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BIBERON

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FOREWORD

Dear loyal Biberon readers and newcomers,

It is with great pleasure and honour that we present to you this year's special edition of our "Biberon" dedicated to the 2024 Paris Arbitration Week ('PAW'). For the fourth year in a row, we have partnered with the PAW's Organising Committee to cover several events of this year's edition.

Continuing with the tradition of growing alongside PAW, this year we worked closely with the PAW Board to deliver a special edition worthy of the unique context in which it lies. Our team of reporters have covered a variety of seminars focused on two main themes that are the adjudication of sports disputes in the field of arbitration - inspired by the upcoming Olympic Games in Paris this summer - and procedural issues pertaining to international arbitration proceedings.

We would like to extend our sincere thanks to all the members of PAW's Organising Committee, whose collaboration continues to prove a real pleasure. We also wish to thank all the firms and companies that have vested their trust in us, and especially the International Commercial Chamber of the Paris Court of Appeal, which opened its doors to us for its very first participation in the Paris Arbitration Week, and last but not least, to our reporters for their outstanding work.

We hope that you will enjoy reading this year's special edition of our newsletter. Do not hesitate to follow us on our social media platforms to stay updated with all our latest news and events.

Paris Baby Arbitration is a Parisian network of students and young practitioners dedicated to the promotion of International Arbitration as a practice, and its accessibility as a field of law.

Each month, our team works diligently to edit and deliver the Biberon, a bilingual newsletter published in english and french, intended to give insights on the latest and most prominent decisions and arbitral awards rendered in various jurisdictions. Since 2021, thanks to the partnership with Paris Arbitration Week, the association also publishes a special edition of this newsletter solely dedicated to the PAW.

Paris Baby Arbitration hopes that this year's special edition of our newsletter will encourage greater contribution from students and junior lawyers to the arbitration community. The values of Paris Baby Arbitration, notably openness and goodwill, motivate us to enable students and junior lawyers to express their passion for International Arbitration.

You can find all the previously published editions of the Biberon on our website: parisbabyarbitration.com.

We also invite you to follow us on LinkedIn.

Enjoy your reading!

Sincerely yours,

Théo Moreno

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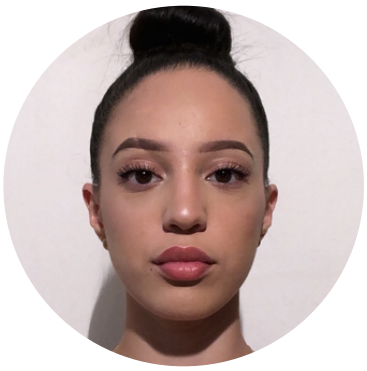

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RENDERING DECISIONS WITH IMPACT: WRITING AWARDS THAT MEET PARTIES' NEEDS

By Lidia Kruczkowska Mottrie

On Tuesday March 18, 2024, as part of the 2024 edition of Paris Arbitration Week, the International Chamber of Commerce ('ICC') in Paris hosted the 8th ICC European Conference on International Arbitration with this year's theme being, "*Towards Mutual Gain: Navigating Party Interests in Arbitration*", which was central through all three sessions during the conference. The third panel focused on parties' interest in award rendering, the arbitrators' role in meeting these expectations, as well as factors which could influence the writing of awards.

The session was moderated by Malgorzata Surdek-Janicka (*Independent arbitrator at Surdek Arbitration in Poland and Vice-President of the ICC International Court of Arbitration*), and was composed of Dr. Mohamed S. Abdel Wahab (*Professor of Law at Cairo University, Founding Partner and Head of International Arbitration at Zulficar & Partners, Egypt*), Karl Hennessee (*Senior Vice-President, Head of Litigation, Investigations & Regulatory Affairs at Airbus, France*), Marieke van Hooijdonk (*Partner at Allen & Overy, Netherlands*) and Angeline Welsh KC (*Barrister at Essex Court Chambers in the United Kingdom*).

The panel expressed consensus on the fact that, in the process of drafting international arbitration awards, there are different interests at stake that cannot be reduced to an exhaustive list and that, on a case-to-case basis, can entail different meanings. Ms. Surdek-Janicka commenced the session on a general question as to whether an arbitral tribunal should limit its reasoning for a decision to requested relief or go beyond what is asked for the purpose of bringing additional value to international arbitration. Ms. van Hooijdonk stated that there are instances when an arbitral tribunal considers providing more elaborative decision justifications, particularly when a party raises several arguments for a claim. Yet, allowing flexibility on beyond interest reasoning could lead to a situation of double stitching and create a room for counter-award attacks.

Prof. Dr. S. Abdel Wahab spoke on the subject of an interest-based approach and the possible influences arising from parallel proceedings on an arbitral decision. He began comparing the contrasting right approach applied to contract and law with the interest-based approach. He referred to the latter as a "realm of guesses" because of a possible variety of views, including parties' views, whereas the former provides more certainty to the process of decision making. He went on to add that in some jurisdictions it is however law itself which will require parties' interest assessment and examination of their proportional benefits. With that, Prof. S. Abdel Wahab underlined the importance of considering various factors beyond solid reasons to inform the reasoning behind decisions, focusing on value creation and the impact on parties' ongoing and future relationships. In relation to influences of parallel proceedings, Prof. Dr. S. Abdel Wahab stressed that complexity in the course of disputes becoming nowadays a given, arbitral tribunals rely on the reasoning of similar decisions, provided the reasoning is sufficiently persuasive and applicable to the case.

Ms. Surdek-Janicka led the panel of speakers on the aspect of permissible flexibility to the arbitral tribunal in case of a conflict of contract provisions with the applicable law. In Prof. Dr. S. Abdel Wahab's view, deference from applicable law due to a lack of awareness or knowledge of parties on the effect of that law does not justify non applicability, nor should it allow for an extension of flexibility. Further, he reiterated his position with the point that deference from applicable law for the preservation of parties' interests can lead to major inconsistencies and risk the enforcement of the award, and therefore, the degree of flexibility will vary depending on the basis of an individual case and its factual matrix.

Ms. Welsh KC addressed the potential conflict in arbitration objectives, particularly the conflict between cautiousness in the enforcement of awards and the need to uphold party interests. Firstly, she observed that cautious attitudes around enforcement and future challenges hold arbitrators back from addressing party interests more extensively. Moreover, she highlighted different categories of cases involving principle-setting, interest-based disputes, evidence-based disputes, and the need for a "no one model" interest-balance exercise, as well as communication balance. Although some practitioners question whether arbitrators should delve into matters beyond the scope of what is directly relevant to a given case, a well-reasoned award is more likely to be accepted by the losing party on account of the substantiated explanations and subsequent understanding it provides. With that, she concluded that arbitrators in the decision-making process should consider the value of a decision beyond mere precedent-setting, urging for special attention in cases with significant financial stakes, as well as the role of arbitration rules in evidentiary matters.

Strengthening the foregoing point, Mr. Hennessee discussed the evolving nature of arbitration proceedings, also noting an increasing concern among arbitrators and parties about public identification and criticism leading to the challenge of awards. He further buttressed this observation with the point that the constant rate of challenges of awards is upheld alongside a continued presence of lack of detailed reasoning in some decisions, suggesting a lack of detail potentially compromises parties' expectations.

In conclusion, on the importance of defining the interest-based approach in arbitration decision-making, Mr. Hennessee suggested that identifying a successful interest-based analysis applicable to individual cases would be easier and more feasible than defining it from scratch.

SPORTS AND ARBITRATION

OLYMPIC GAMES: TIME IS OF THE ESSENCE FOR CONSTRUCTION PROJECTS

By Redeat Mulugeta Zewdie

On Tuesday, March 19th, 2024, Eight Advisory hosted a round-table meeting titled "*Olympic Games: Time is of the Essence for Construction Projects*". The panel focused on the challenges associated with construction projects facing strict deadlines. It was moderated by Guillaume Tyteca, Manager at Eight Advisory, and featured Vincent Lefeuvre, Director at Eight Advisory and specialised in delay analysis issues; Floriane Merias, Partner at Eight Advisory in the Financial Expertise & Dispute Resolution practice, working on loss assessments; and Sandrine Hubert, Director of the Real Estate department at Eight Advisory, with operational expertise in the project management, especially of sports facilities.

The panel, adeptly led by Mr. Tyteca, embarked on a comprehensive exploration of efficient governance and decision-making in construction projects. The floor was first given to Ms. Hubert's insights, the discussion delved deeper into the good practices of decision-making frameworks, transparency, and role clarity to enhance project fluidity. Ms. Hubert's breakdown of the RACI model underscored the practicality of assigning clear responsibilities (R for Responsible), ensuring authority validation (A for Accountable), involving relevant stakeholders (C for Consulted), and maintaining stakeholders' awareness (I for Informed).

Acknowledging the inevitability of delays, Mr. Lefeuvre emphasized the pragmatic importance of proactive risk management and timely identification of delay factors. Drawing a clear distinction between risks and uncertainties, he elucidated their respective impacts on project timelines. From unpredictable weather conditions to unforeseen design changes, Mr. Lefeuvre underscored the necessity of early identification and robust mitigation strategies, all underpinned by effective stakeholder communication.

Expounding upon Mr. Lefeuvre's insights, Ms. Hubert reinforced the crucial role of clear communication and decision-making frameworks in addressing project delays. Her delineation of the only three possible approaches to absorb delays - reducing or altering project scopes, postponing some of the "non-essential" technical content of the project until after the deadline or accelerating lagging portions - highlighted the pragmatic considerations inherent in project management. Ms. Hubert's caution against piecemeal solutions without holistic project consideration served as a pragmatic reminder of the complexities involved in project execution.

In a landscape where pragmatic considerations reign supreme, the panelists' collective expertise resonates as a beacon of practical wisdom for navigating the challenges of construction projects. Through their insights, stakeholders are equipped with the tools necessary to navigate the intricacies of project management, ensuring that delays are addressed with pragmatic precision and projects are brought to successful completion.

Continuing the engaging discourse led by Mr. Tyteca, the panelists dove deep into the intricacies of construction project management, uncovering strategies to combat delays and ensure project compliance. Ms. Merias presented the different types of financial claims, distinguishing between acceleration and extension costs,and stressing the need for clear and transparent documentation to successfully resolve financial disputes.

Expanding on Ms. Merias' insights, Ms. Hubert emphasized the importance of proactive preparation, urging stakeholders to identify and qualify risks early in the design phase by identifying anticipatory corrective solutions. Mr. Lefeuvre underscored the significance of contractual clauses fostering trust and cooperation to prevent delays, cautioning against termination clauses. Ms. Merias chimed in, highlighting the necessity of transparent communication and of evidence to detail the amounts claimed, emphasizing on the economic and financial equilibrium of the contract for each stakeholder and the need for collaboration to ensure the continuity of the project.

Ms. Hubert echoed these sentiments, emphasising the need for comprehensive planning, realistic timelines, and continuous monitoring to mitigate delays effectively.

In a poignant finale, Mr. Tyteca posed a question on the role of experts in construction project management. Ms. Merias stressed the pivotal role of experts in fostering trust and providing evidence for claims resolution, while Ms. Hubert emphasized their proactive strategies and experience in addressing potential issues before they escalate, resonating with the adage, "good preparation is key for success". Mr. Lefeuvre wrapped up, emphasising experts' indispensable role in arbitration phases, ensuring project alignment within set timelines and budgets.

In conclusion, the panel discussion provided invaluable insights into the complex landscape of construction project management. From claims management to communication and risk management, the panellists offered practical strategies to navigate challenges and ensure project success.

As emphasized throughout the discussion, the role of experts emerges as pivotal in fostering trust and providing evidence of acceleration claims. With a blend of practical wisdom and strategic foresight, stakeholders are equipped to navigate the intricacies of construction projects with confidence, ensuring that delays are mitigated effectively, and projects are brought to successful completion. By implementing the principles discussed, stakeholders can forge a path towards excellence in construction project management, where collaboration, preparation, and diligence reign supreme.

ARBITRATION, SPORTS LAW AND THE OLYMPICS

By Inès Elleingand

Months prior to the commencement of this year's Olympic Games in Paris, as part of the 8th edition of Paris Arbitration Week, the Comité Français de l'Arbitrage organised an event on a recent and critical topic: "*Arbitration, Sports Law and the Olympics*".

On 19th March 2024, the panel was welcomed by Janice Feigher (*Secretary General of the CFA, Counsel and Arbitrator at Feigher Dispute Resolution*) and composed of Hervé Le Lay (*Partner at MCL Arbitration and Arbitrator at the Court of Arbitration for Sport/CAS*), Matthieu Reeb (*CAS Director General*), Carole Malinvaud (*Partner at Gide Loyrette Nouel, Board Member of the International Council of Arbitration for Sport/ICAS and Chair of the CAS Ordinary Division*) and Antonio Rigozzi (*Partner at Lévy Kaufmann-Kohler, counsel in sports arbitrations and arbitrator in sports-related disputes outside the CAS, Professor of Law at the University of Neuchâtel*). This distinguished panel discussed two significant but interrelated topics: the specificities of sports law; and the arbitration of the Olympic Games.

On the first panel concerning the specificities of sports law, Mr. Le Lay presented the Court of Arbitration for Sport ('CAS') and its main missions.

As a brief history, CAS is an independent institution not related to any sports organisation and provides services to facilitate the settlement of sports-related disputes. The main tools for CAS to resolve these disputes are arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world. Headquartered in Lausanne, Switzerland, CAS was created in 1984 by the International Olympic Committee ('IOC'). Despite its modest beginnings, the success of CAS is today undeniable.

