dayton Peace Agreement, aimed to achieve two goals: First, end the war and establish peace. Second, to provide a stable framework to enable the country's transition from (a) a state of war to a state of peace, and (b) from a former socialist governance to a democratic society. For further discussion see CHRISTIAN STEINER/NEDIM ADEMOVIĆ, ET AL., *USTAV BOSNE I HERCEGOVINE: KOMENTAR*, Sarajevo: Fondacija „Konrad Adenauer“, pp. 1-31 (2010). There are eleven annexes to the Dayton Peace Accords; Annex IV being the Constitution of Bosnia and Herzegovina (hereinafter, the *BiH Constitution*) that defines its legal, political and territorial structure. Official text of the Dayton Peace Accords (including Annex IV) is available on: <https://www.state.gov/p/eur/rls/or/dayton/>. Interestingly, there is no official translation of Annex IV to one of the official languages of Bosnia, nor was it ever published in the Official Gazette of BiH. There have been unofficial translations of the document in the official languages of Bosnia, see e.g. translation in Croatian available on the website of the BiH Constitutional Court: <http://www.ustavisud.ba>.
- 10 Article III of the BiH Constitution defines the competences of the state, relationship between the state and the entities, and transfer of competences from the entities to the state. Institutions of Bosnia have exclusive competences in only ten areas: (1) foreign policy; (2) foreign trade policy; (3) customs; (4) monetary policies; (5) financing the agencies and international obligations of the state; (6) immigration; (7) implementing international and inter-entity criminal legislation, including relationships with Interpol; (8-10) establishing and operating common and international communication means, interstate land and air transport.
- 11 The term civil law is used broadly here and is meant to encompass the civil procedures (litigation, enforcement procedure, mediation and arbitration), as well as the law of contracts and torts, corporate and commercial law.
- 12 Law on Civil Procedure (*Official Gazette of Federation of BiH*, nos. 53/03, 73/05, 19/06 and 98/15); Law on Civil Procedure (*Official Gazette of Republic of Srpska*, nos. 58/03, 85/03, 74/05, 63/07, 49/09 and 85/13); Law on Civil Procedure (*Official Gazette of Brčko District*, nos. 8/09, 52/10 and 27/14). While the title of the laws is the same, they are in fact three different pieces of legislation applicable in FBiH, RS and BD, respectively. However, the three texts are almost identical. Thus, unless indicated otherwise, the relevant provisions of the Civil Procedure Code of FBiH cited here are relevant for the Civil Procedure Code of RS and BD as well.
- 13 See Arts 434-453 of the Civil Procedure Code.
- 14 For a general overview of the system, see e.g., Mile Lasić, Željko Galić, *Arbitražno rješavanje međunarodnih trgovačkih sporova*, 8 Zbornik radova Aktualnosti građanskog i trgovačkog prava i pravne prakse 141 (2010).
- 15 For example, the formal validity of an arbitration agreement, discussed *infra*.
- 16 For example, in the event the arbitrator is not appointed in a timely manner, the parties may, under Art. 440 of the Civil Procedure Code, seek annulment of the arbitration agreement before the national court. Such approach is not fully in line with Art.11 of the UNCITRAL Model Law.
- 17 Law on Obligations (*Official Gazette of Former Yugoslavia*, nos. 29/78, 39/85, 45/89 and 57/89) (*Official Gazette of R BiH*, nos. 2/92, 13/93 and 13/94) (*Official Gazette of RS*, nos. 17/93 and 3/96).
- 18 BiH Law on Conflict of Laws with Other Countries (*Official Gazette of Former Yugoslavia*, nos. 43/082 and 72/82 – 1645) (*Official Gazette of R BiH*, nos. 2/92-5 and 13/94-189).
- 19 Law on Enforcement Procedure (*Official Gazette of Brčko District*, no. 39/13); Law on Enforcement Procedure (*Official Gazette of Federation of BiH*, nos. 32/03, 52/03, 33/06, 39/06, 39/09, 35/12 and 46/16); and Law on Enforcement Procedure (*Official Gazette of Republic of Srpska*, nos. 59/03, 85/03, 64/05, 118/07, 29/10, 57/12, 67/13 and 98/14). The three texts are almost identical. Thus, unless indicated otherwise, the relevant provisions of the Enforcement Act of FBiH cited here are relevant for the Enforcement Acts of RS and BD as well.
- 20 The Former Yugoslavia was one of the signatory countries to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention was ratified by the Law on Ratification of the Convention on Recognition and Enforcement of Foreign Arbitral Awards. Upon dissolution of the Former Yugoslavia, its countries, including Bosnia, assumed the New York Convention by a form of succession. They did so by virtue of Art. 34 of the Vienna Convention on Succession of States in Respect of Treaties, which Bosnia signed on 22 July 1993. The New York Convention entered into force in BiH on 6 March 1992. Under the BiH Constitution, the New York Convention is directly implementable in BiH. Bosnia made two declarations to the application of the Convention - (a) with regard to awards made in the territory of non-contracting States, Bosnia will apply the New York Convention only to the extent to which those States grant reciprocal treatment and (b) Bosnia will apply the New York Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law - and one reservation with regards to retroactive application of the New York Convention.
- 21 Under Art. II/2 of the BiH Constitution (International Standard), rights and freedoms envisaged by the European Convention for Protection of Human Rights and Basic Freedoms and its protocols have direct application in Bosnia (henceforth *ECHR*). Thus, for the ECHR to be applied in Bosnia, there is no need for a special implementing act to be adopted. Consequently, the courts have an obligation to take into account provisions of the ECHR when resolving a dispute, and should also monitor whether the relevant provision of a domestic statute are in line with the ECHR and the Constitution.
- 22 Except for the case of Cantonal Court in Mostar decision no. 58 0 Pš 059934 11 Pz dated 17 November 2011, all other cases are reported in the Association ARBITRI Report, *supra* note 9, pp. 10-12.
- 23 The dispute between the parties found its way to International Center for Settlement of Investment Disputes. The Slovenian investors initiated arbitration against Bosnia before ICSID. The case is registered as *Elektrogospodarstvo Slovenije - razvoj in inženiring d.o.o. v. Bosnia and Herzegovina* (ICSID Case No. ARB/14/13); further information on the status of the case is available at the following address: <<https://icsid.worldbank.org/en/>>.
- 24 As this is a construction agreement, it is likely that the board parties referred to is a form of dispute adjudication board present in the FIDIC template agreements and used in large infrastructure projects, such as is the one in question here.
- 25 The Regulatory Commission for Energy in Federation of Bosnia and Herzegovina (FERK) is the regulatory energy body of FBiH. Aside from the regulatory acts governing the production, distribution, supply and sale of electricity in FBiH, in 2005 FERK also enacted its Rulebook on Arbitration. The Rulebook was later amended in 2014 and 2016. In terms of scope, the Rulebook, *inter alia*, cover disputes between license holders, as well as between license holders and end users, concerning the distribution, supply and sale of electricity. The text of the rules in local language is available at the following address: <[http://www.ferk.ba/\\_ba/akti-ferk-a/pravilnici/18556-pravilnici-ferk-a](http://www.ferk.ba/_ba/akti-ferk-a/pravilnici/18556-pravilnici-ferk-a)>. General information on FERK is available at the following address <[http://www.ferk.ba/\\_ba/](http://www.ferk.ba/_ba/)>.

- 26 The General Terms for Delivery of Electricity that the plaintiff refers to are one of the FERK's regulatory acts. The text of the terms in local languages is available at the following address: <[http://www.ferk.ba/\\_ba/akti-ferk-a/pravilnici/18555-opsti-uslovi-za-isporuku-elektricne-energije](http://www.ferk.ba/_ba/akti-ferk-a/pravilnici/18555-opsti-uslovi-za-isporuku-elektricne-energije)>.
- 27 The author does not have access to the full text of the decisions. The holding and the reasoning of the court are reported in the bulletin of case law in local languages. For the report in local languages, see *Domaća i strana sudska praksa (2011)* p.
- 28 See Arts 440-441 of the Civil Procedure Code that allow the parties to seek annulment of an arbitration agreement where the presiding arbitrator or other members of the panel were not appointed duly or refuse to assume the duty to arbitrate.
- 29 District Commercial Court in Bijeljina, decision no. 59 0 Ps 018507 12 Ps 3 dated 17 September 2012.
- 30 See e.g. Art. 69 of the Law on Contracts and Torts. Contract form has a dual role in Bosnian contract law. On one end, it may operate as a requirement of contract validity. Such requirement, however, has to be expressly stipulated in the relevant laws. Otherwise, the Law on Contracts and Torts in its Art. 67 prescribes the principle of non-formality. On the other end, the form of an agreement, if not mandatory in terms of contract validity, it may serve an evidentiary purpose, the form agreed by the parties evidences the existence of a contract. While the law stands on the non-formality principle, in practice most of the contracts are entered into in some form of written form.
- 31 See, for example, Art. 53(2) of the FBiH Property Law in conjunction with Art. 73(4) of the FBiH Law on Notaries.
- 32 *Id.* See also, Art. 70(1) of the Law on Contracts and Torts. An agreement that is not concluded in the prescribed form does not have legal effects; as an exception, however, purposeful interpretation may lead to a different conclusion.
- 33 Arts. 435(2) and 436 of the Civil Procedure Code. Similar written requirements exist for choice of court agreements. Thus, it may well be that the Civil Procedure Code treats arbitration agreements and choice of court agreements in the same manner. Both are contractual ways to derogate from the jurisdiction of the courts, with the exception that the with a choice of court agreement parties remain in the system of the judiciary, while with an arbitration agreement they aim to be outside of such system.
- 34 Art. 435(1) of the Civil Procedure Code.
- 35 Arts. 46(2) and 47 of the Law on Contracts and Torts.
- 36 Arts 47 and 103 of the Law on Contracts and Torts.
- 37 Art. 49 and Art. 103(1) of the Law on Contracts and Torts.
- 38 Arts. 434 and 2 of the Civil Procedure Code.
- 39 *Id.*
- 40 Art. 47 of the Law on Contracts and Torts. See also commentary on this issues in BORISLAV T. BLAGOJEVIĆ I VRLETA KRULJI, KOMENTAR ZAKONA O OBLIGACIONIM ODNOSIMA, Savremena Administracija Beograd (1980), pp. 151-153.
- 41 See BLAGOJEVIĆ, *supra* note 35, p. 152.
- 42 Art. 133(1) of the Law on Contracts and Torts.
- 43 Art. 133(4) of the Law on Contracts and Torts.
- 44 *Id.*
- 45 Art. 99 of the Law on Contracts and Torts.
- 46 Art. 50(1) of the Law on Contracts and Torts.
- 47 See BLAGOJEVIĆ, *supra* note 35, pp. 157-160.
- 48 See e.g. decisions of the Municipality court in Sarajevo nos 65 0 Ps 014258 13 Ps dated 12 March 2013 and 65 0 Ps 106510 09 Ps dated 1 December 2010, both discussed *supra*.
- 49 See Blagojević, *supra* note 35, pp. 157-160.
- 50 Arts 60 (duress), 61 (deceit) and 65 (fraud) and 111-112 of the Law on Contracts and Torts.
- 51 *Id.*
- 52 Arts 54-59 of the Law on Contracts and Torts.
- 53 See, for example, ZLATKO KULENOVIĆ ET AL., KOMENTARI ZAKONA O PARNIČNOM POSTUPKU U FEDERACIJI BOSNE I HERCEGOVINE I REPUBLICI SRPSKOJ (2005), pp. 674-675.
- 54 Art. 67(1)(3)-(4) of the Civil Procedure Code.
- 55 See e.g. *Supreme Court of FBiH decision no. 17 0 P 040507 16 Rev dated 20 September 2016* reported in *Domaća i strana sudska praksa 1 (2017)*, where the court ruled that: “[t]he court has to reject the claim if it determines that there are ongoing proceedings between the same parties on the same matter or if there is an existing court judgment (*res judicata* principle). However, if the court does not have sufficient facts to make a decision on this matter, it can continue with the proceedings and make its decision once it has sufficient material to do so.”
- 56 Otherwise, the court may render a default judgment provided that other requirements are met. See Art. 70 of the Civil Procedure Code. For a discussion on the default judgment, see e.g. Muhamed Cimirotić, *Odgovor na Tužbu – dužnost ili pravo, od prijema ili od dostave tužbe?*, 3 Anali Pravnog fakulteta Univerziteta u Zenici, 6, pp. 149-179, available online: [http://www.prf.unze.ba/Arhiva\\_Anali.html](http://www.prf.unze.ba/Arhiva_Anali.html). In its statement of defense, the defendant may opt to concede to the claims raised, in which case the court will, at this early stage of the procedure, render a confession judgment. See Art. 71 of the Civil Procedure Code.
- 57 Art. 70(2) of the Civil Procedure Code.
- 58 Other grounds include a procedural time limit for bringing a claim has lapsed and the claim is, therefore, inadmissible; the plaintiff cannot bring the claim as he is not authorized to do so (active procedural legitimacy); the defendant cannot be sued in the given case as (passive procedural legitimacy); or the plaintiff's attorney or legal representative lacks proper authorization in the procedure.
- 59 E.g., challenging the jurisdiction due to an arbitration agreement under Art. 438 of the Civil Procedure Code.
- 60 *Supreme Court of FBiH decision no. 18 0 P 009943 13 Rev dated 30 June 2016* reported in *Domaća i strana sudska praksa 4 (2016)*, pp. 95. Note, however, that the court does not explain on which grounds a court should assess the raised objections and upon which consideration it should render its judgment. See also, *Cantonal Court in Tuzla decision no. 126 0 P 027777 15 Gz dated 10 February 2016* reported in *Domaća i strana sudska praksa (2016)*, p. 76-77. There the court ruled that “[w]hen the defendant in the course of the proceedings raises two objections that may lead to the rejection of the claim, the court should assess which of the two is most suitable to lead to the rejection. The defendant raised two objections: one concerning the statute of limitation and one concerning the passive legitimacy. The court confirmed the lower court's reasoning that the objection concerning passive legitimacy is more suitable since the statute of limitation objection can be raised only by the defendant that has passive legitimacy.”



# EXCLUSION OF LEGAL COUNSEL IN INTERNATIONAL COMMERCIAL ARBITRATION

By Tea Blakaj<sup>1</sup>

## Abstract

Where does one begin when opening a subject such as international commercial arbitration? Especially if one is to open the subject of conflict of interest. I believe it is to be a well thought out fact that this field could be considered, beyond any doubt a *Pandora's box*, something that when opened, brings all kinds of different issues. There are no questions raised upon the benefits of international commercial arbitration and those will not be a topic of a discussion in this paper. In order to demonstrate why I dared to put commercial arbitration and a certain mythological creature in the same sentence, I will drive reader's attention to the issue of exclusion of legal counsel in international commercial arbitration dispute. This topic is of a particular interest since it overrides a party's own choice, when all of commercial arbitration *enthusiasts* know that arbitration's *forte* lies within the will of the parties.

When talking about arbitrator's ethics, different thoughts pop up: an arbitrator is a person of trust, an expert in the field and someone chosen by the parties, which is in absolute accordance with the principle of *party autonomy* that makes a certain basis for the whole arbitration process to

function. Yet, when there is a person or a panel that shall judge fairly and impartially, taking into account the responsibility of deciding on any matters raised during the process when there is no agreement<sup>2</sup>, one shall ask the following: does exclusion of legal counsel in the case of conflict of interest, fall within tribunals inherent power? Taking into account *Hrvatska*<sup>3</sup> and *Rompetrol*<sup>4</sup> case which serve as landmark on the issue, I will try to give an answer to this question. While talking about international commercial arbitration process, one has to bear in mind the many characteristics of people, sharing the vocation of an international arbitrator: knowledge, expertise, diploma of the most prestigious universities, experience from performing in various legal systems<sup>5</sup>. However, their competences and ethics are brought into question while discussing the exclusion or disqualification of legal counsel from the proceedings. Even though their discretionary powers are to be considered of a wide range, possibility of an exclusion of legal counsel remains to be debated whether or not falls within those powers, and whether or not it collides with a guaranteed right to counsel. And you know how they say: where there's smoke there's fire.

*\*Win or lose, do it fairly.*<sup>6</sup>

## I. Introduction

The world of international commercial arbitration is very deep and complex; however it is received well by the actors of the world of commerce. And who can blame them? Having a mechanism which allows you, rather encourages you into choosing your own rules of procedure, the arbitral institution and in the cases of ad hoc arbitration the venue, has to be enchanting. Furthermore, what could be more convenient than having a possibility of creating your own scene and choosing the main actors, as if we were talking about some Hollywood movie? It is beyond any doubt that the international commercial arbitration has a leading role among the world of commerce, but as pointed out by Alan Scot Rau<sup>7</sup>: *the devil is in the details*.

According to professor Catherine Rogers, barbers and taxidermists are subject to far greater regulation than arbitrators.<sup>8</sup> With this said, according to Professor Rogers, what is problematic is not the fact that arbitrators are subject to less exacting regulation, but that *no one agrees on how they should have been regulated*.<sup>9</sup> Taking into account the *internationality* of the commercial arbitration process, one should have in mind participation of different legal and cultural backgrounds within its core. What I consider to be problematic is the different conceptualization of certain legal institutes, which are differently approached by jurists of different legal systems. No matter how nuanced those differences are they still aren't with no influence. This is a segment that induces more problems within the arbitration process itself and it especially affects the arbitrators conduct. However, this paper will slightly touch upon arbitrator's ethics, discussing the possibility of exclusion of legal counsel in a case of conflict of interest.

When talking about the arbitration process, one should have in mind that arbitral institutions do have their own sets of rules which shall be applied if so chosen by the parties to the dispute. These rules govern the process and are directly applicable to the issues raised. There is no debate as to the already tailored explicit rules conceptualized in the arbitration rules of those institutions. What raises the question is whether arbitrators are to decide upon matters raised during the procedure, which are not foreseen by the arbitration rules? If one takes into account the UNCITRAL model law, based on which many of the aforementioned rules are tailored, it may be concluded that the arbitrators are to decide on all the matters that the parties do not agree on. Notwithstanding this fact, it is important to emphasize the lack of similar rules, when an arbitrator or the arbitrating panel is to decide whether or not they have a right to rule on a certain matter.

In light of the above, what complicates the matter further, is when a panel decides differently based on the same set of applicable rules. This is what happened in the cases of *Hrvatska Elektroprivreda v Republic of Slovenia* (hereinafter referred to as: *Hrvatska case*) and the *Romp petrol Group N.V. v Romania* (hereinafter referred to as: *Romp petrol case*), which were both governed by the ICSID arbitration rules. Both of these cases debated issue of exclusion of legal counsel from the proceedings, due to the conflict of interest with a president of arbitration panel, respectively the party appointed arbitrator. In both of cases it was found that an arbitrating panel may have an *inherent*

power to exclude counsel from the proceedings, yet while the first found parties request to exclude counsel well founded, the latter concluded that while there might be an inherent power to exclude counsel, that right should be applicable only in exceptional circumstances, when an integrity of the process is brought into question.<sup>10</sup>

Furthermore, to what extent is a persons' right to a counsel of its own choosing protected in the arbitration proceedings? I believe that under the international instruments for protection of human rights, i.e. the European Convention on Human Rights (hereinafter referred to as: ECHR) the right to counsel of one's own choosing is a parameter for exercising a right to fair trial. Taking into account that the arbitration process is not a trial and that arbitration itself produces some very unorthodox ways and thus it is necessary to look outside the box, I cannot help but wonder to what extent is the right to counsel guaranteed and whether it could be said that this essential right was overlooked by *Hrvatska* and *Romp petrol* case?

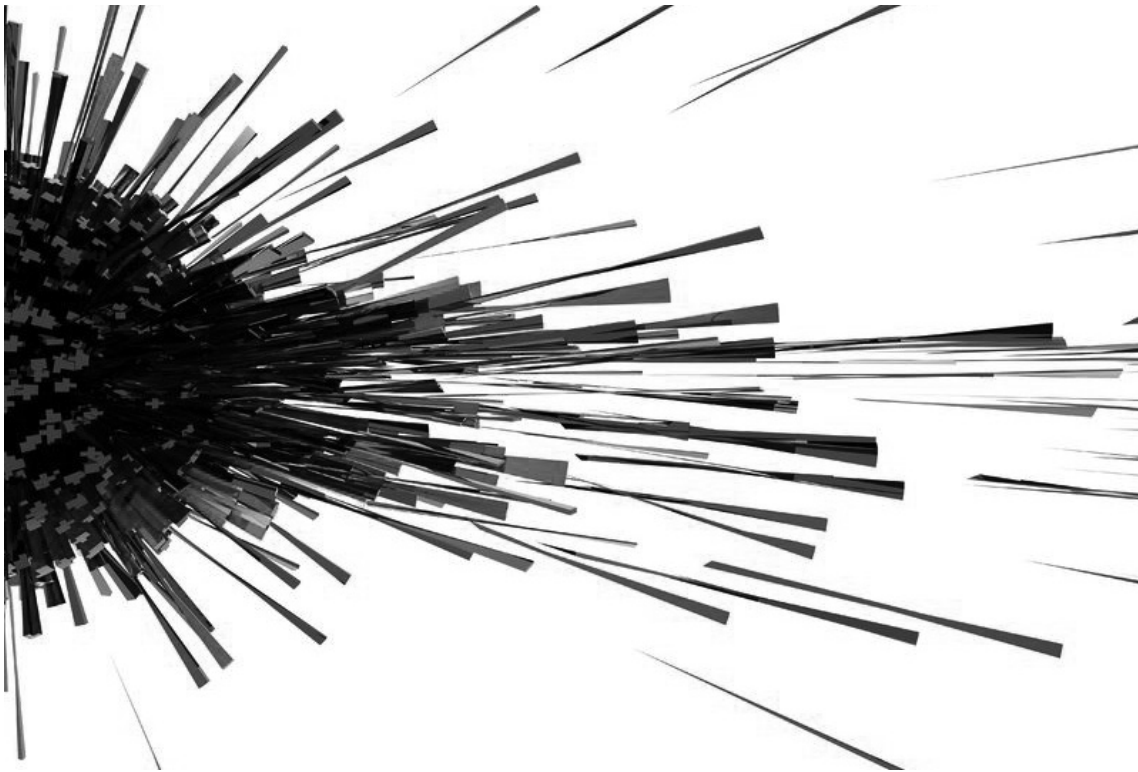
To sum up, this paper will give a modest analysis on the following: what constitutes an inherent power of the tribunal and whether it is applicable on the possibility of counsel exclusion? The analysis will be based on *Hrvatska* and *Romp petrol* cases. It will involve the ICSID rules and the IBA Guidelines on Legal Representation and the Conflict of Interest. Furthermore, it will bring into question the protection of the right to counsel of own choosing in the arbitration process, based on the international instruments for the protection of human rights.

### 1. Inherent power to exclude counsel

It is safe to say that it was *Hrvatska* and *Romp petrol* case that brought up the issue of the possibility for counsel exclusion. I believe that what triggered the debate among scholars and practitioners was that rulings on both of cases relied on the same set of rules, yet the outcomes differed.

*What does an inherent power imply?* Arbitration rules do not contain, in principle, rules on exclusion of counsel in a case of conflict of interest. My first guess would be that this is due to the protected and guaranteed right on counsel of party's own choosing, as foreseen by the human rights standards. However, rules of this particular nature are not explicitly foreseen in the arbitration rules. At least not in the ICSID arbitration rules which were applicable in both *Hrvatska* and *Romp petrol* case. In this regard, inherent power, in accordance with the aforementioned arbitration rules, involves *a power of the tribunal to decide on the question whenever parties do not agree on some procedural point that is also not, or is only inadequately covered by these Rules*<sup>11</sup>. Notwithstanding this fact, it appears that this power refers to a right guaranteed to the arbitration tribunal on the basis of its authority and without an explicit stipulation of it.

Starting from the beginning, it is inevitable to consider the ruling rendered in *Hrvatska* case, on the exclusion of legal counsel of the party. This case involved inclusion of Mr. David Mildon QC to the Respondent's legal team. According to the Claimant, Mr. Mildon was a door tenant at the same Chambers with the



President of the Tribunal and therefore a conflict of interest was caused, which threatened further course of the proceedings. In this regard, Claimant requested a disclosure from the Respondent on the: *detailed explanation of the role that the Respondent expects Mr. Mildon to play at the hearing and how long the Respondent has been planning for Mr. Mildon to participate in the presentation of the Respondent's defense at the hearing beginning in one week, including the precise date upon which Slovenia (Respondent) decided to use Mr. Mildon as part of its arbitration team, and the precise date upon which Mr. Mildon agreed to become part of Slovenia's arbitration team.*<sup>12</sup>

In addition to the above, the Respondent refused to respond to the request for disclosure, yet submitting a clarification willingly offered by Mr. Mildon, a clarification which stipulated that Mr. Mildon had no professional or personal relationship with a Mr. Williams, a President of the Tribunal, nor there were any: *"justifiable doubts as to Mr. Williams's impartiality or independence"*.<sup>13</sup>

Furthermore, the Claimant referred to the IBA Guidelines on Conflict of Interest in International Arbitration, especially General Standard 2(b) and paragraph 3.3.2 of the "Orange List", requesting full disclosure, as soon as possible, by the Respondent.<sup>14</sup> IBA Guidelines on Conflict of Interest cannot override rules applicable to the procedure, chosen by the parties. However, these Guidelines have wide applicability and acceptance within the international arbitration community.<sup>15</sup> In this regard, the Claimant referred to these Guidelines, considering that it was Respondents responsibility to disclose any information related to Mr. Mildon's relationship with the President of the Tribunal. When the Respondent refused to do more than described in the paragraph above, the Claimant asked the Tribunal to exclude Mr. Mildon from further proceedings.

Additionally, both parties agreed that they did not want

a President of the Tribunal to be the one that would refrain from further proceedings. This was explained by *the cost and delay implications that were apparent to all*.<sup>16</sup> In my own view, this is completely in accordance with the fundamental principles of international commercial arbitration: party autonomy and the efficiency of the process. Both parties agreed not to challenge the President of the Tribunal and it was in both parties interest to have gone through quick and efficient proceedings. Taking this into account, the Tribunal in Hrvatska case had to decide on their inherent power to exclude counsel, starting from the consultation of the rules guiding the procedure, concretely ICSID Convention and Arbitration Rules.

It was already stated above that ICSID Convention and Arbitration Rules do not contain specific provisions on the issue. However, according to the Tribunal ruling in Hrvatska, article 44 of the Convention: *"authorizes the Tribunal to decide on any question of the procedure not expressly dealt with in the Convention, the ICSID arbitration rules or any rule agreed by the parties"*.<sup>17</sup> This provision was interpreted in relation to the provision 56 referring to the *immutability of properly constituted tribunal*<sup>18</sup>, which overrides the fundamental principle of party's right to counsel of their own choosing.

Finally, taking into account the stated in the paragraph above, interpreted in the light of paragraph 52(1) (d) of the ICSID Convention, according to which *the proceedings should not be tainted by any justifiable doubt as to the impartiality or independence of any Tribunal member*<sup>19</sup>, the Tribunal decided it had inherent power to exclude counsel from further proceedings.

While analyzing Hrvatska case, I asked myself the following: why would the fundamental principle of a counsel of one's own choosing be overridden by the immutability of properly

constituted tribunal and, could this trigger the unenforceability of the arbitration decision through the New York Convention?<sup>20</sup>

Before digging deeper into the right to counsel of one's own choosing and its (none) support through the New York Convention, a small reference shall be made to the Rompetrol case, which gave its own view on the issue of counsel exclusion, based on the same set of ICSID Convention and Arbitration Rules.

Factual situation in Rompetrol case involved the following: a Respondent in this case, Romania wrote to the Tribunal stating that: *Mr. Legum and the Member of the Tribunal appointed by the Claimant had until recently been members of the same law firm*, therefore demanding full disclosure.<sup>21</sup> Taking into account that Claimant considered that there was neither basis nor need for further disclosure; the Respondent challenged Mr. Legume's position and invoked an inherent power of the Tribunal to exclude counsel from further proceedings, supporting its claims on the basis served in Hrvatska case.<sup>22</sup>

Due to the fact that Hrvatska cannot be considered a binding precedent, the Tribunal agreed that if there was an inherent power to exclude counsel, those powers could be exercised only in extraordinary circumstances, which touch upon the integrity of the process. Furthermore, the Tribunal considered that *a subjective claim by a party that a professional association between counsel and an arbitrator might be misunderstood does no suffice*<sup>23</sup>. Additionally, it considered that the Tribunal could not control party's representation in the process, referring to the leading decision of the UK House of Lords, which was based on Article 6 of the European Convention on Human Rights, in interpretation with the case law of the European Court of Human Rights.<sup>24</sup> Considering the stated above, the Tribunal in Rompetrol case understood that the parties did not want to challenge an arbitrator, and that the Respondent relied solely on the ruling of Hrvatska case. In light of this, it ruled that the Tribunal had no inherent power to exclude counsel and kept Mr. Legum in the proceedings.

