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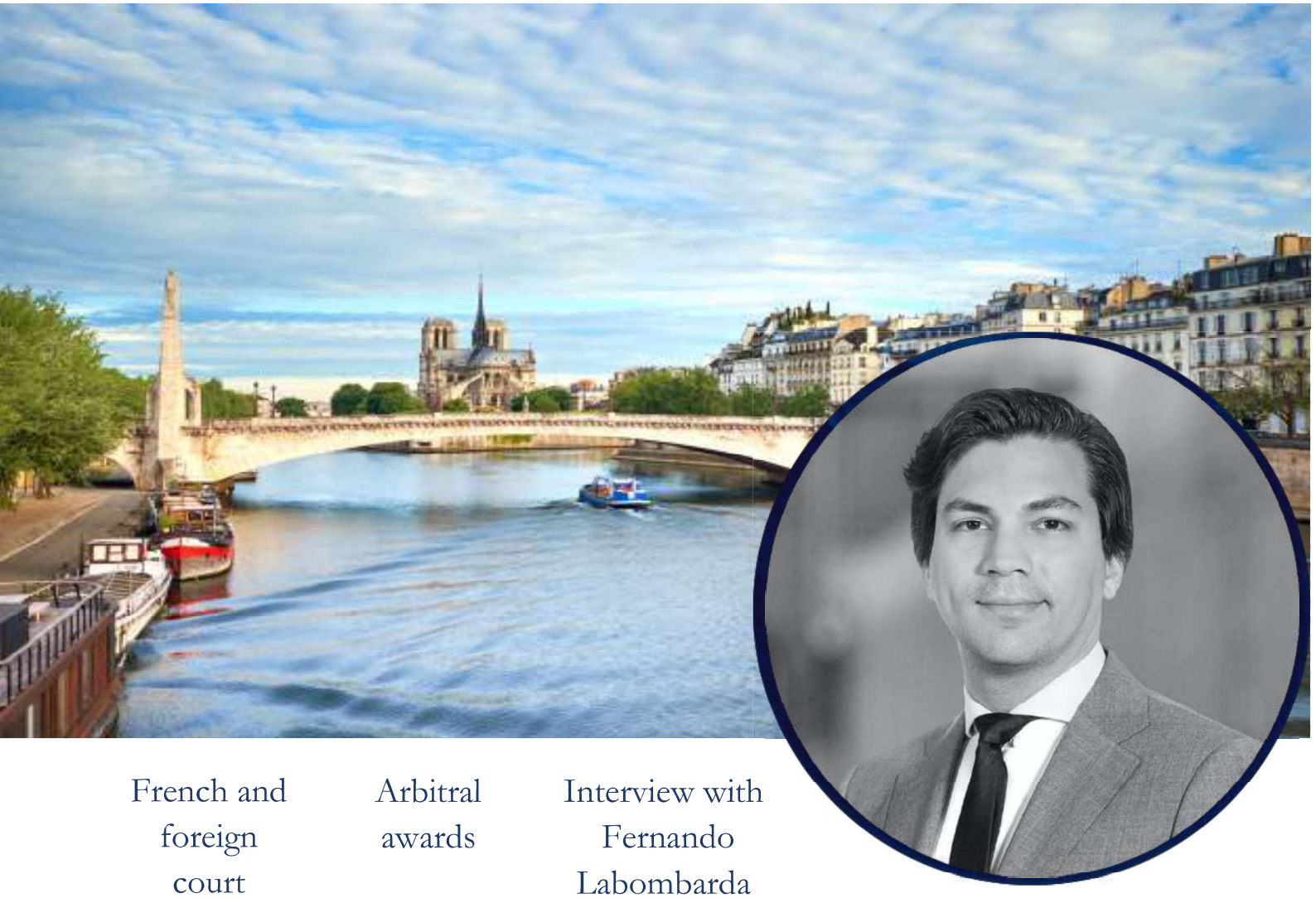

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FOREWORD

Paris Baby Arbitration is a Parisian association and an international forum aiming the promotion of young arbitration practice, as well as the accessibility and the popularizing of this field of law, still little known.

Each month, its team has the pleasure to present you the Biberon, an English and French newsletter, intended to facilitate the lecture of the latest and the most prominent decisions given by states and international jurisdictions, and the arbitral awards.

For this purpose, Paris Baby Arbitration encourages the collaboration and the contribution of the younger actors in arbitration.

Paris Baby Arbitration believes in work, goodwill and openness values, which explain its willingness to permit younger jurists and students, to express themselves and to communicate their passion for the arbitration.

Finally, you can find all the previously published editions of the Biberon and subscribe to receive a new issue each month on our website: babyarbitration.com.
We also kindly invite you to follow us in our LinkedIn and Facebook pages and to become a new member of our Facebook group.

Have a pleasant reading!

FRENCH COURTS

COURTS OF APPEAL

Paris Court of Appeal, 13 April 2021, No. 18/27764

By Abdelmalek Mechbal

In a decision issued on 13 April 2021, the Paris Court of Appeal reviewed the dispute between two companies under French law, respectively Brézillion ("Brézillon") and Eurocoustique SARL ("Eurocoustique").

Since 13 May 2016, Brézillion entrusts under two different contracts Eurocoustique, as a subcontractor, to conduct and deliver two distinct construction sites. Shortly after, Brézillion notes significant delay for the construction sites to be issued, and not being able to get to an agreement with Eurocoustique, hands over the construction sites to another subcontractor, Isolon.

The contracts between the parties provides for an arbitration clause. On 6 November 2017 Eurocoustique entered into an arbitration procedure before a sole arbitratorin order to collect payment for the work already delivered as well as damages for its replacement on the construction sides. In an award of 15 October 2018 the arbitrator condemned Brézillon to reimburse Eurocoustique for the work already delivered as well as to pay damages for its replacement.

Subsequently Brézillon filed an action for annulment before the Paris Court of Appeal.

It points out that the mission of the arbitrator had come to an end by 30 September 2018 and that consequently any award rendered after that date was no longer within the competence of the arbitral tribunal.
Eurocoustique, considering that the award is valid, claims the execution of the award and thus to issue the payment of €145.662, 61 for damages, as recognized in the award, as well as €30.000 for abusive proceedings.

On the application to set aside the arbitral award, the Paris Court of Appeal noted that, in view of Article 1492 of the French Code of Civil Procedure, an action to set aside an arbitral award is available if "the arbitral tribunal has ruled without complying with the mission entrusted to it". Moreover, according to Articles 1477 and following, "the expiration of the arbitration period entails the end of the arbitration proceedings". In these circumstances, the Court then stated that the arbitrator who filed his award on 15 October 2018, exceeding the time limit for rendering his award, set by the parties to 30 September 2018, does not comply with its mission. Therefore, the arbitral award incurs annulment.

