

Paris Baby Investigation – PAW 2023 mini-series :
Presenting The Paris Arbitration Week 2023,
With Vanessa Thieffry (English Transcript)

PBA: In this episode, we have the pleasure of being with Vanessa Thieffry. Hello!

You are a senior associate in the Energy and Natural Resources Department at Reed Smith Paris. Your practice focuses on international arbitration, with a particular interest in the resolution of technical disputes, especially in the infrastructure and construction sectors. You have been involved as counsel, arbitrator and secretary to arbitrators in more than 30 institutional and ad hoc arbitration proceedings under various procedural and substantive laws. You are a regular speaker at seminars, conferences and training courses related to your field of practice. And finally, you were elected to the Paris Arbitration Week Board in July 2022 as Treasurer. You therefore have an expertise and a deep understanding of environmental issues in international commercial disputes. That is why we are pleased and honored to have you on our podcast today and we thank you again for accepting our invitation.

Vanessa Thieffry: Thank you very much, I am very honored.

PBA: The risk of climate-related litigation is now a reality for both private and public actors. On the one hand, governments are increasingly taking these environmental issues into account through the adoption of various treaties, charters and other types of international commitments. Companies, too, are taking into account the environmental aspect in their practices, notably through the adoption of ESG criteria. However, it is important to note that all these environmental standards were not originally binding and that they have become so over time.

So, Vanessa Thieffry, my first question is the following: doesn't this rapid increase in legal obligations related to environmental protection issued by the States pose a risk in terms of legal uncertainty for companies? And how do they deal with it in practice?

Vanessa Thieffry: To answer your question, we need to start by putting things into context. For several decades now, there have been binding legal standards for companies in the environmental field. One thinks of legislation on waste, water, air and in reality companies have been managing environmental risk since the 1970s with the implementation of the first major measures of the so-called industrial environmental law. I am thinking in particular of the law of July 15, 1975 on the elimination of waste or that of July 19, 1976 on classified installations for the protection of the environment (ICPE). In recent years, we have seen major trials resulting from the implementation of this legislation. You may remember the MetalEurop case. It was the oldest zinc and lead smelter in Europe. It was built during the industrial revolution. There were social and environmental problems. It was integrated into a large mining group and ended up filing for bankruptcy. Once the bankruptcy was filed, the question arose as to who was going to rehabilitate the site, which was naturally polluted by the company's activity. This was one of the great cases of industrial environmental law and of the last century in fact.

To come back to the multiplication of international standards. Indeed, environmental law has seen a multiplication of norms, both at the international and community level. Community law is a very important source in environmental and national matters. It is important to remember that all these standards are not of direct effect. There are more than 3000 international conventions in environmental matters. There are not many that have direct effect and can be directly invoked by companies. On the other hand, when we think about the multiplication of norms, environmental law is not very different from other areas of law and besides, companies are used to managing this risk, which is both environmental because we have just seen that it was not new that the multiplication of norms.

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They have put in place the multiplication of legal watches made by engineers or lawyers-technicians who have an essential function to protect the responsibility of companies.

But there are indeed new dimensions today to take into consideration. Firstly, there are the major climate-related lawsuits and secondly, the advent of environmental, social and governance (ESG) criteria.

The major climate lawsuits: we immediately think of the Shell v. Netherlands case. If Shell was condemned, it was on the principle of common law liability, the equivalent of our article 1240 of the French Civil Code (former article 1382 of the French Civil Code).

To arrive at this conclusion, the judge adopted a reasoning which is nevertheless particular. He interpreted the principle of common law liability in light of a Duty of Care, which is a fairly common concept in common law. To characterize the breach of the Duty of Care, the judge went to the United Nations principles on Business Human Rights, which has no direct effect, from which he drew an obligation to respect human rights and more particularly, the human right to a healthy environment. It is clear that this is a bit of a stretch.