In 1994, a significant reform occurred, leading to the establishment of ICAS, a foundation of Swiss law in charge of the administration and the funding of CAS, hence cutting the remaining links with the IOC. Concurrently, sports organisations began incorporating CAS clauses into their statutes. The independence of CAS has been a recurrent concern, consistently addressed and affirmed in various instances. Notably, this independence was underscored by the Swiss Federal Tribunal in the *Lazutina* case of 2003 and reaffirmed by the European Court of Human Rights in the *Mutu & Pechstein* case against Switzerland in 2018. CAS is today sufficiently independent to qualify as a genuine arbitral tribunal.

In terms of its structure, CAS comprises several key components. Firstly, it is overseen by the ICAS, serving as its governing body. In addition to the administration and the funding of CAS, the ICAS is tasked with the preservation of CAS independence and of the rights of the involved parties. It is responsible for adopting and amending the Code of Sports-related Arbitration and for appointing the members of the CAS lists of arbitrators and mediators. Additionally, CAS includes the Court Office, headed by a Director-General and supported by a staff group of 53 members.

The CAS maintains a diverse list of arbitrators, with a required membership of at least 300. Currently, the list consists of approximately 400 arbitrators from the five continents of the globe. Furthermore, specialised lists exist, such as a specific list for football cases and a CAS Anti-doping Division, acting as a first instance in cases related to Anti-Doping Rule Violations ('ADRV').

The speakers then continued on to the matter of what disputes the Court is responsible for resolving or mediating. According to article R27 of the CAS Code "any disputes directly or indirectly linked to sport may be submitted to the CAS". Mr. Le Lay highlighted that the drafting of this rule is intentionally broad and non-limiting. Consequently, it implies that the jurisdiction ratione materiae pertains to "sport-related matters". Mr. Reeb has commented that, to his knowledge, the only instance where the jurisdiction ratione materiae was contested due to a lack of connection to sports occurred during the 2002 Olympic Winter Games Salt Lake City.

In this particular case, complaints were lodged with the CAS by the organisation PETA regarding the protection of animals used in rodeos for cultural events. However, the CAS denied jurisdiction as the dispute was deemed related to a cultural event rather than a sporting one.

With the recent rise of esports competitions, the question of CAS jurisdiction is to be determined. The entire panel unanimously concurred that given the similarities between issues in esports and traditional sports, CAS is fully equipped to settle disputes in this new area.

Two primary types of proceedings are recognized: "ordinary" and "appeal." The most familiar type of proceeding is the appeal, with appealed cases—particularly those concerning decisions of sports-related bodies—receiving the most attention. The foundation of the applied rules can be located within the statutes of the federations. Occasionally, there are sport-specific regulations in place. CAS conducts a comprehensive de novo review of the case. Appeal proceedings also encompass regulatory matters, not solely disciplinary issues, such as disputes regarding athlete eligibility for competition. Awards issued following appeals are typically made public, published on the CAS website, and contribute to a form of jurisprudence.

Regarding challenges against CAS awards before the Swiss Federal Tribunal, Mr. Reeb clarified that the grounds for annulment are limited, including lack of jurisdiction, violation of fundamental procedural rules, or incompatibility with public policy.

In contrast, CAS ordinary arbitration primarily addresses contractual disputes. The arbitration agreement and applicable law can be found within the contract. Swiss law may apply, in particular if there is no choice of law in the contract. Typical disputes relate to fees for services, agent fees, player transfers, sponsorship contracts, and employment disputes. Unlike appeal awards, these arbitral awards are confidential.

The second panel focused on the issue of Arbitration of the Olympic Games, and the role of CAS. Ms. Malinvaud and Mr. Reeb then introduced the second topic, focusing on the unique role of CAS during the Olympic Games. Mr. Reeb commenced the presentation by outlining the inception and development of the "ad hoc" Division of CAS. The ad hoc Division was established specifically for the Olympic Games, at the invitation of the IOC and of the organising committee of the Olympic Games in 1996 in Atlanta. This initiative aimed to provide athletes with timely dispute resolution mechanism, aligning with the short duration of the Olympic Games, which span only 17 days.

With CAS already in existence, the IOC proposed the establishment of the "ad hoc" section. Its slogan, "fair, fast, and free," emphasised the commitment to rapid resolution, aiming to settle disputes within 24 hours to prevent the disturbance of competitions. The term "free" reflected the absence of fees for the involved parties, a principle upheld to this day. The inaugural CAS ad hoc Division debuted in Atlanta. Six applications were submitted by athletes. The division comprised a small group of 12 arbitrators and reduced staff.

Forty years later, the ad hoc Division for the Olympic Games remains relevant. The upcoming Paris Games are particularly noteworthy. This year, the CAS ad hoc Division will be housed at the Tribunal de Paris. Presently, ongoing discussions revolve around the potential establishment of a group of pro bono lawyers to assist athletes who lack the financial means or time to engage legal counsel. Following a comprehensive presentation on the inception of the ad hoc Division of the CAS, Ms. Malinvaud highlighted its key features in the present day.

She began by emphasising that the ad hoc Division possesses jurisdiction to adjudicate any dispute arising from or connected to the Olympic Games. Therefore, it's essential to recognize that any matters related to the review of field-of-play decisions are excluded from this specific division unless there are allegations of fraud or corruption in the decision-making process. Furthermore, in terms of its operations, the ad hoc Division operates under the CAS Arbitration Rules for the Olympic Games, which are readily accessible on the website.

These rules mandate that decisions must be rendered within 24 hours if possible; however, such time limit may be extended if need be. The proceedings remain free, and the applicable law is either the Olympic Charter or, if necessary, Swiss law to address any potential gaps.

Concerning jurisdiction, Ms. Malinvaud stated that all individuals participating in the Olympic Games are required to sign a form acknowledging the exclusive jurisdiction of the CAS. This agreement is further supported by Article 61 of the Olympic Charter, which stipulates that "*Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration*". The primary challenge lies in the combination of material scope and *rationae temporis*.

However, concerning *rationae temporis*, the timing of the onset of a dispute is crucial, given that the jurisdiction of the CAS ad hoc Division is limited from 10 days prior to the Games opening and until the Closing ceremony. Furthermore, it has only a 24-hour window to reach a decision, which means that actions must be promptly implemented. In cases involving the risk of immediate irreparable harm or loss of opportunity, requests for provisional measures may be submitted to the president of the ad hoc Division for resolution.

Professor Rigozzi then closed the event with advice regarding the specific role of counsel acting in arbitration proceedings at the Olympics. In his opinion, the starting point is the 24-hour time frame, and thus the very fast pace of the proceedings. Counsel for the parties need to "forget" about everything they are used to, such as arbitrator selection, case management conferences, and the adoption of a procedural calendar. The key point is to focus on the decisive aspects of the case. This implies significant preparation and also knowing the arbitrators. Since there are only 12 arbitrators, counsel should identify their different interpretations of regulations by examining their track record for example. Equally, it is essential to know the applicable law (i.e. mainly the Olympic Charter and the regulations of the federation involved), and to be familiar with the ad hoc Division's past decisions, given that the procedural and substantive legal issues to be resolved during the Games are often the same or very similar. Finally, it may be interesting to note that the choice of the language of the application (which can be filed in English, French, or Spanish) can have a significant influence on the Panel's composition. Indeed, since the list of arbitrators sitting on the ad hoc Division is limited, this choice can have a direct impact on the "sub-set" of arbitrators likely to be appointed on a given Panel.

FOOTBALL AND ARBITRATION: A TOPSY-TURVY GAME

By Antoine Garbé

On Wednesday, March 20, 2024, as part of the 2024 edition of Paris Arbitration Week, the Disputes team of Deloitte Finance hosted a roundtable discussion on sports and arbitration, with a focus on football. The panel, which was moderated by Xavier Metaireau (*Director within Deloitte Finance's Disputes practice*), included Carmen Núñez-Lagos (*Independent Arbitrator at Núñez-Lagos Arbitration*), Pierfilippo Capello (*Head of Sports at Deloitte legal Italy and Deputy Chairman at the FIFA Tribunal's Agent Chamber*), and Battine Edwards (*Partner in charge of Deloitte Finance's Disputes practice*).

Mr. Capello was first asked to outline the key stakeholders in the football industry. He emphasized that the athlete stands as the primary stakeholder, driving the entire system and industry forward. He explained that multiple stakeholders may be identified, depending on the perspective taken. Adopting a restrictive definition of the industry, other than the athletes themselves, further significant stakeholders include clubs, agents, national associations, sponsors, agencies, international associations. However, from an economic perspective, the boundaries expand, and construction companies or media companies may be regarded as other important stakeholders in the football industry. The decision-making power held by the latter is evidenced by the forthcoming new Champions League format. Football may be viewed as the middle of a cobweb in which players from various industries are involved, thus sustaining a whole ecosystem.

Addressing the question of the contractual set up between stakeholders, Mr. Capello took the example of professional football coaches. Usually, the standard contract – provided by the national associations – is a two-page form, but lawyers commonly add into contracts specific provisions, concerning, inter alia, taxes, guarantees, image rights agreements and jurisdiction clauses.

Focusing on the primary stakeholder, *i.e.*, the players, Mr. Capello highlighted that, as it happens only in sports, athletes are considered as assets on the balance sheets of the clubs. In the normal course of business, employees in any other industry, and even other stakeholders in the football industry, such as coaches, are not registered as assets on the club's balance sheets, their salaries are expenses supported by the clubs.

Furthermore, despite the European Union's principle of free movement for workers, football proves an exception, as transfer windows apply to the clubs, with FIFA (and UEFA) forbidding players from being transferred to different clubs outside of these specific periods. With regards to player transfers, Mr. Capello referred to FIFA's regulation on international transfers, while highlighting the clubs' autonomy in drafting contracts including clauses which are specific to the football industry, like sell-on clauses.

Mr. Metaireau then asked Ms. Núñez-Lagos to provide an overview of the various football-related disputes she had worked on as an arbitrator. She first emphasized the financial implications of contract terminations amid doping issues. She further discussed the various dispute resolution fora, including the interplay between Court of Arbitration for Sport ('CAS') with FIFA's dispute resolution mechanism, focusing on appeals against FIFA decisions and disciplinary proceedings initiated at continental or local levels. She also mentioned disputes arising from violence in stadia and disputes relating to image rights and training costs involving underaged players. Most notably, she highlighted employment disputes as a significant issue in sports, often addressed through the CAS system.

Then, Ms. Núñez-Lagos was asked by Mr. Metaireau about her role as a CAS arbitrator. She began by explaining that CAS was established by the International Olympic Committee and operates in conjunction with the International Council of Arbitration for Sport ('ICAS'), operates in a similar way to the ICC. CAS maintains three lists of arbitrators: the General list, the Football list, and the Anti-Doping list, which is particularly stringent and comprises individuals with scientific or criminal knowledge.

Ms. Núñez-Lagos then pointed out that parties involved in CAS proceedings must select arbitrators from these lists. CAS operates under two sets of rules: Ordinary Proceedings for sports-related cases with arbitration clauses, and Appeals Proceedings, wherein the President of the tribunal is appointed by ICAS. Notably, CAS's *Ad Hoc* Chambers, particularly the Olympic ones, are specific to its operations. Moreover, she added that CAS arbitration seat is always Lausanne, even for Olympic *Ad Hoc* Committees held in other locations like Paris.

Mr. Capello supplemented by highlighting that joining an association (as a national sport federation) entails agreeing to its rules, relinquishing the right to choose one's dispute resolution forum. He added that while this may, on one side, limit freedom, on the other side it ensures a more robust enforcement mechanism. This system promotes uniformity, although both Mr. Capello and Ms. Núñez-Lagos emphasized the challenges arising from the possibility that, in the future, this structure may change, as the recent "Superleague" decision of the European Court of Justice may suggest.

The panel then focused on how to assess the value of a football club. Ms. Edwards first pointed out that, whilst two bases would typically come to mind, when considering the way to assess Quantum in an international arbitration context, namely accounting data and the Discounted Cash Flow ('DCF') method, neither provides the right basis for assessing quantum in the football industry.

She explained that a club's value lies in its squad, its brand, and the stadium, provided it owns the real estate asset. She clarified that the brand refers to what the fans identify with and what embodies the historical performance of the club, even though it can't be sold, being often derived from the name of a city. As such, it may not be regarded as a brand per se. Relying on Manchester United's balance sheet to illustrate her position, she pointed out that the brand value isn't always on the balance sheet. From an accounting perspective, unless the club was acquired, the value of the brand is often nil. Regarding players' valuation, Ms. Edwards, taking Manchester United as an example, showed the difference between the value of the squad registered on the balance sheet (namely the cost incurred to obtain the registration right on a player) and the sum of the market value of each of the players listed in the financial statements as forming part of this squad. She mentioned the platform TransferMarkt as a commonly used and quoted source to assess the value of football players.

When asked about using the DCF method for club valuation, she explained that it is one of the income approaches to business valuation, which is based on the premise that the value of an asset or business equals the present value of the future earnings that are available for distribution to the investors in that asset or business. However, she pointed out the unsuitability of using the DCF method when assessing the value of football clubs due to their structural lack of profitability, resulting from a combination of volatile revenue and extremely high operating expenses, with player wages often consuming a significant portion of revenue. She presented two approaches to value businesses: the DCF approach, and the Market Approach (based on transactions or trading multiples), noting that while the Market Approach is commonly used in football transactions, its implementation requires experience, a robust analysis and a nuanced understanding of revenue, football clubs being valued on the basis of Enterprise Value/revenue multiples. She further touched upon the various types of investors in the industry, their various investment rationale and the implications of the latter on the level of multiples paid. She also explained how to select and apply the correct multiple when implementing the market approach to business valuation, which is based upon the principle of substitution.