What I personally liked about Rompetrol case was the emphasis it made upon one's right to appoint counsel of one's own choosing and a some-what defense of arbitrators vocation, concentrated in the following paragraph, cited from the decision of the Tribunal on the participation of the counsel in Rompetrol case: *those qualifications, as is well known and widely understood, are that the arbitrator must be a person of 'high moral character and recognized competence...who may be relied upon to exercise independent judgment.'* *So the question is: does a person acknowledged to have possessed those qualifications at the time of the appointment (as, for example, in the Hrvatska case itself) lose them because from now onwards some or all of the argument presented to him, while still the argument of the same litigating party, will be delivered through the mouth of a different counsel with whom he has had some of prior association?*

In addition to the above, considering the differences made by two different Tribunals in rendering their decisions in two different cases based on the same sets of rules, I cannot help but wonder: why does Rompetrol case, rightly so if you ask me, protect a right on the representation of one's own choosing in far greater way than the one made in Hrvatska, and can one say with

absolute certainty that an arbitrator's ethics cannot be challenged?

## 2. Protecting the right to a fair trial

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*<sup>25</sup> An adequate question here would be: to what extent is this right, guaranteed by international instruments on the protection of human rights, applicable in international commercial arbitration. This right, as construed in the Article 6 of the European Convention on Human Rights foresees a fair process before an independent and impartial tribunal established by law, establishing equality of arms, which refers to a right of a party to present their case through the legal representation of one's own choosing.

When talking about applicability of human rights standards on the international commercial arbitration process, I would say that one has to bear in mind two things: ability of international commercial arbitration to fall under the party autonomy and adapt to some very unorthodox ways, in relation to the *cases adjudicated by a court*; and that under a case of *Transado Transportes v Portugal* [European Court of Human Rights case], the Court held that *an arbitral tribunal is under an undisputed duty to act compatibly with the Convention rights.*<sup>26</sup>

In light of the above and in relation with the *commercial arbitration's unorthodox ways* it is important to go back one more time to cases of Hrvatska and Rompetrol. While in the first the tribunal ruled on the exclusion of a counsel, contrary to what happened in Rompetrol, in both of those cases arbitration panels (tribunals) acknowledged one's right to appointing counsel of own choosing as a fundamental principle. Additionally, it is important to emphasize that: *the character of the legislation governing how the matter is to be determined (civil, commercial, administrative law etc.) or the authority invested with jurisdiction in the matter (court, tribunal, local authority or professional body) is of little consequence; so long as that body has the power to determine the "dispute", Article 6 will apply.*<sup>27</sup>

In light of the paragraph above, and now that applicability of human rights standard is acknowledged in cases ruled by arbitration tribunals, it remains to be seen whether exclusion of legal counsel in international commercial arbitration is prohibited by international human rights standards and whether it violates a right to a fair trial.

According to the case of *Ringeisen v. Austria*<sup>28</sup>, the European Court of Human Rights decides the question of applicability of Article 6 under civil rights and obligations also. In order to invoke application of Article 6, following elements need to be fulfilled cumulatively:

- There must be a "dispute" over a "right" or "obligation";
- That right or obligation must have a basis in domestic law and finally
- The right or obligation must be of a "civil" nature.<sup>29</sup>

Furthermore, according to the criteria set out by the





European Court of Human Rights, Article 6 involves a dispute over a right or obligation when:

- It is construed in a substantive rather than formal meaning;
- May relate not only to the actual existence of a right but also to its scope or the manner in which it may be exercised;
- May concern questions of facts or law;
- Must be genuine and serious;
- Must be decisive for the applicant's rights, and must not have a mere tenuous connection or remote consequences.<sup>30</sup>

In light of the above and in relation to the exclusion of legal counsel, a dispute does exist over whether an arbitral tribunal has an inherent power to exclude counsel. But not only that: the dispute also exists over whether a party will or will not be limited in his/her right to the counsel of his/her own choosing. Furthermore, a right to counsel of one's own choosing is protected by the international instruments on human rights which are incorporated in the domestic system through their ratification and usually, in a hierarchy of legal acts, find themselves above the domestic legislation. Also, as seen from *Hrvatska and Rompetrol* cases, this right is taken into account by a tribunal and is considered a fundamental principle. Finally, this right in my opinion is of a civil nature, even though one may argue that Article 6 ECHR specifically foresees "a right of a legal assistance of own choosing" for everyone charged with criminal offence. Here is why: *Fairness* within the meaning of Article 6 essentially depends on whether applicants are afforded sufficient opportunities to state their case and contest the evidence that they consider false.<sup>31</sup> Furthermore, *fairness* includes the following implied requirements in criminal and civil cases: *equality of arms*.<sup>32</sup> Additionally, *equality of*

*arms* requires that each party be afforded a reasonable opportunity to present their case under the conditions that do not place it at a substantial disadvantage *vis-à-vis* another party.<sup>33</sup> Finally, since exclusion of legal counsel could easily imply aggravation to the party to present its case, I believe that it is with no doubt that Article 6 is easily applicable to the commercial arbitration proceedings in *Hrvatska* and *Rompetrol* cases and therefore, prohibit the Tribunal to exclude legal counsel from the proceedings, invoked on the basis of an inherent power.

In addition, one has to refer to the notion of *independent and impartial tribunal*, which guarantees a right to a fair trial. In order to determine the applicability of Article 6 on the commercial arbitration proceedings in *Hrvatska* and *Rompetrol* case, it is important to emphasize that the body rendering a decision *need not be part of the ordinary judicial machinery*. Furthermore, *members of the body do not necessarily have to be lawyers or qualified judges, and the body must have the power to make binding decisions and not merely tender advice or opinions*.<sup>34</sup>

I believe that the stated above rules beyond any doubt that a right to a counsel of one's own choosing falls within guaranteed right to a fair trial, under internationally accepted human rights standards. Also, it is applicable to the commercial arbitration proceedings as witnessed in *Hrvatska* and *Rompetrol* cases. However, I wonder whether an immutability of a tribunal overrides a right to a counsel of own choosing? In my opinion, the answer is no. A right to a counsel of own choosing is a fundamental right [as duly noted by *Hrvatska* and *Rompetrol* cases] and is protected by the international instruments on protection of human rights. Additionally, exclusion of one's counsel limits [or maybe it is safer to say *aggravates*] a party's right to present their case. Finally, rendering different decisions based on the same sets of rules, never minding the moment of

counsel's inclusion to the legal team, testifies to the fact that the opinions are divided on the issue of tribunal's inherent power. In order to determine whether counsel exclusion constitutes violation of a right to a fair trial, in the following I will consult the New York Convention on the grounds of unenforceability of an arbitration award, and whether it says anything on the aggravation of a right of a party to present their case.

### 3. New York Convention on the party's right to present their case

Both Hrvatska and Rompetrol case dealt with appointment of external counsel to the legal teams and both of tribunals needed to rule on the grounds of exclusion of counsel, depending upon the existence of an inherent power to decide on the matter. Prior to digging deeper into the New York Convention and possible grounds for refusal of recognition and enforcement of the arbitration award, I must point out to the importance of legal representation in the international commercial arbitration.

Knowing that mainly companies are parties to international commercial arbitration dispute, efficiency of the process, including party control and confidentiality make commercial arbitration a leading dispute resolution in the world of commerce. Benefits of commercial arbitration are very well known and understood, but what comes handy to exercising these benefits, its legal representation.

When one talks about party control in the process, an emphasis is immediately put on the contract, knowing that arbitration is its *creature*.<sup>35</sup> However, due to the great deal of party autonomy in the process, one has to think about an agreement, a tool that helps the parties make room for their needs. A role of legal representative is evident in this part of the process, in opting between ad hoc or institutional arbitration, and drafting the arbitration clause.<sup>36</sup> Furthermore, a counsel's role is eminent in proposing the right mean of arbitration, in order to gain speedy process and reasonable cost<sup>37</sup>, which is among main characteristics of international commercial arbitration and makes it so irresistible. *In order to perform this part of the job effectively, he or she must be knowledgeable concerning the legal framework in which arbitration occurs, the applicable arbitration agreement and arbitral rules, and the arbitration process, as well as familiar with the client, its business and the industry in which it operates.*<sup>38</sup> Additionally, when arguing and defending a role of counsel in international commercial arbitration, Professor Ugo Draetta in his paper on this particular topic, mentions the formation of a Corporate Counsel International Arbitration Group, *which is granted observer status at the UNCITRAL Working Group revising the UNCITRAL Arbitration Rules.*

Going forward to the *confidentiality* of the arbitration process, one immediately realizes the importance of this particular characteristic to the actors of the world of commerce. When opting for commercial arbitration, companies have in mind the non-publicity of the process and the rendering of the award, protecting this way their businesses and keeping the reputation flawless *per se*, for the public. I believe that this is also where a role of a counsel is eminent. When a company renders services from a certain legal firm, it has to share its means of doing business in order to secure

proper legal representation, and precisely those are information that companies keep confidential. When a large firm appoints the counsel, it is important to select and approve a counsel who will actually handle the case and the reputation of the law firm in general, good as it may be.<sup>39</sup> In addition to this, much of the conduct of the proceedings depends on the legal representation, where one shall include, among knowledge of the law, the litigation skills. In light of this, one shall conclude beyond any doubt that in determining going further with the arbitration proceedings, a party depends to their legal counsel in the great amount, knowing that it will further on make a great deal of impact on the conduct of the proceedings by enabling parties right to present their case.

New York Convention on Recognition and Enforcement of Foreign Arbitral Awards provides common legislative standards for the recognition of arbitration agreements, thus recognizing the importance of commercial arbitration. This Convention serves as a leading instrument in this regard and somewhat a relied upon weapon for recognition of an arbitral award. However, this Convention foresees grounds for refusal, if one of the reasons foreseen in Article 5 is invoked. Under Article 5(b) of this Convention: *"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"*<sup>40</sup>.

Notwithstanding the stated above, it yet remains to be determined how and to what extent a party is prohibited in presenting their case due to the counsel exclusion? Based on what stated earlier I would dare saying the following: counsel exclusion as witnessed by the cases of Hrvatska and Rompetrol is something that happens in *extraordinary circumstances*. This because a right to counsel of one's own choosing constitutes a fundamental right and, since a right to exclude counsel is not foreseen in the arbitration rules. Hrvatska and Rompetrol testify to the fact that it is not yet determined with absolute certainty whether an inherent power could or could not refer to something *fundamental* like counsel exclusion. Furthermore, legal representation is an important segment of the arbitration process. Starting from counsel's impact in drafting party's agreement, arbitration clause and making sure that an efficient process is put in place by avoiding long proceedings and bigger costs, it remains to be stated that a counsel's role is of a great significance. Moreover, a counsel is a person of trust and an *entity* sharing company's means of business and their confidentiality in doing so. Additionally, a certain counsel might be an unavoidable part of the firm, being part of its business from the very beginning. Exclusion of counsel in this particular scenario would directly contribute to aggravating party's right to presenting their case.

Finally, if counsel exclusion prevents a party from exercising their right to a fair trial before an independent and impartial tribunal as explained above, then an interested party could invoke Article 5(b) of the New York Convention and prevent a recognition and enforcement of an arbitral award, based on negation of such a fundamental right.

#### 4. Conclusion

Resolving a dispute through the means of commercial arbitration is very well received, thus contributing into promoting this mean of alternative dispute resolution *a leader* in the world of commerce. Commercial arbitration does have its roots in the performances of Grand Old Man, as professor Rogers likes to emphasize in her many papers on arbitrator's ethics. However and no matter its tradition, arbitration loves to provoke its scholars and practitioners over and over again. No matter its flexibility and easy path into finding efficiency and speediness regular courts do not provide, commercial arbitration surprises us all by challenging us in different fields; exclusion of counsel being just one of many.

Hrvatska case opened *Pandora's Box* and a great deal of discussions on whether there was or was not an inherent power of the tribunal to exclude counsel from further proceedings. Arbitration panel/tribunal in Hrvatska ruled that immutability of properly constituted tribunal overrides the fundamental principle of appointing counsel of party's own choosing. In that regard it ruled that the tribunal had an inherent power to exclude counsel, based on the Article 44 of the ICSID Convention which "*authorizes the Tribunal to decide on any question of the procedure not expressly dealt with in the Convention, the ICSID arbitration rules or any rule agreed by the parties*". In Rompetrol, the tribunal *au contraire* considered that even if there was an inherent power of the tribunal to exclude counsel, it could be invoked only if and when the integrity of the process was put at risk. Furthermore, Rompetrol protected in the great amount party's right to counsel of its own choosing refusing to meddle into that fundamental right of the process. It also touched upon arbitrator's ethics, thus protecting arbitrator's duty to act fairly and impartially, refusing to put into question arbitrator's ethics v conflict of interest.

Both those decisions made me think about the implementation of human rights standards in the commercial arbitration process and whether or not exclusion of counsel could influence violation of a right to a fair trial. Considering that commercial arbitration testifies to the fact that, in words of Victor Hugo *nothing is more powerful than the idea whose time has come*, I believe that it should avoid *human rights* implications, like those invoked in cases of Hrvatska and Rompetrol. Having in mind that parties rely completely on the autonomy of will, I couldn't help but wonder whether their unpredictability of similar situations

that left them without finding a solution to those scenarios prior to constituting a tribunal, leaves them with unenforceability of the award due to the prevention of a right to present their case and/or whether it makes room for possibilities of challenging an arbitrator by causing a conflict of interest, purposefully?!

I believe that daring to exclude party's counsel of their own choosing constitutes a violation of a right to a free trial before an independent and impartial tribunal and would absolutely agree with the ruling rendered in Rompetrol. However, I wouldn't disregard the importance of properly constituted tribunal and prior *will of the parties* to its constitution. Therefore, even though being absolutely against an inherent power in excluding counsel, I would say that a deciding moment in Hrvatska case was, as analyzed before by many scholars, a moment of brining a counsel to the legal team. If believing that everything does happen for a reason, Hrvatska case contributed to drafting IBA Guidelines on Party Representation, adopted in 2013, which serve as soft-law, applicable if decided so by the parties. Those Guidelines contain a provision under which: *Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.*<sup>41</sup> This testifies to the fact that indeed appointment of counsel of party's own choosing is a fundamental right, violation of which invokes Article 5(b) of the New York Convention and risks violation of a right to a fair trial, hence giving proper importance to the immutability of already constituted tribunal, based on the will of the parties.

Finally, I would like to point out to the significant moment, in my humble opinion, in the ruling of the tribunal in Rompetrol – a moment which referred to questioning of arbitrator's ethics when in conflict of interest with a party's counsel. The tribunal in Rompetrol wondered whether an arbitrator was to be stripped off his/her ethics when found in the conflict of interest situation. Triggered by this and the fact that a vocation of an international arbitrator yet remains to be regulated, possibly by a *universal code of ethics*, I wonder whether there is ground into questioning arbitrator's ethics and all those other qualities evolving around it. Apparently conflict of interest is a non exhaustive chamber of wonders, and will probably be a topic of my forthcoming articles.

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# CHOICE OF LAW OF AN ARBITRATION AGREEMENT – A COMPARATIVE ANALYSIS & THE PATH AHEAD

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## I. INTRODUCTION

Choice of law of an arbitration agreement is a widely contested topic. This springs from the separability presumption, that an arbitration agreement is separable from the main contract.<sup>1</sup> The proper law of an arbitration agreement assumes significance for a whole range of issues concerning the agreement including formal validity, substantive validity, scope, interpretation, parties to the agreement, assignment etc. In the absence of express choice of proper law of an arbitration agreement, there exists a divergence of opinion among courts of various jurisdictions in choosing the law applicable. According to *Dacey, Morris & Collins*, when the arbitration agreement forms a part of the main contract, “Where there is an express choice of law of the contract as a whole, that law will normally govern the interpretation of the arbitration agreement. Where there is no express choice of law, an agreement... to submit disputes to arbitration in a particular country may be

an important factor in determining whether there is an implied choice of the law of that country ...or whether the contract has its closest connection with that country.”<sup>2</sup>

In this paper, a comparative analysis of the decisions of the courts in England, Singapore and India is undertaken. While some decisions give precedence to the law governing the underlying contract, others prefer the law of the seat. Similarities and divergences in the approach of courts have been explored in detail. It is argued that the three-step formula is a desirable starting point for choice of law analysis of an arbitration agreement.

Furthermore, in suggesting a choice of law policy, the validation principle advocated by G Born, has been examined. It is argued that the validation principle is a desirable choice of law tool when the substantive validity of an arbitration agreement is in question. However, it cannot be a comprehensive choice of law tool, owing to the multitude of issues which arise for consideration, in relation to an arbitration agreement. While it may not be possible to lay down a uniform choice of law rule for all cases, the three-step formula ensures some amount of predictability and certainty.

## II. POSITION OF LAW IN ENGLAND

The courts in England have predominantly followed the three step choice of law analysis of express choice, implied choice and closest and real connection in determining the proper law of an arbitration agreement. However, there are divergences in the application of the three step formula. While some cases point to the law of the underlying contract, others point to the law of the seat. Arguably, there is a strong presumption favouring the proper law of the underlying contract expressly chosen by the parties. The issues in question in each case and the effect of choosing a particular law have played an important role in the law applied to an arbitration agreement. One also comes across cases which have straightaway applied the law of the seat, without considering other probable laws.

### 2.1 *Sulamerica* – the three step approach

*Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A.*<sup>3</sup> (“*Sulamerica*”), is a landmark judgment dealing with choice of law of an arbitration agreement. The key takeaways from the case are as follows: (i) importance of the three-step choice of law analysis (ii) governing law of the underlying contract as an implied choice (iii) the consequence of choosing a particular law as an important determinant factor.

The case concerned insurance policies with London as the seat of arbitration. There was an express choice made by the parties choosing Brazilian law as the proper law of the contract, and there was an exclusive jurisdiction clause favouring the courts of Brazil.

Lord Justice Moore-Bick opined that the law governing an arbitration agreement has to be determined in accordance with the “established common law rules for ascertaining the proper law of any contract – express choice or implied choice by the parties, failing which, the law with which the contract has the closest and most real connection.”<sup>4</sup>

The case of the insured was that the parties have impliedly chosen Brazilian law to govern their agreement. The connecting factors relied on were (i) proper law of the contract being Brazilian law (ii) exclusive jurisdiction to the courts of Brazil and (iii) the close commercial connection of the contract with Brazil.<sup>5</sup> The insurers stressed on the choice of London as the seat of arbitration, thus, arguing for English law to be the proper law of the arbitration agreement.<sup>6</sup>

Moore-Bick LJ made a reference to *Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG*<sup>7</sup>, in which it was held that the proper law of the arbitration agreement, in all likelihood, follows the substantive law of contract. The same principle was reiterated in *Sonatrach Petroleum Corp v. Ferrell International Ltd.*<sup>8</sup>, *Sumitomo Heavy Industries Ltd. v. Oil & Natural Gas Commission*<sup>9</sup> and in *Leibinger v. Stryker Trauma GmbH*<sup>10</sup>.

However, the counsel for the insurers relied on *XL Insurance Ltd. v. Owens Corning*<sup>11</sup> (“*XL Insurance*”) and *C v. D*<sup>12</sup> (“*C v. D*”) to argue that the law governing the arbitration agreement was that

of the seat. Both these cases concerned insurance contracts, which were governed by New York state law and the seat of arbitration was London. In *XL Insurance*, the formal validity of the arbitration agreement was in question, the arbitration agreement was invalid according to New York state Law, but valid according to English Law. It was held that by providing for London arbitration, the parties had impliedly chosen English law to govern issues of arbitration, including formal validity of the arbitration agreement.

Moore-Bick LJ observed that the authorities on choice of law of an arbitration agreement establish two propositions:

- (i) That even if the arbitration agreement forms a part of the underlying contract, the proper law of the arbitration agreement need not be the same as the proper law of the substantive contract; and
- (ii) Proper law is to be determined in accordance with a three stage enquiry:
  - a) Express choice
  - b) Implied choice and
  - c) Closest and real connection<sup>13</sup>

The arbitration agreement in *Sulamerica* formed a part of the main contract; the court observed that had it been a free standing arbitration agreement containing no express choice of law, the seat would have an “overwhelming” significance.<sup>14</sup> Dealing with the concept of separability, the court noted that “the concept of separability... reflects the parties’ presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention.”<sup>15</sup> The court further noted that an express choice of law governing the contract is a strong indication of an implied choice by the parties, that the same law should govern the arbitration agreement.<sup>16</sup>

In this case, though there were powerful factors pointing to Brazilian law as the proper law of the arbitration agreement, Moore-Bick LJ noted two important factors which had to be taken into consideration:

- (i) Choice of London as the seat and
- (ii) The consequence of following Brazilian Law – it would have posed a risk of either undermining the arbitration agreement or rendering the arbitration agreement unenforceable. (Under Brazilian law, the consent of both parties was required to enforce the arbitration agreement.) The court terms this as a “powerful factor” to be taken into account.<sup>17</sup>

The court next moved on to the third prong of the test and concluded that “...it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction to ensure that the procedure is effective..”<sup>18</sup> Thus, it was held that

the arbitration agreement was governed by English Law.

The most compelling factor which led the court in *Sulamerica* to disregard the law of the underlying contract, was the “validation principle”<sup>19</sup> as the arbitration agreement was valid under English law; however, it faced the risk of being rendered unenforceable under Brazilian law.

Lady Justice Hallett, in her concurring judgment, pointed out the inconsistency in the rulings of the English courts on the proper law of an arbitration agreement. However, she observed that it was a matter of “contractual interpretation...depending on all the terms of the particular contract, when read in light of the surrounding circumstances and common sense.”<sup>20</sup> She opined that one of the reasons for the approach preferring the law of the seat, could be the separability principle. In deciding on one of the two courses which the court had to take in this case, she concludes that English law would be favoured as Brazilian law would render the arbitration agreement ineffective.<sup>21</sup>

Though the court in *Sulamerica* followed the three step approach and recognized the importance of the law of the underlying contract as an implied choice of law for the arbitration agreement, the compelling factor for the court to choose English law was to give effect to the arbitration agreement. The court was guided more by the *effect* of choosing a particular law, rather than a mere application of the three step test.

The ratio in *Sulamerica* was followed in the case of *Arsanovia Ltd. and others v. Cruz City 1 Mauritius Holdings*<sup>22</sup> (“*Arsanovia*”). *Arsanovia* concerned a shareholders agreement (“SHA”) and a keepwell agreement with arbitration clauses providing the seat of arbitration as London. The SHA was governed by Indian law. There were three arbitrations heard by the same tribunal, but separate awards were rendered.<sup>23</sup> The issues which arose for consideration included the parties to the arbitration agreement and the scope of the arbitration agreement. Unlike in *Sulamerica*, the court in this case was not dealing with a question of validity of the arbitration agreement. Following *Sulamerica*, the court in *Arsanovia* reiterated that the law applicable to an arbitration agreement was to be determined by the three step formula of the English common law conflict of rules principles. The court had to decide between Indian law which was the governing law of the SHA and English law – the law of the seat of arbitration.

The analysis of the court hinged upon the choice between the two approaches in cases like *C v. D* (favouring the law of the seat) on one hand and in cases like *Sulamerica* (three step approach favouring governing law of the underlying contract as an implied choice) on the other. Andrew Smith J noted the distinction in analysis in *C v. D* and *Sulamerica* – in *C v. D*, Longmore LJ directly applied the closest and real connection test, without dealing with the second prong of implied choice, whereas in *Sulamerica*, Moore-Bick LJ dealt with each of the three prongs separately. In other words, in *Sulamerica*, after determining the law applicable by implied choice, the law having closest and real connection was considered.<sup>24</sup> *Arsanovia* relied on *Sulamerica* and observed that the “governing law clause is at least a strong pointer to their intention that the arbitration agreement in it be governed by Indian law and

there is no contrary indication other than choice of a London seat for arbitrations.”<sup>25</sup> In *Sulamerica*, apart from the choice of a seat of London, the court was compelled by the validation principle to choose the law of the seat. However, validity of the agreement was not an issue in *Arsanovia*. Thus, the court chose the law of the underlying contract as the proper law of the arbitration agreement due to the “close affinity between implication of terms and the interpretation of express terms.”<sup>26</sup>

The decisions in *Sulamerica* and *Arsanovia* demonstrate the importance of the issues in question and the effect of choosing a particular law, while deciding on the choice of law of an arbitration agreement. While both these decisions applied the three step formula and recognized the importance of the law of the underlying contract as an implied choice, they arrived at different conclusions.

## 2.2 Law of the seat approach

Quite in contrast with the three step formula and the predominance given to the law of the underlying contract as an implied choice, there are rulings of the English courts which have directly applied the law of the seat, without undertaking a detailed choice of law analysis.

In *Abuja International Hotels Limited v. Meridien SAS*<sup>27</sup> (“*Abuja*”), the agreement in question contained an arbitration clause that provided for the arbitration to take place in London, before the International Chamber of Commerce.<sup>28</sup> The management agreement was governed by the laws of Nigeria.<sup>29</sup> Abuja challenged the substantive jurisdiction of the tribunal, on the grounds that, *inter alia*, (i) the arbitration agreement was invalidated by the Constitution of Nigeria, (ii) the entire management agreement was invalidated due to non-compliance with certain mandatory provisions of the Companies Act of Nigeria and (iii) the arbitration agreement was contrary to public interest.<sup>30</sup>

While dealing with challenges to the substantive jurisdiction of the arbitration agreement, the court considered the following issues “(i) whether there was a valid arbitration agreement (ii) whether the tribunal was properly constituted and (iii) whether the matters submitted to the arbitration were in accordance with the arbitration agreement?”<sup>31</sup>

The court did not undertake a choice of law analysis on the potential laws applicable, but straightaway ruled that the substantive validity of the arbitration agreement is governed by the law of the seat, English law, and that the proper law of the underlying contract is “irrelevant.”<sup>32</sup> In support of this proposition, the court relied on a previous ruling in the case of *Tamil Nadu Electricity Board v. ST-CMS Electric Company Private Ltd*<sup>33</sup> in which the court went on to state that it was “impermissible” to delve into the mandatory provisions of the proper law of the underlying contract, while determining an issue of jurisdiction of the tribunal.<sup>34</sup>

The court reasoned that the arbitration agreement is implicitly governed by English law, as the agreement provided for arbitration in London. *C v. D* was relied on to state that the seat has the closest and most real connection with the arbitration



agreement.<sup>35</sup> This was further substantiated by the argument that by virtue of the doctrine of separability, the arbitration agreement was distinct from the main contract.<sup>36</sup>

In England, while authorities like *Sulamerica* and *Arsanovia* adhere to the three step test and draw a strong presumption in favour of the substantive law of the underlying contract as the implied choice for the arbitration agreement, other cases like *C v. D* and *Abuja* rule in favour of the law of the seat.

### III. POSITION OF LAW IN SINGAPORE

The courts in Singapore have adopted the three step approach to choice of law of an arbitration agreement, as laid down in *Sulamerica*. However, there is a divergence in the application of the principle in different cases.

#### 3.1 Principle of ‘effective interpretation’

In *Insignia Technology Co Ltd v. Alstom Technology Ltd*<sup>37</sup> (“*Insignia*”), the Singapore Court of Appeal had to decide on an issue regarding the validity of an arbitration agreement<sup>38</sup> providing for one arbitral institution to administer the arbitration, under the rules of another arbitral institution.<sup>39</sup> The underlying contract was a licence agreement governed by Singapore law.

The Court of Appeal noted that an arbitration agreement should be construed like any other form of commercial agreement.<sup>40</sup> Party intent to submit the dispute to arbitration (despite ambiguity in the arbitration agreement) was given a lot of emphasis at all levels of the case – by the tribunal, the High Court and the Court of Appeal. This approach was termed as the “principle of effective interpretation.”<sup>41</sup> In terms of this principle, “where a clause can be interpreted in two different ways, the interpretation enabling

the clause to be effective should be adopted in preference to that which prevents the clause from being effective.”<sup>42</sup> A corollary to this, the principle of broad interpretation<sup>43</sup>, was also relied on while interpreting the arbitration agreement. The court further observed that a pathological clause is not *void ab initio*.<sup>44</sup> The court made a reference to the French approach in giving an effective, broad interpretation to arbitration clauses, in conjunction with the objectives of international arbitration.<sup>45</sup> On the aforementioned grounds, the validity of the arbitration agreement was upheld. Though the court did not get into a detailed analysis of the choice of law of the arbitration agreement, *Insignia* signifies the acceptance of the three step choice of law analysis, in principle, by the Singapore courts. It further highlights the importance of the principle of ‘effective interpretation’ and the principle against strict or narrow construction of an arbitration agreement.

While the ‘validation principle’ is a choice of law tool for choosing a law which validates the arbitration agreement, ‘effective interpretation’ is a principle of contractual interpretation stating that when two or more interpretations are possible, the courts or tribunals ought to choose the one which gives effect to an arbitration agreement.