Indeed, the event giving rise to liability is a little vague and the causal link is also unclear. So yes, there is a risk for companies. Let's move on to the second dimension, the one that can be described as new, which is the taking into account of ESG criteria. These ESG criteria aim to incorporate new objectives into corporate governance, which have a more human rights flavour. We are not talking about compliance, we are more about responsibility. It is not at the same level. But companies are used to managing compliance on a daily basis.

You asked me how companies manage this legal uncertainty. Is there really legal uncertainty? Let's remember that in investment arbitration, since the 2000s, arbitrators have recognized the State's right to legislate. In the case in point, in environmental matters today, can the State really be denied a right to legislate in environmental matters. Companies are therefore perfectly used to managing this uncertainty. It is part of any investor's due diligence and of the compliance of any company.

PBA: Which industries are affected by the obligation to comply with the new environmental requirements?

Vanessa Thieffry : Again, I will draw a parallel between environmental law and ESG criteria, and climate change. It is not quite the same thing. If we talk in terms of French law, I would mention all the ICPE (installation classée protection de l'environnement) categories which are really activities that have an impact on the environment. This is everything that is steel, metallurgy, chemicals, energy companies, large agricultural installations, large livestock farms. All these activities have an impact on the environment.

Construction and infrastructure are a new developing sector along with energy activities and all extractive industries as well. More surprisingly, which may seem surprising, there are some new technologies that are extremely energy intensive. I am thinking in particular of blockchain, all the servers needed to store all our data. We don't print anymore, but now we store our data, which is increasingly heavy. All these activities have an energy impact.

The corollary is sustainable finance. In reality, some sectors are certainly more targeted and have more impact on the environment, but what we are witnessing today is that all parts of society are somewhat targeted and this is moreover, The meaning of the duty of care that was already in force in France and that is being incorporated at the community level by the new draft directive on the duty of care that will concern all companies listed on the stock exchange, companies whose turnover is greater than 100 million euros and / or with more than 500 employees, mutual insurance, insurance cooperatives and credit institutions. It is clear that all this is very broad.

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PBA: Do you think it is possible to anticipate an increase in litigation related to ESG criteria?

Vanessa Thieffry : In my opinion, yes, we will have all the litigation that will result from the respect or not of these criteria. Then, there will be litigation about the consequences of compliance or non-compliance with these criteria. Let's take a very concrete example. You have a construction project, the client includes in the contract an obligation for the company to respect ESG criteria that go beyond what is required by the law applicable to the contract. Moreover, the company is itself bound by its own obligations of its place of incorporation.

Already, we can see immediately that there is a risk of contradiction in the applicable criteria. Then, let's imagine that, as is frequently the case, the company subcontracts certain work. What happens if the company or the subcontractor does not respect the ESG criteria imposed by the client?

Is the client entitled to terminate the contract? But then what would be his prejudice? Certainly, there would be potential damage to his reputation, with resulting loss of profits. But consequential damages are very often excluded in this type of contract for construction and infrastructure projects.

The consequences could go further. Some of these contracts are regularly financed by third parties, the World Bank, the European Investment Bank, the Green Climate Fund, which aims to finance projects working for sustainable development, but which imposes fairly high standards in terms of environmental protection and sustainable development. What if in fine the financing of the project is lost because of a subcontractor and the company. As you can see, we have a very large playground for disputes.

PBA : Could you establish a typology of environmental disputes most often encountered by companies, and indicate those that could be resolved by arbitration?

Vanessa Thieffry : Regarding the disputes that are likely to be resolved by arbitration, we will just remind you of the two requirements. First, there must be an agreement to go to arbitration - a valid arbitration agreement - this is the first point. The second point is that the matter must be arbitrable. In this respect, two seconds ago we were talking about administrative and repressive environmental law. These disputes are not arbitrable.

On the other hand, it should not be forgotten that the parties to a contract can always adjust its effects. This is why, in commercial arbitration, and more particularly in the litigation of warranties: warranties of liability, hold harmless clauses, risk allocation in the contract are a large part of the type of arbitration that we will see in the future, since it is necessary, today, to be very clear about the private nature of arbitration, we do not have many public awards in international commercial arbitration, which would be of interest to the environment.