Lastly, Ms. Núñez-Lagos was asked by Mr. Metaireau about the Special Olympic Committee for the Olympic Games, explaining that sessions will be held at the Tribunal de Paris. The committee's creation stemmed from concerns after the Atlanta Olympic Games, where the National Committee foresaw potential issues with the local judicial courts. To address this, the Olympic Committee established the ad-hoc Commission to swiftly resolve athletes' issues within 24 hours, even shorter if urgent. Ms. Núñez-Lagos added that the Olympic Arbitration Rules are transparent and publicly accessible, with Swiss law applying in case of rule interpretation issues. The committee operates in three languages: French, English, and Spanish. For the Olympic games, the committee will operate 24 hours a day, 7 days a week, anticipating most issues during the day, and will commence ten days before the Olympics, continuing until 17 days after the closing ceremony.

SPORTS ARBITRATION: OPEN TALK ON KEY ISSUES AND FUTURE CHALLENGES

By Eléna Andary and Paul Gobetti

On Wednesday March 20, 2024, as part of the 2024 edition of Paris Arbitration Week, Gaillard Banifatemi Shelbaya Disputes organized a conference entitled "*Sports Arbitration: Open Discussion on Key Issues and Future Challenges*". The event, held at the Parc des Princes (the legendary stadium of Paris Saint-Germain soccer club), was attended by almost 300 participants, including academics, arbitration and sports law practitioners, as well as national and international representatives from federations, leagues, clubs, players' unions and clubs, etc.

The conference kicked off with a presentation by Yas Banifatemi (*Founding Partner of Gaillard Banifatemi Shelbaya Disputes*) on the firm's practice in sports-related arbitration. Franck Latty (*Professor of Law at Paris-Nanterre University*) then kicked off the conference with introductory remarks on sports arbitration. He outlined the reasons why sports arbitration was instituted in the early 1980s by the International Olympic Committee ('IOC'), in particular to benefit from more efficient dispute resolution, meeting the specific characteristics of sport: speed, flexibility, consistency. Professor Latty described the central role played by the Court of Arbitration for Sport ('CAS') in this field, while noting the criticisms still levelled at this specialized arbitration institution based in Lausanne (Switzerland). Following Professor Latty's presentation, Benjamin Siino (*Founding Partner of Gaillard Banifatemi Shelbaya Disputes*) took the floor in his capacity as co-chairman of the PAW to outline the novelties of the 2024 edition and its success. Benjamin Siino then introduced the speakers on the first panel.

The first panel, entitled "*Reflections on sports arbitration in France*", included Mathieu Maisonneuve (*Professor of Law at Aix-Marseille University*), Patricia Moyersoen (*Partner at Moyersoen Avocats*), Bernard Foucher (*Honorary Member of the Conseil d'État*), Stéphane Bottineau (*Legal Director of the Ligue de Football Professionnel*) and Philippe Piat (*President of the Union Nationale des Footballeurs Professionnels*). Pierre Viguier (*Senior Associate at Gaillard Banifatemi Shelbaya Disputes*) moderated the impassioned exchanges between the speakers.

After a brief introduction to the subject of the round table by Me Pierre Viguier, Professor Mathieu Maisonneuve reminded participants of the distinction between sports-related disputes *stricto sensu* (for example, challenges to disciplinary or non-disciplinary decisions by sports federations which, under French law, are administrative acts) and sports-related disputes (where sport simply colors the factual context of the case). He explained that, for sports disputes, the current five-stage French practice (*i.e.*, (i) exhaustion of remedies within the federations, (ii) the compulsory conciliation procedure under the aegis of the French National Olympic and Sports Committee ('CNOSF'), (iii) proceedings before the administrative court, (iv) appeal to the administrative court of appeal and then (v) the Council of State) is no longer satisfactory. He therefore proposed to submit such disputes to the jurisdiction of a specialized court (*e.g.*, arbitration) "*organized and supervised by the State*".

The floor was then given to Mr. Stéphane Bottineau, who explained the reasons why the Ligue de Football Professionnel ('LFP') had recently introduced into its regulations an arbitration clause before the Chambre arbitrale du sport ('CAS') of the CNOSF to resolve certain commercial disputes between professional soccer clubs participating in the French Ligue 1 and Ligue 2 championships. The latter explained that this choice, made against the backdrop of the Covid-19 crisis, was primarily a reaction to dilatory procedures aimed at delaying payment of claims relating to player or coach transfer contracts.

The debate continued with Mrs. Patricia Moyersoen discussing the advantages and disadvantages of arbitration as a means of resolving sports disputes. According to this experienced practitioner, although arbitral justice can sometimes give rise to fears, it enables a fair decision to be reached for the parties, and one that responds to the specificities of sport. Taking the example of the problems raised by disputes concerning the "transfer" of players and coaches, Ms Moyersoen stressed the need for the court responsible for deciding these issues to understand the vocabulary and the stakes involved.

Mr. Bernard Foucher (honorary Conseiller d'Etat, member of the CNOSF's CAS administration committee, and CAS arbitrator) was then asked whether arbitrators or state judges were better suited to resolving sports-related disputes. Mr. Foucher began by pointing out that the system currently in place in France works, and that administrative judges appreciate this type of litigation. He noted, however, that arbitration offers significant advantages (notably the security of the solution, which through arbitration is characterized by a definitive award) and that it is not impossible that, in the more or less near future, sports disputes will be submitted to arbitration in France.

Lastly, Mr. Philippe Piat, President of the Union nationale des footballeurs professionnels ('UNFP') since 1969, was given the floor. Mr. Piat expressed the reluctance of soccer players towards refereeing. In particular, he recalled the criticisms levelled at the CAS (such as its lack of independence from international federations), and the risk that those who lay down the rules in this field will also be those who apply them to settle sporting disputes. Mr. Piat also pointed out the high cost of arbitration procedures for athletes. In other words, according to Mr. Piat, sportsmen and women have more confidence in state justice, particularly in view of the judge's impartiality.

After a richly debated first half, Me Pierre Viguier blew the whistle on the conference's "half-time". Participants took advantage of this convivial moment to chat and enjoy the spring sunshine on the terrace of the magnificent Salon Concorde at the Parc des Princes.

The second half was kicked off by Jean-Rémi de Maistre (*Co-founder and CEO of Jus Mundi*). Mr. de Maistre presented the background of the Jus Mundi legal tech, its innovative research functions and the products it offers to arbitration practitioners, including in international sports disputes.

It was then the turn of the conference's second panel, to discuss the following topic: "*Drawing on 40 years of the Court of Arbitration for Sport: Time for Evolution, Innovation or Revolution?*" The second panel, also moderated by Me Pierre Viguier, included Michele Bernasconi (*Partner at Bär & Karrer, and CAS arbitrator*), William Sternheimer (*Partner at Morgan Sports Law*), Alexandra Gómez Bruinewoud (*Senior Legal Advisor at FIFPro*), David Pavot (*Professor of Law at the University of Sherbrooke, and holder of the Research Chair on Anti-Doping in Sport*) and Antoine Duval (*Senior Researcher at T.M.C. Asser Instituut*).

Mr. William Sternheimer outlined the main features of the CAS procedures, stressing that the strength of the CAS lies in the mechanism for appealing decisions by federations and other sports bodies. He explained, however, that the CAS is an institution with room for improvement, and that greater stakeholder involvement is needed to improve the system. The floor was then given to Ms. Gómez Bruinewoud, who insisted on the need to reform the CAS, particularly with regard to the cost of proceedings for athletes, the time taken to obtain an award, the independence and transparency of the CAS and diversity in the appointment of arbitrators.

The discussion continued with a presentation by Professor David Pavot, who outlined the changes that should be made to the CAS with regard to doping disputes, conflicts of interest and the legal aid mechanism. The discussion continued with Mr. Antoine Duval, who reported on the numerous criticisms levelled at CAS, referring in particular to the recent decisions handed down by the European Court of Human Rights ('ECtHR') in the *Mutu & Pechstein v. Switzerland* and *Caster Semenya v. Switzerland* cases, on the one hand, and the judgments of the Court of Justice of the European Union in the International Skating Union, European Super League and Royal Antwerp cases, respectively, on the other. In Mr. Duval's view, a thorough structural reform of the CAS is essential, drawing inspiration from the model of international tribunals. Finally, the floor was given to Mr. Michele Bernasconi, who underlined the progress made by the CAS over the last 20 years, particularly in terms of access to justice in sports matters. He admitted, however, that the system is not perfect, and that it is up to the CAS to instill confidence in its stakeholders so that its success and credibility continue to prevail in the sports world.

Discussions continued on the question of possible alternatives to the CAS. Mr. Sternheimer spoke briefly about the Basketball Arbitral Tribunal ('BAT'), which was set up by the International Basketball Federation ('FIBA') to settle contractual disputes between players, agents, coaches and clubs in the field of basketball. Ms. Astrid Mannheim (*Senior Case Manager at Sports Resolutions*) then joined the speakers to introduce *Sports Resolutions*, a non-profit organization specializing in the out-of-court settlement of sports-related disputes.

In conclusion, the speakers agreed that there is a real need to reform the current system for resolving international sports-related disputes, albeit favoring evolution over revolution.

Me Pierre Viguier concluded the conference and invited participants to join the Paris Saint-Germain President's Lounge, which gives direct access to the official grandstand and its panoramic view (the stadium was lit up for the occasion). During the cocktail reception, guided tours enabled participants to discover the players' changing rooms and the edge of the pitch, as well as many other emblematic areas of the Parc des Princes.

ARBITRAL PROCEEDINGS

THE FRENCH CONCEPT OF THE AUTONOMY OF ARBITRATION - WHAT'S AT STAKE?

By Théo Moreno and Lea Maalouf

On Wednesday 20 March 2024, for the first time in its history, the Paris Arbitration Week ('PAW') hosted a conference organised by the Paris Court of Appeal. This historic conference provided an opportunity to review the French conception of the principle of the autonomy of arbitration, while opening up the discussion to an analysis of comparative law. The conference was hosted by Mr. Jacques Boulard (*First President of the Paris Court of Appeal*), Mr. Daniel Barlow (*President of the International Commercial Division of the Paris Court of Appeal*), Ms. Fabienne Schaller (*President to the International Commercial Division of the Paris Court of Appeal*), and Ms. Laure Aldebert (*Adviser to the International Commercial Division of the Paris Court of Appeal*). The panel was moderated by Mr. Philippe Pinsolle (*Partner at Quinn Emanuel Urquhart & Sullivan LLP*), and included Prof. Eric Loquin (*Professor Emeritus at the University of Burgundy*), Prof. Claire Debourg (*Professor at the University of Paris X Nanterre*), Prof. Franco Ferrari (*Professor at the New York University School of Law*), Ms. Claire Pauly (*Partner at Jones Day*), and Dr. Xavier Favre-Bulle (*Doctor of Law and Partner at Lenz & Staehelin*).

Mr. Benjamin Siino, co-founder and partner of Gaillard Banifatemi Shelbaya Disputes and co-chair of PAW 2024, started off by giving a keynote speech highlighting the significant influence of French case law on the development of international arbitration law.

The First President Jacques Boulard then took the floor by first presenting the recent developments and initiatives taken by the French legal system to promote international arbitration and adhere to the modern international practices, such as the establishment of international chambers within both the Paris Commercial Court and the Paris Court of Appeal.

Mr. Daniel Barlow then explained that the principle of autonomy of arbitration is welcomed by the Court of Appeal given its 'praetorian' origins. He touched upon the development of French case law dating back to the 1960s, which in his view, reflects the clear intention of the French law and legal system to favour international arbitration.

Ms. Fabienne Schaller then emphasised the relevance of the conference's subject. She pointed out that despite its apparent simplicity, the subject raises some complex issues in France's neighbouring countries. She described the principle of autonomy as the 'French touch' in international arbitration and explained that it would be rather interesting to explore the topic from a comparative perspective.

Ms. Laure Aldebert further highlighted the Court of Appeal's creation of a practical procedural guide - inspired by good practices in arbitration - which confirms that the Paris Court of Appeal is inclined towards giving greater importance to oral hearings and party discussions. She also mentioned the future creation of a new courtroom for international cases.

The floor was then given to the speakers. First, Mr. Pinsolle pointed out that this was the first international conference which brought together the appeal authority in dialogue with leading individuals in international arbitration. He then introduced the speakers, and gave the floor to Prof. Éric Loquin who began by explaining that the principle of autonomy of arbitration in France is governed by two main principles.

The first principle is that of the autonomy of the arbitration clause, the first manifestation of which can be found in the *Hecht* decision of 4 July 1972, whereby the Court of Cassation held that the arbitration clause is completely autonomous in international matters. A striking feature of this case law is that it neither seeks nor states which law is applicable to the arbitration clause, but rather bases this autonomy on the common will of the parties and their good faith in applying the arbitration clause. This approach was crystallized by the Paris Court of Appeal on 13 December 1975 in the *Menicucci* decision, where it was held that an arbitration clause is valid regardless of any state law.

Lastly, this development took concrete form in the *Dalico* judgment of 20 December 1993, which states that the principle of validity of the arbitration clause is based on an international substantive rule of arbitration law, without specifying the origin of the rule. In its decision of 7 June 2006, the Court of Cassation stated that the principle of the validity of the international arbitration clause was a substantive rule of French international arbitration law.

Prof. Loquin further explained that this perception of the autonomy of an arbitration clause is not unanimous, particularly in countries where the substantive rules method has been described as imperialistic. Prof. Loquin's view is that there is no such imperialism, since the arbitration agreement is a procedural agreement whose effectiveness can only be assessed in light of the law of the forum. In this respect, he cited the possibility offered by the New York Convention of 10 June 1958 for each State to declare unilaterally that the clause is valid if the rule invoked by the court of the forum is more favourable to the circulation of arbitration awards than the Convention allows. Regarding the review of the effects of an award in the French legal order, it is for French law to determine the rules applicable to this review, in compliance with international conventions. The French *lex fori* is therefore legitimate and based on public international law.

