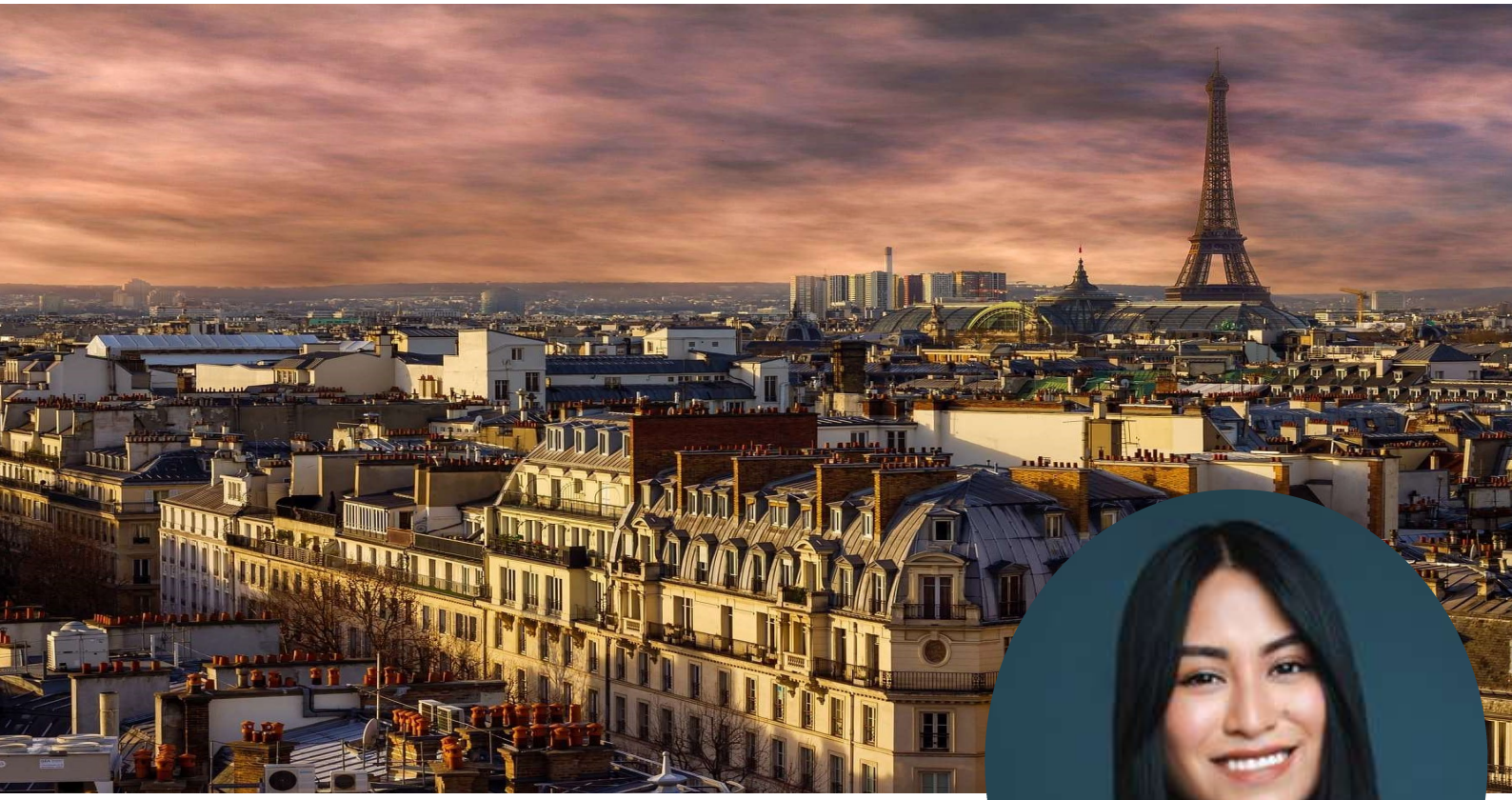
PARISBABYARBITRATION

BIBERON

Monthly Arbitration Newsletter – English Version

MAY 2024, N° 70



French and foreign courts' decisions

International arbitral awards and decisions

Interview with Yoshie Concha Takeshita

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FOREWORD

Paris Baby Arbitration is a Paris-based society and a networking group of students and young practitioners in international arbitration. Our aim is to promote accessibility and knowledge of this somewhat lesser-known field of law and industry within the student sphere.

Every month, our team publishes the Biberon. The Biberon is our newsletter in both English and French, designed to review and facilitate comprehension of the latest decisions and awards rendered by national and international courts, as well as arbitral tribunals.

In doing so, we hope to participate in keeping our community informed on the latest hot topics in international arbitration from our French perspective.

Dedicated to our primary goal, we also encourage students and young practitioners to actively contribute to the field by joining our team of writers. As such, Paris Baby Arbitration is proud to provide a platform for its members and wider community to share their enthusiasm for international arbitration.

To explore previously published editions of the Biberon and to subscribe for monthly updates, kindly visit our website: parisbabyarbitration.com (currently undergoing maintenance).

We also extend an invitation to connect with us on LinkedIn, and we welcome you to follow/share our latest news on LinkedIn and beyond.

Enjoy your reading!

Sincerely yours,
The Paris Baby Arbitration team

THIS MONTH'S THEMES

- ***Cour de cassation*. 1st Civil Chamber, 28 February 2024, n° 22-16.151, *Hémisphère*** (departure from previous case law ; inadmissibility of the request from the debtor of assigned litigious rights to reimburse the same price paid by the assignee to the assignor as allowed by Article 1699 of the French Civil Code, if made before French Courts of Appeal hearing the case after an appeal filed against an exequatur order granted in relation to an arbtiral award rendered abroad, given that this request does not fall within any cases envisaged by Article 1520 of the French Code of Civil Procedure)

- ***Cour de cassation*. 1st Civil Chamber, Opinion, 20 March 2024, n° 23-70.019, *Banque Delubac*** (the argument pursuant to Article 1466 of the French Code of Civil Procedure, whereby a party which, knowingly and without legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner should be deemed to have waived its right to avail themself of such irregularity, is one of inadmissibility)

- **Paris Court of Appeal, 5 March 2024, n° 23/02753, *Euro Grains*** (domestic arbitration; no obligation for arbitrators to submit the legal reasons for their decision to the adversial debate prior to rendering their arbitral award, but necessity for them to submit any information that they use to found their decision thereto, failing which the award may be set aside for violation of due process; instance of contrary intent by the parties within the meaning of Article 1493 of the French Code of Civil Procedure that French courts should rule on the merits within the mandate conferred upon the arbitral tribunal in case that the award is annulled, in case the parties have agreed that an arbitration institution's arbitration rules which prohibit French courts to do so apply)