With regard to the merits of the dispute, the Court took on the role of *amiable compositeur*, as provided for in the arbitrator's mission. After having listed the elements produced by the parties relating to their claims in the dispute, the Court ordered Brézillon to pay Eurocoustique the sum of €108.522,93 plus €5.000 for costs. On the other hand, it dismissed Eurocoustique's claim for damages.

Paris Court of Appeal, 4 May 2021, GREEN NETWORK S.P.A v. SA ALPIQ, No. 18/14593

By Oumaima Gourzmi

By a decision of 4 May 2021, the Paris Court of Appeal dismissed the appeal to set aside an award rendered on 6 April 2018 by an arbitral tribunal in Paris under the aegis of the International Court of Arbitration of the International Chamber of Commerce ("ICC"), opposing the Italian company GREEN NETWORK S.P.A ("GREEN NETWORK") to the Swiss company SA ALPIQ ("ALPIQ").

The two companies are linked by an electricity supply contract dated 2 June 2005, by which ALPIQ undertakes to deliver electricity to the Swiss border for the benefit of GREEN NETWORK. This contract, which included an arbitration clause, provided that ALPIQ would certify the renewable origin of the electricity supplied. As the Italian electricity authority did not accept the certification of the electricity drawn up by ALPIQ, GREEN NETWORK was ordered to pay a fine of 2,466,450 euros for unjustified violation of the European and Italian legislation in force in the electricity sector.

In order to obtain reimbursement of the sums, GREEN NETWORK initiated on 8 October 2012 arbitration proceedings under the aegis of the ICC against ALPIQ.
By award of 5 October 2017, the arbitral tribunal rejected most of the claims of GREEN NETWORK, on the grounds that the 2005 contract only obliged ALPIQ to supply the certificates and that the admissibility of these certificates with regard to the regulatory provisions of European and Italian law controlled by the Italian authorities was not the responsibility of ALPIQ.

On 5 June 2018, GREEN NETWORK filed an action for annulment of the arbitral award before the Paris Court of Appeal. GREEN NETWORK raises, inter alia, that the arbitral tribunal breached its duty of independence and impartiality due to the rejection of its request for document production in Procedural Order No. 4 without motivating its decision before the issuing of the final award.

In response, ALPIQ argues that GREEN NETWORK breached its duty of procedural fairness by producing its documents only in Italian without providing a translation.

In the light of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 132 of the Code of Civil Procedure, the Paris Court of Appeal recalls in its decision the sovereign power of the judge to set aside, as evidence, any document written in a foreign language as well as documents that have not been submitted in reasonable time.

Thus, as the Court was not in a position to take them into account, and despite the fact that the arbitration proceedings had taken place in Italian, refused to communicate the foreign language documents.

On the admissibility of the plea for annulment based on the independence of the arbitral tribunal, the Court notes that GREEN NETWORK did not provide any factual, precise and verifiable element likely to characterize the existence of any link between the tribunal and ALPIQ such as to call into question its independence.

As to the merits of the plea of lack of impartiality, the Court noted that the arbitral tribunal was not required to give reasons for its refusal in accordance with the IBA's provisions on evidence. It added that the mere fact that the arbitral tribunal considered that the production of additional documents was not useful did not allow

it to be inferred that it had prejudged the merits of the dispute. The Court also deduced from the use of the present tense to describe the reasons adopted by the arbitral tribunal that these reasons were indeed those of the tribunal on the day it made its final award. Finally, the Court considers that if the arbitral tribunal rejected the request for disclosure of documents made by GREEN NETWORK, the alleged circumstances are not such as to create a reasonable doubt as to a lack of impartiality or independence of the arbitral tribunal so that the claim is rejected.

Moreover, the Court continued that the power of the arbitral tribunal to accept or refuse the said production cannot be sufficient in itself to characterize a violation of the rights of the defense and recalled that it is not for the annulment judge to assess the merits or otherwise of the arbitral award.

Furthermore, the Court, considering that the Claimant's allegations are not such as to characterize a violation of international public policy and that the Award could perfectly well fit into the French legal system, rejects the plea alleging a violation of its mission, of the rights of the defense, and of the incompatibility of the Award with international public policy.

With regard to the abusive nature of the action for annulment raised by ALPIQ, the Court declares the claims admissible but subsequently dismisses them for lack of proof of any fault or negligence on the part of GREEN NETWORK.
Consequently, the Court of Appeal rejects the appeal for annulment of the arbitration award and orders GREEN NETWORK to pay all costs.

Nimes Court of Appeal, 6 May 2021, No. 19/03172

By Max Pabille,

In a decision dated 6 May 2021, the First Civil Chamber of the Nîmes Court of Appeal ruled on the simultaneous referral of a case to the state courts, in the context of a request for the granting of a judicial expertise, even though the disputed contract contained an arbitration clause and the arbitral tribunal was already seized of the case.

A French company in yachts' management and acquisition ("SAS Cap Niel") signed a marine towing contract with a marine salvage company ("Erasme") to tow one of its yachts on Bastia's offshore. A dispute arose between SAS Cap Niel and Erasme

regarding the towing indemnity. The contract stipulated that any dispute in relation to the convention shall be submitted to arbitration in London under English law. Despite the constitution of an arbitral tribunal and the fact that the latter rendered an interim award in the case, SAS Cap Niel, contesting the jurisdiction of the arbitral tribunal and the application of Anglo-Saxon law to the dispute, brought an action before the Bastia Commercial Court. The company tried to obtain the granting of a judicial expertise, in order to have the disputed contract reclassified as a contract for assistance or maritime towage.

At the request of Erasme and in application of the principle of competence-competence, the Commercial Court retracted its order appointing the judicial expert on the grounds that the arbitral tribunal had been seized in the case and that the arbitration clause was not manifestly inapplicable. SAS Cap Niel then sued its law firm before the Avignon High Court for breach of its duty to advise.

By judgment of 22 July 2019, the Avignon High Court recognised the liability of the law firm and ordered the firm to pay damages and costs. Subsequently, the law firm appealed to the Nîmes Court of Appeal against the decision.

They argued, *inter alia*, that the decision was based on an arbitral award constituting a fraud on the law and that they had not committed any fault in bringing a claim for judicial expertise before the state courts. In pursuing their argument, they maintained that this expert opinion was necessary to establish the nature of the contract and that the qualification of the contract did not fall within the scope of the arbitrator's mission, which was limited to pronouncing the amount of the towage compensation. According to the law firm, the expertise required was therefore necessary in the context of an all-French assurance operation and fell within the exclusive jurisdiction of the French courts.