#### 3.2 Law of the seat as an implied choice

In *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others*<sup>46</sup> (“*Firstlinks*”), the Singapore High Court was dealing with an arbitration clause which provided for claims to be adjudicated by the Stockholm Chamber of Commerce (“SCC”). The issue which arose for consideration was the validity of the arbitration agreement. In the absence of express choice, the court had to decide on the choice of law rules applicable to determine the law governing the arbitration agreement. The parties had not chosen the law of any country as the governing law of the underlying



contract. Instead, the law governing the main contract was indicated thus:

*“This Agreement is governed by and interpreted under the laws of Arbitration Institute of the Stockholm Chamber of Commerce as such laws are applied to agreements entered into and to be performed entirely within Stockholm.”*<sup>47</sup>

The counsel for the plaintiff argued that the arbitration agreement was invalid as the substantive law governing the contract would govern the arbitration agreement as well, and that it “does not make sense” for an arbitration agreement to be governed by the rules of an institution like the SCC.<sup>48</sup>

The court observed that the “three-stage methodology” of *Sulamerica* mirrors the three-stage enquiry by the Singapore Court of Appeal used to determine the substantive law governing commercial contracts.<sup>49</sup> In *Firstlinks*, the three step process of *Sulamerica* was cited with approval, however, the Singapore court differed in the second stage of enquiry (that there was a strong presumption that the substantive law of the contract would be the proper law of the arbitration agreement as well). The Singapore court ruled in favour of the law of the seat of arbitration being the implied choice of the parties.

The court reasoned that while the proper law of contract takes precedence before the breakdown of a contractual relationship, the “desire of neutrality” gains importance once a dispute arises.<sup>50</sup> The cause of neutrality is better served by the law of the seat.

*“In the province of international arbitration, the arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement, without which the seed of an agreement would not grow into a full-fledged arbitration resulting in the fruit of an enforceable award.”*<sup>51</sup>

The court relied on the English court decision in *C v. D* for the proposition that the arbitration agreement has a closer and more real connection with the seat, than with the governing law of the contract. Reliance was placed on Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) (arbitration award is unenforceable if it is not valid in the country where the award was made) and Article 34(2)(a)(i) of the UNCITRAL Model Law (an award may be set aside if the arbitration agreement is not valid under the law of the seat) which demonstrate the importance of the law of the seat.<sup>52</sup>

The court further reasoned that applying the law of the seat to determine the validity of the arbitration agreement ensures consistency between the “law and the procedure” of the arbitration agreement.<sup>53</sup> A reference was also made to the principle of effective interpretation advocated by *Fouchard Gaillard and Goldman*, and reiterated in *Insingma*.<sup>54</sup>

As the parties had agreed to refer their disputes to the SCC, in the absence of any indication of intent to choose another place as the seat, the High Court opined that the parties had chosen

Swedish law as the *lex arbitri* and Sweden as the seat. It was held that the arbitration agreement was governed by Swedish law. The court also relied on Section 48 of the Swedish Arbitration Act, which provides that, in the absence of parties’ agreement on proper law, an arbitration agreement shall be governed by the law of the country in which the proceedings shall take place.<sup>55</sup> As a part of the obiter, the court observed that in international arbitration, the validity of an arbitration agreement may be governed by *rules of law*, as opposed to national laws. Commentary by G Born was cited in support of the proposition that non-national rules of law could govern an arbitration agreement.<sup>56</sup> The French decision in *Dalico*<sup>57</sup> laid down that the validity of an arbitration agreement could be determined without reference to national laws.

In *Firstlinks*, the court came to a conclusion that the law of the seat would apply as an *implied choice*, in the second prong of the three step formula. The court did not move on to consider the third prong of the test *i.e.* closest and real connection. In *Sulamerica*, the court found the law of the substantive contract to be the implied choice under the second prong, however, moved on to the third prong to displace the implied choice. Though the outcome in both *Sulamerica* and *Firstlinks* was ultimately to apply the law of the seat as the law governing the arbitration agreement, the reasoning and the considerations for the courts to reach that law, were different.

### 3.3 Implied choice - Following *Sulamerica*

In *BCY v. BCZ*<sup>58</sup> (“*BCZ*”), the Singapore High Court had to decide whether an arbitration agreement, independent of the unexecuted underlying contract, was concluded by the parties. The dispute arose under a share purchase agreement (“SPA”), seven drafts of which were circulated, along with an arbitration clause. However, the contract was not executed. A dispute arose regarding the proposed sale of shares, and the defendant commenced ICC arbitration proceedings. The defendant argued that a binding ICC arbitration agreement was concluded.<sup>59</sup> While the defendant argued that the governing law of the arbitration agreement ought to be substantive law of the SPA, New York law, the plaintiff argued for the law of the seat to apply, *i.e.*, Singapore law. However, in this case, application of either law would not have made a difference to the issue of whether an arbitration agreement was concluded between the parties. The High Court reiterated the three step test of *Sulamerica*. Relying on *Firstlinks*, the plaintiff argued that the law of the seat was the implied law governing the arbitration agreement.

The High Court noted that the view taken in *Sulamerica* that the substantive law of the underlying contract, was the implied choice, was a departure from the view taken in *C v. D*. The court also considered the reasoning in *Firstlinks*, which differed from *Sulamerica*. The court agreed with Moore-Bick LJ’s view in *Sulamerica*, that the implied choice of law for an arbitration agreement is likely to be the same as the express choice of the law governing the contract, noting that this view “is preferable as a matter of principle.”<sup>60</sup> On whether *Firstlinks* represents the law in Singapore, the High Court made a reference to two rulings of the Singapore courts in *Piallo*<sup>61</sup> and *Rals*<sup>62</sup>, in which, both the substantive law of the contract and the law of the seat were

the same. However, the reasoning for determining implied law of the arbitration agreement in both the aforementioned cases, was the parties' express choice of substantive law. *Rals* had relied on *Sulamerica* in coming to this conclusion.<sup>63</sup> In *BCZ*, the court disagreed with the observation in *Firstlinks* that there was a "direct competition" between the law of the seat and the substantive law, as the parties to the arbitration agreement in *Firstlinks*, had neither chosen a substantive law, nor had they chosen a seat.<sup>64</sup> While the court in *BCZ* agreed with the outcome in *Firstlinks*, it disagreed with the reasoning in reaching that conclusion. The court reasoned that while the law of the seat governs the procedure of arbitration, it doesn't necessarily follow that the seat's substantive law governs the arbitration agreement.<sup>65</sup> When the parties have subjected the arbitration agreement to an implied choice, by expressly choosing the substantive law of the underlying contract, the question of application of the default rule of the seat, does not arise.<sup>66</sup>

The court observed that while it was possible to assume that by the operation of the doctrine of separability, the arbitration agreement ought to be governed by a separate law, that argument is not tenable, as the doctrine of separability operates to give effect to the arbitration clause, irrespective of the validity of the main contract. *BCZ* gives a restrictive interpretation to the doctrine of separability. "Resort need only to be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged."<sup>67</sup> In support of this, reliance was placed on Article 16 (1) of the UNCITRAL Model Law, which deals with *Kompetenz Kompetenz* and provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose*, an arbitration clause which forms a part of the main contract shall be treated as an agreement independent of the other terms of the contract.

According to the court in *BCZ*, the narrow purpose of the doctrine of separability was limited to shielding the arbitration clause from invalidity which might affect the main contract. A reference was made to Moore Bick LJ's view in *Sulamerica* that separability does not "insulate the arbitration agreement from the substantive contract for *all* (emphasis added) purposes."<sup>68</sup>

*BCZ* applied the ratio of *Sulamerica* and reasoned that when the arbitration agreement forms a part of the main contract and the parties have expressly chosen a law to govern the underlying contract, it is reasonable to assume that the parties intended their entire relationship to be governed by one system of law, unless there are indications to the contrary.<sup>69</sup> Choice of a seat different from the proper law of contract, is not sufficient to rebut this initial presumption.<sup>70</sup> The court also makes a reference to the validation principle, and opines that the governing law of the contract as the implied choice can be replaced, only if it has the consequences of invalidating the arbitration agreement (as in *Sulamerica*).<sup>71</sup>

It is also pertinent to note the divergence in the application of the doctrine of separability. Authorities like *Sulamerica* and *BCZ* rely on the narrow interpretation of the doctrine of separability, limiting it to instances where the invalidity of the main contract does not affect the validity of the arbitration agreement. However, in cases choosing the law of the seat as the law governing the

arbitration agreement, separability has been understood in a more expansive way (as laid down in *Abuja & FirstLinks*).

#### IV. POSITION OF LAW IN INDIA

In India, the courts have predominantly taken the view that in the absence of express choice of law governing an arbitration agreement, the law governing the underlying contract governs the arbitration agreement. In *NTPC v. Singer*<sup>72</sup> ("*NTPC*"), the proper law of the underlying contract was chosen as Indian law, and the arbitration was seated in London. The Supreme Court had to decide on the law governing the arbitration agreement, in the absence of express choice. The rival contentions of the appellant arguing for Indian law as the law of the underlying contract, and the respondent arguing for English law (the law of the seat) were considered by the court. The court ruled that the "proper law of arbitration is normally the same as the proper law of contract."<sup>73</sup> However, when there is no express choice of either the proper law of the underlying contract or the proper law of the arbitration agreement, in the absence of any contrary indication, a presumption arises that the parties have intended that both the underlying contract and the arbitration agreement are to be governed by the law of the seat.<sup>74</sup> The ratio in *NTPC* has been reiterated in a recent judgment of the Supreme Court.<sup>75</sup>

In *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Ors.*,<sup>76</sup> the Supreme Court of India laid down that the law governing the underlying contract is the governing law of the arbitration agreement as well. In this case, the parties had made an express choice of Indian law as the proper law of the underlying contract, and the seat of arbitration was London, UK. In *Reliance Industries Limited and Anr. v. Union of India*<sup>77</sup>, the award was sought to be set aside on the ground of non-arbitrability. The underlying contract was governed by the laws of India, by express choice by the parties, and the seat of arbitration was London, UK. It was also expressly provided that the arbitration agreement would be governed by the laws of England. Based on the principles of separability and express choice, the Supreme Court of India held that, while the proper law of the underlying contract was Indian law, the proper law of the arbitration agreement was English law as it was expressly chosen by the parties. In *Citation Infowares Limited v. Equinox Corporation*<sup>78</sup>, while deciding on the appointment of an arbitrator, the Supreme Court of India made a reference to *NTPC*, that the proper law of the arbitration agreement is normally the same as the proper law of the underlying contract.

However, in *Enercon*<sup>79</sup>, (while deciding on the seat of arbitration), in the obiter, the Supreme Court of India makes a reference to *C v. D*, specifically to the judgment of Longmore L.J. that where there was no express choice of law for the arbitration agreement, the law with which that agreement had the closest and real connection was more likely to be the law of the seat of the arbitration, rather than the underlying contract.<sup>80</sup> The court also makes a reference to *Sulamerica* to rely on the importance of the law of the seat. However, the court completely overlooks both the three step test and the reasoning of *Sulamerica* in arriving at the law of the seat. The court conflates the reasoning in *C v. D* and *Sulamerica*, merely relying on the outcome in both the cases, that the law of the seat was chosen. As to the current position of law



in India, *NTPC* holds the field as the law governing an arbitration agreement, was directly in question in that case and the ratio laid down has been followed in recent cases as well.

#### V. SUBSTANTIVE VALIDITY & THE VALIDATION PRINCIPLE

G Born, argues that on a proper application of the principles of the New York Convention and the UNCITRAL Model Law, the courts and tribunals ought to follow the 'validation principle' while deciding on the substantive validity of arbitration agreements in international commercial arbitration.<sup>81</sup> According to the validation principle, when the substantive validity of an arbitration agreement in international commercial arbitration is in question, that law should be chosen which gives effect to the arbitration agreement.<sup>82</sup>

*"The future of choice of law analysis consists of: (i) a validation principle, selecting the national law which will give effect to (rather than invalidate) the parties' agreement to arbitrate. (ii) a uniform international rule prohibiting discrimination against arbitration agreements"*<sup>83</sup>

Application of the validation principle is based on the following factors:

- (i) The international mandate provided by the international instruments of the New York Convention and the UNCITRAL Model Law;
- (ii) The intention of the parties to submit their disputes to arbitration; and
- (iii) The objectives of international arbitration are best served with the application of the validation principle.<sup>84</sup>

#### 5.1 Choice of law rules in the New York Convention and the UNCITRAL Model Law

Neither the New York Convention nor the UNCITRAL Model Law expressly provide for a choice of law rule for arbitration agreements in international arbitration. G Born argues that a "textual and purposive analysis" of Articles II and V of the New York Convention and Articles 8, 34 and 36 of the Model Law, mandates application of the validation principle.<sup>85</sup>

Article II (1) of the New York Convention which provides that "each state *shall* recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration", establishes an international rule of presumptive validity.<sup>86</sup> Read with Article II (3), this creates a mandatory obligation on the part of the courts of the contracting states to refer the parties to arbitration, unless it falls under one of the exceptions mentioned therein – that the arbitration agreement is null and void, inoperative or incapable of being performed. Thus, while Article II of the Convention creates a presumption of validity of arbitration agreements, the very same article shows that this presumption is rebuttable, under the various heads mentioned therein. A parallel can be found in Article 8 of the UNCITRAL Model Law.<sup>87</sup>

These exceptions, G Born argues, have to be determined in accordance with general principles of contract law, "without reference to national rules, which subject international agreements to special, discriminatory or idiosyncratic burdens of treatment."<sup>88</sup>

Article V of the New York Convention also assumes significance in this context.<sup>89</sup> Recognition and enforcement of an arbitral award may be refused if: "(a) the parties to the

agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”<sup>90</sup>

Article V(1)(a) provides for a two-step choice of law rule – (i) express or implied choice by the parties and (ii) in case of no such indication of choice, a default rule of the law of the place where the award was made.<sup>91</sup> The first prong of the rule, includes implied choice by parties, including their “implied agreement on the law which enforces the arbitration agreement effectively.”<sup>92</sup>

It is important to note that the two step choice of rule in the New York Convention under Article V, is in the context of recognition and enforcement of awards. However, Article II of the Convention makes no such reference to any choice of law rule for determining the validity of the arbitration agreement. Born G notes that there is a divergence of opinion on whether the choice of law rule in Article V, should be applied to Article II of the New York Convention as well.<sup>93</sup>

The two step choice of law rule in Article V ought to be confined to the context of recognition and enforcement of awards. The text of Article V is very clear that the narrow exceptions provided therein, are in the context of recognition and enforcement of arbitral awards. A plain reading of Article V indicates that recognition or enforcement of an award *may* be refused at the request of the party against whom it is invoked, if such a party furnishes proof that the award falls under one of the heads mentioned in Article V. If the party does not make such a request, the award is presumptively valid. Thus, while determining the validity of the arbitration agreement when the claim is instituted, the courts or tribunals are not expected to go through the exceptions in Article V. The presumptive validity, mandated by Article II, may be rebutted only by the exceptions mentioned in Article II itself (that the arbitration agreement is null and void, inoperative or incapable of being performed). Extending the exceptions in Article V to Article II, will only be increasing the heads under which the presumption of validity of the arbitration agreement could be rebutted. This would also be contrary to party intent to submit their disputes to arbitration.

### 5.2 Validation principle & the future of choice of law

G Born argues that the contemporary choice of law approaches “produce uncertain and unsatisfactory results.”<sup>94</sup> He opines that choosing the law governing the underlying contract, is unsatisfactory as this approach “disregards the separability presumption and an intention to choose a neutral forum.”<sup>95</sup> (A similar observation was made by the court in *Firstlinks*. The court reasoned that the neutrality principle is best served by choosing the law of the seat). However, choosing the law of the seat is not favoured as it conflates the procedural and substantive aspects of an arbitration agreement and “disregards the relationship of the arbitration agreement” with the underlying contract.<sup>96</sup> The closest connection test also ultimately ends up pointing to either the law of the seat or the law of the substantive contract.<sup>97</sup>

The divergence of approaches leads to a “resulting choice which is often arbitrary and unpredictable.”<sup>98</sup> The goal of any choice of law approach ought to be to promote certainty and predictability and produce a result in tune with the intention of the parties and the objectives of international arbitration, and this is best served through the application of the validation principle.<sup>99</sup>

G Born also points out a variation of the validation principle from decisions in a few jurisdictions like the USA<sup>100</sup> and France (like in *Dalico*<sup>101</sup>), where, international principles giving effect to an arbitration agreement are chosen, instead of the system of any national law.<sup>102</sup>

While there is a presumption of validity of arbitration agreements, as mandated by the international conventions, the question which arises for consideration is whether, the validation principle can be an overarching choice of law rule for arbitration agreements? When the substantive validity of the arbitration agreement is in question, in the absence of express choice of law by the parties, the validation principle aids courts and tribunals in choosing a law which ultimately gives effect to the arbitration agreement. However, the validation principle is limited in its application to cases where the substantive validity of the arbitration agreement is in question. Furthermore, if there is an express choice (or the institutional rules chosen provide for a default choice of law rule for an arbitration agreement, in the absence of express choice by the parties), even if the effect of applying that law as proper law of the arbitration agreement invalidates the agreement, the court or tribunal cannot substitute another law to the law expressly chosen by the parties.

Apart from the validity of an arbitration agreement, a number of other issues may arise for consideration such as the scope, parties to the arbitration, capacity, interpretation of pathological clauses etc. – all of which are governed by the proper law of the arbitration agreement. In such cases, in the absence of explicit choice by the parties, the courts or tribunals, have to undertake a choice of law analysis to determine the proper law of an arbitration agreement.

There could also arise cases (like in *Arsanovia*) in which, two or more of these issues arise with reference to the same arbitration agreement. Thus, ‘characterization’ in traditional choice of law analysis assumes significance while determining the proper law of an arbitration agreement also.<sup>103</sup> While some arbitration agreements form a part of the main contract, others may be freestanding agreements. Courts are also faced with pathological arbitration clauses and arbitration agreements in unexecuted contracts (like in *BCZ*). Owing to the multitude of issues which arise for consideration in hugely diverse arbitration agreements, it may not be possible to designate a single choice of law rule for all cases. However, there is a need to ensure predictability and some amount of certainty in the approach of the courts. The three step formula is a comprehensive starting point for choice of law analysis, as it commences with party choice (express and implied) as the first two steps. This is in conjunction with the principle of party autonomy and gives effect to party intent. In the absence of any such indication, the third step of closest and real connection is considered.

## CONCLUSION

As demonstrated by the decisions in various jurisdictions, there is a lot of divergence and lack of consistency in choice of law analysis of an arbitration agreement. If the arbitration agreement forms a part of the main contract, the proper law of the underlying contract expressly chosen by the parties is favoured by the courts in England (like *Sulamerica* and *Arsanovia*) as an implied choice, under the three step formula. However, there have been other cases which have favoured the law of the seat under the closest and most real connection test (*C v. D*) and in which the law of the seat was applied directly, without undertaking a three step analysis (*Abuja*). In Singapore, the courts have upheld the three step formula, however, have differed in their application of the same. While *Firstlinks* decided on the law of the seat as an implied choice, *BCZ* favoured the law of the underlying contract. The Singapore courts have also consistently upheld the principles of effective and broad interpretation. The Indian approach has predominantly been in favour of the law of the underlying contract, if the proper law of contract has been explicitly chosen.

The cases favouring the law of the underlying contract, have also chosen the law of the seat under the validation principle, to give effect to the arbitration agreement (*Sulamerica*). This shows

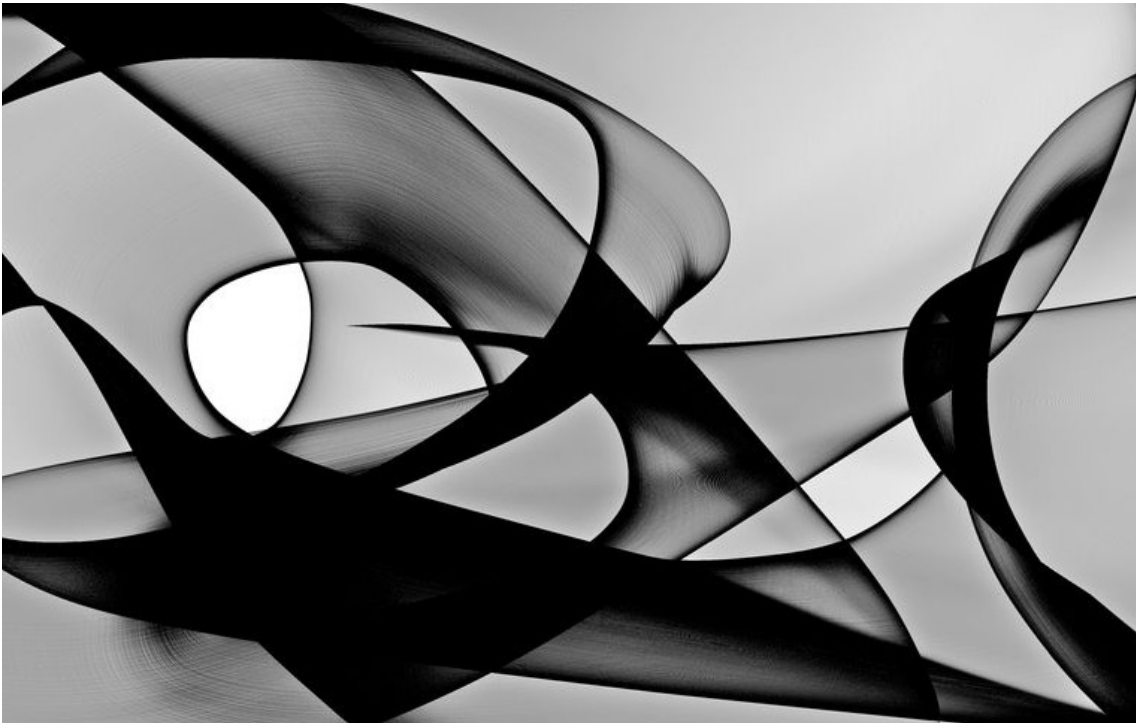
that the validation principle may be applied after undertaking a three step choice of law analysis also.

The validation principle is a desirable choice of law rule when the substantive validity of the arbitration agreement is in question. However, owing to the multitude of issues which arise with reference to arbitration agreements, the choice of law rule with the three step formula would ensure some predictability in the principles which the courts will look into. The precise application of the second and third prongs of the test, will be determined by the issue(s) in question and the circumstances of each case. Given the wide range and variety in contracts and arbitration agreements, it may not be possible to lay down a strict, straitjacket choice of law rule applicable to all cases. However, the three step formula is a comprehensive, uniform starting point in choice of law analysis of an arbitration agreement.

Brunda Karanam

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- 33 [2008] 1 Lloyd's Rep 93.
- 34 *Supra.* note 27 at Para. 35.
- 35 *Supra.* note 27 at Para. 21.
- 36 *Supra.* note 27 at Para. 22, relying on *Fiona Trust & Holding Corporation v. Privalov* [2007] UKHL 40.
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- 40 *Supra.* note 37 at Para. 30.
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85 *Supra*. note 19 at p. 837.  
86 *Supra*. note 19 at p. 819.  
87 “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.” – Article 8, UNCITRAL Model Law on International Commercial Arbitration.  
88 *Supra*. note 19 at p. 824.  
89 Articles 34 and 36 of the UNCITRAL Model Law correspond to Article V of the New York Convention.  
90 Article V(1)(a) New York Convention.  
91 *Supra*. note 19 at p. 837.  
92 *Supra*. note 19 at p. 837.  
93 *Supra*. note 19 at p. 825.  
94 *Supra*. note 19 at p. 831.  
95 *Supra*. note 19 at p. 832.  
96 *Supra*. note 19 at p. 831.  
97 *Supra*. note 19 at p. 832.  
98 *Supra*. note 19 at p. 832.  
99 *Supra*. note 19 at p. 834.  
100 *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 712 F 2d 184.  
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# IMPACT OF CORRUPTION ON ARBITRABILITY, VALIDITY OF ARBITRATION AGREEMENT AND STANDARD OF PROOF

By Derya Durlu Gürzumar<sup>1</sup>

## Abstract

*The pervasiveness of white-collar irregularities, particularly corruption, in the business community has increased over the past decade at an insurmountable pace. This article aims to canvass the interface between international arbitration and corruption regarding four distinct areas. In the backdrop of a growing sense of urgency amongst not only anti-corruption practitioners, but across the multitude of legal fields, including arbitration, evolving jurisprudence on the subject matter and the stepping up of anti-bribery enforcement across the globe have made issues of corruption ever more significant for arbitral tribunals faced with such allegations over both factual as well as legal matters at every stage of the arbitral process. This article seeks to lay out some of the topical questions encircling the interface between an arbitration process and corruption, and its impact on the arbitral process within the context of international commercial arbitration.*

*Keywords: International Commercial Arbitration, Corruption, Kompetenz-Kompetenz, Doctrine of Separability, Burden of Proof.*

The pervasiveness of white-collar irregularities, particularly corruption, in the business community has increased over the past

decade at an insurmountable pace. Transparency International's 2016 Corruption Perceptions Index, which has scored 176 countries and territories from 0 (highly corrupt) to 100 (very clean) based on perceived levels of public sector corruption, reports that nearly two thirds of ranked countries score less than 50, a result that has not changed in six years.<sup>2</sup>

Sectors that are characterized by high-value investment and significant government interaction,<sup>3</sup> both of which provide opportunities and incentives for corruption, are most often the subject matter of disputes taken to arbitral tribunals. Because of this pervasiveness, arbitrators may increasingly come across issues of corruption that parties may, oftentimes, be reticent to raise during arbitral proceedings. Allegations of corruption may permeate over both factual as well as legal matters at every stage of the arbitral process.

In the backdrop of a growing sense of urgency<sup>4</sup> amongst not only anti-corruption practitioners, but across the multitude of legal fields, including arbitration, evolving jurisprudence on the subject matter and the stepping up of anti-bribery enforcement

across the globe have made issues of corruption ever more significant for arbitral tribunals faced with such allegations over both factual as well as legal matters at every stage of the arbitral process. Hence, the interface between international (commercial) arbitration and the realm of corruption merits attention to both practitioners as well as scholars.

This article seeks to lay out the impact corruption has on three of the arbitral pillars through an overview of the case-law. Section I maps out the general interplay between corruption and international arbitration. Section II follows a segmented approach by canvassing three issues an arbitral tribunal will need to assess when corruption allegations emerge: tribunal's assessment of its jurisdiction (A), the issue of the validity of an arbitration agreement in case of an allegation of corruption (B), and the standards of proof and evidence gathering (C). The conclusion on the subject matter will summarize the main discussion points canvassed throughout the article (III).

## I. THE INTERPLAY BETWEEN ARBITRATION AND CORRUPTION

Arbitral tribunals may encounter issues pertaining to corrupt practices. Coupled with the increasing tendency of parties to choose arbitration as an effective means to not only resolve disputes, but also as facilitating international trade and investment,<sup>3</sup> contrary to “*time-consuming and expensive litigation*”,<sup>6</sup> arbitrators are susceptible to encounter both legal as well as factual issues of corruption at every chronological step of the arbitral process in the modern business world.

The famous ICSID case of *World Duty Free Company Limited v The Republic of Kenya*<sup>7</sup> is an example from investment-treaty-based arbitration that provides insight into how an international arbitral tribunal regards corrupt practices when faced with allegations of bribery:

*“In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”*<sup>8</sup> (emphasis added)

From a contract-based arbitration perspective, Judge Lagergren's oft-quoted award in ICC Case No. 1110<sup>9</sup> expressed on a similar vein that:

*“Whether one is taking the point of view of good governance or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations.”*<sup>10</sup> (emphasis added)

It is evident that the essence of corruption is “contrary to

morals” and one may well observe the prevalence of corruption when arbitral tribunals (in both investment treaty based as well as contract based arbitrations) face challenges in public-procurement-related disputes<sup>11</sup> in particular (such as commissions or fees which are promised to intermediaries or public officials if the procurement contract is awarded to the promising party<sup>12</sup>) regarding matters underlying their jurisdictions and of identifying and applying the substantive law, as well as in the evidence gathering processes that may or may not have been tainted with corruption. The tools that are at the disposal of the arbitrators, and which help them fulfill their duties and obligations in the pursuance of fair and equitable judgment, could therefore pose difficulties to that tribunal at the face of a finding of corruption by the same tribunal.

It is because of the growing global awareness to combat corruption that arbitrators who are entrusted with the task of resolving a dispute brought before them ought to understand the appropriate vantage point from which such allegations should be tackled.