- **Paris Court of Appeal, 26 March 2024, n° 23/08940, *Établissements Trescarte*** (domestic arbitration; existence of an arbitration clause resulting from the parties' consent thereto, found in a reference made by them during their negotiations to a "typical contract" that contained an arbitration clause and that had been historically concluded during a 7-year established business relationship, and so despite doubts as to the conclusion of the litigious contract that was meant to contain it)

- **Paris Court of Appeal, 26 March 2024, n° 23/09968, *Exel'Conseils*** (a first contract containing an exclusive choice-of-court clause concluded between two parties and a second interconnected contract containing an arbitration clause concluded as between one party to the first contract and a third party thereto; inapplicability of the arbitration clause to the party to the first but not second contract, in the absence of ratification of the latter by that party; arbitration clause deemed manifestly inapplicable within the meaning of Article 1466 of the French Code of Civil Procedure)

- **Swiss Federal Supreme Court, 30 January 2024, n° 4A_172/2023** (inapplicability to investor-state arbitration of the presumption in commercial arbitration whereby an arbitration agreement is to give exclusive and comprehensive jurisdiction to the arbitral tribunal, and totally eliminate any jurisdiction given to state courts under Swiss case law; BITs having both an arbitration clause and a clause in favour of state courts)

- **High Court of England and Wales, *H1 and H2 vs. W, D and F* [2024] EWHC 382 (Comm)** (removal of a sole arbitrator on the grounds of apparent bias stemming from remarks giving rise to an appearance of having pre-determined a key issue in the dispute; remarks made during hearings by the sole arbitrator, without experience of arbitration but with special knowledge of the relevant industry, whereby he would disallow the need to hear certain expert witnesses and state he could already render his award)

- **Court of First Instance of Hong Kong, *A v. B and Others* [2024] HKCFI 751** (balance between the principle of minimal crucial intervention and the arbitrators' obligation to give sufficient reasons for their award on key issues of the dispute; refusal to allow enforcement of the award on the grounds of contrariety to public policy, when the lack of reasoning was "sufficiently serious to affect the structural integrity of the arbitral process" and "undermined due process")

- **ECJ, 14 March 2024, *Commission v. United Kingdom*, Case C-516/22** (EU-UK withdrawal agreement and obligation for the UK to observe EU law until the end of the transition period on 31 December 2020 ; breach by the UK of its obligation not to grant state aid that is incompatible with EU law, due to a decision by the UK Supreme court rendered before the end of said transition period allowing enforcement of an ICSID arbitral award ordering a Member State to pay damages to investors)

FRENCH COURTS

COURT OF CASSATION

Court of Cassation, 1st Civil Chamber, 28 February 2024, n° 22-16.151, *Hémisphère*

On 28 February 2024, the First Civil Chamber of the French *Cour de cassation* brought to a close a case that had been going on for more than two decades, and departed from one of its precedents by ruling that the court hearing an application for annulment of an award or for appeal against an enforcement order does not have jurisdiction to hear the *retrait litigieux* (a mechanism in French law permitting a debtor to be released from litigious debts, by paying the price at which it was assigned by the creditor to a third party).

The case initially pitted Energoinvest against the Democratic Republic of Congo (hereafter the "DRC") in a dispute concerning an energy infrastructure construction project. In 2003, a Swiss arbitral tribunal issued an award condemning the DRC to pay certain sums to Energoinvest, which subsequently assigned the rights to those sums to FG Hemisphere Associates LLC (hereafter "Hemisphere"), which were the subject of the present decision. At Hemisphere's request, the award had been recognized in France by an enforcement order in 2009, against which the DRC failed an appeal two years later and subsequently invoked its rights to a *retrait litigieux* under Article 1699 of the French Civil Code.

Firstly, in a ruling dated 12 April 2016, the Paris Court of Appeal rejected the DRC's argument, stating that its mission was limited to examining whether the case fell within any of the hypotheses listed in Articles 1520 and 1525 of the French Code of Civil Procedure. However, in a decision dated 28 February 2018, the First Civil Chamber of the *Cour de cassation* overturned the aforementioned ruling, holding that "*the exercise of the* retrait litigieux *affected the enforcement of the award*", thus undermining the limitative nature of the hypotheses in which arbitral awards are allowed to be challenged.

The case was referred back to the Paris Court of Appeal, which issued a second ruling on 7 December 2021, reaffirming its decision whereby "*the Court of Appeal may refuse to recognize or enforce an arbitral award only in the cases provided for in Article 1520*" (emphasis included), and that the exercise of the right to a *retrait litigieux* did not change this.

The DRC appealed to the *Cour de cassation* again. In the present decision, the French Supreme Court took the time to justify its previous decision of 28 February 2018, saying that it "*pursued the objective of concentrating applications that were seeking to prevent the enforcement of the award before the court hearing the application for enforcement of an arbitral award rendered abroad*". This time, however, the Court followed the Court of Appeal's decision, and recognised that the task of courts in that case "*is to review the validity of the award, in application of the criteria set out in article 1520 of the Code of Civil Procedure, in order to allow or refuse its incorporation into the domestic legal order*". As the Court of Appeal had argued, the *Cour de cassation* ruled that the *juge de l'exécution* (enforcement judge) was to have exclusive jurisdiction to rule on the *retrait litigieux*, since it has exclusive jurisdiction over any difficulties relating to enforceable titles (*titres exécutoires*) and disputes arising in connection with forced execution.

The *Cour de cassation* nevertheless overturned the appeal decision, albeit without referral. Indeed, the Court of Appeal had rejected the RDC's claim. However, since it did not have the power to examine the claim in the first place, the *Cour de cassation* demonstrated procedural rigour and held that its claim was inadmissible, rather than rejected.

Contribution by Maxime Villeneuve

Court of Cassation, 1st Civil Chamber, Opinion, 20 March 2024, n° 23-70.019, *Banque Delubac*

In an opinion dated 20 March 2024, the French Court of Cassation gave precision as to the nature of a defense raised pursuant to Article 1466 of the French Code of Civil Procedure, as well as the competent jurisdiction to hear such defense.

The Court was asked to give an opinion on the following questions:

"*First question*
Can a defense based upon article 1466 of the Code of Civil Procedure, alleging that the right to rely on an irregularity not raised in due time before the arbitral tribunal has been raised, be classified as an argument of inadmissibility within the meaning of the Code of Civil Procedure?