The second principle governing the principle of autonomy of arbitration is that an arbitral award is not part of any legal system. This principle was set out in the *Putrabali* decision of the French Court of Cassation of 29 June 2007, where it was held that an arbitral award is not part of the legal system in which the arbitration is seated. According to this point of view, there would be no arbitral forum. On the one hand, this absence of an arbitral forum means that it is only for the arbitral tribunal to determine its own jurisdiction. On the other hand, it means that the arbitral tribunal itself is not integrated into the legal system of the seat. This also means that a foreign decision setting aside an international arbitral award will have no effect on the validity of that same award under French law. In 2022, the Paris Court of Appeal recognised that a foreign court's decision on the merits of a case does not prevent the recognition of an award made subsequently in the same case. The Paris Court of Appeal also ruled that there is no contradiction in requesting exequatur in France for an award rendered by an arbitrator appointed by a foreign support judge, when the decision of that support judge was subsequently set aside in the legal system where it was delivered. Hence, it depends on the French court's discretion to verify whether the arbitral tribunal was properly constituted under French international arbitration law. Some authors have argued that before the exequatur judge, the only issue at stake is the award, concluding that the *Putrabali* decision requires that all foreign decisions rendered by the legal system of the seat of the arbitration be ignored.

Prof. Loquin concluded that when an award is required to be enforced in France, it is treated as if it were retroactively governed by French law. He then answered a couple of questions asked by Mr. Pinsolle. He noted that he did not believe that the substantive rules method entailed a risk of arbitrariness as long as they coincided with the rules of public international law.

The floor was then given to Prof. Ferrari, who first discussed the doctrine of 'exceptionalism' under French law. This notion pertains to a legal system having unique characteristics that distinguish it from foreign systems. In his view, French exceptionalism is a reality in international arbitration. He explained that in the majority of foreign laws, the law of the seat holds more significance than other laws that are likely to apply to an arbitration, thus raising itself to the rank of *lex arbitri*. This means that, in these countries, the seat of arbitration functions as an anchor point binding the arbitration to that seat, and consequently to its mandatory rules and public policy.

According to Prof. Ferrari, the seat is particularly important in the post-arbitration phase as the law of the seat determines the grounds for setting aside an award, and the courts of the seat will apply their national law if no foreign law was chosen by the parties. The seat is equally important with regards to the procedure for recognising and enforcing the award, taking into account whether the country of the seat has ratified the 1958 New York Convention or not.

Prof. Ferrari then pointed out that French courts accept to recognise an award that has been set aside by the courts of the country of origin. However, he believes that this rule does not form part of an autonomous arbitration legal system but is simply a manifestation of the French arbitration practice. He explained that this principle is only applicable in France, despite the fact that it aspires to be applied on a much wider scale.

Answering questions asked by Mr. Pinsolle, Prof. Ferrari emphasised that the courts are subject to their legislative framework, which leaves them little room to instil a different political will towards arbitration. As a final point, he explained that the distinction developed in the United States, between primary jurisdiction (designating the courts of the seat of the arbitration) and secondary jurisdiction (designating the courts of the place where the award is sought to be enforced) applies only to the functions fulfilled by the two distinctive courts and does not create a hierarchy.

Mr. Pinsolle then gave the floor to Prof. Debourg, who discussed the negative impact of the competence-competence principle. She began by pointing out that the negative effect has been long criticised for delaying the outcome of the dispute and for forcing the parties to seize an arbitral tribunal, precisely to contest its proper jurisdiction. However, Prof. Debourg considers that these criticisms are not sufficient to invalidate this principle. She considers that the disadvantages are only temporary as they are intended to be resolved by the annulment judge. Conversely, allowing the court and arbitration proceedings to run in parallel would increase the risk of having conflicting decisions, which could slow down or even paralyse the arbitration altogether.

Prof. Debourg then discussed the key points of the negative effect of the competence competence principle as a tool for managing parallel proceedings and preventing conflicting decisions. In arbitration, in the context of identical disputes, conflicting decisions are said to be the result of a malfunction in the rules governing the allocation of jurisdiction between the judge and the arbitrator. The negative effect has the advantage of coordinating and prioritising jurisdictions before any problem arises by giving priority to the arbitrator. Nevertheless, this effect cannot take into account foreign parallel proceedings, which often presents serious inconveniences.

Prof. Debourg explained that there may still be room for improvements. She presented the hypothesis of a foreign decision brought before the French court for enforcement and wondered whether the French court could or could not have a different say in the post-arbitration proceedings. This could be envisaged in the event where the foreign court rendered an award disregarding the existence of an arbitration clause, and the rendered award cannot be recognised in France. This solution could then have two legal bases: firstly, it may be considered that the foreign decision violates the conditions of indirect jurisdiction, at the cost of a slight adaptation of the rules on recognition of a foreign decision set out in the *Simitch* judgment, which, in principle, relate to the violation of an exclusive French jurisdiction; secondly, a foreign decision could be declared contrary to international public policy if it disregards the competence-competence principle.

She concluded by explaining that this question now also arises with regard to the position of European judges, since the mechanism is now threatened by the London *Steam-Ship* case law of the Court of Justice of the European Union, which imposes compliance with the "fundamental rules of *lis pendens*" in preference of the *competence-competence* principle.

Finally, answering Mr. Pinsolle's questions, she considered that the application of the negative effect of the *competence-competence* principle favours arbitration, and she expressed her opinion on anti-suit and anti-arbitration injunctions, which she sees as highly effective.

The floor was then given to Ms. Pauly, who delved into the autonomy of arbitration proceedings by discussing the limitations of the power of the parties to exercise their procedural freedom. To this end, she identified some mandatory rules that are likely to limit the exercise of this right. She found that certain procedural rules in the 2021 ICC Rules of Arbitration are drafted in mandatory terms and do not allow the parties to modify them by agreement.

This appears to be the case in particular with Article 22(4), which guarantees the application of the due process and the principle of equality between both parties. This Article overlaps with Article 1510 of the French Code of Civil Procedure. Ms. Pauly presented a decision rendered by the Paris Court of Appeal on 19 January 2021, whereby the arbitral tribunal relied on the expert's report notwithstanding the parties' decision to not hear the expert during the hearing. The Court of Appeal ruled that a party's waiver of its right to have an expert heard during the course of the proceedings did not constitute a waiver of the adversarial principle or the so-called '*principe du contradictoire*' under French law, and set aside the award.

With regard to the principle of equality of the parties, Ms. Pauly presented a judgment dated 8 November 2016. In this case, Iraq was not able to file its own documents in support of its position because of the war. The arbitral tribunal saw no problem with this, considering that Iraq still had the opportunity to comment on the documents filed by the other party. This argument did not convince the Paris Court of Appeal, which annulled the award on the basis of the principle of equality of the parties.

Ms. Pauly concluded by discussing the increasing appearance of unbalanced arbitration clauses giving the claimant the power to appoint all the members of the arbitral tribunal. She pointed out that this situation creates a dilemma for arbitral institutions, which may find themselves in a state of confusion between whether they should respect the will of the parties or ensure that the award is not at risk of being set aside.

Finally, Ms. Pauly answered a question asked by Mr. Pinsolle regarding any other limits put on the procedural freedom of the parties. Ms. Pauly confirmed that, according to her analysis, there were no others, and that a consensus seemed to have emerged that failure to comply with the procedural rules chosen by the parties could only lead to the annulment of the decision if it violated the principles of adversarial proceedings and equality of the parties.

The final speaker was Mr. Favre-Bulle, who reviewed the limitations to the autonomy of arbitration, bringing a comparative approach between the Swiss and French law practices. He focused on eight criteria that have a direct influence on the autonomy of arbitration. The first is arbitrability, which remains an important topic in view of the risk that the restrictions existing in domestic arbitration may influence the freedom existing in international arbitration (notably because of the need for protection which could exist in certain fields: employment contract, etc.). The second criterion is the material validity of the arbitration agreement, about which Swiss law has a liberal conception with the alternative connection in favorem validitatis regarding the applicable law, which seems to be one limit less than in French law. The third criterion is jurisdiction, which Mr. Favre-Bulle dealt with through the prism of the extension of the arbitration agreement to non-signatory parties. Whereas French law easily admits that a third party which interfered with the conclusion or performance of a contract is bound by its arbitration agreement, without necessarily recognising substantive rights to that party, the Swiss Supreme Court considers that the party which interfered acknowledges material undertakings going beyond the sole arbitration agreement, which raises the question of the relationship between arbitration law and contract law. He then turned to the fourth criterion, that of judicial intervention, pointing out that under both Swiss and French laws, judicial interference in arbitration is minimal. However, Mr. Favre-Bulle considers that the French theory of the delocalisation of arbitration leaves more room to the negative effect of the *competence-competence* principle.

He further added the fifth criterion being the arbitration procedure. In this respect, the Swiss Supreme Court recently reduced the protection given to the right to be heard by increasing the threshold for establishing a breach of this principle (the elements omitted by the arbitral tribunal must be such as to influence the outcome of the dispute). French case law, on the other hand, is not as strict and more readily accepts complaints of failure to respect due process. The sixth criterion addressed relates to the scope of review of a breach of international public policy, which differs considerably between the Swiss and French practices. Whereas the Swiss Supreme Court has very narrowly defined public policy, the French courts has taken a broader view and give it greater protection, as shown in the recent cases decided on corruption. The seventh criterion is the waiver of annulment proceedings. Here too, the concepts differ: French law allows this waiver unconditionally under article 1522 of the Code of Civil Procedure, whereas Swiss law allows it only for parties who are not domiciled in Switzerland.

Finally, the eighth and last criterion analysed by Mr. Favre-Bulle is that of the recognition and enforcement of awards which, in Swiss law, is entirely governed by the New York Convention of 10 June 1958, unlike French law.

He concluded by answering two questions asked by Mr. Pinsolle on the nature of certain rules contained in the Swiss Private International Law Act. Mr. Favre-Bulle confirmed that certain provisions of this law could be considered as substantive rules.

TAX-RELATED ISDS DISPUTES: RECENT TRENDS AT ICSID, AND FUTURE PERSPECTIVES

By Yasemin Topcan and Céline Kahi

On Tuesday March 19, 2024, the second day of the 8th edition of Paris Arbitration Week, Simmons & Simmons hosted a seminar on the recent trends and the future perspectives of tax-related ISDS disputes, moderated by Mr. Philippe Cavalieros (*Partner and Global co-head of Simmons & Simmons' international arbitration practice*). The panel was composed of three guest speakers: Ms. Aurélia Antonietti (*Senior Legal Counsel at ICSID*), Prof. Arnaud de Nanteuil (*Professor of Law at Université Paris-Est Créteil and Senior Advisor of EY Société d'Avocats*), and Prof. Robert Danon (*Professor of Law at the University of Lausanne and Founding Partner of DANON*).

In his introductory remarks, Mr. Cavalieros introduced the seminar by highlighting the importance of the conference, emphasising the speakers' goal to unravel the complexities of tax-related disputes in international arbitration, and explore potential avenues for addressing the challenges they present.

The first panellist, Ms. Antonietti, set the scene with helpful statistics and illustrations of various carve-outs. According to an impact survey from 2021, 14% of the cases concerned tax measures as a primary issue (the same numbers have been found for ICSID cases). Ms. Antonietti further indicated that up until the year 2000, these cases were mostly contract-based disputes. While post-2000 international investment arbitrations involving tax measures were mostly Argentinean and Ecuadorian, the last 14 years has seen a majority of Spanish or Italian cases. As of 31 January 2024, 129 cases concerning taxation have been registered.

Ms. Antonietti turned to explain that 78% of the cases are based on treaties (all treaties being taken into account), 13% on contracts and 9% on investment law. This is a fair reflection of what is also happening in what the panellist referred to as "regular ICSID cases". The respondents are mainly from: Western Europe (29%), Eastern Europe (20%) and South America (17%). As for the claimants, they are mainly from: Italy, Spain, Germany, US, Netherlands, Luxembourg, France, Turkey, UK, and Denmark. Ms. Antonietti inferred from the average duration of tax-related cases being over five years, that their duration is not shorter compared to other cases unrelated to taxation.

The panellist noted that there seems to be less discontinued settlements in tax-related disputes than in other cases and specified that such a result is "telling". As such, 24% of the dispute settlements are abandoned whereas in regular cases the percentage is 36%.

As for definitions, Ms. Antonietti mentioned three categories of investment law treaties: (i) the treaties which totally exclude matters regarding taxation (an example is the *Indian-Poland* BIT); (ii) treaties with partial exclusions (such as national treatment or some specific taxes); and (iii) treaties which exclude tax matters from the application of some specific provisions (an example is Article X of the *US-Ecuador* BIT which provides the provisions of the treaty shall apply to matters of taxation only with respect to specific matters, among which expropriation). The latter category is a carve-out which itself has exceptions referred to as "clawbacks" (an example is Article 21.1 of the Energy Charter Treaty ('ECT')).

Ms. Antonietti identified the following questions as to determine whether a tax matter falls within the exclusion's scope: who, what, why? As an illustration, she focused on the different interpretation given by separate arbitral tribunals on the Ecuadorian Law 42 which aimed to tax the superprofits resulting from oil exploitation. While in some cases the law was considered as a tax (notably in *Burlington v. Ecuador*, ICSID No. ARB/08/05 and *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6), the tribunal of the *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID No. ARB/08/4 case stated that the law operated as a tax without being considered as such. Finally, Ms. Antonietti mentioned Article 21.7 of the ECT and the well-known cases regarding the *Italian Robin Hood* tax which mentioned the word "*fee*" to cover management and control expenses instead of "*tax*", thus excluding the "*fee*" from the ECT's scope.