## II. THE ARBITRAL PROCESS AND ISSUES OF CORRUPTION

### A) Arbitrability: The Tribunal's Assessment of its Own Jurisdiction and *Kompetenz-Kompetenz*

Allocating authority between arbitrators and national courts depends on whether the matter is arbitrable. The arbitrability of disputes, subsequently, depends on the permissibility of matters by law as to whether an arbitration agreement can be left to the adjudication of private arbitrations.<sup>13</sup> The question that arbitral tribunals may face is whether disputes relating to public procurement matters can be arbitrable and whether arbitrators can exercise *kompetenz-kompetenz*<sup>14</sup> to review their jurisdiction in cases where there are issues relating to corruption.

Article 6(4) of the 2017 ICC Rules of Arbitration states that “(...) the Court shall decide whether and to what extent the arbitration shall proceed. **The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist.**” (emphasis added)<sup>15</sup> The principle of *kompetenz-kompetenz* is also supported by Article 16.1 of the UNCITRAL Model Law<sup>16</sup> and Article 21.2 of the UNCITRAL Arbitration Rules<sup>17</sup> which state:

*“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”*

Jurisprudence on the tribunal's discretion to hear cases involving corruption shows that arbitrators assume jurisdiction to hear such disputes. The following is an account of some of the case-law that the arbitration community has seen over the past couple of decades, from both sides of the rubric (arbitrators



who declined jurisdiction as well as those who assumed their jurisdiction *sua sponte*):

Arbitrators used to refuse to accept jurisdiction in cases involving issues of corruption. In ICC Case No. 1110, the sole arbitrator, Judge Lagergren, disqualified himself to not have jurisdiction over the dispute:

*“It cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators (...) Thus jurisdiction must be declined in this case. (...) In concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability.”*<sup>18</sup> (emphasis added)

However, Judge Lagergren’s position no longer receives acceptance in the international arbitration context<sup>19</sup> not only because it was distinguished<sup>20</sup> since the arbitration agreement was separate from the contractual relationships of the parties, but because the practice of tribunals has been to accept jurisdiction in cases involving illegal contracts, while holding such contracts null and void:<sup>21</sup>

*“Arbitral jurisprudence has evolved profoundly in respect of contracts contrary to public policy (...) Old awards [such as ICC Case No. 1110 of 1963] considered that such disputes were not susceptible of being submitted to arbitration (...). However, in recent awards [such as ICC Case Nos. 2730, 2930, 3916], arbitrators have systematically refused to reject their jurisdiction and have decided, when necessary, upon the nullity of the underlying contract.”*<sup>22</sup>

The sole arbitrator in ICC Case No. 1110 declared itself to not have jurisdiction because he found the contract and, subsequently, the arbitration agreement as being null and void, and as such, the case was not arbitrable. On the other hand, the arbitral tribunal in ICC Case No. 3913<sup>23</sup> declared itself to have sufficient jurisdiction and competence to arbitrate a contract tainted with corruption. Ultimately, the tribunal in the latter case found the consulting agreement, through which the claimant agreed to assist the respondent in winning a business for the African government, was void because the parties intended to pay *pots-de-vin* to the African counterparties.<sup>24</sup> Similarly in ICC Case No. 3916 of 1983, the arbitrator held that the nullity of the main contract does not *ipso iure* nullify the arbitral clause, and that its jurisdiction is not invalidated by the contract that was being claimed null and void.

In ICC Case No. 4145,<sup>25</sup> the tribunal considered the question of nullity of the contract at its first interim award in 1983 as being an issue relating to the merits of the case, and not the jurisdiction, thereby dismissing the defendant’s objections, at that stage of the proceedings, that the agreement cannot be enforced. The tribunal nevertheless pursued the parties’ intent to arbitrate under the ICC, and determined to have jurisdiction to arbitrate the case.

A decade later, an arbitral tribunal assessed its jurisdiction

*sua sponte* in ICC Case No. 6248, even though neither party in the case had raised any objections with respect to the jurisdiction of the arbitral tribunal.<sup>26</sup> The tribunal, in that case, referred to Article 8(3) of the 1988 ICC Rules of Conciliation and Arbitration<sup>27</sup> as well as Article 178(3) of the Swiss Private International Law<sup>28</sup>, evaluating that *“the validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid. This principal of severability has long been recognized not only generally, but also specifically with respect to main contracts which were found void on the ground of a violation of good morals and public policy.”* The arbitral tribunal concluded that it had jurisdiction over the case, regardless of whether the underlying contract was found to be null and void.

Finally, in the well-known *Westinghouse* case,<sup>29</sup> the arbitral tribunal first assessed its jurisdiction, relying upon the principle of *kompetenz-kompetenz*, in view of both the ICC rules applicable at the time (the 1998 rules) as well as the *lex arbitri*, which was Swiss law. As stated in the case, *“(...) it is well established that the Tribunal has jurisdiction to determine its own jurisdiction, a proposition that is not disputed by the parties. This basic principle is reflected in both the ICC Rules and Swiss law (...) Furthermore, the doctrine of Kompetenz-Kompetenz has been consistently confirmed by various decisions and commentators, which similarly recognize their own competency is an inherent attribute of international tribunals.”*(emphasis added)<sup>30</sup>

As can be seen from the foregoing case-law, arbitral tribunals can exercise *kompetenz-kompetenz* to review their jurisdiction in cases where there are issues relating to corruption.

## B. Validity of the Arbitration Agreement and the Doctrine of Separability

The principle of autonomy of the arbitration agreement is the “cornerstone” of international arbitration, which would not exist without such a fundamental principle.<sup>31</sup> This principle sets out the following: the parties’ intentions to submit their dispute to arbitration will survive separately from the validity of the rest of the contract. In other words, an arbitration clause is considered separate from and independent of the agreement in which it is contained or the agreement to which it is affixed, surviving any nullity or the invalidity of that agreement. This principle has been recognized world-wide, through various institutional rules,<sup>32</sup> including the 2017 ICC Rules of Arbitration.<sup>33</sup>

There may be divergences in opinion<sup>34</sup> as to whether this doctrine takes effect in cases involving bribery or whether the doctrine can be applied to any arbitration case irrespective of whether there is an alleged illegality claim, such as bribery. Agreements, in general, that gravely breach acceptable standards of behavior or international public order are void and unenforceable.<sup>35</sup> The question then is whether an illegality, such as bribery, which goes to the heart of the dispute, affects both the agreement between the parties as well as the arbitration clause/arbitration agreement.

An agreement, whose objective is to bribe foreign officials, and which has an illegal objective<sup>36</sup> and is contrary to *“ordre public et bonnes moeurs”*<sup>37</sup> (public order and good morals) is null and void. Based on the principle of separability, the arbitration agreement/



arbitration clause ought to be treated separate from the main contract, irrespective of such illegality observed in the main contract.

Reported arbitral awards, apart from Judge Lagergren's award in ICC Case No. 1110 and other idiosyncratic court decisions<sup>38</sup>, have adhered to this doctrine, as doing otherwise would potentially undermine the tribunal's ability to investigate allegations of corruption and ultimately decide upon the validity of a contract with corruption as its purpose.<sup>39</sup>

The tribunal in ICC Case No. 3913<sup>40</sup> assessed the arbitration agreement separate from the underlying contract, and stated that the underlying intent (to pay commission to the claimant for the claimant to assist the respondent winning business deals with the African government) behind the consulting agreement affected the main agreement, not the agreement to arbitrate.

In ICC Case No. 5943<sup>41</sup>, the sole arbitrator observed the principle of severability, holding that the arbitration clause was not affected by any conclusion that the consulting agreement was partially or wholly void.

A similar conclusion was drawn in ICC Case No. 8891,<sup>42</sup> where the tribunal confirmed that an arbitration clause in a contract is not voided and affected by any nullification of the main contract due to illegality.

The tribunal in the *Westinghouse* case took a different approach stating that where there is a contract obtained by threat and affects the validity of the main contract as well as the

arbitration clause, "(...) the Tribunal does not have to solve this delicate issue since it has found on the facts presented to it that the Defendants have failed to prove their allegations of bribery."<sup>43</sup>

Finally, in *Fiona Trust & Holding Corporation v. Privalov*,<sup>44</sup> while the main contract of the dispute was found to have been procured with corruption,<sup>45</sup> the arbitration agreement was found valid. The House of Lords subsequently explained how the separability doctrine operated in such cases:

*"The principle of separability (...) means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement."* (emphasis added)

As can be observed from the above case-law, separability of the arbitration agreement is upheld in cases where the main agreement is tainted with corruption.

### C. Evidence Gathering and the Applicable Standard of Proof

The general rule in international arbitration is for the party to bear the burden of proving the facts relied on in support of its claims.<sup>46</sup> In disputes where corruption is claimed, burden of proof may be reversed,<sup>47</sup> and a higher standard of proof may be imposed. English courts, for example, like European civil law systems, have required "a degree of probability which is commensurate with the occasion."<sup>48</sup>

This standard of proof, for some scholars, ought to be the balance of probabilities standard, and not the “*beyond reasonable doubt*” standard that is observed in criminal law, for the very reason that the tribunal is assessing disputes concerning not of criminal liability, but of civil liability. Arbitral tribunals are also empowered with the discretion to determine to what extent they can admit evidence pertaining to allegations of corruption, and can request more direct and concrete evidence of bribery rather than circumstantial evidence. Several cases shed light unto this issue.

In the *Hilmarton* case,<sup>49</sup> the arbitrator concluded based on the evaluations made over the applicable substantive laws that the claimant, Hilmarton Ltd. had influenced Algerian government officials, but bribery was not proven beyond doubt. The arbitrator ruminated on the possibility of relying on circumstantial evidence, but that there was no sufficient amount of evidence to conclude the existence of bribery.

An arbitral tribunal’s assessment of burden of proof matters has also been set out in ICC Case No. 6497.<sup>50</sup> The tribunal held that the party that was alleging the existence of bribery bore the burden of proving such allegations, thereby setting out a “normal weighing of probabilities”.<sup>51</sup> The tribunal further held that this burden could be reversed if the party alleging such corrupt behavior was to bring forward relevant, but inconclusive evidence, after which the tribunal may seek the opposing party to submit counter-evidence.

The tribunal in the *Westinghouse* case<sup>52</sup> used the American standard of proof that is used in civil cases, and particularly for standards that are required in fraud cases. It considered the civil standard of “preponderance of evidence” and the standard for frauds of “clear and convincing evidence.”<sup>53</sup> When assessing the rules of evidence for the three jurisdictions involved in the case (the Philippines, the State of Pennsylvania, and the State of New Jersey), the arbitral tribunal, while relying on the principal rule of burden of proof, furthered this standard into a higher standard as there was fraud, and determined that it would apply a “clear and convincing evidence” standard to assess the allegations of bribery brought forward by National Power Corporation and the Republic of the Philippines. The tribunal sought from the defendants to establish the following facts before it could rule on any allegation of bribery:

- That the alleged bribe giver intended to provide a payment or another thing of value to President Marcos, whose office was directly supervising the National Power Corporation, and
- That President Marcos accepted this consideration, either directly or through the local agent, in exchange for National Power Corporation entering into the contract with the bribe giver.

The tribunal, ultimately, concluded that both National Power Corporation and the Republic of the Philippines (the latter of which was later found to not be a party to the arbitration) failed to prove that neither of the claimants, Westinghouse International Projects Company, or Burns & Roe Enterprises, Inc. were involved in bribery.

Finally in ICC Case No. 7047<sup>54</sup> (the *Westacre* case), the

arbitral tribunal addressed the issue of standard of proof for bribery allegations by reversing the burden:

“(…) [B]ribery renders an agreement invalid. In arbitration proceedings, however, bribery is a fact which has to be alleged and for which evidence has to be submitted, and at the same time constitutes a defense, nullifying the claims arising from a contract. The consequences of this are decisive.

If a claimant asserts claims arising from a contract, and the defendant objects that the claimant’s rights arising from the contract are null due to bribery, it is up to the **defendant** to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. **The statement of facts and the burden of proof are therefore upon the defendant.**”<sup>55</sup> (emphasis added)

It is noteworthy to conclude based on the foregoing arbitral cases that the approach of a tribunal towards the facts in the case will most often depend on the standard of proof applied (high or normal) where allegations of corruption are put forward, and that as Sayed criticizes, different interpretations of the fact can be driven out of different approaches utilized for standards of proof in corruption cases.<sup>56</sup>

## CONCLUSION

A swath of legislation as well as arbitral jurisprudence tackling corruption and related offences indicate the “*mounting international concern about the prevalence of corrupt trading practice*”.<sup>57</sup> While some countries accept corruption as a means of conducting business affairs,<sup>58</sup> the international community, in general, has converged their approach towards tackling corruption and related offences as an international public policy, and even a transnational one. Arbitrators would similarly have the obligation to be as attentive to disputes that involve corruption.

Some tribunals may choose to methodically address the issues one at a time<sup>59</sup> when faced with parties raising issues of corruption in an obfuscating manner, while others may dismiss the case at the outset and deny their jurisdiction, on grounds that corrupt practices are “*an international evil*”. Cases where corrupt practices are alleged do not prevent tribunals from assuming jurisdiction. The principle of separability would, generally, be applied by tribunals to hold the validity of the arbitration agreement where main contracts are tainted with corruption. The intrinsic difficulty in proving corruption may pose problems when tribunals are faced with the challenge of assessing indicia of corruption either brought forward by the parties or *sua sponte* regarded by the tribunals themselves.

It will be interesting to observe whether the evolving arbitral jurisprudence will set a higher or a varied tone to these and many other topical questions 10, 20 or even 50 years from now, as the fight against corruption permeates across the globe.

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- 1 Attorney, Istanbul Bar Association.
- 2 Transparency International, *2016 Corruption Perceptions Index Report*, <[http://issuu.com/transparencyinternational/docs/2016\\_cpireport\\_en?e=2496456/43483458](http://issuu.com/transparencyinternational/docs/2016_cpireport_en?e=2496456/43483458)>, accessed on September 10, 2017 (“*The findings are less than encouraging. Not a single country comes close to top marks, while over 120 countries score below 50 on the scale... This means, less than a third of countries are even above the midpoint.*”).
- 3 Transparency International (Ed. Deborah Hardoon and Finn Heinrich), *Bribe Payers Index 2011*, Transparency International, 2011, p.14 (citing real estate, property, oil and gas, and mining as being among the top five industry sectors in which foreign firms are likely to pay bribes to procure business; “*These sectors are also particularly important from a development perspective, as they require decisions to be made with respect to the use and ownership of a country’s core resources and infrastructure.*”); See also Peter Muchlinski, Federico Ortino, Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), p.592 (“*By far the majority of [arbitral] cases [involving allegations of corruption] deal with infrastructure projects, like energy plants, telecommunication systems, or waste landfills... The next group in size terms concerns the purchase of armaments and the construction of military training facilities, followed by the exploitation of natural resources.*”).
- 4 José Ugaz, Transparency International Chair: “*We do not have the luxury of time...Corruption needs to be fought with urgency, so that the lives of people across the world improve.*” At [https://www.transparency.org/whatwedo/publication/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2016), accessed on September 10, 2017.
- 5 Gary B. Born, *International Commercial Arbitration Cases and Materials*, Wolters Kluwer Law & Business (2011), p.1.
- 6 *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245 (2d Cir. 1991), at 248.
- 7 ICSID Case No. ARB/00/7, Award (October 4, 2006).
- 8 *Id.* at 157.
- 9 ICC Case No. 1110 (1963), *Arbitration International Vol.10(3)* (1994), at 282.
- 10 *Id.* at para. 20.
- 11 Transparency International, *Annual Report 2010* (Ed. by Alice Harrison and Michael Sidwell), Transparency International, 2011, p. 25 (“*Our research shows that corruption can add on as much as 50 per cent of a contract’s value. Corruption in public procurement is not just about money though, it can cost lives. Incidences of collapsed buildings and counterfeit medicines have happened in many countries.*” (emphasis added)).
- 12 Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004), p.27.
- 13 Karl-Heinz Böckstiegel, “Public Policy and Arbitrability”, 3 ICCA Congress series 177 (1986), p.193; see also Andrew Rogers QC, “Arbitrability”, *Arbitration International* (1994), Vol.10, p.263-276.
- 14 See Born, p. 219 (for the two effects of the principle of *kompetenz-kompetenz* on arbitral tribunals: the positive and the negative effect. Born states that the positive effect is for arbitrators to review their own jurisdictions *sua sponte* and render decisions on jurisdictional objections, while the negative effect is the preclusion of national courts from considering jurisdictional objections.); see also Sayed, p.28 (for the effect of the non-arbitrability of the arbitration agreement as being the illegality of the arbitration agreement or the invalidity thereof).
- 15 1998 ICC Rules of Arbitration, Article 6(2) (as referred to in the *Westinghouse* case, “(...) the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist.”).
- 16 Model Law on International Commercial Arbitration, adopted by UNCITRAL on June 21, 1985.
- 17 UNCITRAL Arbitration Rules, adopted by UNCITRAL on December 5, 1976.
- 18 *Supra* at fn 8.
- 19 A. Sheppard, J. Delaney, “Corruption and International Arbitration”, at *Contracts Taken to International Arbitration*, 10th International Anti-corruption Conference, *passim*, available at <[http://taconference.org.s3-website-eu-west-1.amazonaws.com/en/archive/document/contracts\\_taken\\_to\\_international\\_arbitration/](http://taconference.org.s3-website-eu-west-1.amazonaws.com/en/archive/document/contracts_taken_to_international_arbitration/)>, accessed on September 10, 2017.
- 20 J. Gillis Wetter, “Issues of Corruption before International Arbitral Tribunals; The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110”, *Arbitration International* (1994) Vol. 10, No. 4, p.227.
- 21 Born, p.394.
- 22 Eric A. Schwartz, “The Domain of Arbitration and Issues of Arbitrability: The View from the ICC”, *ICSID Review* (1994), Vol.9, p.27, quoted at Born, p. 394.
- 23 ICC Case No.3913, Award of 1981, quoted in Note by Yves Derains, *Collection of ICC Arbitral Awards, 1974-1985*, p.497.
- 24 See Section II.2 below for further discussion on validity of contract.
- 25 ICC Case No. 4145, *Establishment of Middle East Country v. South Asian construction company*, Award of 1983, *Yearbook Commercial Arbitration*, Vol.XII (1987), p.97; *Collection of ICC Arbitral Awards 1974-1985*, p.559.
- 26 ICC Case No. 6248, Award of 1990, *Collection of ICC Arbitral Awards (1991-1995)*, p.239; *Yearbook Comm. Arb’n XIX* (1994), p.124.
- 27 “*Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the international Court of Arbitration be satisfied of the prima facie existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator’s jurisdiction shall be taken by the arbitrator himself.*” (emphasis added) The 1988 Rules of Conciliation and Arbitration have been replaced by 2001 ICC ADR Rules and the 2012 ICC Rules of Arbitration.
- 28 “*The validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen.*” (English translation) (French original “*La validité d’une convention d’arbitrage ne peut pas être contestée pour le motif que le contrat principal ne serait pas valable ou que la convention d’arbitrage concernerait un litige non encore né.*”).
- 29 ICC Case No. 6401, Award of 1991, Mealey’s Int. Arb. Report (1992), Vol.7, Issue No.1, Section B, p.B-1.
- 30 ICC Case No. 6401, *Westinghouse International Projects Company v. National Power Corporation*, as reported in *Mealey’s International Arbitration Report* (1992), Vol.7, Issue No.1, Section B, p.17,18.
- 31 Philippe Fouchard, “Où va l’Arbitrage International?”, *McGill Law Journal* (1989), Vol. 34, No. 3, p.435; W.L. Craig, W.W. Park & J. Paulsson, *International Chamber of Commerce* (1990), § 5.04, p.65.
- 32 Art. 21(2), UNCITRAL Arbitration Rules (“[f]or the purposes of article 21 [i.e., the determination by the arbitral tribunal on its jurisdiction], an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”) (emphasis added); Art. 23(1), the LCIA Arbitration Rules, (“The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the nonexistence, invalidity or ineffectiveness of the arbitration clause.”) (emphasis added); Art. 15, American Arbitration Association’s International Arbitration Rules (“The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason render invalid the arbitration clause.”) (emphasis added); Art. 36 of the WIPO Arbitration Rules.
- 33 Article 6(9) (“(...) the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement.”); Cf. Article 6(4), 1998 Rules of Arbitration of the International Chamber of Commerce (“The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.”); cf. also K.-H. Böckstiegel, “Public Policy and Arbitrability”, ICCA Congress Series No. 3 (1987), p. 177 et seq., pp. 201-202 (recognizing principle of severability with respect to main contracts that are found void on the ground that *bonos mores* and public policy are violated); see also Art.178(3), Swiss Private International Law.
- 34 See general Born and accompanying text; see also Sayed, and accompanying text.
- 35 ICC Case No. 3916, p.507.
- 36 See ICC No. 1110 Award of 1963 10 Arb. Int’l para. 16 (1994); ICC 2730 Award of 1982 Coll. ICC Arbitral Awards 490, 494 (1974-1985); ICC 3913, 498; ICC No. 3916 Award of 1982, 111 JDI 930, 933 (1984) (hereinafter ICC No. 3916); ICC 4145 para. 24, ICC No. 6286 19 Y. B. Comm. Arb. 141 para. 22 (1999) (hereinafter ICC No. 6286); ICC No. 6497 para. 2; ICC No. 7047 para. 53; ICC No. 8891, 1079; State Agency A v. Respondent X para. 23.

- 37 ICC Case No. 3916, Award of 1982, Sentences Arbitrales, Chambre de Commerce Internationale, p.930, *Journal du droit international* Vol. 111 (1984), p.930, Collection of ICC Arbitral Awards 1974-85, p.507.
- 38 *The Hub Power Company (HUBCO) v Pakistan WAPDA PLC* 2000 SC, p.841; *Société Générale Surveillance S.A. v Islamic Republic of Pakistan* (3 July 2002) 28 YB Comm. Arb. 1312 (2003).
- 39 A. Timothy Martin, "International Arbitration and Corruption: An Evolving Standard", *International Energy and Minerals Arbitration*, Mineral Law Series, Vol.2002, p.4.
- 40 ICC Case No. 3913, p. 498 (stating "*Des constatations qui viennent d'être relatées, il résulte que la convention liant [l'entreprise britannique] à [l'entreprise française] a une cause illicite, que – pour cette raison – elle est nulle (...).*").
- 41 ICC Case No. 5943, Award of 1990, J.D.I. 4, Chambre de Commerce Internationale (1996).
- 42 ICC Case No. 8891, Award of 1998, *Journal du Droit International* (2000), Vol.4, p.1076.
- 43 ICC Case No. 6401, p. 20.
- 44 [2007] UKHL 40.
- 45 *Id.*, p.19 ("*In the present case, it is alleged that the main agreement was in uncommercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. (...) [T]he arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.*" (emphasis added)).
- 46 Article 27(1), UNCITRAL Arbitration Rules 2010; *Frederica Lincoln Rialhi v. Islamic Republic of Iran, Concurring and Dissenting Opinion of J. Brower in Award No. 600-485-1 (27 February 2003)*, 37 Iran-US C.T.R. 158, para. 18 (2003) ("*It is axiomatic that the burden of proving a claim lies with the party presenting it.*").
- 47 ICC Case No. 6497, Yearbook Comm. Arb. XXIV (1999), p.71.
- 48 Edward Eveleigh, "General Standards of Proof in Litigation and Arbitration Generally" (1994), 10 *Arbitration International* 3, p.334.
- 49 ICC Case No. 5622, Awards of 1988 and 1992, Collection of ICC Arbitral Awards (1991-1995), p.220.
- 50 ICC Case No. 6497, Award of 1994, Yearbook Comm. Arb. Vol. XXIV (1999), p.71.
- 51 Sayed, p.106.
- 52 ICC Case No. 6401, Award of 1991, Mealey's Int. Arb. Report (1992), Vol.7, Issue No.1, Section B, p.B-1.
- 53 Paolo Michele Patocchi and Ian Meakin, "Procedure and the Taking of Evidence in International Commercial Arbitration" (1996) *International Business Law Journal* 7, p. 889 (For example the standard of proof for civil litigation in England is the "balance of probabilities". Similarly in civil law jurisdictions, an "inner conviction" is sought by judges in determining the facts.).
- 54 ICC Case No. 7047, Award of 1994, ASA Bulletin Vol.2 (1995), p.301.
- 55 *Id.*
- 56 Sayed, p. 106.
- 57 ICC Case No. 7047, Award of 1994, High Court Queen's Bench (1997), 4 All ER 570 (1998).
- 58 See Daniel Kaufmann and Pedro C. Vicente, "Legal Corruption", World Bank (October 2005), Second Draft, <[http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal\\_Corruption.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf)>, accessed on September 10, 2017, p.2 (expressing that "*corruption may arise through other less obvious forms, which may involve collusion between parties typically both from the public and private sectors, and may be legal in many countries.*" (emphasis added)).
- 59 See ICC Case No. 4145, p.559.



# INTERPRETATION OF THE OFFER TO ARBITRATE EXPRESSED IN NATIONAL FOREIGN INVESTMENT LAW

By Tatiana Lisboa Padrão

## ABSTRACT

Consent to arbitration is key to the ICSID's jurisdiction and may be given in different ways, including by means of a provision incorporated in the foreign investment law of the host state. Even though consent given by means of a Bilateral Investment Treaty is now the most common method, some capital-importing countries did it or do it through FIL.

The aim of this article is to debate how those provisions included in FIL should be interpreted in order to decide if there was a standing unilateral offer to arbitrate. The topic is pertinent since the particular language used varies considerably and in some circumstances it is ambiguous, which can – and most of the times will – give room to objections to jurisdiction.

Mention will be made to various consent clauses included in FILs, taking into consideration some past arbitral decisions, including the well-known *SPP v. Egypt* and *Mobil v. Venezuela* cases.

The article will then move to address the most relevant available legal criteria to interpret domestic provisions containing an offer to arbitrate, with particular emphasis on national law, on the Vienna Convention on the Law of the Treaties and on the International Law Commission 'Guiding Principles' on unilateral declarations of states, making an argument in favour of a methodological interpretation approach that includes all of these elements.

## I. INTRODUCTION

Consent to ICSID arbitration by means of a bilateral investment treaty (BIT) is presently the most common method to agree to such dispute resolution mechanism, due to the (past) recent popularity of the BITs<sup>1</sup>. Nonetheless, as adopting "domestic law on investment protection can be a more flexible policy tool"<sup>2</sup>, some of the capital-importing countries frequently decide to adopt foreign investment laws (FIL) that provide substantial assurances as well as consent to ICSID arbitration (procedural assurances)<sup>3</sup>, clearly expressing a wish to "open their economies to foreign capital" and

aiming to receive meaningful foreign investment in the country<sup>4</sup>.

In any case, is not uncommon that, after a specific investor accepts such an offer<sup>5</sup> and initiates arbitral proceedings, the host state raises objections to the jurisdiction of the Centre. Nonetheless and as many may recognise<sup>6</sup>, not every reference to ICSID in state's FIL represents consent to ICSID's jurisdiction.

Since the FIL is not targeted to a specific foreign investor but, on the contrary, to the investors' community (is a general offer of consent), the respondent states have been presenting several arguments against ICSID Centre's jurisdiction, including that an additional agreement between the host state and a specific foreign investor is necessary; that the reference to ICSID arbitration is just a reminder that recourse to international arbitration is one amongst other possibilities or to inform that the host state is signatory to the ICSID Convention.

As a consequence of said objections, arbitral tribunals have been called to interpret domestic provisions and to make a decision on their own jurisdiction. The issues raised by said interpretation result mainly from the fact that the domestic provisions amount to – as many may argue – a unilateral offer (which has a *sui generis* character<sup>7</sup>) made by the host state through national legislation with repercussions at the international level<sup>8</sup>.

The main purpose of this article is to analyse the possible criteria to interpret a state's unilateral promise<sup>9</sup> to arbitrate disputes with foreign investors, when such promise is embodied in national legislation. The article will start by giving examples of different consent clauses, the majority of which analysed in past arbitral decisions, citing the well-known SPP v. Egypt<sup>10</sup> and Mobil v. Venezuela<sup>11</sup> cases. Even though there is no precedent rule, the SPP v. Egypt case is relevant since it was the first published case where the issue of interpretation of FIL containing consent to ICSID arbitration was examined; in turn, the Mobil v. Venezuela case is significant since it explains why some scholars found a renewed interest on this topic as a consequence of the several proceedings initiated by foreign investors against Venezuela based on its FIL.

The article will then move to address the most relevant available legal criteria to interpret domestic provisions containing an offer to arbitrate, with particular emphasis on national law, on the Vienna Convention on the Law of the Treaties (VCLT) and on the International Law Commission (ILC) 'Guiding Principles' on unilateral declarations of states, making an argument in favour of a methodological interpretation approach that includes all of these elements.

Despite not being a new topic, considering the relevance that consent plays in international arbitration it is not meaningless to revisit the issue, making reference to relevant past arbitral decisions, as well as the non-consensual views of some international law scholars.