In its decision dated 6 May 2021, the Nîmes Court of Appeal confirmed the judgment of the Avignon High Court and ordered the law firm to pay the costs and damages in compensation for the fees paid in unnecessary proceedings. The court recalled that, by virtue of the obligation of legal auxiliaries to advise their clients, all lawyers have a deontological obligation to advise against taking legal action that is doomed to failure. According to Article 1449 of the French Code of Civil Procedure, when the arbitral tribunal is seized of a case, no proceedings can be initiated before the national courts, even before the judge of summary proceedings or to request an

interim order to obtain a judicial expertise. By consequence, the court recalls that the assessment of the validity of the arbitration clause falls within the competence of the arbitrator according to the principle of competence-competence. In addition, the court maintained that the determination of the amount of the towage indemnity required the qualification of the disputed contract, so that any action necessary to determine the nature of the contract fell within the scope of the arbitrator's mission. Consequently, in application of its duty to advise and its obligation to inform, the law firm had a duty not to bring proceedings on request without knowing whether these would be prior to or separate from the arbitration proceedings. A lawyer who brings an unnecessary legal action is therefore liable to his client.

Paris Court of Appeal, 18 May 2021, Asperbras v. Novo Banco, n°18/06076

By Florence Ecochard

On 18 May 2021, the Paris Court of Appeal dismissed a petition to set aside an award rendered by an ICC tribunal ("Tribunal") on 2 November 2017.

Asperbras ("Asperbras") located in the British Isles entered into a hospital construction contract with the Republic of Congo. For the purpose of financing the construction, Asperbras entered into a discount agreement with Portuguese bank Banco Espirito Santo SA ("BES") on 15 April 2014, pursuant to which BES granted Asperbras a credit of €108,000,000, repayable in two instalments of €54 million each on 31 January 2015 and 31 January 2016 ("Discount Agreement").

On 3 August 2014, following the liquidation of BES, the bridge bank Novo-Banco ("Novo Banco"), a company incorporated under Portuguese law, was created by the Central Bank of Portugal. Novo Banco took over the rights of BES, including for the purpose of the Discount Agreement with Asperbras.

Asperbas did not pay the first instalment, claiming a set-off against a claim held by another company in the Asperbras group. The set-off was rejected by Novo Banco. On 19 June 2015, Asperbras initiated ICC arbitration proceedings against Novo Banco to have the Discount Agreement declared void. At the same time, Novo Banco initiated, on 22 June 2015, ICC arbitration proceedings against Asperbras to request the performance of its obligations under the said contract. Both arbitration

proceedings were filed on the basis of the arbitration clause stipulated in Article 17 of the Discount Agreement.

The Tribunal issued an interim award on 8 April 2016, followed by a final award on 2 November 2017, declaring the Discount Agreement valid and ordering Asperbras to pay the first instalment with interest. On 28 February 2018, the Tribunal issued an addendum specifying costs.

On 19 March 2018, Asperbras filed a petition to the Paris Court of Appeal to set aside the final award.

An issue of admissibility arises first, since Asperbras argues that its petition to set aside relates to the final award and implicitly to the interim award and addendum. The Court rejects this point based on Article 901 of the French Code of Civil Procedure, which requires that the contested decision is explicitly indicated in the declaration constituting the appeal, in this case only the final award had been mentioned.

On the merits, Asperbras seeks to set aside the final award for failure of the Tribunal to comply with its mission (Article 1520 3° French Code of Civil Procedure) and for contravening French public policy (Article 1520 4° French Code of Civil Procedure).

On the ground of Article 1520, 3° French Code of Civil Procedure, Asperbras criticises the Tribunal's decision to link the payment and the due date of the second instalment to the payment by the Republic of Congo of its own debt to Asperbras, even though, according to Asperbras, this had not been requested.

The Tribunal stressed that, under the Terms of Reference, Novo Banco referred to the tribunal with the intention that it would order Asperbras to pay Novo Banco the amounts due under the Discount Agreement, and concluded that the link between the Discount Agreement and the claim for payment was part of the Terms of Reference. The claim is therefore dismissed.

On the ground of article 1520 4° French Code of Civil Procedure, Asperbras criticises the award for allowing Novo Banco to benefit from a contract that was part of a transaction allegedly constituting a fraud. It argues that the Discount Agreement was linked to two commercial paper subscription contracts entered into by another

company of the Asperbras group with the company Rio Forte. It states that those contract formed a single contractual package concluded with the aim of circumventing public policy provisions of Portuguese banking law, namely, the ring-fencing measures imposed by the Bank of Portugal on BES. Those measures prohibit any transfer of capital from the financial part of the Espirito Santo group, of which BES was a part, to the non-financial entities of the group, such as Rio Forte Investments SA.

Asperbras regrets that the Tribunal dismissed the indications of fraud. It also points to the similarity between the Portuguese public policy provisions and Article L. 612-1 of the French Monetary and Financial Code, which would demonstrate the violation of French public policy. It argues that the set aside judge must review compliance with international public policy in fact and in law.

The Court of Appeal begins by stating that Novo Banco's argument that the alleged fraud does not concern the contract at issue or the parties to the present proceedings is not sufficient to reject the claim.

However, the Court notes that the Tribunal did examine the alleged interdependence between the Discount Agreement and the subscription contracts. After analysing the documents, it did not reach the conclusion that there was any interdependence, finding that the only purpose of the money transfers between BES and Asperbras was to provide cash to Asperbras in exchange for interest and commissions for the benefit of BES and that there was no proven link to an illicit transfer of money to the Espirito Santo group.

The Tribunal rejected the evidence raised by Asperbras as insufficient to characterise the fraud. The Court therefore rejects the claim of violation of international public policy.

The petition to set aside is dismissed and Asperbras is ordered to pay the costs.

Paris Court of Appeal, 3 June 2021, No. 20/00498 and No. 20/08146, République du Congo v. Société Commissions Import Export (Commissimpex)

By Nicole Knebel

In two decisions dated 3 June 2021, the Paris Court of Appeal confirmed two arbitral awards of 3 December 2000 and 21 January 2013, which had ordered the Republic of Congo (" Congo ") to pay various sums to the company Commissions Import Export (" Commissimpex ") and authorized the latter to seize an aircraft parked on French soil and belonging to the Congolese State.

The Paris Court of Appeal had authorized, on 27 February 2020, any execution measure on any property belonging to the Congo, including aircraft, with the exception of property used or intended to be used in the exercise of the functions of the diplomatic mission of that State. Following this decision, Commissimpex had an aircraft belonging to Congo seized from a French company specializing in aircraft maintenance on 8 June 2020.

The Congo summoned Commissimpex and the maintenance company before the enforcement judge of the Paris judicial court in order to obtain the release of the seizure. By judgment dated 29 June 2020, the enforcement judge dismissed the maintenance company's case, rejected the application for release and ordered the Congo to pay Commissimpex the sum of EUR 15,000 under Article 700 of the Code of Civil Procedure and to pay the costs.

Following this decision, Congo appealed on 7 July 2020 against the judgment and requested a stay of execution of the contested judgment. By order dated 19 November 2020 the Congo's application was rejected and enforcement was ordered. In its decisions of 3 June 2021, the Paris Court of Appeal rejected the Congo's claims that the seized aircraft was a « state aircraft » which consequently benefited from the absolute immunity and undistrainability conferred by international law and that the aircraft could only be seized pursuant to an express and special waiver of its exemption from seizure.