Second question
If it is an argument of inadmissibility, is the competent jurisdiction the conseiller de la mise en état, pursuant to the provisions of Articles 780, 6°, and 907 of the Code of Civil Procedure, or the Court's panel examining the action for annulment of the arbitral award?".

The Court of Cassation responded that the defense based upon Article 1466 of the Code of Civil Procedure constitutes an argument of inadmissibility under arbitration law, as defined in Article 122 of the same code.

The Court added that this argument, insofar as it does not concern the regularity of the appellate proceedings before the Court of Appeal hearing an action for annulment of an arbitral award, falls within the jurisdiction of the Court of Appeal's panel and not that of the *conseiller de la mise en état*.

Contribution by Valentine Menou

Paris Court of Appeal, 5 March 2024, n° 23/02753, *Euro Grains*

In a decision dated 5 March 2023 which concerned domestic arbitration, the Paris Court of Appeal not only recalled the implications that arbitral tribunals' obligation to observe due process entails, but also gave interesting insight into French Courts of Appeal's jurisdiction to rule on the merits in case the arbitral award has been annulled.

On the facts, French company Euro Grains (hereafter the "Claimant") and the GAEC de Bellevue (hereafter the "Defendant") concluded a contract for the sale of cereals in 2020, which contained an arbitration agreement designating the International Arbitral Chamber in Paris (*Chambre d'Arbitrage Internationale de Paris*, hereafter the "CAIP").

Due to alleged non-performance of the contract, the Claimant started arbitral proceedings before the CAIP. In an award dated 21 April 2022, the arbitral tribunal ruled that the Claimant's request for arbitration was inadmissible. As a result, the Claimant applied to annul the award before the Paris Court of Appeal.

On the one hand, the Claimant claimed that the arbitral tribunal had violated due process, as in order to render its award, it allegedly based its decision upon a custom found in the INCOGRAIN customs without requesting the parties' observations thereon, which had only relied upon the RUFRA customs before the tribunal. The Defendant contended that the principle whereby an arbitral tribunal is under a duty to solicit the parties' observations on the norms upon which it bases their decision only applies if the matter has been put to the tribunal, yet not discussed by the parties.

The Paris Court of Appeal dismissed the Defendant's argument, and considered that the arbitral tribunal based its decision upon one of the INCOGRAIN customs. It then recalled a well-established principle in case law whereby "[w]*hile arbitrators are under no duty, prior to rendering their awards, to request the parties' observations on the reasons for the award, pieces of information that the arbitrators use must, however, gather the parties' observations*". As such, given that both parties did not challenge the fact that they had only relied upon RUFRA customs and not INCOGRAIN customs before the arbitral tribunal, the Court held that the award was bound to be set aside for violating due process, pursuant to Article 1492 4° of the French Code of Civil Procedure.

On the other hand, the Defendant argued that by designating the CAIP, the parties had actually agreed to apply its Arbitration Rules, including its Article 31.1 which provides that the CAIP should have sole jurisdiction to rule on the merits, should the award be set aside. The Claimant considered that the present Court had jurisdiction to adjudicate on the merits.

The Paris Court of Appeal first recalled that under Article 1493 of the French Code of Civil Procedure, "[w]*hen the court sets the arbitral award aside, it shall rule on the merits within the mandate conferred to the arbitrator, unless the parties have agreed otherwise*". It then considered that since the parties agreed that an arbitration agreement designating the CAIP existed, its Arbitration Rules were to apply as a result. As such, it held that "*by virtue of Article 31.1 of the CAIP's Arbitration Rules, the court shall not have jurisdiction to rule on the merits of the case between company Euro Grains and the Gaec de Bellevue*", so that "*it is up to the most diligent party to start proceedings before the CAIP*".

In other words, the Court found that by consenting to arbitration before an arbitral institution, parties also consent to the application of its Arbitration Rules. It follows that if these Rules contain a provision which deprives French Courts of Appeal before which the application for annulment is filed of jurisdiction, consent to the institution's arbitration rules qualifies as an instance where the "*parties have agreed otherwise*" within the meaning of Article 1493 of the French Code of Civil Procedure.

Contribution by Yoann Lin

Paris Court of Appeal, 26 March 2024, n° 23/08940, *Établissements Trescarte*

In a decision issued on 5 March 2024, the Paris Court of Appeal dismissed the action for annulment initiated by company Établissements Trescarte (hereafter the "Claimant") against an award in a domestic arbitration ruling on the validity of an arbitration agreement.

The Claimant and company Leplatre & Cie (hereafter the "Defendant") had established commercial relationships spanning from 2011 to 2018, and had concluded various contracts mainly for the sale of grain, most of which included arbitration clauses.

In November 2017, a disagreement emerged regarding the legal nature of the exchanges between the parties. The Defendant claimed that these exchanges gave rise to an agreement for the sale of lentils, while the Claimant maintained that they merely amounted to invitations to treat.

In these circumstances, on 12 February 2019, the Defendant started arbitral proceedings, so as to obtain that the Claimant be ordered to pay it various heads of damages. In an award dated 23 July 2019, the tribunal found that it had jurisdiction to rule on the dispute and acceded to the Defendant's claims.

In response, the Claimant applied to the Paris Court of Appeal to have the award set aside. In a ruling dated 11 January 2022, the Court of Appeal held that the Defendant could not rely upon the existence of an arbitration clause that would be binding upon both parties in light of their past contractual relations, as proof of a contract containing the arbitration clause had not been adduced. In French domestic arbitration, unlike French international arbitration, arbitration clauses are subject to formal requirements, and must be in writing, although they can result from an exchange of written communications or be contained in a document to which reference is made in the main agreement.

The Defendant appealed to the French *Cour de cassation*, which overturned the Court of Appeal decision in its entirety by a decision dated 13 April 2023. The main reason for this decision was that both parties had entered into several contracts in writing, which had validated the arbitration clause and given jurisdiction to the arbitral tribunal. The case was then referred back to the Paris Court of Appeal.

The Claimant argued that the arbitration clause could not derive from the earlier contracts since they did not comply with the same conditions of formation as the litigious contract. On the other hand, the Defendant argued that the arbitration clause, which was referenced in the previous contracts, was valid as long as it could be proven that the Claimant was aware of it and had accepted it.

In the present decision, the Court followed the decision of the *Cour de cassation* and dismissed the Claimant's action for annulment. It held that since during negotiations the parties had made a reference to the conclusion of a "*typical contract*", corresponding without any doubts to contracts concluded between them during their past commercial relationships and which included a document containing an arbitration clause. As such, it concluded that, while the conclusion of the litigious contract was disputed by the Claimant, the arbitration clause was deemed to have been concluded between the parties by virtue of the principle of independence of arbitration agreements.