## II. THE SPECIFIC CASE OF CONSENT EXPRESSED THROUGH FILS

"Arbitration is, by definition, based on an agreement

between the parties"<sup>12</sup> and, therefore, consent to arbitration by the host state and by the investor is the "cornerstone" of the Centre's jurisdiction<sup>13</sup> and an "indispensable requirement for a tribunal's jurisdiction"<sup>14</sup>.

As article 25 of the ICSID Convention demands, in order to the Centre to have jurisdiction both the host state and the state of the investor's nationality must be a party to the ICSID Convention. Nevertheless, said fact by itself will not be enough to establish the jurisdiction of the Centre, since ICSID arbitration is not mandatory merely because states are signatories to the Convention<sup>15</sup>. Indeed, it is necessary (amongst other requirements) that both parties give specific (and written) consent to ICSID arbitration, which might be done, for example, through a provision included in the FIL of the host state and later acceptance by a foreign investor<sup>16</sup>.

The consent given through the host state's FIL "does not involve an agreement between two states or between a state and a foreign investor; consent (...) proceeds from a unilateral undertaking of the host state in its domestic investment law"<sup>17</sup>. Arbitration as a dispute settlement mechanism is offered to foreign investors "in general terms"<sup>18</sup> and it will only suffice if a particular investor accepts such offer. Both abovementioned features might justify why some authors recognise *sui generis* characteristics to the unilateral offer to arbitrate<sup>19</sup>.

Being the consent to jurisdiction a crucial aspect of international arbitration and knowing that "not every reference to investment arbitration in national laws amounts to consent to jurisdiction"<sup>20</sup>, it is pertinent to provide some examples of domestic provisions and observe how the language used varies considerably<sup>21</sup> and is sometimes unclear, providing grounds for objections to jurisdiction.

### 2.1 Estonia

Article 22 of **Estonian Law on Foreign Investments** (11 September 1991) has a brief and generic reference to international arbitration, without providing for any specific consent to such a dispute resolution method:

*"Disputes of foreign investors and enterprises with foreign capital with juridical persons of the Republic of Estonia (...) are examined by a court of law (...) or an arbitration court chosen on agreement of the parties."*<sup>22</sup>

### 2.2 Algeria

Article 17 of **Algeria's Investment Law** (Decree No. 01-03, 20 August 2001) contains a reference to a bilateral or to a multilateral treaty that Algeria might be a part of, which might provide for arbitration as a method for dispute settlement. Nonetheless, such reference is only informative and does not represent any standing offer:

*"Tout différend entre l'investisseur étranger et l'Etat algérien, résultant du fait de l'investisseur (...), sera soumis aux juridictions compétentes sauf conventions bilatérales ou multilatérales conclues*

*par l'Etat algérien, relatives à la conciliation et à l'arbitrage ou accord spécifique stipulant une clause compromissoire ou permettant aux parties de convenir d'un compromis par arbitrage ad hoc.*"<sup>23</sup>

Analogous to the above-reproduced provision, is the domestic provision where states include an express reference *informing* that they are signatories to the ICSID Convention. It is understandable that doubts regarding the goal of such information may arise, as the list of ICSID Convention's signatories is public record<sup>24</sup>.

### 2.3 Tanzania

Article 23(2) of the **Tanzania Investment Act** of 1997 contains a reference to ICSID, but requires a specific agreement between the state and the foreign investor before establishing the jurisdiction of the Centre:

*"A dispute between a foreign investor and (...) the Government in respect of a business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with any of the following methods as may be mutually agreed by the parties, that is to say: (a) the rules of the ICSID Convention (...)"*<sup>25</sup>

Based on this provision, the arbitral tribunal in the *Bewater Gauff v. Tanzania* case found that such FIL did not represent a unilateral offer by Tanzania to arbitrate<sup>26</sup> and that it required further agreement between the parties.

### 2.4 Albania

Few FILs contain an express and clear standing offer to submit arising disputes to ICSID arbitration. This is, for example, the case of article 8(2) of the **Albania's Law on Foreign Investments** (Law No. 7764 of 1993):

*"If a disagreement with respect to a foreign investment between a foreign investor and the state administration of the Republic of Albania, which is not settled by agreement, then the foreign investor may apply to a court or arbitration tribunal competent in the Republic of Albania, in accordance with its compensation for expropriation or discrimination, or with transfers under Article 7 of this law, then the foreign investor may also apply to the International Centre for the Resolution of Investment Disputes"*<sup>27</sup>

Regarding this provision, the arbitral tribunal in the *Tradex v. Albania* upheld its jurisdiction, asserting that Albania "had unambiguously consented to the Centre's jurisdiction"<sup>28</sup>.

### 2.5 El Salvador

Other FILs do not provide an express standing offer as clear as the offer provided by the Albanian FIL. However, the language used was also considered by tribunals to amount an offer to ICSID arbitration. This was the case of article 15 of the **El Salvador's Foreign Investment Law**:

*"(...) In the case of controversies arising between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to: a) the International Centre*

*for Settlement of Investment Disputes (ICSID), with the purpose of solving the controversy through conciliation and arbitration, in accordance with the ICSID Convention*"<sup>29</sup>

The arbitral tribunal found in the *Inceysa v. El Salvador* case that article 15 constituted a unilateral offer of consent to submit to the jurisdiction of the Centre all disputes arising between El Salvador and the foreign investor<sup>30</sup>.

### 2.6 Venezuela

One domestic provision that international law scholars have been asserting to belong to the "grey area" is article 22 of **Venezuela's Foreign Investment Law** of 1999 on Promotion and Protection of Investments (Decree No. 356 of 3 October 1999), according to which:

*"Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions (...) of the ICSID Convention are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation"*<sup>31</sup>

This specific provision was analysed by the arbitral tribunals in *CEMEX v. Venezuela* and *Mobil v. Venezuela* cases and both tribunals declined jurisdiction based on the decision that article 22 did not amount any consent to ICSID arbitration<sup>32</sup>.

### 2.7 Egypt

One of the most famous domestic provisions containing consent to ICSID arbitration is article 8 of **Egypt's Law No. 43** of 1974, which provided that:

*"Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the ICSID Convention which Egypt has adhered by virtue of Law No. 90 of 1971, where it (i.e., the Convention) applies.*

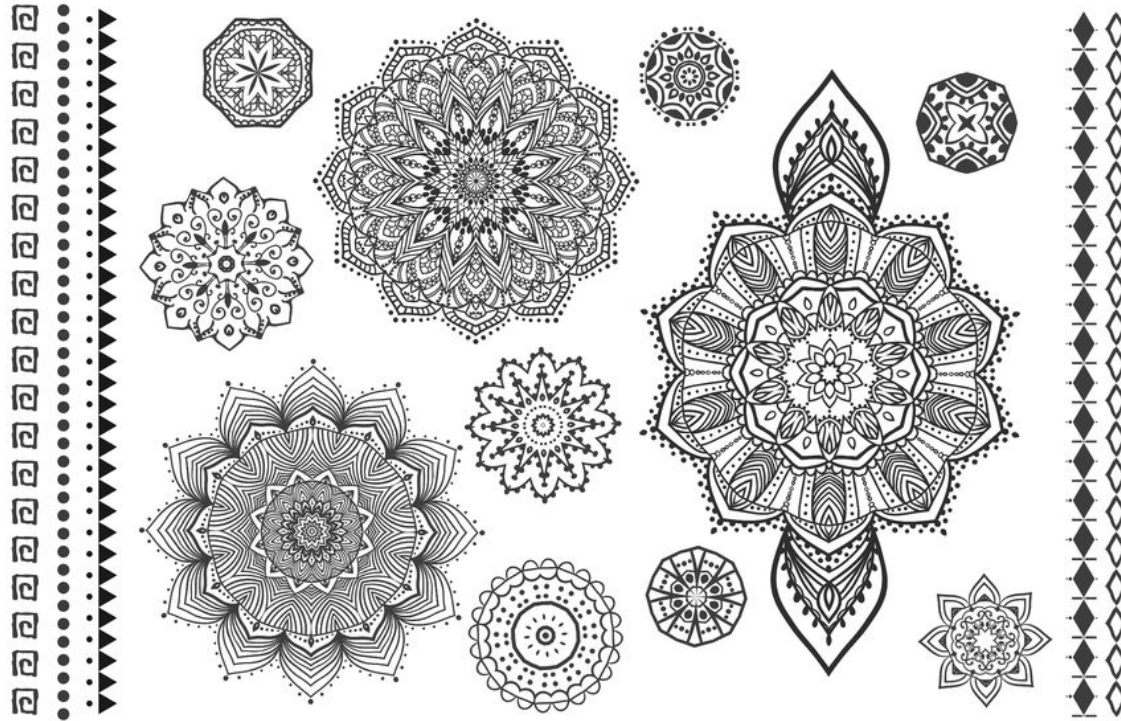
*Disputes may be settled through arbitration. An Arbitration Board shall be constituted (...)"*<sup>33</sup>

This article was analysed by the tribunal in the *SPP v. Egypt* case, which decided it had jurisdiction, since the wording of the provision did not demand any separate agreement between the parties. Egypt – after the award in the *SPP* case was rendered – amended its FIL, now expressly demanding a subsequent agreement between the parties<sup>34</sup>.

## III. INTERPRETATION OF CONSENT CLAUSES AS UNILATERAL ACTS OF STATES

There are different possible paths to be followed when





interpreting a (alleged) standing offer to ICSID's arbitration made by a state through a FIL, some of which this chapter will try to outline.

Despite there is no consent regarding the juridical nature of such standing offer, the qualification as a unilateral act seems to attract the widest support both from scholars and arbitral tribunals. Indeed, tribunals have been following the approach of analysing FILs as a possibly binding unilateral act under international law<sup>35</sup> as happened, for instance, in *SPP v. Egypt* and *Mobil v. Venezuela* cases. Furthermore, in Schreuer's words "from the perspective of international law a statutory provision containing an offer of consent to arbitration is a unilateral act and has to be interpreted as such"<sup>36</sup>.

In a slightly distinct approach, some scholars argue that domestic provisions containing an offer to arbitrate cannot be considered "genuine unilateral acts" (as they are not autonomous from the parties relations arising from the ICSID Convention), but instead should be placed "within the realm of a treaty relation"<sup>37</sup>, having in any case similar effects to the unilateral declarations formulated under article 36(2) of the ICJ's statute. Also, other scholars consider that the "characterization of the consent to ICSID arbitration in domestic laws as a unilateral obligation governed by international law is far fetched"<sup>38</sup>.

For the purposes of this article, it will be accepted that a domestic provision containing an offer to arbitrate is a unilateral act from the state, as the main aim is rather to analyse some of the possible standards of interpretation.

#### (i) National Law

As the provisions under consideration are included in national

law, one might argue that domestic interpretation rules – that give prevalence to the legislator's intent<sup>39</sup> – should logically be applied<sup>40</sup>. The drawback of this assumption is that consent to be perfected needs to be accepted by the foreign investor and, therefore, it could not possibly be considered purely domestic law<sup>41</sup>.

The *SPP v. Egypt*'s tribunal emphasised that even though Egyptian interpretation of its own national law was entitled to considerable weight, it could not have the power to control the tribunal's decision on its own jurisdiction. Similarly, the *Mobil v. Venezuela*'s tribunal recognised it was free to take into consideration a domestic ruling on the interpretation of a domestic provision, even if the domestic provisions are not to be interpreted according to Venezuelan interpretation rules. Hence, it can be asserted that tribunals have been rejecting "purely national methods of statutory interpretation"<sup>42</sup>.

As Schreuer notes, "it is generally accepted that questions of jurisdiction of an international tribunal are determined by international law"<sup>43</sup>. Since unilateral declarations may lead to unilateral obligations, which might affect its relationships with other states<sup>44</sup>, domestic provisions containing a standing offer to arbitrate should not be interpreted exclusively according to national law.

Despite the majority of scholar's views, in Anzorena's opinion – with which this article does not agree for the exposed reasons – domestic provisions allegedly establishing consent to ICSID jurisdiction should be interpreted on the basis of national interpretation rules<sup>45</sup>.

At this point, the relevant question is which canon of international law should be used to interpret the consent given through FIL. According to Caron<sup>46</sup> there are two possible routes:

apply by analogy the interpretative rules for the interpretation of treaties following the ICJ's jurisprudence, on the one hand, or use the ILC 'Guiding Principles' approach, on the other hand. This article will explore both alternatives next.

## (ii) VCLT

The SPP v. Egypt's tribunal while interpreting Egyptian FIL applied general principles of statutory interpretation taking into consideration, namely and where appropriate, relevant rules of treaty interpretation. Also, several scholars recognise the relevance of article 31(1) of the VCLT and argue that domestic provisions should be interpreted in the context of treaty law<sup>47</sup>, following the basic methodology of treaty interpretation (predominance of an objective-textual approach<sup>48</sup>). Notwithstanding, this is not a consensual point of view<sup>49</sup> and some highlight that the paradigm of VCLT drafting is the traditional state-to-state relationship "embodied in agreements creating and regulating reciprocal obligations of states as sole subjects of international law"<sup>50</sup> and not a state-to-investor relationship. This argument *per se* does not seem sufficiently robust (the existence of two different paradigms does not justify alone the unfitness of the treaty interpretation rules) to reject interpretation according to good faith and not to give primacy to the text in its context.

In any case, since the perfected consent is not a treaty, article 31(1) of the VCLT could only be applicable by analogy<sup>51</sup>. This approach has been admitted by tribunals<sup>52</sup> and followed by ICJ's jurisprudence<sup>53</sup>. According to the latter, ordinary rules of treaty interpretation should be applied by analogy "to the extent they are compatible with the sui generis nature of unilateral declarations"<sup>54</sup>. Nonetheless, it should be noted that ICJ's jurisprudence focus has been more oral declarations from state officials and diplomats than written declarations included in FIL.

Also, the principle of *good faith* has been considered relevant to a great extent not only by the ICJ<sup>55</sup> but also by arbitral decisions, as for example in SPP v. Egypt<sup>56</sup>, Inceysa v. El Salvador<sup>57</sup>, Amco v. Indonesia<sup>58</sup>, SOABI v. Senegal<sup>59</sup> cases. In the latter arbitral decision, the tribunal considered that the "legitimate and reasonable expectations of the investors" needed to be taken into account while interpreting consent. The principle of good faith was also included on the ILC 'Guiding Principles' (principle 1) and it was considered to be "entirely applicable to unilateral acts"<sup>60</sup> by special rapporteur Victor Cedeño in his fourth report on unilateral acts of states. What exactly means to interpret in good faith is a distinct and also debatable question that will not be addressed here due to the space limit.

When following the basic methodology of treaty interpretation mentioned above, supremacy should be then given to the *ordinary meaning of the terms*, in their context (FILs as instruments of protection and promotion of foreign investment) and in light of their object and purpose (provide legal assurances and safeguards to foreign investors)<sup>61</sup>: this is exactly what article 31(1) of the VCLT tells.

Similarly language to article 31(1) (with exception to "object and purpose" expression) can be found in principle 7

(second part) of the ILC 'Guiding Principles'. Regarding the application by analogy of article 31(1) of the VCLT and because principle 7 does not mention neither the object nor the purpose of the text, the special rapporteur showed some concerns of applying such language to the unilateral acts of states. Such position was openly criticised by Caron<sup>62</sup> since the special rapporteur did not identify which specific characteristics of unilateral acts demand a departure from article 31(1) of the VCLT.

## (iii) ILC 'Guiding Principles'

In the Mobil v. Venezuela case, the tribunal interpreted article 8 of the Venezuelan FIL according to the "ICSID Convention itself and to the *rules of international law governing unilateral declarations of states*". Two precautions should be kept in mind while making use of the ILC 'Guiding Principles' (adopted in 2006) applicable to unilateral acts of states: (a) these are only principles offering guidance that should be applied with criticism<sup>63</sup>; (b) despite not being a total drawback by itself, the perspective adopted while drafting these principles was a state-to-state relationship<sup>64</sup> and its concern were mainly the oral unilateral declarations, with no regard to FILs<sup>65</sup>.

When applying the ILC 'Guiding Principles', Caron identifies two departures from the approach of the VCLT: on the one hand, principle 3 establishes that factual circumstances in which the unilateral declarations were made as well as the reactions to which they give rise (which is not exactly the same as "object and purpose") must be considered as a supplementary tool when interpreting a unilateral act<sup>66</sup>; and on the other hand, principle 7 *suggests* a restrictive interpretation of the obligations resulting from the unilateral act whenever there is doubt as to the scope of that obligation.

As Caron suggests, the principle of restrictive interpretation in case of doubt was included in the 'Guiding Principles' out of "fear that any declaration by a diplomat could bind a state"<sup>67</sup>, which being justifiable (to protect a state's sovereignty) does not make it more suitable when interpreting domestic provisions containing an offer to arbitrate. Not infrequently respondent states tried to argue that ambiguous domestic provisions should be interpreted restrictively, argument that if accepted would unintelligibly (especially considering that the purpose of the domestic provision is to attract foreign investment) place the risk of drafting ambiguous provisions on the investor. Fortunately, the majority of the arbitral tribunals have been rejecting this argument and backing instead a balanced interpretative approach (neither restrictive nor expansive), as for instance: Mobil v. Venezuela<sup>68</sup>, CEMEX v. Venezuela<sup>69</sup>, Inceysa v. El Salvador<sup>70</sup>, SOABI v. Senegal<sup>71</sup>, Amco v. Indonesia<sup>72</sup>. Some tribunals have even accepted a more extensive interpretation approach, as for example Tradex v. Albania<sup>73</sup>.

Considering all the abovementioned perspectives and the *sui generis* nature of the FILs, it is our opinion that FIL should be interpreted according to international law – using both the VCLT and the ILC 'Guiding Principles' – not disregarding completely, in any case, the national law contribution. The same is to say that a methodological approach that includes several complementary

criteria should be followed.

#### IV. CONCLUSION

Consent is the cornerstone of ICSID's jurisdiction and investment arbitration is a *creature of contract*, reasons why it is crucial to verify that the parties consented to arbitration, which might happen if the investor accepts a standing offer made by the state through its national legislation. Domestic provisions containing an offer to arbitrate are widely approached as unilateral acts of states under international law, not being consensual amongst international law scholars the rules for its interpretation.

This article discussed several available criteria of interpretation and came to the conclusion that – considering the *sui generis* nature of the consent given through FIL – a methodological approach that includes several complementary criteria should be followed. FIL should be interpreted mainly according to principles

of international law: application by analogy and when appropriate of article 31(1) of the VCLT and an objective textual analysis should be carried out, considering – if compatible with the characteristics of unilateral acts – its object and purpose. Finally, factual circumstances in which the declarations were made should also be considered.

*“Jurisdictional instruments are to be interpreted (...) objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in its favour is preponderant.”* (SPP case).

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- 1 Some governments have announced the termination of BITs, as for examples Ecuador's government.
- 2 Ignacio Anzorena, 'Consent to Arbitration in Foreign Investment Laws', *Investment Treaty Arbitration and International Law*, Volume 2 (JurisNet 2009), 68.
- 3 David Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law', *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2011), 649.
- 4 Makane Mbengue, 'Consent to Arbitration Through National Investment Legislation' (2012) *Investment Treaty News* <<https://www.iisd.org/itn/tag/icsid/>> accessed 25 July 2017, 149.
- 5 "The possibility of unilateral state consent to arbitration was specifically contemplated in the Report of the Executive Directors on the ICSID Convention, which noted that consent of both parties did not need to be expressed in a single instrument. Since then, the unilateral nature of state consent has been widely recognised in scholarly literature and arbitral practice" in Yulia Andreeva, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions' (2011) 27 *Arbitration International*, 138.
- 6 Rudolf Dolzer and Christoph Schreuer, *Principles Of International Investment Law* (2nd edn, Oxford University Press 2012), 256. See also Andrea Steingruber, *Consent in International Arbitration* (Oxford University Press 2012).
- 7 Andreeva (n 5).
- 8 Caron (n 3).
- 9 This article does not intend to be an extensive reflexion on the theory of the unilateral acts of states and therefore will not examine issues related with oral declarations. On this topic see Michael Reisman and Mahmoud Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 *ICSID Review*.
- 10 Southern Pacific Properties (Middle East) Ltd (SPP) v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction I (27 April 1985), 3 *ICSID Rep.* 112 (1995) and Decision on Jurisdiction II (14 April 1988).
- 11 Mobil Corporation and others v. Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010).
- 12 Christoph Schreuer, 'Investment Arbitration Based on National Legislation', *Völkerrecht und die Dynamik der Menschenrechte, Liber Amicorum Wolfram Karl* (Facultaswuv 2012), 527.
- 13 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (2003) International Centre for Settlement of Investment Disputes <<https://icsid.worldbank.org/>> accessed 25 July 2017, para. 23. See also Michele Potestà, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27 *Arbitration International*, 150.
- 14 Dolzer and Schreuer (n 6) 254.
- 15 See ICSID Convention's preamble. United Nations Conference on Trade and Development, *Dispute Settlement: Investor-State* (United Nations 2003) 2.2. Selecting the appropriated Forum, 15.
- 16 Dolzer and Schreuer (n 6) 254. See also Jan Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Review*.
- 17 Mbengue (n 4).
- 18 Dolzer and Schreuer (n 6) 254. As Mbengue (n 4) mentions it "is an offer made to the foreign investment community as a whole with no real possibility of individualizing the scope of the offer".
- 19 Andreeva (n 5).
- 20 Christoph Schreuer, 'Consent To Arbitration' <<http://www.transnational-dispute-management.com/>> accessed 25 July 2017, 3.
- 21 Solveiga Palevičienė, 'Consent to Arbitration and the Legacy of the SPP V. Egypt Case' (2014) 7 *Baltic Journal of Law & Politics* 149, 151.
- 22 *Investment Laws of the World*, ICSID release 94-4, issued July 1994.
- 23 *Investment Laws of the World*, ICSID release 2009-2, issued November 2009. No official translation available.
- 24 Potestà (n 13) 158.
- 25 *Investment Laws of the World*, ICSID release 99-1, issued May 1999.
- 26 *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 329.
- 27 *Investment Laws of the World*, ICSID release 95-1, issued January 1995.
- 28 *Trallex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction (24 December 1996), paras. 186-187.
- 29 The new FIL (Decree No. 732, 2013) provides that: "En caso que surgieren controversias o diferencias entre los inversionistas nacionales o extranjeros y el Estado (...) las partes podrán acudir a los tribunals competentes, (...)" – *Investment Laws of the World*, ICSID release 2014-1, issued April 2014. No official translation available.
- 30 *Inceysa Vallisoleatana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006), paras. 331-332. However, the tribunal declined jurisdiction based on different grounds: see Schreuer, 'Consent to Arbitration' (n 20) 5.
- 31 *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction (30 December 2010) para. 64. Spanish version: *Investment Laws of the World*, ICSID release 95-1, issued January 1995.
- 32 See also *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award (2 August 2011).
- 33 SPP v. Egypt case (n 10), Decision on Jurisdiction II, para. 70.
- 34 Potestà (n 13) 160 and footnote 49. See the new Egyptian FIL (article 7 of Law No. 8 of May 11, 1997).
- 35 Caron (n 3) 655.

- 36 Schreuer, 'Investment Arbitration Based on National Legislation' (n 12) 532. See Andreeva (n 5). See also Caron (n 3) who argues that a FIL is best evaluated as a unilateral act under international law.
- 37 Victorino Tejera Pérez, 'Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study', *Investment Treaty Arbitration and International Law*, Volume 2 (JurisNet 2009), 111. As the author emphasizes "this type of act has been characterized as belonging to the sphere of the law of international agreements or unilateral acts of states that fall within the treaty sphere". This qualification has impact in the author's opinion on how domestic provisions should be interpreted.
- 38 Anzorena (n 2) 78. The author argues – not completely deprived from reasoning – that "If the source of consent is domestic law, it seems more appropriate to determine the existence and scope of such consent in accordance with the framework under which it was issued. A different question is whether – once the existence and the scope of the offer to arbitrate is determined – its validity should be assessed with exclusive reference to domestic law".
- 39 Anzorena (n 2) 74.
- 40 SPP v. Egypt, Dissenting Opinion (n 10).
- 41 Schreuer, 'Consent to arbitration' (n 20) 39.
- 42 See also *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999) para. 35. In this case consent to arbitration was based on an agreement signed between the parties with reference to the relevant BIT.
- 43 Schreuer, 'Investment Arbitration Based on National Legislation' (n 12) 530.
- 44 Nuclear Tests (Australia v. France), 1974 ICJ as referenced by Caron (n 3) 654.
- 45 Anzorena (n 2) 79. See also *Inceysa v. El Salvador* (n 30), para. 263.
- 46 (n 3) 655-656.
- 47 Pérez (n 37) 111.
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- 50 Andreeva (n 5) 131.
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- 53 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US)*, 1984 ICJ; *Land and Maritime Boundary between Cameroon and Nigeria*, 1998 ICJ; and *Fisheries Jurisdiction (Spain v. Canada)*, 1998 ICJ all as referred by Caron (n 3) 656-658.
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- 59 *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award (25 February 1988), para. 4.10. Consent in this case was expressed in an agreement signed between the parties.
- 60 Caron (n 3) 661.
- 61 Mbengue (n 4).
- 62 (n 3) 662-663.
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- 66 (n 3) in contrast with article 32 of the VCLT that should only be used to confirm the result of the interpretation based on article 31 or to determine the meaning of the provision in case of the outcome was unreasonable, 659. Regarding the importance of circumstances while interpreting unilateral acts see paras. 149 and 151 of the fourth report of the special rapporteur, Caron (n 3) footnote 38.
- 67 Caron (n 3) 668.
- 68 (n 11) paras. 112-119.
- 69 (n 31) paras. 104-110.
- 70 (n 30) paras. 176-181.
- 71 (n 59) paras. 4.08-4.10.
- 72 (n 58) paras. 12-24.
- 73 (n 28) para. 68. See Schreuer, 'Consent to Arbitration' (n 20) 38.



# ON THE UTILITY OF A CODE OF ETHICS FOR REGULATING THE CONDUCT OF COUNSELS IN INTERNATIONAL ARBITRATION

By Filipa Duarte Gonçalves

## 1. Introduction:

This article addresses the topic of counsel's responsibility in international arbitration, a topic which may be considered firmly on the table. Despite the Conference sponsored by the Institute for Transnational Arbitration held in March 2016 on the theme , no consensus was reached regarding who should regulate the conduct of the counsel in international arbitration. At the Conference the panellists listed the entities that might be responsible for regulating counsel's conduct, notably, the national bar associations and the arbitration institutions. In the absence of any uniform code of ethics, arbitral tribunals may be called upon to regulate counsel's conduct during the arbitration proceedings. In this article I intend to analyse the legitimacy of the so called tribunal's "inherent right" or "inherent powers" to perform such role,<sup>1</sup> just as others players of international arbitration. In fact, when thinking about the role of lawyers in arbitration, I initially took the view that one should start by a theoretical approach. However, while going through my research, I understood that it would be more effective to take a practical approach by clarifying the boundaries of lawyer's responsibility

and specifying the conducts of lawyers that may be considered as reprehensible.

In order to reach a conclusion, a preliminary analysis was required to determine the scope of counsel's responsibility before the client. Then, to discuss whether there would be a need for a Code of Ethics<sup>2</sup> to regulate the conduct of lawyers in arbitral proceedings<sup>3</sup>. And if so, who should be appointed as the supervisory authority? Or, on the contrary, could one just simply consider as satisfactory the rules of each country on ethics?

This issue was raised by Lisa Bench Nieuwveld<sup>4</sup> who, following the publication of the IBA Guidelines in 2011, questioned on the need of a Code of Ethics for purposes of regulating lawyers' activity in arbitration. And, if so, what kind of rules of conduct should be considered. As Doak Bishop<sup>5</sup> once referred, "(...) *International arbitration dwells in an ethical no-man's land. Often by design, arbitration is set in a jurisdiction where neither party's counsel is licensed. There is no supra-national authority to oversee attorney conduct in this setting, and local bar associations rarely if ever extend their reach so far. Specialized ethical norms for attorneys in*

*international arbitration are nowhere recorded. Where ethical regulations should be, there is only an abyss (...)*”.

Thus, what should be the solution for the problem? Should it entail the creation of a supranational Body for supervising the Lawyer’s conduct? Should the Code of Ethics be applied by the Arbitral Tribunal or, instead, by the national courts at the seat of arbitration? And could a Code of Ethics guarantee the fairness and integrity of arbitral proceedings? These are some of the questions that I intend to analyze in this article.

## II. Why a Code of Ethics?

The need for a Code of Ethics was firstly raised by Edna Sussman and Solomon Eber who claimed that *«while the topic of ethical standards for arbitrators in international arbitration has been the subject of codes and guidelines, major international arbitration providers are silent as to the question of ethics for counsel.* <sup>6</sup> In the last years, the International Bar Association published several papers, notably “Counsel Ethics in International Arbitration Survey”, which provided with a list of procedures for counsels to consider in the beginning of arbitral proceedings. Additionally, arbitral institutions have introduced changes to their own regulations in order to be of guidance for counsels in their practice.