The judgment of 27 February 2020 having granted exequatur to the arbitral awards, had in particular authorized Commissimpex to carry out, according to the arbitral

awards, any measure of forced execution on any property belonging to the Congo, "with the exception of property, including bank accounts, used or intended to be used in the exercise of the functions of the diplomatic mission of that State."

According to the Paris Court of Appeal, a distinction must be made between immunity, which is granted to persons, such as a State or any representative thereof, and undistrainability, which relates to property belonging to a person protected by diplomatic immunity.

Indeed, it notes that the Vienna Convention of 18 April 1961 (" Vienna Convention ") is intended to protect the diplomatic missions abroad of a State and concerns, on the one hand, the premises and means of transport " of the mission " and, on the other hand, the person of the " diplomatic agent ", it being specified that the functions of a diplomatic mission are thus distinguished from the diplomacy in general exercised, for example, by the President of a State. Since the seized aircraft was on French soil, the Congo should have demonstrated, in order to be able to avail itself of the protection of the Vienna Convention, that the disputed aircraft was part of the means placed at the disposal of its diplomatic mission in France.

As regards the Congo's argument that the disputed aircraft constitutes a State aircraft and is therefore absolutely immune from seizure, Article 3.3 of the United Nations Convention of 2 December 2004 on Jurisdictional Immunities of States and their Property (" United Nations Convention ") has, according to the Paris Court of Appeal, the sole effect of excluding from its scope the question of aircraft without establishing the principle of the exemption of State aircraft from seizure.

Moreover, the judges point out that a State-owned aircraft is not necessarily a State aircraft, Moreover, even assuming that the aircraft seized is a State aircraft and that it is therefore immune from seizure, there is nothing to prevent a State from waiving immunity from execution over a State aircraft that it owns, as the Congo did in the present case when, in its letter of undertaking of 3 March 1993, it definitively and irrevocably waived all immunity from jurisdiction and execution.

Consequently, the Paris Court of Appeal, in two decisions of 3 June 2021, confirms the contested judgment insofar as it authorizes the seizure of the disputed aircraft and orders the Congo to pay the costs of the proceedings and the entire costs of the proceedings, while rejecting its counterclaim for wrongful seizure.

FOREIGN COURTS

High Court of Justice of England and Wales, 5 May 2021, *Alpha Marine Corp v. Minmetals Logistics Zhejiang Co. Ltd*, [2021] EWHC 1157 (Comm)

By Rudy Tchikaya

On 5 May 2021, the High Court of Justice of England and Wales allowed an appeal against a partial award and set aside the award on the legal aspects submitted in the appeal.

The Alpha Marine Corporation ("Claimant" or "Owners") is the owner of the vessel placed on charter with Minmetals Logistics Zhejiang ("Respondents" or "Charterer"). Shortly after leaving port, the vessel grounded and became the subject of the dispute submitted to arbitration pursuant to the charter party concluded between the parties.

In its partial award issued on 12 June 2020, the Arbitral Tribunal considered that although the Charterer had provided a port security guarantee to the Owners, the shipboard personnel, employees of the owner, had been negligent, causing the vessel to run aground. This severed the chain of responsibility for any safety failure on the part of the Charterer, an aspect not disputed in the appeal. On the basis of of an implied clause in the Charter Party preventing the Owners from intervening to recover the freight payment, the Tribunal concluded that the Charterers were entitled to recover as damages the value of the cargo not paid by the sub-charterer, *i.e.* US$1,860,390, less the amount held by third parties.

On 13 October 2020, pursuant to section 69 of the Arbitration Act of 1996, Claimants were authorized to submit to the State Court the following legal question: "*Did the Charter party contain an implied obligation that the Claimant would not revoke the Defendant's authority to collect from GNR the freight payable under the Bills of Lading unless hire and/or sums were due to the Claimant under the Charter party?*". The Arbitral Tribunal held that this question could substantially affect the rights of the Parties.

Claimant considered that the Arbitral Tribunal was wrong to find that there was an implied term based on the formulation "*All Freight Implied Terms*"" or "*Dollar by Dollar Implied Term*" chosen in the Charter party, as it was neither necessary nor obvious. The Charterer, on the other hand, argued that there is an implied term which could be formulated in several ways: (1) the implied "*All Freight*" clause; (2) a clause that the Owners were not entitled to revoke the Charterers' authority to collect freight payment unless a sum was due to them under the charter party and the sum in question was identified at the time of revocation of the charterers' authority (referred to in argument as the "*All Freight (Sum Identified) Implied Term*"); and (3) the implied "*Dollar for Dollar*" clause. It further argued that its counterclaim was not considered as based on tort and wishes to have this issue referred to the Arbitral Tribunal if the Court allows the appeal.

According to the Court, for a term to be implied, it is necessary that the nature of the term is clear and clearly expressed. As Bingham MR said in Philips Consumer Electronics SA v British Sky Broadcasting Ltd [1995] EMLRT 472 at 482 (quoted in Marks and Spencer para [19]): "… *it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred*…" Furthermore, the fact that an implied term may take on several different formulations "*is a classic sign that it is neither necessary nor obvious*". Thus, the Court considers that no implied term should be implied because the charter-parties function satisfactorily without it and that it is therefore unnecessary in view of the "*Bulk Chile*" case. Furthermore, the content of the implied term would not be so obvious either, as the Court believes that the Claimants would have rather considered that there should be no restriction on their right to intervene to collect the freight payment. Finally, the judge highlights the significant difficulties in the wording and enforceability of each implied term raised by the Charterers.

Consequently, the High Court allows the Claimants' appeal by answering the question of law put to it: there is no implied obligation in the Charter-Party preventing owners from revoking the Charterers' authority to recover freight payable under bills of lading. On the other hand, the award is set aside insofar as it awarded damages for breach of this implied obligation. Finally, the case is remanded to the Arbitral Tribunal to rule on the charterers' freight counterclaim on the alternative ground of tort.

ARBITRAL AWARDS

ICSID Case No. ARB/12/6, 4 May 2021, Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan

By Bénédicte Marquise

On 4 May 2021, an Arbitral Tribunal ("Tribunal") rendered its final award in the matter opposing Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. to the State of Turkmenistan (ICSID Case No. ARB/12/6).

The case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID") on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of other States dated 18 March 1965, which entered into force on 14 October 1966 (the "ICSID Convention"), and the Agreement between the Republic of Turkey and Turkmenistan concerning the Reciprocal Promotion and Protection of Investments dated 2 May 1992 and entered into force on 13 March 1997 (the "Turkey-Turkmenistan Bilateral Investment Treaty" or "BIT"). The claimants are Sehil Inşaat Endustri ve Ticaret Ltd. Sti, a Turkish company ("Sehil") and Mr Muhammet Cap, a Turkish national ("Mr Cap"). Mr Cap was the owner (up to 97,5% of the share capital) of Sehil, which entered into bankruptcy proceedings, and is now under the control of the Istanbul Bankruptcy Office (14 June 2016). Sehil and Mr Cap are herein jointly referred to as "Claimants". The respondent is the State of Turkmenistan ("Turkmenistan" or "Respondent"), hereinafter collectively referred to with Claimants as "the Parties".