Professor de Nanteuil then aimed to identify the main tools given by international law to address tax measures. Their particularities are double as they are linked to State sovereignty and most are covered by double taxation conventions ('DTCs'). While tax measures infringe by nature on private property, Professor de Nanteuil suggested that the reduction of the value of assets is not the criterion which will be useful to determine whether there is a breach.

The essence of Professor de Nanteuil's intervention rested on the importance of an analysis on the implementation of the litigious tax measure as all State measures are by nature lawful. He focused on the notions of expropriation and fair and equitable treatment. He stated that expropriation clauses are not the most protective clauses when it comes to taxation as it is well-established that the threshold to qualify a measure as an expropriation is very high. While it is known that expropriation can be direct or indirect, "*by their very nature, tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that may be tantamount to expropriation*" (*Marvin Roy Feldman Karpa v. Mexico*, ICSID ARB(AF)/99/1). Professor de Nanteuil inferred that the tax measure must be, first, confiscatory, *i.e.* "*impos*[ing] *a charge of such magnitude, that taxpayers are forced to abandon their property in the hands of the State or to sell assets at a distressed price*" (*Manolium Processing v. Belarus* PCA No. 2018-06); and, second, unlawful (*ADC Affiliate ltd v. Hungary* ARB/03/6). If such steps are followed, Professor de Nanteuil concluded that a breach could be established under expropriation which might explain the existence of complex provisions involving tax and expropriation.

The panellists went on to suggest that leverage can be applied more efficiently with regard to fair and equitable treatment. While the tax measure's confiscatory effect or its amount can be used, the absence of such elements can be compensated by establishing discrimination which can amount to a breach of fair and equitable treatment. Professor de Nanteuil indicated that such exercise can be done for every component of the standard.

Nevertheless, he emphasised, by relying on the *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, the importance to recall that any change in the tax regime cannot amount to a breach of the fair and equitable treatment.

Professor Robert Danon finally mentioned the possible interactions between the fields of tax and arbitration and the misunderstandings that can arise from such interactions.

Professor Danon referred to international tax law as a moving target. Through a few opening remarks, he indicated that although DTCs remain the primary source of the international taxation system, the sources of international tax law are no longer solely derived from tax treaty law. The traditional distinction between national and international taxation is blurred. The most prominent example is the global minimum tax, consisting in a set of rules which are directly transposed into national law. Although it remains domestic law, the approach is globally accepted, and states do give up a portion of their sovereignty by committing to globally accepted standards. Professor Danon further stated that one of the extensive problems of the international tax system is the absence of a common tax architecture expressed in a global dispute mechanism. In addition, he highlighted three differences of the mutual agreement procedure ('MAP') with investment arbitration: (i) it is settled State to State; (ii) it only requires disagreements on the tax provisions of the convention; (iii) and the outcome of a MAP is not published. Amongst the strategic questions from an international tax point of view, the panellist encourages a more holistic approach of the resolution framework.

From a jurisdictional perspective, Professor Danon pointed out that while arbitral tribunals do not have jurisdiction under a DTC, and while 'inconsistency clauses' in DTCs sometimes provide for the MAP to prevail, tax treaties and investment treaties govern different subject matters and are as such not incompatible.

Further, Professor Danon indicated that in the absence of a tax carve-out, there is no reason for an arbitral tribunal not to have jurisdiction over a tax-related dispute. He thus excluded implied exclusions (*Cairn v. India*), and explained that the notion of taxation matters is a treaty notion and that states are not at liberty to twist the carve-out by designing all types of taxes that are difficult to be able to be labelled as such.

From a substantive perspective, Professor Danon declared that the general perception in the international tax world is that arbitral tribunals second guess state policies. The importance of comparative tax law is thus raised, given that international tax rules are dominant. Moreover, the *Lone Star v. Korea*, Case No. ARB/12/37 is referenced in the OECD commentaries and in some globally accepted materials. For example, the Transfer Pricing Guidelines are globally accepted and give the example of what refers to the fair and equitable treatment standards. Such benchmarks for proper State conduct may in the future contribute to arbitral tribunals' analysis.

In his concluding remarks, Professor Danon raised three questions. Is the MAP viable in the long run? Will the increasing trend of tax carve-outs be justified from the perspective of ISDS and international tax law? Is the sovereignty argument really persuasive?

TAINTED ARBITRATION: BETTER KNOW WHERE YOU STAND (AS A LAWYER)! PERSPECTIVES FROM FRANCE, ENGLAND AND LUXEMBOURG

By Elizabeth Ebelechukwu Arubalueze and Aliénor Nin

On Tuesday 19th of March 2024, BSP hosted an hybrid session on "*Tainted Arbitration: Better know where you stand (as a Lawyer)! Perspectives from France, England & Luxembourg*" at Alerion Avocats. The event shed light on the complex issues surrounding tainted evidence, proceedings, and the enforcement of allegedly tainted awards, from a comparative analysis, cutting across perspectives of lawyers from France, the UK, Luxembourg and an English investigator who focused on the consequences for the practice of lawyers.

The Panel was constituted of Fabio Trevisan (*Partner at BSP*), Laure-Hélène Gaicio-Feivez (*Partner at BSP*), Jacques Bouyssou (*Partner at Alerion Avocats*), Marie-Hélène Bartoli Vallet (*Counsel at Alerion Avocats*), Sebastian Neave (*Director at J.S. Held LCC*), and Jason Woodland (*Partner at Peters & Peters Solicitors LLP*).

Mr. Trevisan commenced the session by giving a general overview of what led to the topic. He highlighted that very recently in France, there was a change of case law concerning the admissibility of evidence obtained by unfair means. He further buttressed this development with the point that there is an increasing interest from the arbitration community in wanting to have arbitration proceedings and the resulting awards be irreproachable. Hence, in France, at the enforcement stage or at the setting aside proceedings, whenever an award is challenged for breach of international obligation policy, the allegations are fully examined by the French Courts on the merits. The rationale behind doing so is to search for the truth - so, they always involve considerations of fairness in the conduct of the proceedings. With this, there is a great realization that the legal traditions practiced in France are significantly different from the UK and Luxembourg.

Mr. Bouyssou spoke about evidence, from the French perspective. He began his point by capturing the role of lawyers, who in an ongoing or future arbitration is presented evidence by a client - evidence that might be relevant on the merits, but dubious as to its origin or authenticity. He classified it as 'tainted evidence'. Further delving into the subject matter, evidence was broken into two facets: first, that which a lawyer suspects may have been fabricated; second, authentic evidence, obtained through illicit or unfair means. Therefore, this refers to different types of evidence, all encompassing, fabricated evidence, forged documents, unlawfully obtained evidence such as authentic evidence, but obtained through processes violating the law (for instance, physical or electronic intrusions), even so, there is unfairly obtained evidence - which is authentic evidence obtained without breaking any particular rule, but obtained in a way that violates fairness (for instance, evidence obtained in a covert manner such as audio or video recording without the consent of the person).

Strengthening the foregoing point, Mr. Bouyssou raised a probing question - where evidence is obtained through leaks, how are lawyers supposed to handle such cases? He answered by highlighting certain institutional rules. Under the IBA rules for instance, the arbitral tribunal may at the request of the party or on a *suo moto* basis, exclude evidence that represents legal impediments or privileged information that may infringe on commercial or technical confidentiality or evidence that may raise issues regarding fairness or equality of the parties, or to exclude evidence that was obtained illegally. The tribunal will take into consideration due process requirements such as the legal duty of good faith, respect of the equality of forms, principles of equal treatment and procedural fairness. The tribunal will also take into account the procedural public policy of the place of enforcement of awards and seat of arbitration. The tribunals and the lawyers will thus have to balance between the process and circumstances through which the material was obtained.

Ms. Bartoli Vallet also came from the French perspective, in answering a pivotal question on how the principle of fairness is applied and understood from other jurisdictions. She began by referring to Article 1464 of the French Code of civil procedure, which establishes the principle of fairness in the conduct of proceedings. Even so, Art. 6.1 of the ECHR establishes due process. Hence, it is for each party to prove in accordance with the law, the facts, necessary for the success of its claim. The principle is clear and fairly obtained evidence is admissible, but it is a bit more complicated. Authentic evidence obtained through unlawful or unfair means was not admissible under French law, especially in civil and commercial proceedings, but was a bit different in criminal proceedings. It is however different now due to a ruling of the Court of cassation in 2007 which changed the landscape on the distinction between unlawful evidence and unfair evidence. It was decided that there was a right to evidence which allowed unlawful evidence to be declared admissible where such evidence was essential to the claim and if the infringement of the conflicting rights in question was strictly proportionate to the aim pursued. The plenary session of the Court of cassation in 2011, however gave a contrast ruling stating that you could not submit evidence gathered by deceit without someone's consent. This was the legal framework, until December 2023, which then unified the rules regarding unfairly and unlawfully obtained evidence. Now if the two-prong test - 'necessity for the success of the claim' and the 'proportionality to the aim pursued' - are met, it makes the evidence admissible, even though they were obtained unfairly. Where the conditions of the test are not met, the client may be convicted for a violation of criminal law.

From the UK Perspective, Mr. Woodland stated that evidence illegally obtained is treated slightly differently. It flows from the English approach to disclosure - anything relevant has to be disclosed to the court or the tribunal. The general rule in England is that evidence, provided it is relevant, is admissible. There is no general rule that the evidence ought to be obtained in a lawful manner, nor is there a sort of weighing of proportionality.

Mr. Neave, the English Investigator commented on the 'gray zone' areas covering evidence obtained by a non-party to the dispute, upon instructions - thus answering the question concerning where lawyers stand in such instances.

The Luxembourg perspective, according to Ms. Gaicio-Feivez, is very similar to that of France. Case law always takes much longer to change in Luxembourg. As of today, the Luxembourgish courts will not accept evidence obtained by an unlawful means such as a hidden camera, or telephone tap. This constitutes a criminal offence, like before the French courts.

On tainted proceedings, each panelist added their respective views on the matter, highlighting relevant major case law developments. Per the particular advice given by Mr. Bouyssou from the French perspective, as counsel, there is no bargaining that the success of your client's claim is of importance. However, it is crucial to behave properly as a lawyer and to fight against fraud. There is an obligation to know who your client is, who pays your fees, who gathers the evidence - essentially, a duty of vigilance rests on the lawyers' shoulders.

Ms. Gaicio-Feivez, from the Luxembourg perspective stated that there is an obligation on the part of the lawyer to report any suspicion of money laundering, and it has to be obvious. Even so, when there is a criminal investigation going on, Luxembourgish law follows the same principle in France that criminal law takes precedence over civil law. Usually, civil proceedings will be stayed, pending the criminal proceedings.

Finally, Mr. Neave summed up his point from the UK perspective using the notorious case dating back to 2017 between Nigeria and the UK - the P&ID case - to further emphasize the duty a lawyer ought to assume in the instance of a tainted arbitration proceeding.

ETHICS AND ARBITRATION: SHEDDING LIGHT ON ISSUES OF CONFLICTS INTEREST, INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS

By Oumeima Baazaoui

On Tuesday 19th of March 2023, Navacelle hosted a seminar on "*Ethics and Arbitration: Shedding light on issues of conflicts of interest, independence and impartiality of arbitrators*".

The panel was moderated by Stéphane de Navacelle (*Founder and Managing Partner at Navacelle*), and was composed of Michael Ostrove (*Partner at DLA Piper*), Patricia Nacimiento (*Partner at Herbert Smith Freehills*), Eduardo Damiao Gonçalves (*Partner at Mattos Filho*) and Ashish Bhan (*Partner at Trilegal*).

To kick off the discussion, the panelists started by examining the evolution of ethical standards across the different legal systems (France, Germany, Brasil and India) and the importance of disclosure in regard to independence and impartiality.

Ms. Nacimiento started by introducing the idea of a reasonable standard of disclosure and Mr. Ostrove followed up on that idea by explaining the high standard of disclosure in France. He then moved on to discuss the recent position of French courts, according to which the party seeking annulment has to prove that they did not know or could not have reasonably known about the issue raising concerns regarding the arbitrator's impartiality or independence. This jurisprudence brings forward new nuances on the questions of the burden of proof and imposes a heightened burden of diligence on parties.

Mr. Gonçalves then stepped in to explain that it is fair to state that the standards of disclosure are pretty similar everywhere, but the tension exists around the definition of these standards. In fact, impartiality and independence remain concepts that are not well established despite the IBA guidelines, the ICC intervention or the clarifications brought by national courts. These rules are often used as a last resort as a ground to challenge the award.

As to Mr. Bhan, he emphasized the change brought by the recent amendments introduced in India in order to codify disclosure requirements so that it does not constitute a ground for challenge. According to these amendments, doubts should be brought forward at the first occurrence; otherwise, they're not entertained. These amendments have consequently allowed national courts to rationalize arbitral awards challenges.

Ms. Nacimiento then moved on to explain the evolution of the standards of institutions regarding the matter: in fact, ICC has become very strict regarding disclosure but if there are disclosures, the arbitrators will most likely not be confirmed. Thus, finding arbitrators has become a real difficulty. That is why, according to her, having reasonable standards is a must. As to arbitrators, she believes it is crucial to exercise common sense and self-control as well as self-awareness when getting in touch with counsels. She highlighted the idea that by behaving inappropriately, arbitrators and counsels alike hurt the entire arbitration community.

Mr. Gonçalves added that disclosure only results in non-appointments when the arbitrators were appointed by someone else than the parties. Due to these difficulties, arbitral institutions often end up taking a more flexible approach towards these issues. He put forward a double duty in the matter: while the arbitrator should be held to his duty to inform, the parties have a duty to investigate.

Following that idea, Mr. Ostrove explained that according to him the IBA rules don't address this question as well as they should but the lists with green/orange/red flags are a good place to start. The appearance of independence is also as important as being independent and impartial.