Contribution by Sarah Lazar

Paris Court of Appeal, 26 March 2024, n° 23/09968, *Exel'Conseils*

In a decision handed down on 26 March 2024, the International Commercial Chamber of the Paris Court of Appeal ruled on the application of the principle of *Kompetenz-Kompetenz* when both an exclusive choice-of-court clause and an arbitration clause arising from two separate contracts are used to bring similar cases before different courts.

The dispute involved Exel'Conseils, a company incorporated under French law, and Campus ESG SARL, a company incorporated under Moroccan law (hereafter "Campus ESG"), a 90%-owned subsidiary of Groupe ESG Maroc, which was itself owned until 2019 by the French company. Under a contract signed on 11 August 2014, Exel'Conseils granted Campus ESG a 1-year loan, renewable by amendments, which included a clause providing for the settlement of disputes between the parties by way of "*amicable arbitration*", with the "*competent commercial tribunals of Paris*" being appointed, should no solution be found within this framework.

However, the initial clause was amended by a third addendum, which stipulated that "*the amicable arbitration clause as provided for in the agreement is no longer justified and that in the event of a dispute, only the Paris courts shall have jurisdiction*". On 1 August 2019, Exel'Conseils and other companies transferred their shares in the EGS Group to UPM Casablanca, a Moroccan company, under a framework transfer agreement (hereafter the "Framework Agreement"). The Framework Agreement included an arbitration clause, which stipulated that "*any disputes arising out of or in connection with the Framework Agreement*" would be settled by an arbitral tribunal seated in Casablanca.

In 2020, UPM Casablanca initiated arbitration proceedings against one of the assignors due to accounting irregularities in the target company assigned under the Framework Agreement. In the meantime, on 29 December 2020, Exel'Conseils brought an action against Campus ESG before the Paris Commercial Tribunal seeking repayment of the loan. Campus ESG argued *in limine litis* that the Commercial Tribunal lacked jurisdiction, maintaining that the dispute fell within the scope of the arbitration clause set out in the Framework Agreement and that the matter was already under proceedings before an arbitral tribunal. In a ruling rendered on 25 May 2023, the Paris Commercial Tribunal declared Campus ESG admissible but "*unfounded in its plea regarding the jurisdictional objections*", thereby declaring itself competent to hear the case. Campus ESG subsequently appealed against the ruling.

In addition, with regard to the parallel arbitration proceedings, Exel'Conseils applied for voluntary joinder in the arbitration proceedings on 1 March 2022 to request repayment of the loan. In a decision dated 20 October 2022, the arbitral tribunal ruled that Exel'Conseils' application for voluntary joinder was admissible but that its claim for repayment of the loan was not.

In its submissions, Campus ESG asked the Court to overturn the judgment of 25 May 2023, by declaring its objection as to jurisdiction admissible and well-founded in light of the existence of an arbitration clause in the Framework Agreement enforceable against Exel'Conseils and argualy applicable to the loan repayment claim, and to uphold jurisdiction of the arbitral tribunal seised.

In its decision of 26 March 2024, the Paris Court of Appeal dismissed the appellant's claims and confirmed the lower court's ruling.

Based upon the principle of *Kompetenz-Kompetenz* set out in Article 1448 of the French Code of Civil Procedure and applicable to international arbitration by reference from Article 1506 of the same Code, the Court give its analysis of the jurisdictional objections brought before the Paris Commercial Tribunal.

The Court noted that the arbitration clause in the Framework Agreement had not been ratified by Campus ESG, which was therefore not a party to the agreement. On the other hand, the last part of the loan agreement included a clause conferring jurisdiction on the Paris Commercial Tribunal, and expressly excluded recourse to arbitration. In addition, the Court added that the lower court had waited for the arbitral tribunal to rule on the matter, which it did by denying jurisdiction to hear the question of the repayment of the loan.

Consequently, the Court considered that the arbitration clause invoked by Campus ESG was manifestly inapplicable within the meaning of Article 1448, and that the principle of *Kompetenz-Kompetenz* had been abided by by the judgment rendered by the lower court.

Contribution by Jorge Hidalgo

Swiss Federal Supreme Court, 30 January 2024, n° 4A_172/2023

On 11 January 2024, the Swiss Federal Supreme Court rendered a decision following a challenge brought against the award of an arbitral tribunal seated in Geneva dated 16 February 2023 (ICSID, 16 February 2023, *AsiaPhos Limited et Norwest Chemicals Pte Limited c. République populaire de Chine*, Case No. ADM/21/1). The parties to the proceedings were AsiaPhos Limited and its subsidiary, Norwest Chemicals Pte Ltd (hereafter the "Claimants"), and the People's Republic of China (hereafter the "Defendant").

The Claimants were Singapore-based companies with various activities in China, the most significant of which was the holding of exploration and mining licences for three mines in the country. In 2016 and 2017, China adopted a policy prohibiting mining in nature reserves, resulting in the closure of the mines.

In August 2020, the Claimants initiated an arbitration against the Defendant, alleging a breach of the China-Singapore Agreement on the promotion and protection of investments signed on 21 November 1985 (hereafter the "Agreement"). However, in the award dated 16 February 2023, the arbitral tribunal declared that it lacked jurisdiction, with the arbitrator appointed by the Claimants writing a dissenting opinion.

According to the Defendant, disputes concerning investments covered by the Agreement should be dealt with by contracting States' national courts. Only disputes relating to the amount of compensation in the event of expropriation, nationalisation or any other measure having equivalent effect to nationalisation or expropriation, within the meaning of Article 6 of the Agreement, should be submitted to an arbitral tribunal. On the other hand, the Claimants argued, unsuccessfully, that the wording of Article 13(3) of the Agreement, containing an arbitration clause, should be interpreted, so as to encompass any disputes involving a claim for compensation for expropriation, nationalisation or any measure having an equivalent effect thereto, in accordance with the wording of the arbitration clause.

As such, the Claimants challenged the arbitral award before the Federal Supreme Court, seeking to set it aside, and to declare that it was for the arbitral tribunal to hear their claim. They alleged, in particular, that the arbitral tribunal wrongly declined jurisdiction to decide the dispute. In addition, they argued that the arbitral tribunal had disregarded the 1969 Vienna Convention on the Law of Treaties.