According to Claimants, the Parties' business relationship began in 1993, and the dispute arose of a large number of contracts entered into by Sehil with different entities in Turkmenistan over the course of 9 years. In particular, between 2000 and 2009, Sehil was awarded 65 contracts by different State organs and State-owned companies relating to different kinds of construction work on both private and governmental buildings. Claimants alleged that Respondent unlawfully expropriated Claimants' investments through various actions and omissions, notably defaults and delays in payments, the imposition of unjustified restrictions on imports, and the issuance of unfair delay penalties and fines. Claimants also alleged that Respondent harassed Sehil's employees, damaged Mr Cap's reputation and endangered Mr Cap

and his family's lives through a number of threats, forcing them to flee the country. Thus, Claimants disputed 32 Contracts.

The request for arbitration dated 21 February 2012 was received by ICSID on 23 February 2012, sent by Claimants against Turkmenistan. Later, the Tribunal rendered a Decision on Respondent's objection to Jurisdiction under Article VII (2) of the Turkey-Turkmenistan Bilateral Investment Treaty on 13 February 2015. In the decision, the Tribunal had to consider whether the Turkey-Turkmenistan Bilateral Investment Treaty required Claimants to submit the dispute to the local courts before commencing arbitration under the BIT. The objection was dismissed, as the Tribunal concluded that the submission of the dispute to local courts was not a pre-condition to the ICSID arbitration proceedings, but only an option for the investors. Claimants brought several claims against Turkmenistan, the relief sought having been submitted separately.

Firstly, Mr Cap mainly sought from the Tribunal to declare that Turkmenistan has breached its obligations under the Turkey-Turkmenistan Bilateral Investment Treaty, namely that Respondent : committed an unlawful expropriation of Mr Cap's investment, breached its obligation to treat Mr Cap and his investment fairly and equitably, breached its obligation to treat Mr Cap and his investment in a reasonable and non-arbitrary manner, breached its obligation to accord Claimant full protection and security; failed to comply with its specific undertakings towards Claimant. Due to Turkmenistan's alleged breaches of its obligations under the BIT and international law, Mr Cap requested the Tribunal to order Turkmenistan to pay Mr Cap 97.5 percent of the damages in the amount of USD 413,011,889. Moreover, Mr Cap requested Turkmenistan to reward in the amount of USD 35,000,000 for the moral damages arousing out of Respondent breach and to declare that Mr Cap is entitled to 97.5% of the moral damages, assessed at USD 5 million, sought for Sehil's reputational harm and the harassment of Sehil's employees, as well as 100% of moral damages claim, assessed at USD 30 million, sought for the pain, stress, shock, humiliation, shame and reputational harm Mr. Çap has suffered as a result of Turkmenistan's acts and omissions relating to his investment, which forced him to leave the country for his own safety.

Secondly, Sehil mostly sought from the Tribunal to declare that Respondent has breached its obligations under BIT and customary international law and

consequently order Respondent to pay USD 413,011,889 to Sehil due to the aforementioned breaches.

Respondent predominantly asked the Tribunal to dismiss the case for lack of jurisdiction, and alternatively, to dismiss all of Claimant's claims. Respondent brought counterclaims relating to breaches by Claimants of several contracts' obligations, that is substantial delays in performance concerning various disputed contracts, failure to meet different fundamental obligations under one of the disputed contracts, undue payments for works under another contract. Respondent also claimed non-payment of Claimants' tax debt owed to Turkmenistan. Therefore, Respondent requested the Tribunal to grant Turkmenistan USD 69.5 million, plus interest, in connection with its counterclaims.

The Tribunal rules that (i) Claimants have made an investment falling under the scope of Article 25 of the ICSID Convention and Article I(2) of the "Turkey-Turkmenistan Bilateral Investment Treaty; (ii) it has jurisdiction with regards to Claimants' expropriation claim; (iii) it does not have jurisdiction regarding Claimant's Fair and Equitable Treatment, Full Protection and Security, arbitrary and discriminatory treatment, and umbrella clause claims; (iv) Claimants' investment in Turkmenistan has not been expropriated; (v) all other claims and requests are dismissed; and that (vi) each party is responsible for its own costs and expenses, the costs of the arbitration being equally divided between the Parties, in proportion to the advances made to ICSID.

ICSID Case No. ARB(AF)/16/5, 7 May 2021, América Móvil S.A.B. de C.V. v. Republic of Colombia

By Julian Mestre Penalver

It is not the role of an international arbitral tribunal to substitute its own interpretation for that of domestic courts nor to act as an appeal court against domestic decisions when these are neither substantially or procedurally defective nor violate international law.

América Móvil is a Mexican company based in Mexico City, which operates in the mobile telecommunications sector. In 2002, through its sister company "Telmex", América Móvil indirectly took control of the main Colombian operator, "Comcel".

In 2004, Comcel (operator of the Eastern telecom region) acquired the Colombian operators "Occel" (Western telecom region) and "Celcaribe" (Atlantic coast telecom region). Each of these operators owns a license to run the mobile cellular network, in the portion reserved for public or semi-public entities. In 2013, Comcel still owned the assets used to provide these services (mainly network infrastructure, § 95) excluding radio frequencies, before merging with Telmex to become "Claro Colombia", a subsidiary of Mexican company América Móvil for its landline and mobile, digital television and internet operations in Colombia.

Colombian law of 1998 (Ley 422, art. 4) provided a right to return radio frequency to the State for telecommunications service concession contracts. Colombian law of 2009 (Ley 1341, art. 67 4 °) extends this provision to telecommunications licenses, permits and authorizations. The Colombian Constitutional Court ruled that these provisions comply with the Constitution, noting, however, that "what [it would be] unconstitutional to interpret them in such a way that they [would modify] the restitution clauses agreed upon before [these rules] came into force" (Sentencia C-555/13).

As Comcel expressed its intention to join the new regulatory regime, the concession contract was terminated. Concluded in 1993, the concession contract included a provision requiring that assets used to provide these services should be remitted to the state upon termination. The Colombian Ministry of ICTs issued a resolution requiring the return of the said assets or a financial compensation from the operator, in addition to the return of radio frequency.

A request for domestic arbitration is then brought by the Colombian Ministry of ICTs. The domestic arbitral tribunal found that the disputed provision was binding, although the return of the assets to the State was technically impossible. Therefore, Comcel shall compensate the Ministry for 3,155,432,000,000 Colombian pesos, plus default interest. After multiple appeals before Colombian courts and, due to the failure to reach a friendly arrangement, Comcel pays compensation to the Ministry "subject to its rights and those of América Móvil under Colombian law and international law" (§ 91).