Mr. Navacelle then summed up the discussion and went on to add that the end user is entitled to have the service they're paying for; that is: efficiency, neutrality and no bias. On the other hand, he did highlight one positive collateral effect of extreme disclosure rules: it holds people responsible for their decisions to interact with other practitioners.

Offering key takeaways, each panelist put forward an idea that they thought everyone should keep in mind: Mr. Bhan thought it is crucial to enlarge the arbitration community in order to tackle these concerns and have fewer chances of having the same people always interacting with each other.

Ms. Nacimiento emphasized the role and importance of diversity of mindsets and nationalities that allow the unification of approaches as we try to find a common ground and a uniform approach stemming from all of them.

As to Mr. Gonçalves, he highlighted the role of consistency and coherence principles in this matter. According to him, arbitrators should avoid both being partial and giving away an appearance of bias. As for counsels, they should have the courage to push back with clients if these ones want to go against what the community advocates for.

Finally, Mr. Ostrove approved the idea of avoiding the appearance of bias but added that we should also take regional differences into account. Thus, if the parties raise no objections, it shouldn't be a problem. In this regard, it is wise to balance global tendencies with local specificities.

THE INTERACTION BETWEEN THE MERITS OF THE CASE AND RATIONE TEMPORIS ISSUES

By Lea Maalouf and Yasemin Topcan

As part of the 2024 Paris Arbitration Week, Jones Day hosted a bilingual event which revolved around the intricate interplay between the "*Merits of the Case and Ratione Temporis Issues*" in investor-State arbitration, albeit from the lens of French law and quantum experts. The event, which was moderated by Claire Pauly (*Partner at Jones Day, Paris*), was divided into two parts. The first panel was held in French and featured Jérôme Ortscheidt (*Special Counsel before the French Court of Cassation*) and Professor Sophie Lemaire (*Université Dauphine*), who discussed the French courts' approach on ratione temporis issues in investment arbitration, in the context of annulment proceedings. Whereas, the second panel was held in English and featured Alan Rozenberg (*Compass Lexecon*) and Marion Gady (*FTI Consulting*), who discussed how the link between ratione temporis issues and the merits of a case is viewed by quantum experts and whether there is a possibility to take into account past acts or facts in quantification of damages in investment arbitration disputes.

First of all, Mr. Ortscheidt set the stage by delineating the difference between 'jurisdiction ratione temporis' and the 'merits' of a case as recognized by French courts, be it in the context of French-seated arbitration proceedings or arbitral awards that are sought to be recognised or enforced in France. In this regard, Mr. Ortscheidt explained that the post arbitration review that is conducted by the French 'annulment judge' has in fact two elements, which are that first the judge has to legally characterize on their own motion the issue(s) at the heart of the dispute seized before the court, and then has to review if jurisdiction was properly assessed by the arbitral tribunal.

Both panellists kept reminding the attendees of the significant distinction that shall always be drawn between issues falling under 'jurisdiction' and those falling under 'merits'. They mostly relied on the recent decision dated 7 December 2022 of the French Court of Cassation in Oschadbank v. Russia, which concerned the interpretation of Article 12 of the Ukraine-Russia Bilateral Investment Treaty ('BIT') stating that "[t]*his Agreement shall apply to all investments made by the investors of one Contracting Party in the territory of the other Contracting Party as of 1 January 1992*". It was explained that provisions as such may on one hand be interpreted as an 'arbitration clause' affecting the entire scope of application of the BIT, and on the other hand be treated as the rest of the provisions provided for under the treaty where no further review or interpretation is required beyond the 'wording' used in the provision. According to both professors, if a BIT does not contain an explicit provision defining jurisdiction ratione temporis, then the treaty's jurisdiction ratione temporis shall not be limited. The rationale behind this analysis is the application of the 'principle of separability' of arbitration clauses. In Oschadbank v. Russia, the French Court of Cassation analyzed that Article 12 of the Ukraine-Russia BIT fell outside the annulment judge's scrutiny as the court explained that it provided for the ratione temporis scope of application of the treaty rather than the court's ratione temporis jurisdiction. The decision seems to have adopted the following two principles: 'where the law does not distinguish, neither should we' (*ubi lex non distinguit, nec nos distinguere debemus*) and 'one does not add a condition to a treaty which does not provide for it'.

Prof. Lemaire further highlighted that, in this same case, the court established another condition that is "*for the purpose of ratione temporis jurisdiction, the Court of Appeal only had to verify that the dispute arose after the entry into force of the treaty*". She also noted that if the treaty is silent and does not provide for an explicit limitation on the tribunal's jurisdiction ratione temporis, French courts tend to rely on Article 28 of the 1969 Vienna Convention on the Law of Treaties, providing that a treaty shall not be applied retroactively "*unless a different intention appears from the treaty or id otherwise established*".

The complexity of this topic was further explored by looking into how certain BITs were drafted in terms of their temporal scope of application. While some BITs proved to be quite straightforward, others were rather confusing. By way of example, Article 8(1) of the Argentina-France BIT provides that: "[a]*ny dispute concerning investment within the meaning of this agreement between one of the Contracting Parties and an investor of the other Contracting Party shall as far as possible, be settled amicably between the two parties concerned*."

In this example, the treaty refers to 'any dispute'; however, other treaties refer to a 'disputed measure' instead and that is where the uncertainty arises. In most cases, the parties would have opposing views on the definition of the 'disputed measure'. In any case, both professors opined that the dispute brought before an investment arbitral tribunal should have arisen after the BIT's entry into force. Furthermore, they highlighted the definition of a 'dispute' put by the Permanent Court of International Justice in *Mavrommatis Palestine Concessions* case of 1924, where it was held that a dispute arises when there is a "*disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*".

Moving on to the relation between *ratione temporis* issues and the merits of a case from the perspective of quantum experts, Ms. Gady first highlighted that there are certain factors that are taken into account when calculating the value of an investment and allocating damages, such as the 'risk' of an investment. In this regard, she clarified that any factor that protects the investment, which falls under the category of 'risk', has a positive value; hence, should be taken into account at the valuation stage. Furthermore, Ms. Gady shared some results of a recent survey, which surprisingly revealed that market practitioners do not particularly consider when dealing with issues of quantum, the drafting or the wording of certain provisions of the BIT - those providing for a temporal scope of application for instance. That is because these practitioners consider that BITs simply provide for the protections that a qualified investor shall enjoy in the host State, the obligations of both the foreign investor and the host State, and the dispute resolution mechanism that shall be adopted and applied in the event where a dispute arises between both parties in connection with the investment and the scope of application of the treaty. Ms. Gady opined that this stance is not that of quantum experts, who strive to take all factors into account when allocating damages, including the starting point of the 'dispute' or the 'disputed measure', the risk of an investment, jurisdiction *ratione temporis* when any issue about it is raised.

Ms. Gady even brought to the attendees' attention the fact that some quantum experts have tried, in a number of cases, to give a value to 'risks of expropriation' in the context of compensation requested due to unlawful expropriation performed by the host State. The *raison d'être* behind their argument was that States cannot benefit from their 'own wrongdoing'; this implies that when it is crystal clear that there has been an intention of expropriation and that the unlawful expropriation was deliberately performed by the host State, then this would amount to a 'risk of expropriation' that has been present at the time when the investment was made and before the emergence of the dispute - the act of unlawful expropriation. Therefore, this risk should be taken into account when evaluating compensation. That was the case in *Gold Reserve v. Venezuela*, where the tribunal held that the Canadian investor shall be compensated for the act of unlawful expropriation undertaken by the respondent State while taking into account the 'risk of expropriation' that clearly seemed to have been present before the expropriation was made. Ms. Gady presented other contrary decisions in which tribunals refused that investors rely on factors directly linked to *ratione temporis* issues - such as the presence of a 'risk of expropriation' - to request an unreasonable amount of compensation and 'over benefit' by claiming damages for a higher value than that of the investment.

Adding onto Ms. Gady's presentation, Mr. Rozenberg briefly discussed the Yukos cases which demonstrated how certain acts and factors related to jurisdiction *ratione temporis* may impact the merits of a case, and particularly quantum issues at the valuation stage. In this regard, he highlighted that the acts committed by the respondent State at the time when the investment was made may be taken into account at the valuation stage. In any case, Mr. Rozenberg noted that quantum experts will try to allocate any economic value for all relevant factors, including those that are related to the BIT's temporal scope of application.

In a nutshell, the intricate interplay between issues of jurisdiction *ratione temporis* and the merits of a case is a controversial topic within the framework of investment treaty arbitration in the context of French annulment proceedings, and the panel's discussion confirmed that it will most likely continue to be a focal point of debate for the years to come.

"TWILIGHT ISSUES: LATENT CHOICE OF LAW ISSUES IN ARBITRAL PRACTICE": LECTURE BY PROFESSOR GEORGE A. BERMANN

By Aya Serragui

On Tuesday March 19, 2024, Paris Place d'Arbitrage and Sorbonne Arbitrage, two associations committed to promoting Paris as the world's leading seat of arbitration, on the premises of the University of Paris 1 Panthéon-Sorbonne, hosted a lecture by Professor George A. Bermann presenting his latest book entitled *Twilight Issues in International Arbitration: Latent Choice of Law Challenges*. This was the sixth meeting organised by Sorbonne Arbitrage, whereby an author who has recently published a book was invited to present and discuss it.

Professor Bermann is a leading figure in litigation and commercial arbitration and has been teaching for 47 years between Columbia University, Sciences Po, The University of Paris 1 and Paris 2. Following a presentation of his new publication, a panel moderated by Professor Thomas Clay (*Head of Sorbonne Arbitrage*) and Gaëlle Le Quillec (*President of Paris Place d'Arbitrage*) discussed the insights offered by the volume. The panel was composed of Isabelle Michou (*Partner at Quinn Emanuel*), Matthieu de Boisséson (*Partner at de Boisséson Arbitration*), and Caroline Kleiner (*Professor of Law at Université Paris Cité*).

Professor Bermann started his lecture by defining his book as "a collection of high-level reflections on the direction international arbitration is taking today, specifically focusing on regularly encountered issues of arbitral practice". He defined the collection by the metaphor "twilight issues", referencing the image of tribunals in the dark when facing issues of practice, as arbitral tribunals are often without any clear guidelines to address these frequent issues. He analysed the lack of identification of a proper normative source for addressing these issues and explained their frequency in arbitral practice. Exhibiting some issues as examples, he followed the cycle of an arbitration from the question of parties waiving the right to arbitrate, to the relevance of the role of non-signatories, or the stakes of litigating first in investment cases. He also particularly insisted on the use of tribunal secretaries in arbitral tribunals and sanctioning of counsel in audiences, which he deemed particularly pertinent for the development of arbitral practice as a whole.

Moving forward, Prof. Bermann focused on the key role of the relationship between arbitration and jurisdictional laws. He proceeded to compare different laws and their sources, and their adaptability to arbitral practices by asking questions such as: Is national law the one that best fits the establishment of a common framework for twilight issues? Is the law of the Seat still prevailing over all considerations? Should awards still be considered in every jurisdiction? Does *lex causae* exacerbate procedural issues? While leaving the audience to discover his findings in the book, Prof. Bermann concluded the ongoing debate on the law of the seat by clarifying that "if the arbitrability of a case is put into question, then the law of the seat is not to be ignored". His final point concerned the link between 'twilight issues' and the relationship between international standards and their normative sources. He discussed soft law and doctrinal sources that have the advantage of being codified and easily revised. In pure arbitral custom, he discussed institutional rules (mainly those of the ICC and the LCIA) and their place as a standard, as well as arbitral jurisprudence and its recent developments. Prof. Bermann then concluded by clarifying that the aim of identifying these 'twilight issues' was to plant the seed for an international standard that is "gravely missing in arbitral practice"; an international standard that is only possible "through cooperation between doctrine and practitioners".

The discussion that followed saw panellists nuance the findings of Prof. Bermann. Firstly, Mr. de Boisséson questioned the mere existence of twilight issues, assuming that twilight issues are "in the essence of arbitral culture, as darkness is to a certain extent is the light, the aim of arbitration", making a reference to the adaptability of practice. Prof. Bermann emphasised that the goal of creating a common framework for those twilight issues was not to eradicate flexibility but rather to orient it, adding that "guidance is not mutually exclusive with nuance and subtlety". Ms. Michou inquired about the sources of arbitral practice, asking whether arbitral agreements, the law of the seat of arbitration, and international rules are truly providing insufficient guidance.

Prof. Bermann answered that taking these considerations together would defeat the purpose of arbitration and would end in arbitral tribunals imitating what courts do. He added that national law shouldn't be examined, except, and only to a certain extent when considering *lex arbitri*. Prof. Kleiner analysed bodies of national law and their use to tackle these 'twilight issues', especially from a French perspective, while keeping in mind that looking at national law is frowned upon in international practice.

Prof. Bermann finally agreed that some issues are well addressed by national law, and that there is no compulsion in that case to look for an international standard. He concluded the discussion by noting that he supports balance between national and transnational practices, and invited the panel to nuance their take on the question depending on the case at hand, especially distinguishing investment cases from commercial ones.

WHERE ARE THE DOCUMENTS? A COMPARATIVE AND ARBITRATOR'S PERSPECTIVE ON DOCUMENT PRODUCTION AND THE ROLE OF STATE COURTS

By Youssef Ben Khamsa

On Wednesday, 20 March 2024, as part of Paris Arbitration Week 2024, Loyens & Loeff organized an enriching event entitled "*Where are the documents? A comparative and arbitrator's perspective on document production and the role of state courts*". The event attracted a diverse assembly including legal practitioners, arbitrators, and industry professionals eager to explore the nuanced intricacies of document production in arbitration proceedings.