By the present decision, the Federal Court started by analysing the content of the relevant articles of the China-Singapore Agreement, in light of Articles 31 and 32 of the Vienna Convention. Indeed, Article 13(2) of the Agreement provides that if a dispute could not be settled through negotiation within a period of 6 months, the parties to the dispute had the right to submit the dispute to the national courts of the host state. In addition, Article 13(3) provides that if a dispute concerning the amount of compensation resulting from expropriation, nationalisation, or other measures having equivalent effect thereto within the meaning of Article 6 of the same Agreement, could not be settled within six months after the start of negotiations as specified in Article 13(1), then such dispute may be submitted to an international arbitral tribunal.

The Tribunal considered that the narrower wording of Article 13(3), which refers only to disputes concerning the amount of compensation, as opposed to the broad wording of Article 13(1) and (2) of the Agreement, which refers to any dispute, made it clear that only a subset of the disputes covered by Article 13(1) and (2) may be submitted to arbitration. In other words, the central focus of the proceedings laid in determining the scope of Article 13(3), and consequently, the extent of the arbitral tribunal's jurisdiction.

On the question, the Federal Court found that the ordinary meaning of the arbitration clause supported the interpretation put forward by the Defendant, whereby consent to arbitration only concerned the issue of the amount of compensation to be awarded to an investor following expropriation measures.

In addition, the Claimants also relied upon Article 178 paragraph 2 of the 1987 of the Federal Act of Private International Law, which provides that an arbitration agreement is valid if it meets the requirements set out under Swiss law. They argued that, in addition to the Vienna Convention on the Law of Treaties, account must also be taken of the principle laid down by the Swiss Federal Supreme Court, whereby if it is established that an arbitration agreement exists, it must then be assumed that the parties intended the arbitral tribunal to have broad jurisdiction. The Court clarified that this principle, developed by case law in the field of commercial arbitration, could not be applied in the context of an investment protection agreement which does not provide for the exclusive jurisdiction of an arbitral tribunal, but which declares State courts to have jurisdiction over certain disputes.

The Federal Court also emphasised that, contrary to what was claimed, it was not possible, in the present case, to provide for an interpretative rule according to which the contracting parties would wish the arbitral tribunal to have global jurisdiction. The Tribunal thus confirmed once again that the established principle was that jurisdiction of an arbitral tribunal must be based upon the clear and unequivocal consent of the parties to the dispute.

Two other points are worth mentioning. The Tribunal recalled that a dissenting opinion is an expression of opinion that is independent from the arbitral award and has no legal significance of its own. It also clarified that while Article 99 of the 2005 Federal Supreme Court Act, pertaining to the prohibition to adduce new evidence before the Swiss Federal Supreme Court was applicable in international arbitration proceedings, legal opinions academic opinions and courts' decisions refer to arguments in law and are not concerned by this prohibition, provided that they are adduced within the time limit and aim to strengthen the party's arguments. However, the Court opined that expert opinions on foreign law, academic opinions on foreign law and foreign courts' decisions qualified as evidence, at least in part, provided that the party has to contribute to the determination of that foreign law's content.

In light of the above, the Swiss Federal Supreme Court held that the challenged lodged by AsiaPhos Limited and Norwest Chemicals Pte Ltd was to be denied.

Contribution by Maya Konstantopoulou

High Court of Justice of England and Wales, 22 February 2024, *H1 and H2 vs. W, D and F* [2024] EWHC 382 (Comm)

In a judgment issued on 22 February 2024, the High Court removed a sole arbitrator in an *ad hoc* arbitration on the grounds of appearance bias under section 24(1) Arbitration Act 1996.

On the facts, a film production insurance policy was issued by an insurer on the one hand (hereafter the "Claimant"), and a film company and a film production guarantor on the other (hereafter the "Insured" or the "Defendants"). The policy was governed by English Law and contained an arbitration agreement submitting disputes to arbitration in London before a sole arbitrator, who had to be "*an experienced practitioner in film or television programme production*".

Following an accident on set, The Insured's claims for compensation, based upon the duration of the set being extended, were rejected, which led to a request for arbitration in 2019. The main substantive issue in the arbitration was to determine who out of the Insured or the stunt coordinator was to be deemed the ultimate responsible entity for safety on the set. In 2022, the British Film Institute appointed the sole arbitrator, due to the absence of agreement between the parties.

Before the High court, the Claimant sought an order that the sole arbitrator be removed for lack of objective impartiality, since an impartial and knowledgeable observer would conclude, after weighing the evidence, that there was a plausible chance that the arbitral tribunal was biased. The Claimant noted that its arguments were based upon statements made by the sole arbitrator during the Second Procedural Hearing, whereby (i) he acknowledged that he was a very close friend of the Insured's witnesses and experts, and (ii) that he therefore considered, in advance and before any hearing, that it was unnecessary that the cross-examination of their future testimony take place. As such, the Claimant argued that the arbitrator's opinion was predetermined as well as favourable with respect to the Insured's witnesses, and unfavourable with respect to its witnesses.

The High Court applied the test for apparent bias set out in the UK Supreme Court case of *Halliburton Company v Chubb Bermuda Insurance Ltd* [2021] UKSC 48. In cases where there is an allegation, not of actual bias, but of apparent bias, the relevant legal test is whether an fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

In the case at hand, the High Court highlighted that the mere degree of professional acquaintance between the arbitrator, who was experienced in his field, and the experts and witnesses in question could not give rise to justifiable doubts as to the arbitrator's impartiality, since such business relationships were inevitable.

However, the High Court found that the sole arbitrator's remarks related to the unnecessary cross-examination of the Insured's expert witnesses gave the impression that the arbitrator had allowed extraneous and illegitimate factors to influence his assessment of evidence that he had not yet heard. Regarding this point, the High Court opined that such a remark was particularly problematic, to the extent that the sole arbitrator was inexperienced in arbitration (and as such, could not benefit from the tempering influence of two other co-arbitrators) and could render awards against which no appeals could be filed.

As a result, the High Court held that the arbitrator should be removed pursuant to section 24(1) of the Act due to apparent bias and anonymised the parties, witnesses and arbitrator's identity.

Contribution by Juliette Leterrier

First instance court of Hong Kong, 13 March 2024, *A v. B and Others* [2024] HKCFI 751

In a decision dated 13 March 2024, the Hong Kong Court of First Instance refused to allow enforcement of an award on the grounds of public policy, due to a lack of reasoning by the sole arbitrator in the award.

This case involved a dispute between Party A (hereafter the "Claimant"), and Parties B, C and D (hereafter the "Defendants"), regarding the termination of licence agreements concluded between the Claimant and Defendants, which contained arbitration agreements. The sole arbitrator's award was rendered in 2022 in favour of the Claimant on all the issues, for which the Claimant obtained leave by Hong Kong courts to enforce the award by way of an enforcement order. However, the Defendants raised concerns regarding the lack of reasons for the award. In particular, the arbitrator did not give any explanation or analysis regarding the Guarantee, Non-Compete Covenant, and Breach Issues, which were central issues to the dispute. This failure to provide adequate reasons led to a challenge brought by the Defendants against the enforcement order to set it aside.