América Móvil (Claimant company) filed a request for ICSID arbitration against the Republic of Colombia (Respondent State). The Claimant company argues that the compensation requested by the Respondent State breaches its "right to avoid

returning assets without compensation" and that such request for compensation entails an expropriation as defined in Article 17-08 of the Mexico-Colombia Free Trade Agreement (Mexico-Colombia FTA). The violation of fair and equitable treatment was initially raised by the claimant company, but later dropped due to a reservation made by Colombia to the treaty (§ 93).

The respondent State challenges the jurisdiction of the tribunal and the expropriatory nature of the return of the assets, since "it did not affect the overall investment of America Móvil" (§ 98). Finally, the respondent State contests the very existence of the "right of non-return", since the clause in the terminated concession contract stated "in unequivocal terms the return of the assets at the end of the concession, and said clause has not been modified nor removed". In any event, the decision of the Constitutional Court in favor of this interpretation "could not be in violation of international law, as [the plaintiff company] did not provide evidence of a denial of justice" (§ 99).

After quoting a certain amount of case law and authors, the arbitral tribunal recalls that international law does not create property rights (as the Tribunal refers to the "right of non-return") since it merely protects an in rem right conferred by domestic law. Thus, the arbitral tribunal refers to national law to determine whether the investor has a property right over the telecommunication infrastructure (§ 327) as claimed by the Respondent State (§ 272 & § 293).

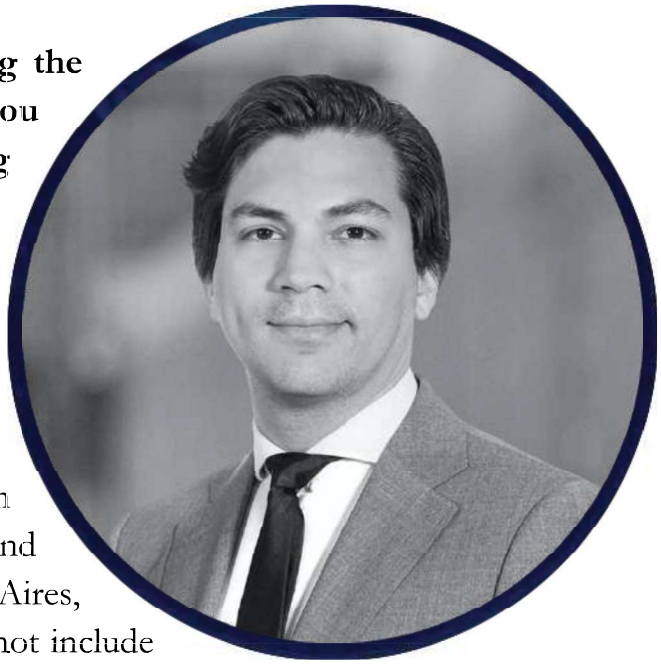
Recognizing that "the obligation of the international judge to respect the interpretation and application of domestic law as accepted by the national legal system is even more evident when the issue of domestic law at stake has been ruled upon by a national court" (§ 336), the arbitral tribunal believes that a domestic judge is the sole judge of his or her own legislation (§ 337) and that it is not the role of an international arbitration tribunal to depart from such interpretation of domestic law or even to substitute its own interpretation for that of the domestic judge (§ 338).

Hence, since the Constitutional Court ruled that the provisions of the applicable Colombian law and the domestic arbitration award, recognizing the "constitutional res judicata" (§ 387—citing the domestic arbitration award) as well as the "fully valid and effective" disputed restitution of the assets to the State clause (§ 382—citing the domestic arbitration award), were constitutional, the arbitral tribunal concludes that the "right of non-return" (or property right) alleged by the claimant company does

not exist (§ 386 and § 415). Furthermore, the domestic decisions and awards must be accepted as they are neither materially or procedurally defective (§§ 398–400), nor do they violate international law (§ 412). At the same time, the arbitral tribunal rejected the claimant company argument of legitimate expectations, pointing out that the claimant had not demonstrated that it supported its claims (§ 455).

The tribunal ordered the plaintiff company to pay all of its representation costs and 50% of the defendant State's costs, which amounted to US$2,095,728.90.

INTERVIEW WITH FERNANDO LABOMBARDA



Q1. Hi Fernando, thank you for taking the time to answer our questions. Would you mind presenting yourself and recalling briefly your background?

I am an Associate with the international arbitration practice of White & Case, in Paris.

My introduction to international arbitration was rather fortuitous. I grew up and completed my legal studies in Buenos Aires, Argentina, where law schools typically do not include arbitration in the curriculum. In 2012, during my fourth year of law school, I had the opportunity to do an exchange at UC Hastings in California. One of the proposed courses was international business transactions (which had a module on arbitration).

At the time, I was keen on intellectual property, and this course did not sound particularly interesting. However, this was one of the few courses eligible to obtain the necessary school credits for my law school, so I chose to do it. In the end, the course opened my mind as to the type of law I wanted to practice, and from that moment onwards I steered my career towards arbitration. The following year, I

graduated, did an internship at a big law firm in Buenos Aires, and obtained the Buenos Aires bar qualification.

In 2014, right after graduating, I moved to Paris to do a Masters. I thought Paris would be the ideal place to study, mainly for two reasons. First, there would be good prospects of finding a position after graduating, given the size of the Parisian arbitration market, and, second, it would allow me to study arbitration while improving my French. In 2015, I did a Masters in international business law, and the following year a Masters in international arbitration, both at the University of Versailles.

After my Masters, I did an internship with the international arbitration group of a big law firm and another at an arbitration boutique. In early 2019, I passed the French bar exam, joined White & Case as an intern, and then became an associate a few months later.

Q2. Could you tell us more about your experience in Buenos Aires? In your opinion, is it necessary to be dual-qualified in order to succeed in arbitration?

My experience in Buenos Aires was actually very brief and not particularly focused on international arbitration. At the time, the Argentine arbitration market was relatively small, and a big part of it was domestic arbitration. That being said, the market has opened up greatly in recent years: a new arbitration law was enacted and new arbitration firms were created, as well as new arbitration practices at existing firms.

As for bar qualifications, it is certainly not necessary to be qualified in more than one jurisdiction to succeed in arbitration. In fact, unlike in domestic litigation, there is no general requirement to have any bar qualification in order to practice arbitration (although some states require it for practicing law in general within their territory). At the end of the day, what matters in my view is whether one feels comfortable doing legal analysis under the laws of a given jurisdiction, and a qualification (or lack thereof), may not always reflect that. Other than that, it can be relevant in specific circumstances. For instance, when choosing an arbitrator, a bar qualification can comfort the parties that the candidate is well versed in the laws of a country.