The panel included esteemed partners and associates from Loyens & Loeff, Olivier van der Haegen (*Partner*), Bastiaan Kemp (*Partner*), Robin Moser (*Partner*), Melle Boevink (*Senior Associate*), Romy Menasalvas Garrones (*Senior Associate*), and Johanna Haedinger (*Associate*). Additionally, the roundtable featured guest speakers Alexander Blumrosen (*Partner at Polaris Law*), who acts as a litigator and as an arbitrator, and Sara Nadeau-Seguin (*Partner at Teynier Pic*), who also acts both as counsel and as arbitrator. Their expertise enriched the discussions, providing comparative perspectives and practical strategies for navigating the complexities of document production in arbitration proceedings.

The session commenced with a warm welcome from Mr. van der Haegen and Mr. Kemp. As part of their opening remarks, they highlighted the pivotal role of document production in ensuring fairness and efficiency in arbitration proceedings. Stressing the importance of cross-jurisdictional collaboration, they set the stage for a thorough exploration of the topic.

The discussion was divided into two parts, each led by different speakers, offering diverse perspectives and insights. The first part was led by Ms. Nadeau-Seguin and Mr. Blumrosen, who delved into the various aspects of document production in international arbitration proceedings, including the criteria applied to document production, the scope of documents covered by confidentiality, requests targeting specific categories of documents, requests targeting affiliates or third parties, and the practical tools available for document production.

Meanwhile, Ms. Menasalvas Garrones and Ms. Haedinger took the reins during the second part of the discussion, offering a comparative approach with regard to document production and related state court aid. Their analysis shed light on jurisdictional differences and procedural nuances. They have also outlined the interplay between arbitration proceedings and state court jurisdiction. This division of the event's discussion ensured a comprehensive exploration of the process of document production, covering both theoretical considerations and practical challenges encountered in real-world arbitration cases.

In the first part of the roundtable, Ms. Nadeau-Seguin and Mr. Blumrosen led the discussion, providing invaluable insights from the tribunal's perspective on document production. The speakers elaborated on the key criteria outlined in the International Bar Association ('IBA') Rules and the Prague Rules, explaining nuances such as specificity, relevance, materiality and proportionality. Sara Nadeau-Seguin also explained the criterion of burden of proof, which is not explicitly addressed in Articles 3 and 9.2 of the IBA Rules. Mr. van der Haegen further highlighted that in Belgium, similar to other civil law jurisdictions, the criteria of the burden of proof may be less significant due to the Respondent's increased obligation to collaborate in the research for truth. Mr. van der Haegen's insights underscored the nuanced perspective on burden of proof, emphasising its relative nature in light of evolving procedural norms.

Ms. Nadeau-Seguin then emphasised the subjective nature of relevance and materiality, highlighting the importance of contextual considerations in assessing document requests. Drawing from her extensive experience, she delved into hypothetical scenarios, illustrating the inherent complexities of determining the significance of requested documents to the outcome of arbitration proceedings.

Mr. Blumrosen complemented Ms. Nadeau-Seguin's insights by providing a comparative analysis of document production norms. He contrasted the document production standards under the US Federal Rules with the more stringent standards prevalent under the French procedural framework. He also traced the evolution of document production practices, highlighting recent reforms aimed at enhancing efficiency and the trend toward merging civil and common law rules and traditions.

In discussing the topic of "documents covered by confidentiality", Ms. Nadeau-Seguin and Mr. Blumrosen explored the complexities surrounding privilege and confidentiality in arbitration proceedings. Mr. Blumrosen emphasized the importance of procedural clarity in addressing privilege issues, stressing the need for proactive tribunal intervention to identify and manage privilege-related challenges early on during the arbitration process. In fact, Mr. Blumrosen highlighted the importance of "Procedural Order No. 1" for the arbitral tribunal in handling questions related to privilege and confidentiality.

Moving on to the third topic of "categories of documents", Ms. Nadeau-Seguin explored requests pertaining to specific categories of documents. She emphasized the importance of specificity and reasonable time limits in document requests, stressing the need for clarity to facilitate efficient document production. She provided insights into the nuances of document categorization, highlighting challenges associated with overly broad requests and the need for parties to adopt reasonable keyword strategies to optimize the process.

In addressing the topic of "requests targeting affiliates", Mr. Blumrosen shed light on the disparity between court-ordered discovery in common law jurisdictions and arbitrator-ordered document production, emphasizing the challenges posed by jurisdictional differences. Ms. Nadeau-Seguin echoed this sentiment, stressing the need for a nuanced approach in balancing competing sovereign interests and ensuring procedural fairness.

Finally, in the discussion of the fifth topic on "practical tools available to help document productions" Ms. Nadeau-Seguin highlighted the utility of schedules such as the Redfern Schedule, the Stern Schedule, and the Armesto Schedule in managing document requests, as much as adverse inferences, illustrating proactive issue identification and resolution strategies. The Speakers further provided insights into the application of adverse inferences in addressing non-compliance with document production orders, emphasizing tribunals' reluctance to draw such inferences without clear evidence of deliberate document destruction.

Real-life examples enriched the discussion, providing attendees with tangible insights into navigating complex scenarios and maximizing procedural efficiency. Participants actively engaged in dynamic exchanges, leveraging the opportunity to pose questions and share insights gleaned from their professional experiences.

The discussion then transitioned to the subsequent segment, whereby Ms. Menasalvas Garrones and Ms. Haedinger delved into jurisdictional differences in document production and related state court aid. The discussion revolved around two key topics, namely the authority to seek assistance from state courts and the legal techniques available in this regard.

Ms. Menasalvas Garrones started off by explaining which individuals involved in arbitration could petition state courts to obtain document production. She highlighted the varying approaches across jurisdictions, noting that parties in some jurisdictions have the discretion to approach state courts independently, while in others, such action requires authorization from the arbitral tribunal itself.

Two critical observations were drawn from Ms. Menasalvas Garrones's analysis. Firstly, she explored whether tribunals could proactively seek relevant documents through state court assistance. She explained that in certain jurisdictions like the Netherlands, tribunals lack the authority to directly request state court assistance. However, in jurisdictions such as Switzerland and Luxembourg, arbitral tribunals may seek aid from state courts, subject to specific procedures and permissions.

Secondly, she addressed whether parties must obtain the tribunal's approval before petitioning state courts for assistance. While Switzerland and Luxembourg require parties to obtain the tribunal's approval, the Netherlands grant parties autonomy in directly approaching state courts for aid. In all cases, the tribunal plays a role in ensuring the relevance and necessity of requested documents.

Following Ms. Menasalvas Garrones's insights, Ms. Haedinger navigated the discussion towards jurisdictional considerations and the availability of state court assistance in different arbitration proceedings. She outlined two key angles through which this can be analysed. Firstly, Johanna Haedinger examined the jurisdictions in which state court assistance may be sought, drawing attention to provisions like the UNCITRAL Model Law. She highlighted Luxembourg and Switzerland as examples where foreign arbitral tribunals and parties to foreign arbitration proceedings may seek assistance from state courts. Secondly, she explored the scope of documents accessible through state court assistance. She cited examples like the new law in Luxembourg, which is inspired by a provision of French Law that restricts state court measures geographically to documents located in France or to individuals residing in France.

Mr. Blumrosen contributed to the discussion by highlighting default rules in certain jurisdictions, such as France, where the concept of denial of justice is commonly invoked in arbitration proceedings. He emphasised the importance of demonstrating a connection to the jurisdiction or the necessity of the requested document for obtaining state court assistance.

WE HAVE AN AWARD, WHAT'S NEXT? CHALLENGING AT THE SEAT, RECOGNIZING AND ENFORCING ABROAD: A COMPARATIVE APPROACH

By Rym Bahbou and Hoda Otayek

As part of the 2024 edition of Paris Arbitration Week ('PAW'), the association of European law firms Advant Altana, Beiten and Nctm organised a panel entitled "*We have an Award, what's next? Challenging at the Seat, Recognizing and Enforcing Abroad: A Comparative Approach*". The conference took place on Wednesday 20 March 2024 in the room Louis Napoléon at the Hotel du Louvre, and was moderated by three partners of the firms members of the association: François Muller, partner at Altana, in France, Angelo Anglani, partner at Nctm, in Italy, and Ralf Hafner, partner at Beiten, in Germany.

The panel's discussion was driven by the following point: it is good to have a favourable award in arbitration, but it is even better if the award's exequatur is also obtained. Indeed, enforcing the award may become as challenging as winning the case before the arbitrator. To give an international perspective on the subject, the partners answered the same set of questions respectively, each according to the national practice of his home country: France, Germany and Italy.

Mr. Muller began by arguing that the legal system in France is highly favourable to arbitration and, a fortiori, to the enforcement of awards. As such, French courts tend to grant exequatur to awards submitted to them, and it is for instance irrelevant whether the award was set aside in the country where the arbitration was held. Subsequently, Mr. Hafner echoed these comments, establishing that in Germany, courts only take into account their own interpretation whether reasons for non-enforcement exist. In Germany, international arbitration is seen as only loosely connected to the country of the seat of arbitration. That being said, arbitral awards do not belong to any state jurisdiction and are governed by international law. Mr. Anglani highlighted that, unlike in France and Germany, foreign awards set aside by the courts at the seat cannot be enforced in Italy (pursuant to Article V(1)(e) of the New York Convention and Article 840(3)(5) of the Italian Procedural Code). Then, despite the lack of any precedent in point, Mr. Anglani noted that, perhaps, enforcement could be granted to an award set aside at the seat of the arbitration, in the event that the foreign judgment setting aside the award were itself unenforceable in Italy under any of the grounds laid down by Italian private international law.

Furthermore, and as a side issue, with regard to what happens to decisions recognizing a foreign award, in the event that the award is later set aside at the seat, Mr. Anglani deems that the occurred annulment of the award could be raised as a defence at the enforcement stage, where an opposition on that basis could be made.

The panellists then turned to the question of the validity of the parties waiving their right to seek annulment. In France, Mr. Muller explained that the waiver of this right has been valid since the 2011 reform of the rules for arbitration of the French code of civil procedure, but only on condition that the parties have specific agreement. In addition, waiving the right to challenge an award for annulment does not prevent from requesting or denying its enforcement. Mr. Hafner noted that, in Germany, the issue remains uncertain due to the absence of a clear set of rules of law governing this particular issue. The general view is that it is not permissible to waive the right to challenge an award for annulment in advance. Whether a general waiver may be given after the award is issued is a matter of debate. Generally, a waiver may be given for specific reasons for non-enforcement. It seems that there is no clear answer to the question which specific reasons are waivable under the German arbitration practice. As to the Italian perspective, Mr. Anglani points out that in Italy the right to request the setting aside cannot be waived *ex ante* by the parties.

The question of the suspensive effect of an application to set aside an arbitral award was also raised. Mr. Muller highlighted that in France, an application for annulment does not suspend the enforceability of the award, except in certain defined circumstances, and subject to proper application and a judge's interim decision (if the enforcement of the award may "seriously infringe the rights of one party"). Mr. Anglani, added that, in Italy, there is no automatic suspensive effect, however, the court before which the application for annulment of an award is made may suspend the effectiveness of the award if "serious grounds" for doing so are found. Furthermore, if at the seat of the arbitration the effectiveness of the award is suspended, during the annulment proceedings, there is a direct impact over the recognition and enforcement in Italy, which can no longer be obtained (at least until the suspension is in place). Lastly, in Germany, Mr. Hafner pointed out that in matters related to the suspension of the award's enforceability, the judges have wide discretionary powers.

A question was raised as to whether an application for exequatur and an application for annulment could be submitted before the courts at the same time. In France, according to Mr. Muller, the exequatur is an ex parte decision, and, again, neither the appeal against this decision, nor the request to set aside the award are suspensive, therefore it should be possible to meet this situation where both applications cohabit. On the other hand, in Germany, Mr. Hafner explained that the application for the enforcement of the award makes the application for setting it aside inadmissible as the court verifies the validity of the award. It is only in the event of a manifest breach that the judge will not grant exequatur.

Regarding the validity of the arbitration clause in France, Germany and Italy, all panellists argued that reference should be made to Articles II and VII of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. They noted however that the Convention is a starting point, not a limit to the recognition of foreign awards, meaning that States can apply their own laws if they are more favourable than the rules of the Convention.

In conclusion, the panellists touched upon the issue of third-party opposition in arbitration. All three speakers agreed that third-party opposition is traditionally not allowed against the decision granting exequatur of the award. Hence, it is rare that third parties be admitted. However, Mr. Hafner pointed out that in certain situations, notably where the third party is a victim of fraud, the latter may initiate separate proceedings before the German courts. Similarly, in Italy, as Mr. Anglani noted, an award may be subject to a separate recourse for annulment by third parties who did not participate in the arbitral proceedings, when the relevant award is detrimental to their rights; in particular, one specific case of third-party opposition codified in the Italian Procedural Code, applies to creditors or assignees of a party to the arbitral proceedings, who can file a recourse for annulment if the award is the result of fraud or collusion to their detriment. It is, then, highly doubtful whether a third party can also oppose recognition and enforcement of the same award in all the different countries where recognition and enforcement are sought. Moreover, as Mr. Muller finally noted, the role, and rights of third parties in the arbitration are frequently debated such that the matter is susceptible to further evolve into the future.

ALL ABOUT ARBITRATION CLAUSES: THE GOOD, THE BAD AND THE UGLY

By Maria Gruszczynska and Elisa-Marie Goubeau

On March 20th, 2024, Habib Al Mulla and Partners, Hage-Chahine Law Firm and Lexis Nexis co-hosted a conference as part of the Paris Arbitration Week 2024 aiming to shed light on the intricacies of arbitration clauses from their drafting to their enforcement. Moderated by Sarah Malik (*Founder, SOL International*), the panel was composed by Najib Hage-Chahine (*Managing Partner, Hage-Chahine Law Firm*), Sally Kotb (*Partner, Habib Al Mulla & Partners*), Matthew Page (*Partner, Habib Al Mulla & Partners*), Karen Seif (*Counsel, Habib Al Mulla & Partners*) and Gary Born (*Chair, International Arbitration Practice Group, Wilmerhale*).