The Defendants contended that the effective termination date was crucial for the calculation of damages and royalties, as well as for the duration of the injunction granted by way of enforcement of the Non-Compete Covenant. They argued that the lack of reasoning for the arbitrator's dismissal of the Respondents' arguments raised legitimate causes for concern.

In considering the challenge against the enforcement of the award, Mimmie Chan J referred to established principles and highlighted the importance of awards being "*read generously, in a reasonable manner and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with* [them], *and always bearing in mind the policy of minimal curial intervention*". However, the Court also emphasised that "*it is fundamental to concepts of fairness, due process and justice, as recognized in Hong Kong, that key and material issues raised for determination, either by a court or the arbitral tribunal, should be considered and dealt with fairly*", which implies the need for adequate reasons to be provided by arbitral tribunals in the award. On the facts, the arbitrator failed to give an analysis and explanation of the reasons regarding key issues of the dispute.

Since "*these failings of the arbitrator were sufficiently serious to affect the structural integrity of the arbitral process and to have undermined due process*", Mimmie Chan J was satisfied that the enforcement order was to be set aside, and enforcement of the award denied, with the usual costs order that the Claimant should bear the costs of the application to set aside.

Contribution by Soukaina El Mouden

ECJ, 14 March 2024, *Commission v. United Kingdom*, Case C-516/22

The United Kingdom was caught in the crossfire: primacy of European law *versus* the 1966 ICSID Convention. This was the background in which the decision dated 14 March 2024 was rendered by the European Court of Justice, in which it ruled on the liability of the United Kingdom for the enforcement of an arbitral award rendered in an intra-European investment arbitration.

First of all, the history of the aftermath of the *Micula* case shall be retraced up until the present decision by the European Court of Justice.

Two Swedish nationals and the companies that they controlled made an investment in Romania, before it became a Member State of the European Union. In 2005, in preparation for its accession to the EU, Romania put a regional investment aid scheme to an end by way of tax incentives. Considering that their legitimate expectations had been infringed, the investors requested the constitution of an arbitral tribunal under the aegis of the ICSID Convention, in accordance with the bilateral investment treaty concluded between Romania and Sweden in 2002. In 2013, the arbitral tribunal acceded to the investors' arguments and ordered Romania to pay €178 million, in compensation for the losses allegedly suffered by the investors from 2005 to 2009.

On 17 October 2014, the investors applied for enforcement of the award in the United Kingdom under the Arbitration Act 1996, which implements the ICSID Convention. Pursuant to Article 54 of the ICSID Convention: "[e]*ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court in the that State*". However, on 1st October 2014, the European Commission adopted a decision enjoining Romania to immediately suspend any action that could lead to the implementation or enforcement of the arbitral award. Then, on 30 March 2015, the Commission adopted another decision, wherein it stressed that the implementation of state aid rules did not affect the rights and obligations provided for under Article 351(1) of the Treaty on the functioning of the European Union (hereafter the "TFEU") relating to international agreements concluded with one or more third countries prior to 1st January 1958, or prior to the date of accession by the Member State to the European Union.

In 2017, the High Court of Justice of England and Wales dismissed Romania's application for the annulment of the award's registration and suspended enforcement of the arbitration award until completion of the proceedings before the European courts. In 2018, the Court of Appeal confirmed the first judge's decision and added that the UK courts could not enforce the award immediately due to the principle of loyal cooperation set out in Article 4(3) of the Treaty on European Union (hereafter the "TEU").

On 18 June 2019, the General Court of the European Union (hereinafter the "General Court") annulled the final decision in its entirety on the grounds that the Commission did not have jurisdiction *ratione temporis*. The Court overturned the Commission's decision (as regards the amounts to be recovered) for failing to distinguish between the period before and after Romania's accession to the Union. On 19 February 2020, the UK Supreme Court ordered enforcement of the award.

On 25 January 2022, the European Court of Justice overturned the General Court's decision (ECJ, 25 January 2022, *Commission v. European Food et al.*, Case C-638/19 P). Firstly, it held that the General Court had erred in law when it held that the Commission did not have jurisdiction, since the state aid referred to in this decision had been granted by an arbitration award after Romania's accession to the European Union.

Secondly, it ruled that the General Court had erred again in law, in holding that the *Achmea* decision (CJEU, 6 March 2018, *Slovak Republic v. Achmea*, Case C-284/16) was irrelevant to the case. As a result, the Court remanded the case to the General Court, while ruling in another decision that the arbitral award could not produce any effect and that any Member State's courts seised of its enforcement were compelled to set it aside (ECJ, Order, 21 September 2022, *Romatsa et al. v. Micula*, Case C-333/19, at [42-[43]).

Regarding the United Kingdom's breach of EU law when allowing enforcement of an arbitral award rendered in an intra-European investment arbitration.

In this context, the UK Supreme Court nevertheless decided to allow enforcement of the arbitral award. On 29 July 2022, the European Commission started proceedings for the UK's failure to comply with EU law. Under the UK Withdrawal Agreement, the European Court of Justice maintained jurisdiction to hear disputes brought before it within 4 years after the end of the transition period for breaches of EU law committed during the transitional period (the breach being the decision by the UK Supreme Court on the facts).

On the merits, the Commission put forward four arguments: (i) a breach of the principle of loyal cooperation (Article 4(3) of the TEU), (ii) a misapplication of Article 351 of the TFEU to previous international agreements with third-party states, (iii) the violation of Article 267 of the TFEU, in that the UK Supreme Court had not previously referred a question to the Court of Justice for a preliminary ruling, and (iv) the infringement of Article 108(3) of the TFEU, which requires the Commission to be informed in good time of any plans to grant state aid. The present analysis shall be restricted to Article 351 of the TFEU in relation to the ICSID Convention.

In ordering enforcement of the arbitral award, the UK Supreme Court held that Article 351(1) of the TFEU was applicable to the UK's obligations under the ICSID Convention (*Micula and others v. Romania* [2020] UKSC 5, at [58]-[118]). The UK Supreme Court interpreted the Convention as imposing obligations not only towards the Kingdom of Sweden, but also on all the other contracting states to the Convention, including non-EU states to which Article 351(1) of the TFEU was to apply. In this regard, the UK Supreme Court emphasised that (i) the ICSID Convention was arguably based upon mutual trust and whose efficacy depended upon the all the contracting States observing its provisions, and that (ii) if a contracting State were to breach its obligations under the ICSID Convention, the other contracting States could take appropriate steps to remedy the breach.