One could say that the main reason for demanding of a Code of Ethics to regulate the conduct of counsel in international arbitration is to avoid the risks of applying various ethics rules that may enter into conflict in the same arbitration proceedings. This would be the case when lawyers involved in the same case are subject to different codes of ethics.<sup>7</sup>

Some of the authors who are in favour of an International Code of Ethics claim that such a Code, to be approved in the beginning of the arbitral proceeding, must include rules from the seat of arbitration (*lex arbitri*) combined with national rules of each one of the parties involved in the proceedings. With respect to the enforceability of said Code, some take the view that it is up to arbitral institutions to adopt a Code of Ethics and to supervise its applicability. More, arbitral institutions should include in their own regulations some of the rules from the Code of Ethics for purposes of binding parties involved in the arbitral proceedings. If that would be the case, the Code of Ethics should be implemented either by the arbitral institution or by the respective arbitral tribunal.

Traditionally, counsels are bound to their own ethical code. In international disputes, though, one may question if those national codes could be applicable beyond their frontiers. If they are, there could be a conflict between two or more ethical rules (what a reputable author called a “*double deontology problem*”).<sup>8</sup> On this matter, Benson claims that more than the existence of a Code of Ethics with supranational implementation, it is of most importance that parties present a kind of “*check list*” in the beginning of the arbitral proceeding, listing admissible and reprehensible conducts, in order to guarantee that the lawyers involved in the proceedings are bound by the same ethical standards.

Some researchers, like Cyrus Benson made other proposals,

by providing a Checklist of Ethical Standards for counsels in International Arbitration. The one should be applied at the outset of a case to ensure that the parties, their counsels and the tribunal are on the same page insofar as ethical standards are concerned. Such a checklist would seek to identify the areas where ethical standards among counsel may differ and offer parties solutions that may be adopted (or not) by parties. This would mean that parties and their counsels would be encouraged to seek agreement prior to the start of procedural hearings.

However, as Doak Bishop and Margarete Stevens conclude, the time has come for the adoption of an explicit Code of Conduct to guide counsel representing the parties. The existence of such a Code in *ad-hoc* arbitrations could help counsels and arbitrators lacking experience in arbitration to standardize rules to apply to arbitral proceedings. On the other hand such a Code of Ethics could also contribute to setting up case law leading to more equity, justice and credibility of arbitration.

While parties need to understand how to plan their legal representation and related case strategy, arbitrators need more guidance and support in making rulings on ethical issues. On the other hand, national bar associations need to be prepared for the event of relinquish part of their control in favor of an uniformization of transnational practice.<sup>9</sup>

## III. The struggles of creating a Code of Ethics

One of the major problems when considering the utility of a Code of Ethics is the existence of aggressive tactics used in arbitration, commonly known as “*guerrilla tactics*”, something which most of the arbitration community fights against

Stephan Wilske, who named *guerrillas tactics* as “*black arts*” provide some examples of such bad conducts, as follows:

- (i) Filing surprise documents after all motions have been filed or, filing relevant documents in the middle of the copies, with no identification in order to prevent the other party to reply to such document;
- (ii) Pleading the existence of conflict of interests between one of the counsels and one of the arbitrators;<sup>10</sup>
- (iii) Excessive and unjustified motions refusing the nomination of the arbitrator made by the other party;
- (iv) Surprise or supervening motions alleging new facts;
- (v) Fling injunctions consecutively before the judicial court;
- (vi) Establishing contact by the parties or their counsels to the arbitrators;
- (vii) Summoning other party’s witnesses;
- (viii) Interrupting constantly the other party’s counsel while they are inquiring their witnesses in order to impede



or affect their examination;

(ix) Filing adulterous translations of documents on purpose.

All of the above described kind of behaviours, without any regulation or control, may provoke delays in the arbitration proceedings and undermine arbitration.

There are certain Ethic Codes, guidelines and/or recommendations that have been published in a way to attempt to give a solution to the problem, notably: (i) The IBA Rules of Ethics for International Arbitrators (1986), (ii) The Union Internationale des Avocats Turin Principles of 2005, (iii) The IBA General Principles of Legal Profession (2006), (iv) The Code of Conduct for European Lawyers ("CCBE Code"). However, these instruments/documents do not provide meaningful guidance due to the fact they are either not specific to international arbitration or do not address counsel conduct<sup>11</sup>

For instance, a certain provision of the IBA's Code of Ethics (1988) states that "(...) a lawyer who undertakes professional work in a jurisdiction where he is not a full member of the local profession shall adhere to the standards of professional ethics in the jurisdiction in which he has been admitted", without however, solving the question of multiple nationalities or the simultaneous application of several legal systems to arbitral proceedings which may lead to applying contradictory ethical rules. This solution presented by the IBA's Code of Ethics of 1988 may result when no conflict exists between the regulations/codes of ethics. But how to solve the conflict when there is one?

On this matter, Prof. Jan Paulsson has raised the following question: When lawyers from different countries - and contradictory codes of ethics - face each other in an arbitral proceeding, may we consider that the client being represented by the lawyer bound by a national Code of Ethics less severe is in a more privileged position in the arbitral proceedings? How to deal with this question? Hence the resulting needs to implement a standardized Code of Ethics that may set the conduct of counsels in arbitration in order to guarantee fair and more efficient proceedings. In fact, unifying the Counsel's conduct will influence fairness and celerity of proceedings and eventually the costs of arbitral proceedings.

Furthermore, the CCBE ("Code of Conduct for Lawyers in the European Union")<sup>12</sup> was tailored to give guidance to lawyers engaged in cross-border activities in Europe and it is, by far, the most advanced and successful international code of ethics to date. However it has little to say about international arbitration practice (except for the relation between arbitrators and parties' counsels).<sup>13</sup> The question of *double deontology* is the major problem, though; the CCBE does not give any special guidance, apart from establishing, generically, the lawyer's proper conduct, based on mutual respect and professional courtesy, adding that the EU's lawyers that are performing their activity in another member state have to comply with the deontological rules of the member state where is seated (cfr. Article 2.4 of CCBE). However, the CCBE does not solve either ethical conflicts that may arise when lawyers from different nationalities face each other in proceedings, only suggesting lawyers to inform themselves on the existing ethics rules in force in the member-state where they intend to perform their activity. More recently,

the IBA (“International Bar Association) published *“The IBA Principles On Conduct For the Legal Profession”*, which replaced the previous version of “The Code of Ethics” published in 1954 and edited in 1988. These guidelines established 10 main principles on lawyer’s ethic conduct in international Arbitration’s proceedings; yet, none of these guidelines were of assistance to solve the problem.

David Wilkins identifies four categories of sources that regulate the counsels’ conduct: (i) Disciplinary controls, meaning traditional mechanisms imposed by local bar authorities; (ii) liability controls, meaning, claims with reference to attorney’s conduct, notably by clients, lawyers, clerks and others; (iii) institutional controls, meaning mechanisms that exist within the institutions attorneys operate (i.e. judicial or administrative sanctions); and (iv) legislative controls, meaning statutory obligations imposed on lawyers by political branches that supplement, but are separate from their bar-imposed ethical obligations.<sup>14</sup>

As Catherine Rogers refers in her article, the solution for this problem is *self-regulation*, noticing that arbitration case-law has shown evidences of said self-regulation by the arbitral tribunal in its own proceedings regarding the participants’ conduct. Some of the rules that we consider important to be implemented could come from the practice of arbitration, specifically of what the arbitral tribunal considers an improper conduct. Any objection to the above referred list should be invoked before the arbitral tribunal and solved immediately. The bound of the parties to this list could also justify applying fines when those rules are breached, if we consider that the Arbitral Tribunal were assigned powers to do that by means of the arbitration clause or commitment to proceed accordingly.<sup>15</sup> Doak Bishop and Margaret Stevens proposed a draft of an Ethical Code referred as *“International Code of Ethics for Lawyers Practicing Before International Arbitration Tribunals”*<sup>16</sup> which may be adopted by Arbitrators for, formally, bound parties and namely their counsels, for compliance with this rules regarding their conduct in the arbitral proceeding. At this stage, it is important to check the importance of guidelines for regulating counsel’s conduct in international arbitration and the need for its existence.

If there is no international Code of Ethics regulating counsel’s conduct in international arbitration, consequently no supranational authority entitled to supervise their conduct exists. On the other hand national Bars rarely do or merely can supervise their supervision abroad.<sup>17</sup> Catherine Rogers sustain that in the same way that the powers to solve the conflict is given to Arbitral Tribunal by parties, it should be considered that the tribunal as also powers to decide on counsel’s conduct during the proceeding, bearing in mind that parties are obliged to act in good-faith and to comply with the rules determined in the proceeding. With regards to institutional arbitrations, the institutions should include said Code of Ethics in their regulations as well as in the arbitration contract, thus binding the parties to such rules.

Issues may also arise on who has the power to enforce the Code of Ethics in case of infringement: the national courts at the seat of arbitration, the arbitral tribunal, or arbitration institutions?<sup>18</sup>

The truth is that the involvement of national courts in such cases would lead, necessary, to delays and extra costs. To some authors, it would be unacceptable to give those courts the power to apply sanctions to counsels when national Bars exist and which are entitled to do it. Moreover, how could one accept the possibility of arbitral institutions to apply fines for misconduct behaviour if those counsels had no intervention in the constitution or election of said institution?<sup>19</sup>

Catherine Rogers takes the view that the power to sanction and/or control counsels’ conduct should lie, exclusively, on the arbitral tribunal since it is the latter that is responsible for resolving the dispute, notably transnational ones. Arbitral tribunals are entitled to do so by means of the arbitration agreement. Parties should, jointly with the arbitration tribunal, tailor those rules to arbitral proceedings in accordance with their own culture. However, counsels are not exempt from respecting the rules imposed by their national Bars. Some Bars have admitted national counsels to be bound by rules determined by other national courts other from those of their own country. In fact, some of the national Bars are developing rules which are favourable to exception when it comes to international proceedings<sup>20</sup>

Unfortunately, arbitration is one step back of international criminal courts, as, for instance, the International Criminal Court of Ex-Yugoslavia regulates parties’ conduct, as they bravely assume that the powers to sanction their behaviour includes the power to supervise and report to the national Bars any misconduct of counsels intervening in the proceeding. And how should the national Bars decide in case the rule allegedly breached in arbitral proceedings enters into conflict with the deontological code of conduct at the counsel’s country of origin?

It is interesting to note that various courts have been called to resolve issues on misconduct by the parties’ counsels. Some of the cases refer to conflict of interests with the arbitrator, challenging thus the tribunal’s reputation and independency. Others are on access to privileged information by one of the parties’ counsel. These events have forced arbitral tribunals to decide and punish the misconduct of counsels, considering it inherent to the tribunals’ power to control and regulate the arbitral process.

Contrarily, Elliott Geisinger<sup>21</sup> considers a mistake to put into the hands of arbitral tribunals the power to decide on matters relating purely to ethical (or unethical) conduct of the counsel. Also, the approach of conferring such powers on arbitration institutions is also highly questionable in terms of legitimacy, as neither parties nor counsels have participated in the composition of the institution’s governing bodies or rules.

#### IV. Conclusion

Due to the lack of a Code of Ethics some international arbitral tribunals have assumed the power to regulate counsels’ misconduct. In the case *Hrvatska Elektroprivreda, d.d. v. Slovenia* the ICSID Tribunal, concluded that an international arbitral tribunal has the inherent power to deal with all the issues necessary for the conduct of matters falling within its jurisdiction, despite the



fact ICSID Arbitration Rules did not explicitly give powers to the tribunal to exclude counsel. .<sup>22</sup>

But not all arbitral tribunals agree that they possess such power. In ICC Case No. 8879, the tribunal concluded that the question of counsel conduct should be the subject of “domestic proceedings,” reasoning that domestic courts are better suited to address grievances regarding counsel conduct than international arbitral tribunals; whose view I fully share. In fact, accepting that arbitrations tribunals have the inherent power to sanction counsel’s misconduct may open room for the domestic tribunals starting to claim the same. And soon, arbitral tribunals just as domestic ones may start to carve out such powers from the national bars associations.

As for the arbitral institutions to regulate counsel conduct, despite some authors consider that they are well suited for the job, I do not share their opinion. Besides the risk of fragmentation if the many arbitral institutions around the world promulgate their own set of rules to govern counsel conduct;<sup>23</sup> imagine how it would be to allow arbitral institutions to regulate counsel’s misconduct when neither the counsel itself nor the counsel’s bar association had the chance to intervene in the draft of such rules.

As a conclusion, this new vision of sanctioning counsel’s behaviour may lead to a depreciation of counsel’s profession as it is

known today threatening, notably, its independency and reducing counsel’s role to a merely actor such as witnesses and experts.

In light of the above, I consider that neither the arbitral tribunal nor the arbitral institutions are entitled to directly sanction the misconduct of counsels during arbitral proceedings, as they lack legitimacy to do so. On the contrary, I take the view that it would be extremely valuable to have a set of truly core principles – a kind of universally recognised “international public order” of counsel of ethics - that could be tailored by the arbitral tribunal jointly with parties at the very set of the arbitral proceedings. This would allow the clarification of which conducts could be considered by the arbitral tribunal as inadmissible in order to improve the fairness of arbitration. As far as applying sanctions is concerned, the matter is still open to discussion, however, in practice, in certain cases the arbitral tribunal may condemn the defaulting party in the cost of the proceedings, leaving to the party the decision to act or not against its own counsel claiming a compensation for damage.

Filipa Duarte Gonçalves

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# ARBITRATION - THE METHOD OF CHOICE IN INSURANCE INDUSTRY

By Katica Tomic<sup>1</sup>

## Summary

The European insurance sector went through a radical transformation caused by the global financial crisis of 2008, liberalization and deregulation processes, creation of the European Single Market for insurance services, rapid innovations and advances in information and communication technologies, helping to remove an important obstacle to cross-border trade between EU Member States. For a long time, arbitration has played a rather limited role in insurance sector and the practitioners have relied primarily on litigation to enforce contracts because the arbitration can be disadvantageous for policyholders and often, the process is biased in favor of the insurance company. The financial crisis has changed the litigation culture in the insurance industry and today, the traditional reluctance towards arbitration is less prevalent and arbitration provisions are becoming increasingly common in insurance contracts. In this paper, the author will introduce arguments in favor of arbitration of insurance disputes. Furthermore, she emphasizes the expertise of insurance arbitrators, litigation cost savings, negative image avoidance of the insurer, expedited procedure, party autonomy and flexibility

of arbitral procedure. Having in mind basic characteristics of modern insurance regulations, in particular the need to protect a policyholder and insurance customer, the author draws a conclusion that implementation of practice to resolve disputes by arbitration, but not in front of the court, has not been contrary to the most recent tendencies in this legal field.

**Key words:** insurance arbitration, B2B disputes, B2C disputes, ARIAS, AFTAR, ICC, Vienna Rules, New York Convention, Consumer Protection.

## I. INTRODUCTION

Litigation has traditionally been the forum of choice for dispute resolution in insurance sector. Most disputes arising from insurance contracts, consumer contracts, unit-linked life insurance contracts<sup>2</sup> and similar contracts are solved in the court. Relatively little number of papers has been published on arbitration in the insurance practice and possible reason for this is that in such practice permanent arbitral tribunals almost do not exist and arbitration in the sector primarily takes place on an *ad hoc* basis.

<sup>3</sup> Although, insurance arbitrations are held on an *ad hoc* basis, nevertheless many organizations (LCIA, ICC, ARIAS) provide rules for the conduct and administration of such arbitrations.

Insurance and Reinsurance Arbitration Society “ARIAS” has been established under the umbrella of International Insurance Law Association - AIDA with the branches in the USA,<sup>4</sup> the UK<sup>5</sup> and France<sup>6</sup>. ARIAS originate from the relatively recent growth of disputes in the global insurance and reinsurance markets when it became apparent that there existed a need for a body to promote quality, advancement and education around insurance and reinsurance alternative dispute resolutions as well as to provide a pool of certified arbitrators.

When parties find themselves in disputes in respect of the innovative insurance products, there is often a lot at stake and the interests of many can be affected.<sup>7</sup> The issues contested in these disputes can be complex and insurance companies need to handle conflict between low interest rate and the customer’s aspiration of a certain security level, while additional requirements have been put in place in relation to transparency requirements which must correspond to the nature of these products. These days insurance market are dealing with sometimes multi-party, often multi-contract disputes, involving complex-structured insurance products implicating a number of legal relationship that interact in complicated ways.<sup>8</sup>

The recession and financial crises in the 2000s challenged insurance industry and their litigation culture considerably. According to current economic constraints of the financial crisis and financial pressures on reducing insurance operating costs, deregulation and liberalization of the insurance market, technological progress and social trends have increased the number of insurance products available on the market, and it is likely that insurers / reinsurers will more often sue other insurers / reinsurers and will be more often sued by its insured / reinsured / consumer. The choice of the right dispute-resolution mechanism becomes an increasingly important issue for the insurance sector.

The advocates for dispute settlement of insurance disputes by arbitration point to variety of benefits of arbitration for the resolution of their B2B (“Business-to- Business”) and B2C (“Business-to-Consumer”) disputes, including measure of procedural flexibility that allows conformity with particular financial market conventions and can meet a need for expedited procedures or confidentiality, avoiding specific legal systems/national courts, selection of arbitrators, neutrality and privacy, ensuring that any decision, judgment, or an award will be upheld in the relevant jurisdiction.

## II. ARBITRATION IN INSURANCE INDUSTRY

For many years, insurance practitioners have shown aversion towards arbitration and contracts had historically assumed dispute settlement by domestic courts in the leading financial centers – primarily by London or New York courts. The main characteristics of disputes in insurance matters is that at least one of the party is an insurance company, the parties are business partners preferring amicable and accelerated proceedings.

Moreover, in insurance disputes, the interests of more than two parties must be considered (insurers and the insured, but also those of third parties). Consequently, the interest of injured or injuring third parties or other insurers, especially reinsurers, often have to be taken into consideration.<sup>9</sup>

The procedural rights and obligations of the parties in insurance disputes can be separate into two groups, from the position of whether or not the party is a consumer. Increasing number of consumer contracts necessary increase consumer disputes and it is uncontested importance of and the need for special consumer protection whether provided by special laws, typically in Europe, or on the basis of general legal principles and the application of general contract law, like in the US.<sup>10</sup>

Some countries experience thousands of consumer arbitrations each year while many other countries refuse or strictly limit arbitration enforcement in B2C relationships due to concerns regarding power imbalances and public enforcement of consumer protections.<sup>11</sup> In the United States of America, many standard insurance contracts include a „pre-dispute arbitration clause“ which requires that any disputes that the parties have will be handled not in a court system, but through binding arbitration.<sup>12</sup> In Germany, scholars and practitioners opinion is deeply divided on this issue, although the applicability of pre-dispute arbitration clauses is almost circumstantial.<sup>13</sup> Austrian approach towards consumer arbitration is restrictive and arbitrations involving consumers are very rare.<sup>14</sup> This is in line with the prevailing opinion, at least in Europe, that international commercial arbitration should be understood to be a dispute resolution mechanism primarily established for commercial users. In legal literature, consumers are considered to be “weaker” than their contracting partners, the professionals who have a strong negotiating position, and assumed to be unable to protect their interests due to inferior bargaining power and insufficient access to information.<sup>15</sup>

Today, the expending and evolving nature of key element of the insurance markets, the widening participation of a range of market players differently situated, and the growing complexity of structured insurance products have increase demand to have recourse to arbitration. This doesn’t mean that arbitration is a suitable means of dispute resolution in all cases and it depends on the circumstances of each case.

The long list of reasons why arbitration has no place in insurance sector is constantly repeated by scholars and insurance practitioners. Those characteristics of arbitration which are usually considered to speak in favor of this dispute-resolution process but often cited as disadvantages of arbitration in this specific industry sector, may vary from party to party and even from case to case. Also, the disadvantages can often be mitigated by the inclusion of additional provisions in the arbitration clause. In the following section, we will analyse the possible significance of arbitration in the insurance practice by assessing the advantages of arbitration as a dispute resolution mechanism for insurance industry.

## III. KEY REASONS FOR CONSIDERING USING ARBITRATION IN INSURANCE SECTOR

## 1. The expertise of insurance arbitrators

Disputes in the insurance practice often involve complex legal and factual relationships on insurance coverage which appear in many different forms and often rotate around matters of interpretation and/or the scope of coverage between the insurance company and the insured. Moreover, high profile international insurance disputes often involve third parties, particularly in relation to liability insurance and indemnity matters, and raise commercial and/or technical aspects of particular complexity. The decision to nominate certain person with commercial expertise and market knowledge for party-appointed arbitrator is extremely important and it lays the basis for a constitution of arbitral tribunal. The link between the appointment of the arbitrator and party control is very important because it represents the moment at which control over the arbitration is transferred from the parties to the arbitrator(s).<sup>16</sup>

Part 6, Section 6.3 of the ARIAS Arbitration Rules (AAR), the ARIAS UK arbitration court prescribes as a requirement for the registration of an arbitrator on the list of arbitrators, qualification of with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisors serving the industry. Part 6, Section 6.2 ARIAS U.S. arbitration rules allows for a current or former managing officer of an insurance company or a reinsurer, or an arbitrator certified by ARIAS U.S. to become an arbitrator or umpire. Explanatory note to Article 4.1.4 of AAR, the ARIAS UK and ARIAS Fast track arbitration rules (AFTAR), recommend that the qualification requirements for arbitrators may be set by the litigants themselves, which is taken into consideration by some permanent arbitration courts in their arbitration rules, where they require the parties to provide brief personal details of qualification for arbitrator expertise in the industry or legal specialty in which they will handle disputes.<sup>17</sup>

Provided that the selection of arbitrators is performed diligently on the grounds of their specialist knowledge of the insurance practice in question, and with due consideration of the individual case, the panel thusly selected may be expected to successfully take on the legal challenges of adjudicating multi-layered disputes of international nature. Furthermore, in this way, both time and costs are likely to be saved.

## 2. Arbitrators are required to render decisions in an “independent” or “impartial” manner which offers neutrality in the adjudicative process

The possibility of selecting suitable arbitrators for hearing the parties' case is an advantage but not limited only to insurance disputes. The free selection of arbitrators with following attributes: industry experience, arbitration experience, legal experience, competence, integrity, impartiality, persuasive ability and availability, adds yet another benefit which makes arbitration the most desirable method of resolving insurance disputes at the litigious stage.<sup>18</sup>

The UNCITRAL Model Law on International Commercial Arbitration and many national arbitration laws require arbitrators

to remain open-minded and participate in the arbitration process in a fair, honest and good faith manner and to have a natural tendency to take into account economic interests of the parties as well as the usages, customs and business practices of the relevant commercial or industrial sector.<sup>19</sup> This is one of the crucial advantages of arbitration *vis-à-vis* state proceedings before domestic courts.<sup>20</sup>

Article 2.4 of ARIAS Rules for the Resolution of U. S. Insurance and Reinsurance Disputes (ARRUS) provides that an arbitrator must be disinterested, unbiased and impartial. The Neutral Selection Questionnaire used by ARIAS U.S. contains a series of questions pertaining to the past as well as existing labor-law and other contractual relationships between the arbitrator and the litigants. It also contains questions regarding any involvement by the arbitrator in the resolution of other disputes between both parties (as an arbitrator, legal representative, witness or expert).<sup>21</sup>

Regardless of the above mention advantages, there are also some disadvantages often cited in the context of international insurance disputes. Arbitration is informal, confidential, and not appealable which increased risk that the arbitrators are going to be bias.<sup>22</sup> If the policyholder or the insured party is a party with the status of a consumer, the insurer, as the stronger and usually better experienced party, may push through the inclusion in the insurance policy of an arbitration clause expressly stating the first name and surname of the arbitrator and that may also arise that the arbitration clause contains a mechanism for the constitution of the arbitrator or the arbitration panel, which will be drafted in favour of one of the contracting parties.<sup>23</sup>

## 3. Expedited Procedure Provisions

Some institutional rules allow arbitration provisions on the accelerated procedure, typically where the amount in dispute is below a certain threshold value, in cases of urgency, or where the parties agree to shorten the timelines. Since arbitral proceedings, in legally and/or factually complex cases can take as long as state court proceedings, the duration of proceedings is increasingly cited as a disadvantage of arbitration for insurance disputes. All practitioners know that arbitrator selection can be a very expensive and time-consuming endeavor. The selection of the arbitrator is critically important and a decision that can have potentially devastating results to a client. When the solo arbitrator expands to a panel of a three-member arbitral tribunal, the selection and anguish processes increase significantly.

Moreover, if a respondent does not participate in the proceedings, the arbitral tribunal may not render a summary judgment and in that case the arbitral tribunal must continue the proceedings without argue such failure (to communicate his statement of advocacy within the set time-limit) in itself as an admission of the claimant's allegations<sup>24</sup>. Even if the respondent is in default, the arbitral tribunal must evaluate the dispute on the basis of the legal arguments and documents submitted by the claimant before rendering an award.

Several important international arbitration institutions offer specific rules for fast track arbitration. The increase in



number of arbitral institutions creating such special rules for expedited proceedings demonstrates the “need for speed” in arbitral proceedings.<sup>25</sup> The International Chamber of Commerce’s (ICC) new Rules of Arbitration 2017 came into force on 1 March 2017 and they include new expedited procedure rules for claims valued at less than \$2 million.<sup>26</sup> Although, Art. 30 of the ICC Rules of Arbitration generally provides for expedited procedures by granting the parties the opportunity to shorten various time limits set out in these rules, the ICC Arbitration Rules do not contain further detailed regulations in this regard.

The German Institution of Arbitration (DIS) has adopted the Supplementary Rules for Expedited Proceedings (DIS-SREP).<sup>27</sup> These new Rules supplement the standard DIS Arbitration Rules. The DIS Arbitration Rules state that the arbitral tribunal must conduct the proceedings expeditiously. The DIS-SREP provide for: dispute resolution by a sole arbitrator as a rule; a limit on the number of briefs exchanged; and proceedings to be concluded within six months.

Vienna rules<sup>28</sup> contain more elaborate section on expediting proceedings and the provisions on expedited proceedings constitute an important amendment to Vienna Rules 2013 compared to the Vienna Rules 2006.<sup>29</sup> The expedited procedure pursuant to Art. 45 is not simplified procedure<sup>30</sup> and the parties’ right to be heard must be observed to the same extent as in “normal” arbitration proceedings. An arbitral award rendered in expedited proceedings must be reasoned with the same due care as an arbitral award that is rendered in non- expedited proceedings.

The purpose of the provisions on expedited procedure is to minimize the duration of the proceedings without reducing the quality of the decision of an arbitral tribunal.

Pursuant to Art 45(1) of the Vienna rules, the provisions on expedited proceedings only apply if they have been agreed by the parties (“opt-in” model). Vienna Rules deliberately do not contain a monetary limit below which the conduct of expedited proceedings is automatic in adversely to the other arbitration rules. Expedited proceedings put higher constraints on the parties and arbitral tribunal and the “opt-model” was chosen because the parties should be free to decide whether a dispute is suitable for expedited proceedings or not. A high amount in dispute does not automatically mean that the proceedings will be more complex, on the contrary, even proceedings with a low amount in dispute may be complex and therefore be considered by the parties to be inapt for an expedited procedure. The agreement on expedited procedure may be concluded at the same time as the arbitration agreement is concluded and the model arbitration clause recommended by the VIAC (Vienna International Arbitral Centre) contains a model clause for an agreement on expedited proceedings.

Since at the time of the conclusion of the agreement the possibility or need for expedited proceedings is often not yet predictable, parties are advised to adapt the arbitration agreement by including a right of choice. Under such a clause, a claimant could choose, after the dispute has arisen, to pursue its claim in “standard” or in “expedited” arbitration proceedings, both being administered by the same arbitral institution.

Clearly, fast track procedures must be welcomed by both parties as well as the arbitral tribunal, and must be duly supported by the institution which provides the framework for the proceedings. Care should be taken, however, to ensure that all parties are able to present their case, and to avoid unrealistic or inflexible deadlines: if a deadline for rendering an award cannot be extended and is missed, any subsequent award may be vulnerable to challenge.

In practice, the AFTAR and related expedited procedures have been successful where there have been simple legal questions in dispute, not complex technical or fact-finding issues, or where the quantum of the claim would obviously be otherwise dwarfed by legal fees, but where the parties have nevertheless been unable to reach a negotiated settlement through their own efforts. Parties that are looking for a fast, (relatively) low-cost outcome to an insurance or reinsurance dispute would be well-advised to consider proposing the expedited procedure to counterparties especially if the dispute is not particularly complex. Bearing in mind that in some cases insurance contracts typically contain a technical and complex financial terms (e.g. index-linked life insurance) the “simplicity argument” is falling into another dimension.