Generally, I would say linguistic abilities are a bigger factor. I am not qualified in other Latin American jurisdictions, but given the similarities among legal systems in Latin America, speaking Spanish allows me to understand the legal issues whenever the laws of a Latin American State are applicable. In retrospect, this opened many doors for me that otherwise may not have been open.

Q3. This year, you were involved as coach in the Willem C. Vis International Commercial Arbitration Moot Court Competition. In previous years, you have also been involved as an arbitrator. Could you explain to us what motivated you to accept these commitments and what you have learned as coach and arbitrator?

The Vis Moot is a great opportunity for aspiring arbitration students. At school, most assignments have an academic approach, i.e. analyzing an issue and presenting the different views on that issue, but they do not necessarily teach the practical aspects of legal practice. For most students, moots are the first time they will be required to present a case and to defend a position. For an arbitration student specifically, the Vis Moot is the closest thing to real-life arbitration proceedings and generally, to the experience of practicing arbitration. Studying the facts and the law of your case, building an argument, working as a team, complying with deadlines, etc., are all key parts of our day-to-day.

I did the Vis Moot as a student during my Masters in 2016/2017 and truly enjoyed the experience. Looking back, I think it gave me an advantage during my internships, and indirectly, it has lead me in some way to where I am today. So I started coaching to give back to others what I got from the Vis Moot. Essentially, my role is to set the right framework for students to deliver their best work product. In doing so, I am only passing on tips and advice I received over time, such as how to prepare an outline, how to properly sequence an argument, or how to make the most out of a weak position. From a personal standpoint, it is very rewarding to witness the learning curve of the students, and how the team pushes through to deliver a good brief. As an associate, I think coaching is a good way to become acquainted with handling a case on a managerial level. Being a coach involves reviewing the work of others, and giving feedback and comments, which are also very useful skills.

Q4. The Covid-19 crisis has greatly affected our ability to travel globally, which has had a major impact on the arbitration world. Do you think that the changes we have become accustomed to (e.g. remote hearings) will remain in place after the crisis?

Personally, my impression is that virtual hearings will continue to exist, but I do not think they will fully replace in-person hearings. The flexibility of virtual hearings is useful, but whether one or the other is more convenient ultimately depends on the circumstances of the case (e.g. time-zone differences, budget, length and nature of the hearing, availability of the tribunal and the parties, among others). The preferences of the client or the person(s) in charge of the oral advocacy can also play a role. Generally, I think virtual hearings could become the rule for short hearings (for example, a case management conference or a 1-day hearing), where the time of travel may be disproportionate to the length of the hearing.

Q5. You are also actively involved in pro bono matters. Could you tell us more about the cases you are dealing with? Do you think practicing Pro Bono is important for junior lawyers and why?

Since April 2020, I have been involved in a pro bono matter regarding the wrongful dismissal of two foreign employees at a French company during the pandemic. I became aware of the case through a press article that I read by pure coincidence. The circumstances of the case were very touching, and I thought perhaps there was something I could do to help. I found one of the employees on Facebook, and offered to help on a pro bono basis. I talked about the case with one of the partners at White & Case, and with one of my friends from my Masters, both of whom kindly offered to help. We were able to arrange the case to be one of the firm's pro bono matters, allowing us to have the support of the firm, which has made it a lot easier to manage. The case is still ongoing.

Arbitration generally involves contracts for large sums between large entities, which means there can be some distance between the outcome of a case and the resulting benefits, on an individual level. For example, if a favorable award for our client means that a company avoids having to dismiss employees, those employees whose jobs were saved may never know how our work contributed to that outcome. This aspect of legal practice is not exclusive to arbitration – it is a common feature of practicing commercial law at a top-tier firm. Doing pro bono work is an opportunity

to have that palpable feeling of helping people. Personally, I find it very rewarding, and in this case, it gave me the opportunity to work side-by-side with one of my closest friends.

Q6. What is the best advice you have received as a young lawyer?

I have received a lot of good advice over time, but the one that comes to mind is to take ownership of your case. This can mean a number of things but I have three specific points in mind. First, learn all that you can about your case, including how the different parts of it fit together. This will allow you to make the most out of your legal case (especially when the facts or the law are against you), and to be in a better position to discuss the case with partners and clients.

Second, think in terms of the big picture. It can happen that the person assigning the workload is not as familiar as you are with the specificities of the case, and that therefore his instruction may not include an aspect of the case that you consider relevant. I am not suggesting to do something different from what you are asked, but rather to communicate how you see the assignment, to make your work product as useful as possible.

Finally, try to project the next step of your assignment. For example, if you were asked to analyze a given issue and it turns out your findings have implications for others parts of the case, do not wait to be asked to address the issue, but rather propose what you think is the best way forward. In my view, doing this will help you to make your input more valuable, and to earn the trust of clients and partners.
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EVENTS OF THE NEXT MONTH

From June 2nd to June 5th, 5th ICC Africa Conference on International Arbitration

ONLINE

Online event providing updates on developments in the region regarding international commercial arbitration in Africa.

Website: https://globalarbitrationnews.com/event/5th-icc-africa-conference-on-international-arbitration-2/?instance_id=657

From June 8th to June 12th, 2021 Columbia/CIArb Comprehensive Course on International Arbitration (1st week)

ONLINE

Courses destined to arbitrators, advocates, in-house counsel, and others interested in international arbitration, examining the law and practice of international arbitration through lectures and interactive segments.

Website: http://www.arbitralwomen.org/aw-events/#/6285/2021Columbia/CIArbComprehensiveCourseonInternationalArbitration(1stweek)

June 9th, ICC YAF: Climate change disputes and greener arbitration

ONLINE

Webinar challenging legal practitioners to think about their impact on the climate, where the panel will consider how arbitration can resolve climate change disputes and how it can become greener istelf.

Website: https://2go.iccwbo.org/icc-yaf-climate-change-disputes-and-greener-arbitration.html

June 16th, The Future of International Supply Chain – Sustainable, Digital, Smart

ONLINE

International forum hosted by ICC and ICC Germany, discussing the benefits and the challenges of international supply chains.

Website: https://2go.iccwbo.org/icc-the-future-of-international-supply-chains-sustainable-digital-smart.html

June 18th, ICC YAF: Meet the ICC Court Iberoamerican case management team

ONLINE

Fourth edition of the ICC YAF series "Traveling through Latin America", for a conference with the Iberoamerican case management team of the ICC International Court of Arbitration.

Website: https://2go.iccwbo.org/icc-yaf-meet-the-icc-court-iberoamerican-case-management-team-4-6.html

June 21st, ICC YAF: Practical tips on estimation of damages in international arbitration

ONLINE

Webinar featuring international arbitration experts and counsel who will discuss practical aspects regarding estimation of damages in international arbitration.

Website: https://2go.iccwbo.org/icc-yaf-practical-tips-on-estimation-of-damages-in-international-arbitration.html

From June 22nd to June 26th, 2021, Columbia/CIArb Comprehensive Course on International Arbitration (2nd week)

ONLINE

Second week of the courses held from June 8th to June 12th.