In the present decision, the European Court of Justice concluded that Article 351(1) of the TFEU has been misinterpreted, in that the UK Supreme Court could not enforce the arbitral award under Article 54 of the ICSID Convention, since the situation at issue fell within the internal relations of the European Union.

The Court began by highlighting that Article 351(1) of the TFEU applied to relations between Member States and third countries, and not to relations within the Union (at [59]-[61]). As such, the "*rights*" within the meaning of this article refer to the rights of third countries, while the "*obligations*" correspond to only those of the Member States (at [62]). The multilateral nature of the TFEU had no impact in this respect. Before applying this rule to the present case, the European Court of Justice opined that the ICSID Convention fell within the scope of Article 351(1) of the TFEU, which is a provision of EU law in respect of which the Court has exclusive jurisdiction to give a definitive interpretation (at [68]).

In the present case, the Court of Justice noted that a bilateral investment treaty between two Member States was involved (at [72]), and that the disputed issue pertained to the question as to whether there existed an obligation for a Member State (the UK) to enforce an arbitral award following the ICSID Convention, so as to ensure compliance by another Member State (Romania) with its obligations under the bilateral investment treaty vis-à-vis a third Member State (Sweden) (at [73]). Similarly, the Court of Justice stated that "*a third country does not appear entitled to require the United Kingdom to enforce the arbitral award pursuant to the ICSID Convention*" (at [75]). Thus, the interest of third countries raised by the UK Supreme Court was deemed to be a "*purely factual interest*" that cannot be assimilated to a "*right*" within the meaning of Article 351(1) of the TFEU (at [76]). Furthermore, the UK Supreme Court was criticised for failing to examine the key question as to whether a third country could engage the UK's international responsibility in application of Article 64 of the ICSID Convention relating to disputes between contracting States (at [77]).

Finally, the Court of Justice reasoned by way of a *reductio ad absurdum* and observed that "*were the judgment at issue followed, all the Member States which concluded the ICSID Convention before their accession to the European Union, which is the case of most of them, could, by relying on the first paragraph of Article 351 TFEU, be in a position to remove disputes concerning EU law from the judicial system of the European Union by entrusting them to the arbitral tribunals established under that convention*" (at [80]).

The European Court of Justice concluded by saying that the UK Supreme Court had seriously compromised the EU legal order (at [87]), by adopting a course of action which had the object and effect of deliberately excluding the application of EU law in its entirety (at [85]).

Contribution by Iulian Chetreanu

INTERVIEW WITH YOSHIE CONCHA TAKESHITA

1. **To begin with, could you tell us about your background and the reasons as to why you chose international arbitration as a career option?**

For starters, I am very glad for this invitation. Thank you, Biberon!

In retrospect, I think it was only a matter of time before I focused my professional career on international arbitration. However, arbitration was not exactly where I began the journey that took me where I am today – more than 10,000 km away from my home country.

My university classes at law school in Peru helped me deepen my understanding of the interactions between the State and society, and how the State operates to achieve national policies and pursue public interest amid sociological, political, and economic instability. Public law, administrative law, and government control were hence my initial points of focus, and public contracts were the main mechanism representing said interaction. And soon I discovered that the more varied the purpose of public contracts concluded is, the more diverse and complex the potential disputes became.

In Peru, the general legal regime for public procurement mandates that disputes arising from public contracts must be solved through conciliation or arbitration. Hence, when I started working, I was rapidly immersed not only in the day-to-day execution of public contracts for all types of services, supplies, and infrastructure and construction projects, but also in dispute prevention and resolution, including negotiations, conciliations, dispute boards, and arbitrations.

The complexity of the public contracts that I was lucky to work on added additional layers of intricacy in the arbitrations, both procedurally and substantively, which made my work not only challenging, but very diverse and interesting. However, by being based in Peru, my chances of working on arbitrations with seats different than Lima were limited, and I really thought that there was more to learn and discover in the dispute resolution field.

That is why, in 2021, I decided to take a step into the international arena, moving to one of the main arbitration seats worldwide: Paris. My first step in this new chapter of my career started with pursuing an LL.M. in Transnational Arbitration and Dispute Settlement at Sciences Po. Thanks to the internship requirement to obtain the LL.M., I joined MCL Arbitration in 2022, first as an intern. I have been working with its amazing team ever since, now as an associate.

2. **You have been working at MCL Arbitration since 2022. Can you tell us about MCL Arbitration's team in Paris, and what your day-to-day work is like?**

MCL Arbitration is a boutique specializing in international dispute prevention and resolution, founded in 2021. Although we are a tight-knit team – composed of partners Alexis Mourre, Valentine Chessa, and Hervé Le Lay; counsel Nataliya Barysheva; of counsel Bingen Amezaga; and associates Ernest Morales and myself –, we have cases in various jurisdictions around the globe, including commercial and investment arbitrations, both institutional and *ad hoc*.

Our team members regularly serve as arbitrators, and we have developed our practice as legal counsel in selected cases, ensuring meticulous attention to conflicts of interests. Since joining MCL Arbitration, I have collaborated with all partners at the firm in these diverse capacities, leading to varied days depending on the active cases. Procedural calendars in arbitration allow for anticipation and organization in my work. However, depending on the phase of the arbitration, a case may require special dedication for days or even weeks. Nevertheless, exclusive dedication is hardly feasible as we are commonly involved in several active cases; counsel work entails unexpected interactions and requests from clients; and sudden emergency arbitrations may arise. So, in my day-to-day work I do my best to organize my work and, when not possible, adapt to the circumstances. Active internal communication within the team is key to make this possible.

3. **As a practitioner with over 10 years of experience advising both private and Peruvian public entities regarding public law issues, could you tell us about a case that you have worked on that made a particular impression on you?**

Peru faces several national infrastructure deficits in different sectors, and continuous efforts are underway to find solutions. For example, the National Plan for Sustainable Infrastructure for Competitiveness 2022-2025, approved by Supreme Decree 242-2022, foresees an investment of EUR 37 billion in the sectors of transportation, communications, water and sanitation, electricity, hydrocarbons, environment, production, agriculture and irrigation, education, and health sectors.