When parties are considering what dispute resolution clause to include in a policy or contract, it is worth considering for insurance or reinsurance disputes all benefits of expedited procedure.<sup>31</sup>

#### 4. The arbitral tribunal’s jurisdiction

It is often suggested that arbitration is not convenient for insurance disputes because the final decision on the merits is often delayed by preliminary disputes on the jurisdiction of the arbitral tribunal. Arbitration awards rendered without jurisdiction have no legitimacy<sup>32</sup> and the absence of jurisdiction is one of the few recognized reasons for a court to set aside or refuse recognition and enforcement of an award.

The tribunal’s jurisdiction depends on the existence of a valid arbitration agreement between the parties that covers in scope the arbitrable dispute before them and the interest of the parties and the arbitral tribunal are to establish it as quickly as possible. This is a matter of procedural efficiency. A number of different issues arise in relation to the choice of law in the context of insurance arbitrations. The arbitrators must determine the law governing the agreement to submit the dispute to arbitration, the law governing the reference to arbitration, the law governing the arbitral proceedings and the law governing the substance of the dispute.<sup>33</sup>

Most arbitration rules require the respondent to raise any objection as to jurisdiction promptly in the arbitration proceedings, or else be barred from raising it at all.<sup>34</sup> It is common case in international commercial practice that little, if any, attention is paid to the drafting of the dispute resolution clause. Typically, these clauses, together with the choice of law provision, are located at the end of the lengthy contract document. Consequently, a poorly drafted “*ad hoc*” arbitration clause, inserted into the contract at the very last moment of the contract negotiations, when the insurance

intermediaries want to close the transactions and commemorate their deal, instead of having to think about potential future disputes. Often contract drafters have little or no experience in arbitration or they don’t include model clause of a leading arbitral institution into their contract. This poses serious problems if a dispute arises between parties but this problem does not stem from an inherent disadvantage of arbitration but rather from the parties’ negligent at the drafting stage.

Parties in international contract negotiation should always pay close attention to careful drafting of the dispute resolution clause and using a standard “boilerplate” model clauses of recognized arbitration institutions which serves as an important means of conflict avoidance and they save money and time by providing the required legal certainty with respect to potential disputes about the tribunal’s jurisdiction that may arise during the arbitration.

#### 5. Procedural Flexibility and Party Autonomy

Party autonomy is the fundamental principle of the arbitration which allows the parties to determine all the essential elements of the arbitration and to design the proceedings in advance in accordance with their needs for special experience of the arbitrators, applicable laws, speed and efficiency. It is often argued that its procedural flexibility and potential disadvantages in many cases is intentional gap<sup>35</sup> in the rules that may lead to an unacceptable degree of legal uncertainty in a financial and capital market transactions, allowing parties many possibilities to delay the proceedings.<sup>36</sup>

Several sets of rules currently exist which reflect globally recognized “best practice standards” and these rules can be incorporated by the parties into their procedural agreements or can be used by arbitral tribunals as guidelines for the exercise of their procedural discretion. The basic are the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the “IBA Rules of Evidence”). These IBA Rules contain procedures initially developed in different legal systems and in international arbitration processes. They are a blend of different legal traditions and are intended to govern the taking of evidence in an efficient and economical manner. Parties and arbitral tribunals may adopt the IBA Rules in whole or in part at the time of drafting the arbitration clause in a contract or once arbitration commences or they may use them as guidelines but the Rules do not provide a complete framework for the conduct of international arbitration and the parties must still select another set of rules, institutional or *ad hoc*, to govern their proceedings.

In October 2014, the IBA Council adopted new guidelines on Conflicts of Interest in International Arbitration. While they are not binding, the Guidelines are intended as an expression of best practices in international arbitration and offer a set of standards seeking to enhance legal certainty and preserve the integrity, transparency and fairness of arbitral proceedings. Arbitral institutions and courts refer to the Guidelines in deciding challenges of arbitrators. International arbitrators should be impartial, independent, competent, diligent and discreet and IBA Rules of Ethics for International Arbitrators seek to establish

the manner in which these abstract qualities may be assessed in practice. They reflect internationally acceptable guidelines developed by practicing lawyers from all continents and they will attain their objectives only if they are applied in good faith.<sup>37</sup>

#### 6. The decision of the arbitrator is binding

In a court proceeding, when a judgment is entered against the weight of the evidence, or an error in law is made, an appeal can be had and, if well taken, a new trial order. In arbitrations, however, the revision of arbitral awards remains an exceptional remedy which is only available to the parties in extreme circumstances (only a violation of essential principles of arbitral due process, such as the parties' fundamental right to be heard, or of public policy can lead to the annulment of an arbitral award).<sup>38</sup>

The finality of arbitral decision promotes a speedy clarification of the legal issues at stake and resolution of the conflict between the parties and it is considered to be one argument in favor of arbitration which also applies to the insurance sector.

One argument in favor of state court jurisdiction remains: in those instances, in which insurance companies take a legal issue to court, they wish to have it determined definitively, if necessary by the highest court, and with effect for the entire sector. On a national level this makes sense for b2c disputes, in particular if the dispute concerns the interpretation and validity of certain clauses of the standard terms and conditions used by all insurance companies in that country. However, arbitral awards which have the same effect between parties as state court judgments, may serve as precedents.<sup>39</sup> This is also true for the insurance sector.

The arbitral precedent is a necessity for certain types of disputes because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose. The credibility of the entire dispute resolution system depends on consistency and this presume that arbitral awards are published in a specific collection.

#### 7. Multi-Party and Multi-Contract Arbitration

Not every transaction or contract is executed by two counter-parties. Often there may be one contract but more than two parties ("multi-party"), or a number of contracts possibly involving different parties ("multi-contract"). This is typical for joint venture agreements;<sup>40</sup> arbitration clauses contained in articles of association;<sup>41</sup> insurance distribution agreements; construction projects;<sup>42</sup> and many other forms of commercial contracts. As particular form of multiparty –arbitrations, commercial arrangements also give rise to multi-contract arbitration between two or more parties, who have entered into a number of different contracts all providing for arbitration.

The insurance sector often question if it is possible to conduct arbitrations in a multiparty context. <sup>43</sup>There is a lot to be said in favor of establishing one tribunal instead of several different ones to settle disputes. First, a single tribunal would gain full knowledge of relevant facts and circumstances of the parties' dispute. Second, to consolidate multiple disputes in one

arbitration will often save the parties a significant amount of time and other resources. Third, resolving multi-party disputes in a single forum resolves the risk that different tribunals reach inconsistent or contradictory conclusions with the regard to the same matter.<sup>44</sup>

However, multi-party (and multi-contract) proceedings raise some difficult issues. First, the arbitration agreement must be valid and applicable in scope to all parties to the disputes.<sup>45</sup> Second, all the parties must have been given proper notice of arbitration and have had an equal opportunity to present their cases<sup>46</sup> and finally, all parties must have an equal opportunity to participate in the constitution of the tribunal.<sup>47</sup>

If arbitration is to function as a real alternative for litigation in multi-party and multi-contract situations, it is imperative that the applicable laws and rules provide more satisfactory procedural solutions for issues arising in these contexts. Most institutional arbitration rules nowadays contain provisions which allow an arbitral tribunal to be constituted even if the side consisting of more than one party fails to agree on an arbitrator. Securing an effective multiparty proceeding depends on the careful harmonization of the arbitration clauses contained in different but interlinked contracts.

#### 8. Arbitration is confidential

One of the major factors that encourage parties to choose arbitration over litigation for the resolution of insurance disputes is the perceived confidential nature of arbitration proceedings. Confidentiality is core issue in international arbitration law<sup>48</sup> and together with the worldwide enforcement system for foreign arbitral awards established by the New York Convention of 1958, have always been a major reason for parties to agree to arbitration.

The concepts of privacy and confidentiality in arbitration are important and interrelated features of international commercial arbitration. Privacy involves arbitration proceedings being private to the disputing parties and to the tribunal and the privacy of arbitration proceedings is concerned with the obligation not to disclose information relating to the content of the arbitration. Confidentiality is an important feature and a major advantage of international commercial arbitration, and also it can be advantage for insurance industry.

#### 9. Arbitration and State Courts

Arbitration is based on an agreement between the parties and therefore insurance practitioners very often criticize the exclusive competence of arbitral tribunals. *De facto*, parties like to keep their dispute-resolution options open and they often agree that actions can be brought before courts at the seat of the debtor, the place of contract performance or at other places where the debtor has assets which serves to prevent the debtor, after the arbitration, from misusing the ensuing enforcement proceeding before the state court to cause additional delays.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, has proven to be



“the cornerstone of the international arbitration system”<sup>49</sup> and one of the most successful instruments of international uniform law and essential advantages of arbitration. The New York Convention creates a uniform international framework, which enables parties to international commercial arbitration agreements to enforce foreign arbitral awards with relative ease. Although the prevailing party has to rely too on the courts in the country of the respondent, the procedure for recognition and enforcement is uniform.

Enforcement of a foreign award can be refused only in the limited circumstances listed in Article V of the New York Convention, which go mainly to procedural defects rather than the substance of the decision. Bering in mind that in the insurance practice is common to comply with judicial decisions, and therefore, arbitral awards issued by expert arbitrators are likely to be voluntarily complied with in a very large number of cases (if not all) . That is also of interest to an injured party and in cases if the insurer is involved in the resolution of the dispute between the injured party and the insured, he will have less difficulty going after the insured if it is ordered to pay.

## CONCLUSION

The insurance market has over time become more dynamic and the number of complex insurance disputes is on the rise. The modern EU concepts of consumer protection imposes numerous duties on insurers to inform policyholders about their rights and obligations prior to, and at the time of, the conclusion of insurance contracts and also during the term of the contracts. Moreover, there has also been an evolution in the nature of the issues that come to court in insurance market disputes, particularly those arising from distribution of insurance based investment products or in complex insurance coverage cases. The parties are bringing to court disputes involving highly technical issues that comprise

specialist knowledge which demands framework in market practice, custom, and usage. It would seem undesirable to expect the parties in such a situation to seek resolution of the issue in a court of general jurisdiction—either a local court where the judges might lack relevant experience in the field of insurance industry or especially if it would require to settle complex insurance disputes, in which the policy provides that insurance law customs must be applied. Moreover, the parties of insurance disputes are business partners and they prefer amicable and accelerated proceedings. For many decades, insurance sector have shown a marked lack of faith in arbitration and had no incentive or particular advantage to utilize private and quicker dispute resolution methods. The arbitration has possible advantages for all the parties involved in an insurance related dispute (the insurer, insured and injured party). Taking into account the above mentioned, the success of arbitration in insurance sector will depend in part on whether parties make reasonable progress in drafting feasible arbitration agreements, choosing the right arbitral institutions and arbitrators who are already versed in complex financial transactions (so that the parties only need to explain the facts and can rest assured that the arbitrators understood what was presented) and competitiveness of state courts. In light of the various characteristics of arbitration (including primacy of party autonomy, the moderate cost of the proceedings and time-saving, free choice of arbitrators with legal/technical/commercial expertise, confidentiality and privacy elements of the arbitral proceedings, finality of award ) the dispute settlement proceedings in complex proceedings in connection to insurance law disputes by means of arbitration should be considered more often, particularly in an international context.

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- 2 Unit-linked life insurance products and other insurance-based investment products (e.g. index-linked policies, hybrid life insurance, variable annuities etc.) consist of two components: the component of life insurance and the component of investment, each falling under the scope of its own sectoral regulation; Nicola Döring, *Teilung von fondsgebundenen Versicherungen im Rahmen des neuen Versorgungsausgleichs*, Reihe „Versicherungswirtschaft“, Band 62, Eul Verlag, 2010, p. 50.
- 3 B.V. Zelst, *The Open Arbitration Clause: a Means of Arbitrating Insurance Disputes? An assessment of opportunities and threats in arbitration insurance law disputes*, *European Insurance Law Review*, Vol.3, 2016, p. 35.
- 4 <https://www.arias-us.org/>
- 5 <http://arias.org.uk/>
- 6 <http://cefarea-arias.fr/>
- 7 Bearing in mind that conclusion of unit-linked life insurance contracts in the form of an individual or collective insurance policy is a double-edged sword for potential customers, protection of consumers (policyholder and beneficiaries of a life insurance policy) is of special interest. K.Tomic, *Unit-linked life insurance contracts- question of liability*, publication description Legal Word, Lawyers Association of Republic of Srpska, No.47, Banja Luka, 2016, pp. 541- 558
- 8 The Federal Court of Justice of Germany (*Bundesgerichtshof* - BGH) passed a several verdicts on 11.07.2012 in cases Clerical Medical Investment Group Limited (CMIG)(BGH, 11.07.2012 - IV ZR 164/11; IV ZR 122/11; IV ZR 151/11; IV ZR 268/10; IV ZR 271/10). CMIG has received a number of claims in the German courts, relating to Clerical Medical's life insurance policies, who were sold by independent intermediaries in Germany (e.g. EMF AG Hamburg, LEX Vermögensverwaltungs AG), principally during the late 1990s and early 2000s. Clerical Medical Investment Group litigation in Germany involved more than 2,000 individual claims brought by investors against a financial services provider.
- 9 C. Duve, *Arbitration and alternative dispute resolution in insurance law—a practitioner's approach*, ERA forum, Vol. 10, Issue 2, 2009, p. 178.
- 10 The American model is characterized by validity and binding character of the agreement of refer contained in the consumer contract. If the consumer claims that his rights have been threatened, he must prove that. The Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts stipulates that the contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. However, in most EU Member States this is only theoretical possibility because of the traditional hostile attitude of court practice to the arbitrary settlement of consumer disputes.
- 11 P. Rutledge, *Testimony before the U.S. House of Representatives Committee on the Judiciary* (The topic of the session was "The Arbitration Fairness Act of 2007"), 25 October 2007, p.5; M. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, *Tennessee Law Review*, Spring 2008.
- 12 Pre-dispute arbitration clauses in consumer agreements have been controversial in the United States. American courts have had hundreds of cases in which parties have contested the enforceability of pre-dispute arbitration clauses in consumer contracts, including several cases heard by the Supreme Court. For example: *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (upholding a consumer arbitration agreement for termite extermination services); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) [Randolph] (upholding arbitration for a borrower's truth and non-discrimination in lending statutory claims); R. J. Adams, *Consumer Reaction toward Arbitration as a Remedial Alternative to the Courts*, *The Journal of consumer affairs*, Vol. 17, Issue 1, 1983, pp. 172–189; S. K. Huber, E. W. Trachte-Huber, *Top ten developments in arbitration in the 1990s*, *Dispute resolution Journal*, Vol. 55, No. 4, 2000, p.24.
- 13 In Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, The European Court of Justice decided on 26 October 2006, in *Claro* that an arbitration award may be annulled by a national court if it is based on an arbitration clause which turns out to be an unfair contract term case. German Federal Court of Justice (the *Bundesgerichtshof* - BGH) in decision on 13. Januar 2005 · Az. III ZR 265/03 had to decide the question of whether a pre-dispute arbitration clause were subject to standard business conditions or not. In this case, a woman had entered an agreement (setting up a managed account) which contained an arbitration clause, excluding legal recourse to a court of law. The BGH decided in favour of validity of such a clause as long as the formal requirements of Section 1031 Subsection (5) of the German Code of Civil Procedure (*Zivilprozessordnung* –ZPO) are fulfilled. Accordingly, to this section, the validity of an arbitration clause requires an agreement signed by the contracting parties which is explicitly separate from the insurance agreement and this distinctive formal requirement protects the consumer sufficiently against fraud.
- 14 Pursuant to Section 617 Subsection (1) of the Austrian Code of Civil procedure (*Zivilprozessordnung* –ZPO) an arbitration agreement between an entrepreneur and a consumer may only be effectively concluded where the dispute has already arisen. It's clear from practical perspective that the Subsection (1) of the Austrian Code of Civil procedure limits the scope of arbitration agreement for consumer and it is a rare case that parties agree on arbitration once the dispute between them has arisen.; F.T. Schwarz, C.W. Konrad, *The Vienna Rules A Commentary on international Arbitration in Austria*, Wolters Kluwer, 2009, p.14; G. Zeiler, *Austrian Arbitration Law Commentary*, Neuer Wissenschaftlicher Verlag, Vienna- Graz 2016, p.236.
- 15 V.Lazić, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, *Utrecht Law Review*, Vol, 10, Issue 4, 2014, pp.100-117.
- 16 K.P.Berger, *Private Dispute Resolution on International Business, Negotiation, Mediation, Arbitration Third Revised Edition Volume II: Handbook*, Wolters Kluwer Law&Business 2015, p.341.
- 17 The Spanish Insurance Arbitration Court allows registration in the list of arbitrators (Article 9(1) of recognised experts in their respective fields, who are independent, available at: <http://seaida.com/que-ofrecemos/tribunal-espanol-de-arbitraje-de-seguros-teas/> (accessed on 06.08.2017).
- 18 Article 2.4 of ARIAS Rules for the Resolution of U. S. Insurance and Reinsurance Disputes (ARRUS) provides that an arbitrator must be disinterested, unbiased and impartial. The Neutral Selection Questionnaire used by ARIAS U.S. contains a series of questions pertaining to the past as well as existing labour-law and other contractual relationships between the arbitrator and the litigants. It also contains questions regarding any involvement by the arbitrator in the resolution of other disputes between both parties (as an arbitrator, legal representative, witness or expert). (<https://www.arias-us.org/arias-us-dispute-resolution-process/forms/>)
- 19 Art. 7.1 and 7.2 AIDA Reinsurance and Insurance Arbitration Society of the UK, ARIAS Arbitration rules (Third Edition - 2014) prescribes that an arbitrator is obliged, at the request made by either litigant within 14 days of the constitution of the arbitration panel, to produce a declaration of impartiality setting out any facts or matters that may reasonably raise doubts as to their impartiality.
- 20 S Kröll, *Schiedsverfahren bei Finanzgeschäften – Mehr Chancen als Risiken*, *Zeitschrift für bankrecht und bankwirtschaft* (ZBB), 1999
- 21 <https://www.arias-us.org/arias-us-dispute-resolution-process/forms/>
- 22 United States Court of Appeals, Sixth Circuit in case 429 F. 3d 640 - *Nationwide Mutual Insurance Company v. Home Insurance Company*, analyzed claims of bias regarding a party-appointed arbitrator. The Sixth Circuit noted that the Federal Arbitration Act or FAA presumes that arbitration awards will be confirmed and that a court may abolish an arbitration award only in limited circumstances, including where there was evident partiality or corruption in the arbitrators, or either of them.
- 23 R. E. Stewart, *Arbitration and Insurance Without the Common Law*, ARIAS-US Quarterly, Vol.3, No.3, 2004.
- 24 Art 25(b) UNCITRAL Model Law; cf Art 28(2) UNCITRAL Arbitration Rules.
- 25 Rudolf Fiebinger & Christian Gregorich, *Arbitration on Acid*, in *Austrian Arbitration Yearbook 2008*, Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds, 2008, p 237
- 26 Art. 30 ICC Rules of Arbitration
- 27 The Rules are available at <http://www.dis-arb.de>; see for a commentary on the DIS Rules K Böckstiegel, S Kröll and P Nacimiento (eds), *Arbitration in Germany, The Model Law in Practice*, The Hague, Verlag Recht und Wirtschaft, 2007, p. 655
- 28 For more details: Vienna International Arbitral Centre –VIAC, *Handbook Vienna rules A Practitioner's Guide*, Vienna 2014.
- 29 The Rules are available at <http://www.viac.eu/en/>
- 30 Cf. by contrast DIS – Supplementary Rules for Expedited Proceedings (2008), Section 7; „Rules for expedited arbitrations“ SCC Rules (The Arbitration Institute of the Stockholm Chamber of Commerce) and the Swiss Rules of Arbitration (2012), Art 42; which allow that the reasons upon which the award is based are stated in a summary form.
- 31 Parties that do agree to use the AFTAR may benefit from the following cost and time saving measures: restricting the parties to a sole arbitrator, waive

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from oral hearings and witness evidence in most cases, a preliminary hearing for directions within seven days of appointment., a four month timescale from commencement to close of submissions, final awards to be published within 14 days of close of submissions.

- 32 J.D. M. Lew, L. A. Mistelis, S.Kröll, Comparative International Commercial Arbitration, Kluwer Law International, 2003, p.329.
- 33 N. Kyriaki, Reinsurance Arbitrations, Springer 2013, p.190.
- 34 C. H. Schreuer, Belated Jurisdictional Objections in ICSID Arbitration in Liber Amicorum Bernardo Cremades, M. A. Fernandez-Ballesteros, D.Arias eds., Kluwer Law International, 2010, p.1081.
- 35 This is particularly so when the parties come from different legal backgrounds and cultures or when one or both of the parties are inexperienced in international arbitration.
- 36 P Wood, International Loans, Bonds and Securities Regulation, London, Sweet & Maxwell, 1995, margin no 5-60
- 37 The rules cannot be directly binding either on arbitrators, or on the parties themselves, unless they are adopted by agreement.
- 38 German Arbitration Act contains stricter provisions than the UNCITRAL Model Law in this context where a request has been made to the tribunal for correction or interpretation of the award in Section. 1059 Subsection (3) of the Civil Procedure( *Zivilprozessordnung*). Arbitration awards made in a German seat arbitration have the same effect between the parties as a final judgment of the court (sec. 1060, 1055 of the Code of Civil Procedure).
- 39 G K Kohler, Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture, Arbitration International, Vol. 23, No. 3, LCIA 2007.
- 40 K.Tomic, Bancaassurance and insurance markets in EU, Association for insurance law (AIDA Serbia), Palic 2017, p.205.
- 41 J Lew, L.Mistelis and S.Kröll, Comparative International Arbitration, The Hague, Kluwer Law International, 2003, para.16-7.
- 42 Ch. C Bühring-Uhle, Arbitration and Mediation in International Business, Second Revised Edition, Arbitration and Mediation in International Business, Kluwer Law International, 1996, p.65
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- 45 See Article V (1)(a) NY Convention, Annex 11
- 46 See Article V (1)(b) NY Convention, Annex 11
- 47 See Article V (1)(d) NY Convention, Annex 11
- 48 See Article 52(a) WIPO (World Intellectual Property Organization)
- 49 Renaud Sorieul, Director UNCITRAL Secretariat



## WHAT HAPPENED IN LATAM ARBITRATION IN 2017? PART II

By Bullard Falla Ezcurra

The arbitration practice is constantly evolving. Parties, arbitrators and legislators are involved in a continued trial-error process to adapt their practices and reforms to new circumstances and challenges. In this regard, we have identified three stark tendencies across Latin America. We hope this review will spark interest and be useful to support the evolution of international arbitration in the region.

### Emergency Arbitration rising in LatAm

Mario Reggiardo<sup>1</sup>, Rodrigo La Rosa<sup>2</sup> and Julio Olórteguí<sup>3</sup>

People arbitrate for many reasons. One of them is clear: they look for quick decisions. This has always been clear for practitioners, companies and arbitral institutions. In the last 20 years, arbitration has developed a new feature to fulfill this purpose: Emergency Arbitration.

The idea of a pre-arbitral mechanism started in 1990 with ICC's Pre-Arbitral Referee Rules. Since then, many jurisdictions and arbitral institutions decided to include provisions regarding emergency arbitration.

Particularly, in LatAm we can see one of the most recent incorporations of emergency arbitration: the Peruvian case. Early in 2017, the [Lima Chamber of Commerce Arbitration Rules](#) incorporated provisions of emergency arbitration in their new rules.

Furthermore, we have the Bolivian case in matters of legislative innovation. The Bolivian arbitration act, [amended in 2015](#), is the first arbitration act in Latin America to include Emergency Arbitrator provisions. This also makes it the third worldwide, only after Hong Kong and Singapore.

This tendency goes along with the increasing popularity of emergency arbitration proceedings in LatAm. According to the latest information reported by the International Chamber of Commerce (ICC), 30% of emergency arbitration proceedings filled in 2016 (from a total of 25 applications) involved parties from Central and Latin America.

Even more, at least 20% of the cases filled in 2015 were ruled by an emergency arbitrator from LatAm. Precisely, one from Colombia and one from Peru.

Emergency arbitration proceedings are not only popular in the commercial arbitration context, but also in the investment arbitration one.

It has been used in a recent dispute over a hydroelectric power plant in [Chile](#). The Nuevo Maipo consortium filed two requests for emergency relief with the ICC in July 2017. In one, the Nuevo Maipo consortium seeks an order against AES Gener –its counterparty– to place the profits of the guarantees in an escrow account (previously a court in Santiago lifted a restriction regarding the collection of US\$76 million in bank guarantees). In the second, Nuevo Maipo seeks the return of documents and hard drives that contain confidential information not related to the disputed project.

What all of this tells us about emergency arbitration in LatAm and, even more, about emergency arbitration as institution in international arbitration?

First, it tells us that emergency arbitration is alive and strong. Its introduction in international arbitration has proven to be a successful one, as both jurisdictions and arbitral institutions have increasingly included provisions in regard of emergency arbitration. LatAm has not been the exception, with both Bolivia (as jurisdiction) and Peru (as arbitral institutions) as prime examples.

It tells us that emergency arbitration has proven to be popular among parties in future arbitrations, and particularly popular in the LatAm scenario. This tendency is true both for commercial arbitrations as well as for investment arbitrations, not showing any sign of fatigue.

However, we must not rest on our laurels. In order to guarantee the success of emergency arbitration in LatAM, there are still two issues to deal with. First, the creeping corruption of the judiciary in many LatAM countries is a latent danger that could slow down its use. Second, we must secure the offer of qualified emergency arbitrators in order to fulfil the expectations of parties that choose this arbitration proceeding.

What can we expect in the future? We hope, that the rising of emergency arbitration in LatAm is not a temporary one and its use increases both in quality and quantity, giving place to a more pro-arbitration LatAm scenario.

### The Odebrecht saga continues

Huáscar Ezcurra<sup>4</sup> and José María de la Jara<sup>5</sup>

As reported in the last edition, several politicians and executives from Latin America have been linked in the last months to the Odebrecht's bribery scandal. In fact, Lula Da Silva, Brazil's former president was convicted because of his ties with OAS; Ollanta Humala, Perú's former head of State was sentenced to custody on the same grounds and the former President from Panama's assets were confiscated.

However, this scandal is not exclusive to politics. In fact, several news are starting to emerge regarding corrupt practices by Odebrecht in arbitration processes with Latin American States.

For example, the Spanish newspaper [El País](#) recently disclosed that Horacio Cánepa, a Peruvian arbitrator, had supposedly received 1.4 million dollars from Odebrecht, in an account located in Andorra. It should be noted, as published by [IDL-Reporteros](#), that Horacio Cánepa acted as an arbitrator nominated by Odebrecht in several arbitration cases against the Peruvian Government, in which the Brazilian Company obtained 16 favorable awards.

In our view, the investigation in Perú about the impact of the Odebrecht scandal is progressing faster than in other countries, since the Peruvian Government is obtaining direct evidence from Jorge Barata as part of an "effective collaboration" program. Therefore, the challenges that the Peruvian arbitration market is facing right now will be replicated in following months in other regions of Latin America.

In this scenario, we would like to stress the importance of paying attention to possible legislative reforms. Since the Odebrecht scandal is bolstering negative comments towards the arbitration system, it is tempting to Congressmen to propose demagogue measures. Also, with the public pressure rising, it is easy to generalize the behavior of the "bad apples" with the performance of the vast majority of arbitrators.

For example, the Justice Commission of the Peruvian Congress is currently discussing a Legislative Project that aims to limit the actions of arbitration centers by stating that (i) membership in a pre-approved arbitration list in the center of arbitration won't be a requirement for designation, (ii) inclusion in such list should only be on "objective criteria, (ii) exclusion from that list should also be based on "objective criteria and proven grounds" and (iii) the residual nomination should be random.

In our view, the aforementioned Legislative Project proposes a far more worst remedy than the disease. Limiting the power of the arbitration centers is not at all a good way to prevent corrupt arbitrators and corrupt practices sneaking into arbitration.

In sum, a list of arbitration and a filter by arbitration centers (such as the confirmation procedure) provides the opportunity to rule "bad apples" out. Hence, the Project would make it easier for non-independent arbitrators to participate, increasing the risk of corruption. Therefore, the Project fights the same objectives it supposedly tries to achieve.

At the time, this project has not been approved by the Justice Commission nor discussed in plenary session by the Congress. In any case, the Peruvian experience reflects that demagogue reforms, under the Odebrecht scandal, will be a hot topic in the following months in several countries in Latin American. It is up to arbitration practitioners to research, write, organize conference and publicly discuss the implications of corrupt practices in arbitration, and to advocate for a transparent arbitration system.