Website: http://www.arbitralwomen.org/aw-events/#/6286/2021Columbia/CIArbComprehensiveCourseonInternationalArbitration(2ndweek)

June 24th, ICC YAF: How to Build your Profile in International Arbitration

ONLINE

Virtual networking social event hosted by ICC YAF and Quadrant Chambers, where experienced practitioners will discuss issues which may help raise your profile in international arbitration.

Website: https://2go.iccwbo.org/icc-yaf-how-to-build-your-profile-in-international-arbitration.html

June 24th, ICC 2021 Rules of Arbitration – Launch in Vietnam

ONLINE

Conference which will introduce the main changes to the 2021 ICC Rules of Arbitration that came into force on January 1st, 2021. The first half of the webinar will also include a keynote speech by Mr. Alexander G. Fessas, Secretary General of the ICC Court of International Arbitration.

Website: https://2go.iccwbo.org/icc-2021-rules-of-arbitration-launch-in-vietnam.html

June 24th, ICC YAF: The Opportunities and Challenges of Expert Witnesses

ONLINE

Conference where a panel of speakers will share their experiences of using expert evidence and cross-examining in arbitrations, in multiple jurisdictions

Website: https://2go.iccwbo.org/icc-yaf-the-opportunities-and-challenges-of-expert-witnesses.html

June 25th, ICC Friday eChaikhana: ICC Arbitration Sessions for Central Asia

ONLINE

Session led by prominent international experts & Court members from the region, in an event for arbitration professionals, to get insight into the latest trends and developments in the field of international arbitration and dispute resolution.

Website: https://2go.iccwbo.org/icc-friday-echaikhana-icc-arbitration-sessions-for-central-asia-1-3.html

June 30th, ICC YAF: Gas Disputes in a Nutshell

ONLINE

Webinar addressing the specificities of gas disputes and the arbitration proceedings by which they are often resolved.

Website: https://2go.iccwbo.org/icc-yaf-gas-disputes-in-a-nutshell.html

REVIEW OF THE ICC YAF WEBINAR:

The Unwritten Rules of A Career In International Arbitration
- The Junior Years -

10 Questions about your career in International Arbitration you always wanted to ask

1 **To start a career in international arbitration, LLM yes or no?**

An LLM might be a good idea, especially if you know that international arbitration really is the field in which you would like to specialize your practice. In choosing your LLM, do not limit yourself to the "classic" destinations such as the US, choose more exotic destinations such as Australia, China, South Korea, India, or other Asian countries. This might lead to an interesting discussion for a future job interviews.

2 **...and at what point do I best do my LLM?**

Some law firms may not be interested in hiring a junior associate only to watch him or her leaving to do an LLM two years later. However, this may not be the case everywhere. In Switzerland, for example, most people work after law school to gain "real world experience" and then go away to complete an LLM. From a practical point of view, it might also be very interesting to do your LLM after a couple of years of work experience when you already understand all the important challenges and expectations in the field. Moreover, LLM's tend to be huge investments, so before committing, it is important to know that arbitration is definitely the area you want to practice in afterwards. Starting with an internship beforehand is therefore an excellent way to find out if the field is the right fit for you.

3 **What if I don't have the financial means to pursue an LLM?**

Don't worry about not having an LLM on your CV. If you cannot afford it, try demonstrating your passion for international arbitration in another way. For example most arbitration institutions offer trainings and workshops of lower expense. In any event, an LLM is not essential to start your career in arbitration.

4 **What about a PhD?**

Typically, a PhD is a degree that qualifies you to pursue an academic career. However, it really depends on the country and cultural background in which you are applying. In some countries, such as Switzerland and Germany, a PhD is nearly "normal" even in private practice. Nevertheless, you should keep in mind that a PhD requires an enormous amount of determination and persistence and that you will be studying a very specific topic "in a vacuum". Law firms might therefore prefer candidates with more practical experience on wider aspects of law, rather than a purely academic profile. To put it in a nutshell, if you really want to pursue a PhD it should be because you are passionate about studying in depth a very specific subject and not to boost your arbitration career.

5 **What about publishing?**

Publications are a good way to gain experience and visibility. You can also try to co-author with more experienced practitioners so that you can benefit from their input as well as their visibility.

6 How do I attract the attention of law firms for my application? How can I differentiate myself from other candidates?

Motivation, motivation, motivation! You have to demonstrate through your application that you are passionate about international arbitration. That is really key to recruiters and lawyers. Keep in mind that working in international arbitration means being especially hard working. Thus, law firms do really look out for people who love what they do and who can demonstrate that motivation throughout their application. The first step to demonstrating your motivation is to really tailor your cover letter for each application you are writing. Keep in mind what the job offer is requiring. Do not copy and paste your applications and sent them out to different actors. The next step is to prepare for the interview: do research on the law firm or institution you are applying to as well as on the people with whom you are interviewing so that at the interview you can just be yourself.

7 What about junior lawyers: How can a junior get a particular kind of work in which he or she is interested?

Patience is key. You have to accept that you are not going to write submissions on your own from day one. As a junior lawyer, you have to accept the idea that you don't have the practical experience and the quality to do the work alone. What you can and should do is start asking questions: Try to understand how the team works, how the drafting is done and what is expected from you. If you do your first work fine, people will come back to you with other things because you did a good job. You can also directly speak with your partner to try to get involved, at your level, on a specific task.

8 What about when a junior gets too much work, is it possible to say "stop"?

If you are a good partner, you are a good team leader. As such, you should be realizing that you are overloading one member of your team. Ideally, it should be the partner realizing this and not the junior. However, even as a junior, you can and you should say "no" if you won't be able to manage all the tasks at hand. You can also try to talk with your partner about the priorities determining which task might wait a little bit longer than others.

9 What about clients? How do I get to work directly with them and how do I build stable relationships?

Building relationships with clients goes a long way. If you get exposure to clients, try to keep up the connection with the people working at the same level as you are. It's all about keeping up your contacts. However, keep in mind that as a junior lawyer it is not your responsibility to deal with clients. Putting you at the forefront from the beginning means also that you might get to take the heat for something which is not your fault. Take your time, be observant as much as possible and the opportunity will present itself to you in right times.

10 Talking about relationships, some say that networking is even more important than skills. What are efficient ways to network when you are starting your career?

Join the young institutions of the big arbitration institutions: ICC YAF, young ICSID, young AAA etc. and get actively involved. Follow the events, apply for leadership positions and get the courage to put yourself at the forefront. Getting involved in associations is a brilliant way to get to know people from all over the world. However, be careful not to overload yourself, getting involved means being able to get the work that is expected from you done.

The editorial team of the Paris Baby Arbitration – Biberon warmly thanks the organizers and participants of the ICC YAF Event: "Read Between the Lines: The Unwritten Rules of a Career in International Arbitration – The Junior Years" for allowing us to cover the event in this months' edition.

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