One of the cases I handled in Peru involved the construction of new road infrastructures between the highland and coastal regions, awarded to a consortium primarily composed of foreign companies. Several months into executing the contract without external counsel, issues emerged with the contracting public entity, jeopardizing the progress and completion of the works. The project's physical location, technical and legal contract requirements, involvement of multiple local, regional, and national authorities and third parties, deficiencies in engineering studies and design conducted by a third party, and budget reliant on public funds required our representation and strategic intervention across multiple fronts. This included engaging with competent authorities to seek amicable solutions and commencing multiple arbitrations when consensual solutions proved unattainable, while trying to prevent new issues in the day-to-day execution of the contract. However, the project often faced delays due to the public officers' reluctance to make decisions considering the administrative, civil, and even criminal liability, which always added additional considerations to our counselling.

For me, this case was a clear illustration of the additional complexities and challenges inherent to public projects compared to private projects, which extended to the dispute resolution mechanisms put in place. It also revealed a recurring pattern of issues similarly present in other public projects I was involved in, making apparent the systemic problems within the public procurement system in my country.

4. **You have worked as administrative secretary and assistant to arbitrators. Could you describe what this is like? What would you say are the 'dos and don'ts' when communicating and exchanging with arbitrators?**

Collaborating with international arbitrators has had tremendous value for me. It is quite fascinating to witness the dynamics between arbitrators – who often have different nationalities and come from diverse backgrounds –, their own approaches to cases, how they handle interactions with the parties and the way in which they manage the proceedings, and how they develop their reasoning to resolve disputes. If given the opportunity to assist arbitrators, I highly recommend it!

The parties will consent to my participation in any stage of the arbitration after being informed of my administrative tasks in support of the tribunal. Is it important to note that my role does not involve decision-making, as that responsibility solely rests with the arbitrators. While specific institutional rules may or may not require it, at MCL we adhere to the best practice of tribunal secretaries making disclosures in line with the standard of independence and impartiality of arbitrators. Additionally, I am bound by the same confidentiality obligations as the arbitral tribunal.

When communicating and exchanging with arbitrators, I would suggest being direct and thorough with your messages. Keep in mind that arbitrators often handle multiple cases simultaneously. Therefore, it is helpful to begin with a recapitulative first paragraph, to reference relevant information from the record if needed, and highlight urgent issues to be addressed in subsequent communications with the parties. Deadline reminders are also always appreciated.

It is best to address multiple aspects of a matter in a single message, rather than sending several messages for one issue.

5. **You have taken active steps to promote female arbitration practitioners' visibility, by volunteering within Mute Off Thursdays' team in charge of creating the "*Compendium of Unicorns: A Global Guide to Women Arbitrators*", which was published in 2022. Can you tell us what this initiative is about?**

The *Compendium of Unicorns* is a project of MUTE OFF Thursdays, a networking and knowledge-exchange group for mid-level to senior women in arbitration that holds weekly 30-minute virtual gatherings. Led by admirable women arbitrators, Elena Gutiérrez García de Cortázar and Ema Vidak, the *Compendium* project is a tangible action towards gender diversity in arbitration and a clear proof that appointing qualified women as arbitrators is **not** like finding a "*unicorn.*" So, I could not have been happier to help with this initiative, with which I am still committed.

The inaugural edition of the *Compendium* published in 2022 portraits 176 women arbitrators from around the world. Aiming to facilitate its review and consultation, this edition of the *Compendium* is divided in three main parts: (i) a general list of the included women arbitrators; (ii) classification indices by arbitration experience, procedural experience, industry focus, geographical focus, and language capabilities; and (iii) individual forms filled by each arbitrator. Everyone is a click away from the *Compendium*, as it can be freely downloaded from the Global Arbitration Review's webpage. I invite you to discover, share, and, when the case may come, use it to appoint women arbitrators!

6. **You co-authored an article called "*Dispute Boards: Why is it important to incorporate it into all current public works contracts?*" in 2020. For our non-Spanish readers, could you tell us more about what this article pertains to?**

In recent years, dispute boards have been successfully used as another mechanism to deal with contractual disagreements and disputes in various sectors and industries. While more common in infrastructure and construction projects, the dual consultative and resolution function of dispute boards allow for both the prevention and resolution of multiple controversies throughout the life of a project, with greater immediacy compared to other mechanisms. This ensures the efficient continuity and completion of the project. What is delayed, therefore, is not the project itself, but the obtaining of a definitive solution to the parties' disputes, which may later be resolved before courts or arbitral tribunals.

Dispute boards are a possible dispute resolution mechanism for construction public contracts in Peru and were mandatory for such contracts under the general regime, initially depending on the contract amount. In 2020, the general regime was changed to permit dispute boards, regardless of the amount of the contract, but only for recently concluded ones. Following this legislative change, and the controversies that were affecting public works at the time due to the COVID-19 pandemic, the article highlights how the dual function of dispute boards could be beneficial for all ongoing public construction projects, based on our experience with them. This recommendation remains in force, as recent legislative changes provide for the mandatory intervention of dispute boards as a dispute resolution mechanism for public contracts that include both design and construction works.

NEXT MONTH'S EVENTS

14 May: Conference "*Do we need to regulate the use of artificial intelligence in international arbitration?*"

Organised by Sciences Po, and Mayer Brown

Where ? Mayer Brown – 10 avenue Hoche, 75008 Paris

Website:
https://docs.google.com/forms/d/1Kd6hA74ueSk4uQzD4l_cGvsr4zX3DDKDPKeklDq-b7s/viewform?edit_requested=true (mandatory sign-up)

31 May: Inter-university Conference "*Le non-arbitre*" (event in French)

Organised by Université Paris I Panthéon-Sorbonne, Université de Versailles – Saint Quentin-en-Yvelines, Université de Lille and Aix-Marseille Université

Where ? Centre Panthéon-Sorbonne, Room 1 – 12, place du Panthéon, 75005 Paris

Website:
https://www.eventbrite.com/e/colloque-inter-universitaire-le-non-arbitre-tickets-880284934937 (mandatory sign- up before 30 May 2024)

INTERNSHIP AND JOB OPPORTUNITIES

LAW PROFILER

INTERN
ALEM & ASSOCIATES

INTERNATIONAL ARBITRATION
Start date: July 2024
Duration: 6 months
Location: Abu Dhabi

INTERN
NORTON ROSE FULBRIGHT

LITIGATION & ARBITRATION
Start date: July 2024
Duration: 6 months
Location: Paris

INTERN
ALLEN & OVERY

LITIGATION & ARBITRATION
Start date: July 2024
Duration: 6 months
Location: Luxembourg

INTERN
SQUIRE PATTON BOGGS

LITIGATION, INSURANCE
& ARBITRATION
Start date: July 2024, January 2025
and July 2025
Duration: 6 months
Location: Paris