### Investment arbitration in Latin America: where are we going?

Alfredo Bullard<sup>6</sup> and Nicolás Rosero<sup>7</sup>

The history of investment arbitration in Latin America is as

varied as its geography. It is not surprising that the first and only denunciations of the ICSID Convention had come from countries in the region, such as Ecuador, Venezuela and Bolivia. Further, it also shares some of the most recent developments in the field, such as paradigmatic case decision [Phillip Morris v. Uruguay](#).

This situation continues today, exemplifying the cases of Ecuador and Colombia. Both countries show two extremes. While Ecuador has long experience in the investor-state dispute resolution (ISDS) system; the experience of Colombia resolving disputes with foreign investors is relatively recent compared to other Latin American countries. However, both countries share a common purpose: to strengthen the State's defense against foreign investor claims.

In the Ecuadorian case, the State's decision to denounce its BITs has caused a great echo due to the important legal and political significance that it represents. The State relied on the CAITISIA report, in which a group of lawyers concluded that investment treaties did not help to stimulate foreign investments, but instead represented the payment of millions of dollars to investors who have submitted claims under BIT's protection.

However, due to the recent changes of government in Ecuador, new hope for the ISDS has opened up. The Ecuadorian state [has accepted](#) that not belonging to this system of dispute settlement has been counterproductive to attract foreign investment. For these reasons, the Ecuadorian State would be willing to renegotiate its BITs, and this also opens the possibility for Ecuador to return to be part of the ICSID Convention. However, it will be necessary for Ecuador to have a new BIT model, which currently [does not exist](#).

On the other hand, the Colombian State, although just [last year](#) was notified of his first lawsuit in investment arbitration, has published its [new model of BIT](#), which replaces the version of 2011, and seeks to be at the forefront in the matter, in order to avoid abuses of the mechanism of ISDS. Among the particularities of the regulation proposed by the treaty is the right to regulate of the States, as well as *third party funding*.

Particular attention should be paid to the provisions concerning the possibility for States parties to file counterclaims

against investors, according to which an investor wishing to file a claim against the State must first accept that he may be subject to counterclaims. With these clear rules, many of the major discussions on jurisdiction and admissibility are avoided, and allow arbitrators to concentrate on the substance of the dispute. On this last point, the new model of BIT brings a list of possible claims that the States parties can propose, including some of the most common ones related to human rights, environmental rights, corruption or fraud, among others. Likewise, it is considered as validity the possibility of invoking violations of national law in order to substantiate its claim.

The divided paths that both cases pose will undoubtedly serve as a reference for the region. The experiences in both countries show that despite the demands made by foreign investors, it is necessary for States to have international investment agreements and a dispute settlement system, which guarantee stability to foreign investors.

For the moment, the outcome of this story, which is only beginning, awaits.

#### About Bullard Falla Ezcurra +

Bullard Falla Ezcurra + has a unique approach to arbitration. During our 16 years of existence, our professional activity has strongly been tied and fed by our academic compromise, completing our practice with theory when facing legal or economic issues. This has let us to develop a particular and multidisciplinary *know how* in arbitration, including law and economics, persuasion techniques and applied psychology. This has been recognized by Chambers & Partners, where we are classified on Band 1 in arbitration.

For more information, please go to <http://bullardabogados.pe/english/index.htm>

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Bullard Falla Ezcurra

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 5 Associate at Bullard Falla Ezcurra +, Arbitrator Intelligence's Ambassador for Peru.  
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# [BIOGRAPHY]

## The Founders



**PEDRO  
SOUSA UVA**

YAR co-founder Pedro Sousa Uva heads an arbitration and litigation department as Of-Counsel of the Lisbon based full service law firm PBBR.

To date, Pedro has gathered over 13 years of work experience in Dispute Resolution. Before joining PBBR, Pedro handled at Miranda law firm international disputes, often based in former Portuguese colonies in Africa or Asia. Seconded to the London office of Wilmer Hale in 2009/2010 he worked on international arbitration matters alongside a worldwide team of lawyers. Pedro started his career at Abreu Advogados, where he represented foreign and national clients in court and arbitral proceedings for nearly a decade.

Pedro holds a LL.M degree in Comparative and International Dispute Resolution from the School of International Arbitration (Queen Mary University of London). Before graduating in Law at the Lisbon Law School of the Portuguese Catholic University (2003), he studied as a scholarship student International Arbitration at the Katolieke Universiteit

Leuven in Belgium in 2001/2002. Pedro is a regular speaker on arbitration events and hosts conferences, including São Paulo, Vienna and Lisbon. Recently, he accepted a teaching assignment for the 7<sup>th</sup> Post Graduation Course of Arbitration at the University Nova, in Lisbon.

During the last years, Pedro authored several articles on international and national arbitration topics, notably "*Getting the Deal Through - Arbitration 2016*" (co-author, Portugal; 11th Edition), "*World Arbitration Reporter -2nd Edition*" (co-author, Jurisnet 2014), "*Interim Measures in International Arbitration - Chapter 30 (Portugal)*" (co-author, Jurisnet 2014) and "*Portugal finally approves its new arbitration law*" (co-author, *Revue de Droit Des Affaires Internationales / International Business Law*, no. 3, June 2012). His dissertation was published in the *American Review of International Arbitration* under the title "*A Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*".

Pedro co-chairs the Sub40 Committee of the Portuguese Association of Arbitration (APA) since 2013. He is also an active member of the Co-Chairs Circle (CCC). Pedro co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA).

The idea for YAR was born in London and put into practice by the co-founders Pedro Sousa Uva and Gonçalo Malheiro in January, 2011. It is a pioneer project as it was the first under40 international arbitration review ever made.

# [BIOGRAPHY]

## The Founders



**GONÇALO  
MALHEIRO**

Gonçalo Malheiro is an associated partner of Abreu Advogados. He focuses his work on Arbitration and Litigation.

With around 20 years of experience, Gonçalo has a broad expertise in handling arbitration, civil, commercial and criminal litigation. He has represented foreign and national clients before Tribunals and Courts.

He has also handled numerous contract disputes including claims arising out of sales of goods agreements, distribution arrangements, unfair competition matters, banking and insurance, real estate, franchising disputes and corporate matters.

Gonçalo completed his LLM at Queen Mary – University of London (School of International Arbitration) and published his dissertation about interim injunctions in Portuguese Arbitration Law and a compared analysis with different jurisdictions.

Before, he already had attended a Summer Course at Cambridge University.

Between 2012 and 2015 he was Chairman of the Young Member Group of the Chartered Institute of Arbitrators and is currently member of the Chartered Institute of Arbitrators.

Gonçalo attended the 1st Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry in April 2015.

He has been a speaker in several national and international conferences focused on arbitration.

Besides publishing in English and Portuguese regarding various arbitration matters, Gonçalo is also Co-Founder of *YAR - Young Arbitration Review*, which is leading Portuguese on-line publication focused on International Arbitration and distributed worldwide.

Gonçalo also co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA), of which he is a member.

Gonçalo published recently articles about arbitration in Portuguese speaking countries and recently about rules of evidence in arbitration for the book “La prueba en el procedimiento arbitral”.

# [BIOGRAPHIES]



**CATHERINE  
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Catherine A. Rogers is a Professor of Law at Penn State Law, with a dual appointment as Professor of Ethics, Regulation, and the Rule of Law at Queen Mary, University of London, where she is also Co-Director of the Institute of Regulation & Ethics.

Professor Rogers is a Reporter for the American Law Institute's Restatement of the U.S. Law (Third) of International Commercial Arbitration, a Member of the Board of Directors of the Lagos Court of Arbitration, a member of the International Advisory Board of the Vienna International Arbitration Center, and Co-Chair, together with William W. "Rusty" Park and Stavros Brekoulakis, of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration.

She is the founder of Arbitrator Intelligence, a non-profit organization that aims to increase transparency, fairness, accountability and diversity in the arbitrator selection process.

Professor Rogers writes and publishes on topics relating to ethics, and regularly engages in arbitration-related capacity-building efforts around the world. Her book, *Ethics in International Arbitration*, was published by Oxford University Press in 2014.



**KATE BROWN  
DE VEJAR**

Kate Brown de Vejar is a partner of Curtis, Mallet-Prevost, Colt & Mosle in Mexico City. Kate has represented clients in a wide range of commercial and investor-state arbitrations, with a focus on complex construction disputes. Kate is on the Board of Directors of the Mexican Centre of Arbitration for the Construction Industry. Since 2008, she has been a member of the Australian Delegation to UNCITRAL Working Group II and she was co-Chair of Young ICCA in 2014-2016. A graduate of Harvard Law School/University of Queensland, Kate is fluent in English, French and Spanish.



**KATIE  
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Katie Hyman is counsel in the Washington, DC office of Akin Gump Strauss Hauer & Feld, where she is a member of the international arbitration and commercial litigation practice. She has broad experience in various forms of dispute resolution, including multijurisdictional, offshore and investor-state matters. She is dual-qualified as an English solicitor and New York attorney, and is admitted as a Special Legal Consultant in D.C. Katie represents a variety of clients, including in the energy and telecoms industries, in international commercial arbitration proceedings under the major arbitral rules all over the world and in investor-state arbitrations. Katie advises clients in relation to commercial disputes in the English High Court and, in conjunction with local counsel, in offshore jurisdictions, including the British Virgin Islands and in commercial disputes in the English High Court.





## GABRIELLE NATER-BASS

Gabrielle Nater-Bass is a partner at Homburger in Zurich and currently serves as Vice President of ArbitralWomen and Chair of Young ArbitralWomen Practitioners (YAWP).

Her practice focuses on domestic and international arbitration and litigation. She is an experienced party counsel and arbitrator in international commercial arbitration, ad hoc and institutional (ICC, Swiss Rules and others).

Gabrielle Nater-Bass is listed on the panel of arbitrators of the ICC National Committee (Switzerland), the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC). She was recognized by Global Arbitration Review as one of the magazine's "all female top 30" women in arbitration and currently serves as President of the Arbitration Court of the Swiss Chambers' Arbitration Institution (SCAI). She is also a board member of the Swiss Arbitration Association (ASA). Gabrielle Nater-Bass is further a member of the International Board of the Arbitration Institute of the Finland Chamber of Commerce and was invited to join the SIAC Users Council and ICDR International Advisory Committee. She also co-heads the ICCA-ASIL Task Force on Damages.



## ANNABELLE MÖCKESCH

Annabelle Möckesch is an associate in the Dispute Resolution Group of Schellenberg Wittmer in Zurich and specializes in international arbitration. She has acted as counsel and legal secretary to arbitral tribunals in arbitrations under a variety of arbitration rules and set aside proceedings before the Swiss Supreme Court. Prior to joining Schellenberg Wittmer, Annabelle was an associate at Hanefeld Rechtsanwälte in Hamburg and Assistant Legal Counsel at the Permanent Court of Arbitration in The Hague. Annabelle graduated from Humboldt University Berlin (2008) and is admitted to the bar in Germany. She obtained an LL.M. in International Business Law from London School of Economics and Political Science (2009) and a PhD from Heidelberg University (2015).



## MELISSA MAGLIANA

Melissa Magliana is counsel at Homburger, where she focuses on international commercial arbitration and litigation. With full law degrees from universities in both the United States (Columbia University School of Law) and Switzerland (University of Lucerne) as well as experience in both legal systems, she has a unique skill set with which to comprehensively advise clients in cross-border disputes.

Melissa Magliana has extensive experience as party counsel and acts as arbitrator in disputes involving various rules of arbitration and industries, including pharmaceuticals, construction, and transportation/logistics. She is an active member of various international associations and regularly publishes and speaks on topics of interest in the field of international dispute resolution. She is a member of the executive committee of Young ArbitralWomen Practitioners and co-chair of ASA below 40, the Swiss Arbitration Association's under-40 group.

She was the 2016 recipient of the ASA Prize for Advocacy in International Commercial Arbitration and has also been recognized for her arbitration work by Who's Who Legal: Switzerland; as among the most highly regarded individuals in her category by Who's Who Legal - Arbitration: Future Leaders; and as a rising star by Euromoney.



## YOKO MAEDA

Yoko Maeda is a Special Counsel of City-Yuwa Partners in Tokyo, Japan. She has represented clients in international commercial arbitration under the rules of the ICC, SIAC, and JCAA. She has experience in disputes in various industries, such as automotive industry, electronic devices, pharmaceutical and medical devices, construction and engineering, chemical materials, mining and resources. Admitted in Japan and New York. A graduate of the University of Tokyo (LL.B.) 2002. University of Pennsylvania Law School (LL.M.) 2010. Yoko is fluent in Japanese and English.



## EMA VIDAK GOJKOVIC

Ema Vidak Gojkovic is a Senior Associate at Omnia Strategy LLP focusing on investment arbitration, international commercial arbitration and public international law. She holds degrees from both Harvard Law School and Zagreb Faculty of Law, and is dual qualified in New York and Croatia. Ema has worked on complex and high stakes commercial and investment arbitrations under ICC, LCIA, SAS-HGK (Zagreb), ICSID, ECT and OIC rules. She holds leadership positions in international groups and organisations. She is a Board Member of Arbitral Women's YAWP and a delegate at the UNCITRAL Working Group II (Arbitration and Conciliation). Ema has taught university courses at Vienna Law School and Zagreb School of Management, and regularly speaks and publishes on international dispute resolution topics. She was shortlisted for GAR Awards 2017 – Best Innovation in International Arbitration.



## ANNE-SOPHIE BESANÇON

Anne-Sophie Besançon is a lawyer specialising in arbitration and litigation and is completing her LL.M. in Comparative and International Dispute Resolution at Queen Mary University of London (2016/2017). She is a Member of the French Bar and has previously worked as an Associate at French law firms “Jurisophia Savoie” in Chambéry and “Chauplannaz” in Lyon where she handled commercial disputes and domestic and international litigation. She also completed internships at the Paris law firm of “Olivier Morice” (2011) and at the French National Assembly (2010-2011). Anne-Sophie holds a Master in Criminal law and Criminal Science at Pierre Mendès France University of Grenoble (2009) and a Master in Law at Pierre Mendès France University of Grenoble (2008).



## KRISTYNA KHRIPKOVA

Krystyna Khripkova is a visiting foreign lawyer at WilmerCutlerPickeringHaleandDorrLLP in London. Her practice focuses on international arbitration and dispute resolution. Ms. Khripkova's international arbitration practice includes representation in both institutional and ad hoc arbitrations (including under the ICSID, ICC, LCIA, SCC, UNCITRAL and ICAC at the UCCI rules) seated in both common and civil law jurisdictions, and has particular experience with issues relating to CIS jurisdictions. Ms. Khripkova's international arbitration practice covers a wide range of industries, including construction, financial services, telecommunications and oil and gas. Ms. Khripkova is a graduate of Stockholm University (LL.M), Ukrainian State University of Finance and International Trade (LL.M), and Ukrainian Academy of Foreign Trade (LL.B).



## MANEL CHIBANE

Manel Chibane is a qualified lawyer at the Paris Bar. She holds a Masters degree in Private International Law and International Trade Law from Pantheon-Assas University and a Bachelor of Arts in Philosophy from Nanterre University. She has also studied at University College London and has worked in the arbitration departments of several law firms in Paris and London such as Freshfields, CMS Cameron McKenna and Herbert Smith Freehills. She is currently studying a PhD in International Procedural Law.



## ANA COIMBRA TRIGO

Ana Coimbra Trigo is currently an Arbitration Trainee Lawyer at PLMJ – Law Firm, in Lisbon, Portugal.

Ana completed her bachelors in Law at the University of Coimbra and holds a LL.M. in European and International Law from the China-EU School of Law in Beijing, being fluent in English and Mandarin Chinese. Most recently, Ana concluded a post-graduate program on arbitration law in Portugal and Portuguese-Speaking Countries hosted by the University of Law in Lisbon. After competing in the 13th Vis East Moot in 2015 (Hong Kong), Ana went on to serve the MAA as a delegate to the UNCITRAL Working Group on International Arbitration in both New York and Vienna meetings. Ana's master thesis focused on applicable regimes to interim measures in China-seated international commercial arbitration.

In 2017, Ana was selected as a Mentee for the Young-ICCA Mentoring Program, and is currently being mentored by Professor Albert Jan van den Berg.



## MARIANA FRANA GOUVEIA

Mariana is a distinguished Portuguese scholar and jurist in the field of arbitration, civil procedure and alternative dispute resolution.

She is a Professor of Law at Nova University of Lisbon, where she also manages the Litigation and Arbitration Master Program, and a consultant with PLMJ Law Firm Arbitration Team. She has had experience in over 30 arbitration proceedings, both as counsel and as arbitrator, and is listed as an arbitrator near the all the major Portuguese arbitration institutions.

Mariana regularly travels the world to attend hearings and to speak on topics related with recognition and enforcement of foreign arbitral awards, production of evidence, multilateral disputes, case management, mediation and so forth. Among a robust list of published articles and books, we highlight “Curso de Resoluo Alternativa de Litigios”, currently in its third edition.



## PAYEL MAZUMDAR

Payel Mazumdar obtained her LL.M. in litigation and dispute resolution from University College London and is currently a Visiting Foreign Consultant with the International Arbitration team of Wilmer Cutler Pickering Hale and Dorr, London. She has experience of working on multi-jurisdictional International Commercial disputes under different institutional rules (SIAC, ICC, LCIA, KCAB, UNCITRAL) and investment law matters.



## VERONICA SANDLER

Veronica Sandler is a LLB (abogada) University of Buenos Aires (UBA); postgraduate in Media Law, University of Palermo. Adjunct Professor of Investment Law at the UBA; Professor of arbitration at the Masters program in Law and Economics at the Torcuato DiTella University and of Corporate Practice at the Masters program in Corporate Law at the Universidad Argentina de la Empresa (UADE); and Professor of arbitration at the law degree program of the Austral University and of International Business Transactions at the UADE. She has been counsel in many domestic, international, and investment arbitrations. She is a member of the Argentine Anti-Doping Sports Arbitration Tribunal and of several permanent arbitration panels in Argentina. She is the author of several articles on arbitration and contract law. She is also the GC of an international media company.



## MUNIA EL HARTI ALONSO IS

Munia El Harti Alonso is a lawyer specialized in international law. She obtained her Masters in International Economic Law from Université Panthéon Sorbonne Paris I. She has gained experience in economic and judicial diplomacy, starting her carrier assisting the Minister Counsellor in charge of trade negotiations of the European Union Council on behalf of the Spanish Ministry of Foreign Affairs. She then joined the European Union Delegation to the United Nations in New York where she participated in UNCITRAL Working Group II (Arbitration and Conciliation). In 2016 she participated in redacting Transparency International Report on anti-corruption review mechanisms. She is currently a Delegate for the European Commission Solidarity Corps, a Delegate to the International Bar Association and a Member of Young ICSID (World Bank Group). She also is a Member of the Environmental Law Masters of Universidad Complutense of Madrid Academic team where she teaches a seminar on economic diplomacy and climate change since 2016.



## TEA BLAKAJ

Tea Blakaj is a lawyer that graduated from the Faculty of Law of the University in Sarajevo, Bosnia and Herzegovina. Her masters degree focused on private international law and commercial arbitration, producing a thesis called: Ethics in International Arbitration. Ms Blakaj worked as a teaching assistant in the Private International Law and Commercial Arbitration courses at the Faculty of Law of the University of Sarajevo. Even though she started her career at the International Criminal Tribunal for Former Yugoslavia working on the war crimes, she worked mainly in the rule of law field, serving as a legal expert, respectively legal advisor to the Kosovo Judicial Council and the Ombudsperson Institution in Kosovo. Ms Blakaj is currently serving in the position of a Secretary General of the Arbitration Center, within the American Chamber of Commerce in Kosovo.



## NEVENA JEVREMOVIĆ

Nevena Jevremović is one of the initiators and three founders of the Association ARBITRI, an organization of young professionals focused on the capacity building, education and promotion of arbitration in Bosnia and Herzegovina. In her capacity as the President of the Association, Nevena coordinates and manages a team of five people currently working on the implementation of these projects in Bosnia.

As a part of her pre-doctoral research, Nevena is currently working at the Hague Conference on Private International Law (HCCH) on the Judgments Project. She primarily works in the preparation of the Special Commission on the future Convention on Recognition and Enforcement of Foreign Court to be held in November 2017. At the same time, Nevena is associated with the Institute of International Commercial Law at Pace University (IICL) since June 2016 first as the inaugural full-time Albert H. Kritzer Fellow and now as one of the contributing editors of the new CISG Database. Prior to joining the IICL, Nevena worked as an associate in Wolf Theiss office in Sarajevo, Bosnia and Herzegovina.

Nevena's research work focuses on international dispute resolution, especially alternative dispute resolution mechanisms in both a commercial and investment context. She published work focused on the arbitration system in Bosnia, and participated as a panelist in several conferences in Bosnia and in the region.

Nevena holds an LLM in International Law from the University of Pittsburgh, School of Law (cum laude 2016) and an LLM in Civil Law in the EU from the University of Sarajevo, School of Law (2015). She has been admitted as an SJD Candidate at the Pittsburgh School of Law under the supervision of Professor Ronald A. Brand. She passed the State Bar Exam in 2014.



## BRUNDA KARANAM

Brunda Karanam is a legal practitioner focusing on litigation, arbitration and dispute resolution. She recently graduated with a distinction from the University of Pennsylvania Law School, USA, where she was a Dean's Scholar in the LL.M. programme. She also holds a Bachelor of Civil Law (BCL) from the University of Oxford, UK and a B.A., LL.B. (Hons) from the National Law School of India University, Bengaluru, India.



## TATIANA LISBOA PADRÃO

Tatiana Lisboa Padrão is currently an LLM student at London School of Economics and Political Science ('LSE'). Her experience in dispute resolution includes having worked in the Litigation and Arbitration Department of Uría Menéndez – Proença de Carvalho (Lisbon), as a junior associate.

Tatiana received her law degree from Universidade Católica Portuguesa (Porto), completed her Master also at Universidade Católica (Lisbon) and participated in the 2017 session of the Summer Course of the International Academy for Arbitration Law in Paris, which was focused on investment treaty law. She is a member of the Portuguese Bar Association, of the Club Español del Arbitraje, of the Young International Council for Commercial Arbitration (ICCA) and of the Young International Arbitration Group (YIAG).

Tatiana is fluent in Portuguese (mother tongue) and in English, and also speaks Spanish.



## DERYA GÜRZUMAR

Mrs. Derya Durlu Gürzumar graduated from Bilkent University Faculty of Law, where she was a participant in the 15th, 16th and 17th Vis Moots. She received two Honorable Mentions in the Martin Domke Award in the 16th and 17th Vis Moots, being the sole recipient of this award from among participants attending the Vis Moot from Turkey. She also holds an LL.M. degree from the same university, with a specialization on law & economics.

Mrs. Durlu Gürzumar is a registered attorney-at-law to the Istanbul Bar Association. Her practice areas have been competition law, internet/technology law, freedom of speech matters and white-collar irregularities. She is the author of a book on "Fundamental Concepts of Anglo-American Law" published by Legal Publishing, and has published numerous articles on matters of competition law, freedom of speech, internet law, and white-collar irregularities.

Mrs. Durlu Gürzumar has also worked as a research assistant at Bilkent University Faculty of Law in the Private International Law department, focusing, in general, on private international law, and more specifically on international commercial and investment arbitration.

In 2017, she won the International Bar Association's global essay scholarship award contest, and became the global and sole award recipient for the Alternative and New Law Business Structures Committee from Turkey, for the International Bar Association's Annual Conference, held in Sydney, Australia on 8-13 October 2017. Her award-winning essay discussed the implications of the use of artificial intelligence in the provision of legal services.

Mrs. Durlu Gürzumar is currently pursuing her research on the intersection between corruption and international commercial arbitration.



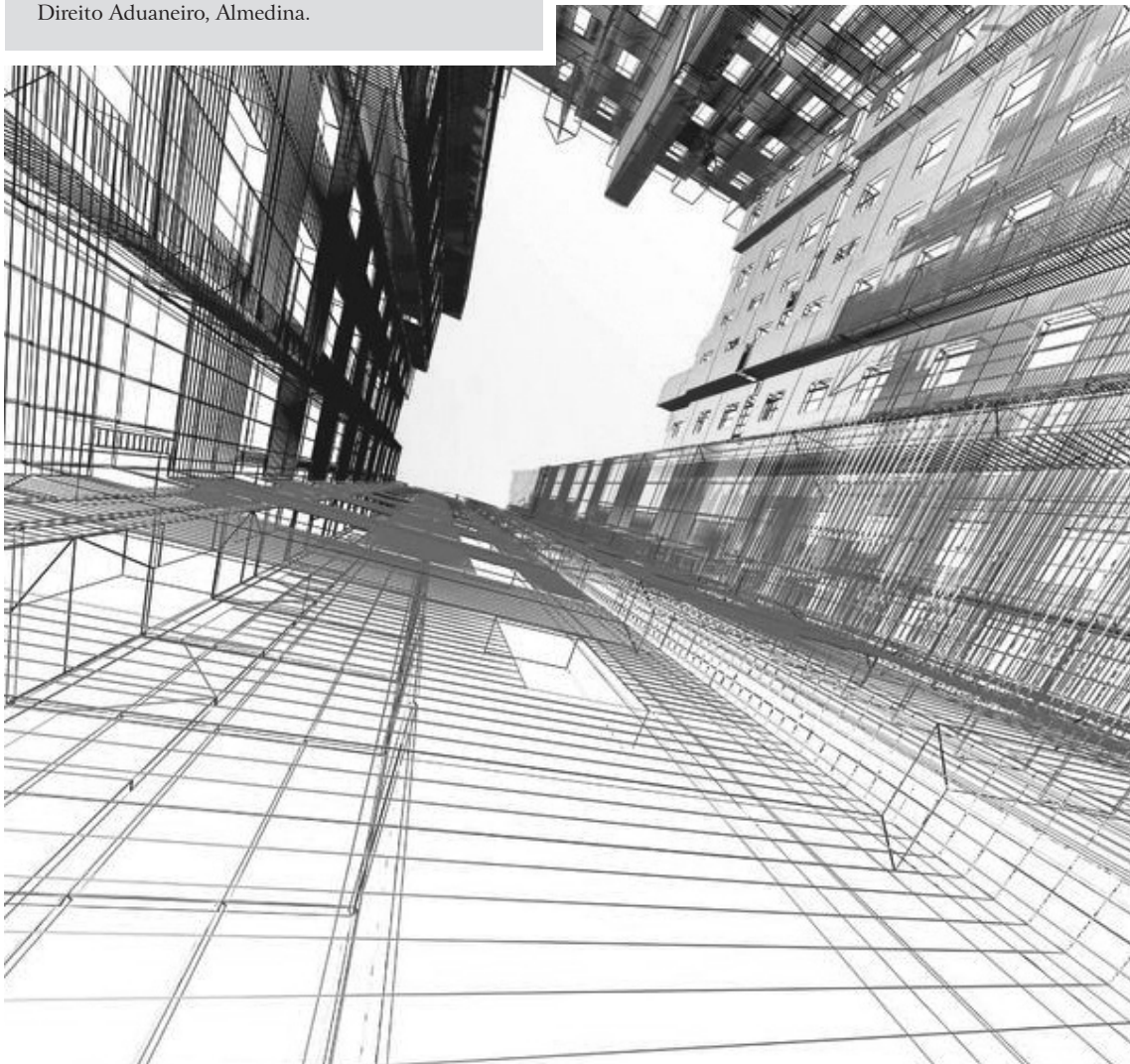
## FILIPA DUARTE GONÇALVES

Filipa Duarte Gonçalves is an Associate at Miranda Law Firm, in Lisbon. Her practice focuses on Arbitration, Criminal & Civil Litigation and Insolvency, both in Portuguese and African Jurisdictions, notably, Angola, São Tomé e Príncipe, Guinea-Bissau and Cape Verde. She has lately started to work also with Timor-Leste. Filipa holds a master degree in European Law from Minho University, a specialization in Customs and a post-graduation in Arbitration from Lisbon Nova University Law School. After taking her degree in Law, Filipa was a legal consultant of a small and medium-sized enterprises' Association, in Portugal for five years. Filipa frequently writes articles for newspapers and other magazines and recently has written an article on "Customs Clearance Security Deposit" for the Portuguese magazine "Temas de Direito Aduaneiro, Almedina.



## KATICA TOMIC

Mag. Katica Tomic works as an associate at the Rechtsanwältin BVM Vienna, Austria and she is a Ph.D student at the University of Vienna Faculty of Law, as well as a Ph.D student at Law University of Banja Luka, Bosna and Herzegovina. Before moving to Austria, she worked at the International Criminal Tribunal for Former Yugoslavia (ICTY) - Association of Defense Counsel Practicing before ICTY, Chamber of Commerce of Republic of Srpska and Organization for Security and Co-operation in Europe (OSCE). Katica Tomic has authored articles and book chapters on various topics in the field of Private International Law, Insurance Law, Blockchain technology and Smart Contracts and she is frequent speaker at seminars and conferences.



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