The only one I could find in French law is the decision of the Court of Paris of January 11, 2022, which concerned a guarantee of liability. According to the court, it lasted for 75 years. In environmental matters, this is enormous. Then, speaking of typology, comes the litigation of extractive activities. So everything that is mining, oil, gas.

And there is a third category that appears, which is all construction and infrastructure litigation: solar panels, dams, construction of power plants, so everything that concerns energy. The activities also concern the treatment and storage facilities for waste, water, etc. I would add in terms of construction, the achievement of environmental performance criteria that are included in construction contracts.

PBA : Consequently, a certain number of environmental disputes can be settled by arbitration. In this case, what are the advantages and disadvantages of commercial arbitration compared to state courts?

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Vanessa Thieffry: I am not going to make the traditional distinction between the advantages and disadvantages of arbitration. We know them. I would like to say that there are three advantages that seem to me particularly interesting in this case, and that is the internationality because all these projects are frequently international. The appointment of arbitrators: the fact of being able to choose an arbitrator who is truly competent in the sector is an undeniable advantage and the flexibility of the procedure as well: the possibility of resorting to expert opinions, provisional and/or conservatory measures, the existence of an emergency arbitrator to block the call for first demand guarantees for example.

A disadvantage that could be seen with arbitration and which is particularly true in environmental matters, is its private nature. I do not use the term confidentiality, because in French law and even in the ICC Rules, the principle of confidentiality does not exist. On the other hand, international commercial arbitration is a truly private arbitration, which can run up against certain major principles of environmental law, first and foremost the principle of transparency and publicity.

But we must not forget that commercial arbitration is different from investment arbitration. In investment arbitration, we know that there is a principle of transparency which does not exist in commercial arbitration. And why doesn't it exist? Quite simply, because it does not settle the same disputes. Investment disputes are indeed in the public interest. In commercial arbitration, we are dealing with truly private disputes between two commercial operators, which are of no interest to anyone other than the two commercial persons, if we are to generalize.

PBA: Since our episode is in collaboration with PAW, I have a few questions related to this event. First of all, the previous PAW had already addressed this topic. Could you remind us of some of the issues raised and tell us which ones caught your attention?

Vanessa Thieffry: During the last PAW, we had no less than 14 events dedicated to environmental and energy issues, that is to say about 10% of the events. The topics covered were not only related to the resolution of investment and commercial arbitration disputes in environmental, energy and climate matters. But the speakers went as far as to question the role that arbitration had to play in the fight against global warming.

To give you some more specific examples: we had topics on compliance comparing the issue of corruption to climate change. We also had topics on ESG, human rights and arbitration, and how they can meet. The issue of energy and climate change and whether investment law was burning. The role of climate change in post m&a arbitration.

PBA: For auditors interested in environmental issues and arbitration, what Paris Arbitration Week events would you recommend?

Vanessa Thieffry: There are many. Not all of them are online yet. We notice that some events are still online today, while we are one week away from the Paris Arbitration Week. On the other hand, some of the events that I have noticed and that are of particular interest to me personally, is the event "Resolving disputes arising from climate change, peace and security", which looks very interesting. One of the events that is organized by my firm (reed smith Paris) because it is precisely on ESG criteria and the role that Africa has to play on the subject "Dispute resolution in Environmental, Social, and Governance (ESG) matters: How is Africa leading the way?"

Indeed, Africa is truly a driver of sustainable development and this is the very purpose of sustainable development. It's going to be extremely interesting. There is a similar one on renewable energies organized by the firm Jeantet in Eastern Europe, which is also a driver on the subject, so I am very interested.

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You have one organized by Backer McKenzie on "ESG, Energy Transition and the difficult Commercial and Investment Disputes our clients are facing", which from a practical point of view is likely to be very interesting and you also have two events organized by the campaign for greener arbitration, which have to do with the day-to-day environmental impact of our business that I would highly recommend.

PBA: We are coming to the end of our podcast. Vanessa Thieffry, thank you for your time and for these interesting exchanges, which have enlightened me and will enlighten all of our listeners about this exciting topic.

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