To start with, the panellists were asked to deliver their thoughts on Decree No. 34 of 2021 ('the Decree') adopted by the Dubai Government effective from 14 September 2021. This Decree provides that the DIFC-LCIA Arbitration Centre would cease to exist and that the abolished institution's workload be transferred to the Dubai International Arbitration Centre ('DIAC'). Mr. Born highlighted concerns about both ongoing and future arbitration cases pointing out that the decree would convert existing arbitration clauses into a different institution and another set of rules than those originally agreed. He further highlighted how different national courts dealt with similar issues. For example, the Louisiana court recently ruled that DIFC-LCIA is not equivalent to DIAC, making the arbitration clause unenforceable and emphasizing the inability of the US court or the Dubai government to alter the arbitration agreement. However, a Singapore court enforced a DIAC provisional award referencing the defunct DIFC-LCIA, as the respondent had consented to the tribunal's jurisdiction.

Mr. Page added that this sudden decision was a problematic issue in the Middle East because changing the institution was not intended by the parties. In his view, if the agreed forum is unavailable, parties should not be compelled to have their dispute administered by another arbitration institution. He also questioned whether it is acceptable to override an arbitration agreement by allowing litigation. He cautioned counsels to consider amending the clauses providing for DIFC-LCIA arbitration, in order to prevent enforcement and challenge issues that could potentially occur.

Prof. Hage-Chahine described the decree as an unusual transfer to the DIAC and raised concerns whether foreign courts shall implement a decree enacted by a foreign State and whether arbitral tribunals constituted under DIAC would have jurisdiction over the case. The decree being part of Dubai Law can be either applied as the law of the seat of arbitration or the governing law of the arbitration agreement. However, as some jurisdictions have a specific law governing arbitration agreements, this raises another layer of complexity, begging the question of whether a national court should give effect to a decree enacted by a foreign state. Thus, it becomes essentially a race between the party favouring arbitration with DIAC and the party favoring litigation arguing that the arbitration clause is no longer in force, the decree no longer applicable and setting a precedent ruling in this regard.

Mr. Born commented on the importance of selecting the arbitration seat and applicable law. First, he said that if an arbitration is seated in Dubai, the gap left by the DIFC-LCIA's abolition may be filled by Dubai law aligning with the parties' consent, but that such argument is more challenging if the arbitration is seated somewhere else. It would be alarming if states could freely and unilaterally alter institutional arrangement of the intuitions to reach what parties have agreed on.

Ms. Kotb then provided insights on the pitfalls of arbitration clauses in practice. As introductory remarks, she mentioned that pathological clauses are prevalent in the Middle East, where arbitration is viewed as an exceptional method for dispute resolution. Hence, national courts often retain jurisdiction instead of referring them to arbitration. Indeed, express intent of the parties to arbitrate is essential for the validity of the agreement and its enforceability.

Common examples of such pitfalls include notably lack of capacity to enter into arbitration agreements, a fundamental requirement in the UAE. As a way of illustration, signing an agreement based on a general power of attorney is insufficient to validate an arbitration clause, the signatory must have specific authorization to do so.

The next segment of the discussion dealt with the lack of formality. Mr. Born insisted on the 'writing requirement' of the New York Convention ('NYC'), where articles I and II require the arbitration agreement to be signed by the parties. Due to the fluid and decentralized nature of business operations, compliance with this requirement is often lacking in national arbitration laws. Nevertheless, most national courts are willing to recognize partially written or unwritten international arbitration agreements. If the NYC does not address the capacity issue, the Dubai courts may impose special requirements for capacity. This raises questions about whether such a situation aligns with articles 2.1 and 2.3 of the NYC regarding national legislative requirements.

Dr. Seif proposed to examine the topic from an empirical framework. She discussed the findings of Prof. Maxi Scherer's empirical research on the refusal to enforce arbitration awards under the New York Convention for reasons relating to arbitration clauses. She found that so-called pathological clauses are surprisingly the least used argument for enforcement purposes accounting for 3% of the cases, with a 0% success rate. The second comment was that Prof. Scherer's study concluded that substantive illegality or public policy grounds were the most popular grounds for challenge of the award accounting for 20% of success. Dr. Seif contrasted this with her own empirical study on almost 200,000 Dubai court judgments issued between 2010 and 2018, which revealed no instances where the enforcement of a foreign award was refused due to the violation of UAE public policy. Mr. Born expressed his surprise as to the low prevalence of pathological clauses in those statistics, because from an institutional experience they build up a high proportion of cases. He suggested that few challenges are successful because national courts find ways to remedy to honor the parties' intent. For example, they can fix the clause correcting the misnamed institution. Ms. Kotb also stressed that one must pay attention to the issue of arbitrability, as well as to the content and geographical scope of public policy from each country's perspective by quoting an example from Qatari law.

Prof. Hage-Chahine discussed the pitfalls of institutional arbitration and inoperable clauses asking whether a claimant can obstruct an institution's appointment of an arbitrator and proceedings. He took the example of an institution which did not abide by its own rules, appointing an arbitrator leading to an undisclosed conflict of interest. At a later stage of the proceedings, the arbitrator eventually withdrew from the arbitration. The claimant, after being denied a bailiff's verification of such appointment, pursued an unconventional request based on the contractual relationship with the arbitral institution. On these grounds, any contract can be terminated if there is a breach of its fundamental obligations, in this case, a breach of trust. Indeed, by adhering to arbitration rules, the obligations specifically encompassed the conduct of proceedings impartially and fairly and the assurance of neutrality. Prof. Hage-Chahine pointed out this unusual contractual relationship between three parties, namely between the claimant, the respondent and the institution. Currently, there are no specific provisions organizing such relationships from a contractual standpoint. Surprisingly, the Claimant sought the urgent matters judge to suspend arbitration and prevent the nomination of another arbitrator until the main court rules on the contract matter. It still remains uncertain whether the court will nullify the arbitration agreement for a breach of trust, but it has halted the arbitration center from appointing an arbitrator and starting proceedings. Mr. Born commented that the institution becomes part of a contractual relationship once the request for arbitration is filled and the fees are paid. Accordingly, he agreed that should any issues arise during the proceedings, it does not affect the underlying intention of the parties to arbitrate. In any case, if we remove the institution from that equation, the parties are still left with ad hoc arbitration.

Mr. Page took the floor to conclude by raising the topic of non enforceable arbitration clauses due to the criteria set out for the selection of arbitrators. He gave the example of a clause mentioning an arbitrator being expert in a specific law and a specific niche sector which made the clause inoperable. He commented on the term 'highly-experienced' which could lead to some lack of clarity between the parties as to its meaning. Thus, one should not opt for restrictive criteria when drafting clauses. Mr. Born stressed that practitioners should choose the model clauses elaborated by institutions (ICC, SIAC…) as they are the product of experience. The best approach is always the simplest approach.

AND THEY LIVED HAPPILY EVER AFTER... A STORY OF SUCCESSFUL ENFORCEMENT: FABLE, MYTH, OR REALITY?

By Lea Maalouf and Samuel Davies

As part of Day 4 of the 8th edition of the Paris Arbitration Week, Linklaters hosted an enlightening event entitled "*And They Lived Happily Ever After… A Story of Successful Enforcement: Fable, Myth, or Reality?*", which brought together distinguished speakers who shared their first-hand experiences, through a lively and interactive discussion, on the complexities surrounding the enforcement of international arbitral awards and how the journey of enforcement proceedings can in fact be turned into a 'happily ever after'.

The panel was composed of Roland Ziadé (*Partner at Linklaters, Paris*), Gerard Meijer (*Partner at Linklaters, Amsterdam*), Jacqueline Chaplin (*Counsel at Linklaters, London*), Duncan Holland (*Corporate Development Director at CRC Evans*), Yasmin Mohammad (*Director at Fortress Investment Group*), and Hannah Van Roessel (*Managing Director and Chief Investment Officer - EMEA at Omni Bridgeway*).

In their opening remarks, the moderators raised the question of whether there is any difference between enforcing an award against a state-owned entity and a private commercial actor. Ms. Chaplin observed that from one view, there is no difference between enforcing an award against a state-owned or a private commercial entity, as sovereign assets are off limits. Hence, in any event, enforcing a pecuniary award against a losing sovereign shall be recovered from the latter's commercial assets that are susceptible to seizure. However, she equally acknowledged that enforcement proceedings against a state or a state-owned entity present some unique challenges that are related to politics and bureaucracy and that are not present in enforcement proceedings against private commercial entities. Yet, Ms. Chaplin noted two positive aspects pertaining to enforcement of awards against sovereigns. First, states cannot "disappear" the way private entities or individuals do. Second, states cannot exonerate themselves from paying debts through bankruptcy. On that note, persistence will pay; however, in the words of Ms. Chaplin, "be prepared for challenges".

Building upon the issue of state sovereignty and sovereign immunity, Mr. Ziadé highlighted the complexities surrounding enforcement proceedings against sovereigns, which vary from one jurisdiction to another and from one circumstance to another. States enjoy sovereign immunity which poses a significant challenge to execution and enforcement proceedings. He noted that the principle of sovereign immunity varies from one forum to another, and that states often invoke this principle to protect their assets from execution. Overcoming defences thus requires a careful analysis of the governing legal framework, limitations, and the exceptions that are applicable in a given jurisdiction. Mr. Ziadé further added that enforcing awards against states presents additional difficulties, especially when states are a party to several unrelated arbitrations across different jurisdictions, reducing the likelihood of prompt compliance with the rendered awards.

Despite challenges, the international economic community has strived to increase state incentives to pay adverse awards in an attempt to avoid reputational harm and disruption to the flow of foreign investment. Nevertheless, settlement discussions remain challenging because of bureaucratic hurdles within states and state entities, and the reluctance of state officials to engage in settlements.

Ms. Chaplin complemented the discussion by marking the important distinction between the use of incentives for states to cooperate and the need for "something that holds their feet to the fire". Responding to the hypothesis of seizing a president's private jet, Ms. Chaplin observed that such an action may be detrimental to the President's reputation. That is one technique to attract key stakeholders to the negotiating table. On this particular point, Ms. Van Roessel added a remark that some high-profile assets will not always be subjectable to seizure. She explained that there seems to be a difficulty in meeting client expectations when seeking to seize assets that will likely draw the media's attention where factual obstacles pertaining to the use, financing, ownership, and location of the asset exist. Given that the principle of sovereign immunity varies from one jurisdiction to another, the "game" of enforcement proceedings, albeit interesting, is not quite a simple one.

Ms. Van Roessel moved to the topic of interest payments on pecuniary awards. She compared states to other commercial debtors, who prioritise payment of high-interest debts over the variety of other bank loans, bonds, and debts in their portfolio. She therefore advised counsel, clients, quantum experts, and arbitrators to have discussions concerning the proper interest that should be requested and that reflects the urgency of the payment.

Mr. Holland shared his experience by giving an example of enforcement of an arbitral award in one of his cases. He highlighted that the system where he sought enforcement underwent substantial legislative changes that promoted enforcement actions and strategies, such as seeking legal remedies and seeking diplomatic pressure as an effective tool to incentivise the state to comply with adverse awards. He once again brought the complexities of dealing with governmental entities to the attendees' attention, which requires matters to be approached through diplomacy and negotiation. Despite obstacles, Mr. Holland emphasised the imperative to maintain positive relations with the government and its officials to effectively secure enforcement goals.

Ms. Van Roessel discussed certain instances where multiple creditors orchestrate coordinated efforts and actions. Ms. Van Roessel equally acknowledged the difficulty in distributing assets, noting that some jurisdictions operate on a "first come, first served" basis, while others follow a pro rata distribution model.

Ms. Mohammad raised a critical question concerning state perception and prioritisation of financial considerations related to award settlements. She highlighted the interconnection between enforcement and settlement, and advocated for a holistic approach when it comes to resolving disputes. She explained that a state's attitude and actions may be influenced by several factors, such as political developments, elections, and shifts in the government and its administration. These factors may equally affect enforcement proceedings and state compliance with an adverse award.

Interestingly, Ms. Mohammad touched upon a new trend that is the willingness of parties to accept alternative forms of payment, including cryptocurrencies. Contrarily, alternative forms of payment can present legal complexities. For example, seizing bitcoin assets in jurisdictions like France, the enactment of new enforcement mechanisms, tailored to executions as such, is required. A practical solution in England & Wales for instance, was to request the issuing of orders to disclose cryptographic keys. Additionally, Ms. Mohammad discussed the role of insurers in mitigating risks for both award holders and funders, particularly during setting aside proceedings.

In their closing remarks, the panellists discussed certain trends in enforcement. While Ms. Van Roessel mentioned briefly the emergence of family law and inheritance disputes, Ms. Mohammad made the remark that there seems to be no particular trend in investor-state arbitration. Ms. Chaplin took a more philosophical approach, inviting the attendees to reflect on questions related to future disputes, actors, and the location of assets. On this point, she mentioned the rise of ESG disputes likely to generate high-value arbitration disputes globally.

SOMETHING NEW, SOMETHING OLD, SOMETHING BORROWED

By Maya Konstantopoulou

On Thursday 21st of March 2024, Fieldfisher and the European Chinese Arbitrators Association ('ECAA') hosted a seminar spotlighting recent developments in arbitration laws and recently adopted amendments in different jurisdictions, under the title "*Something new, something old, something borrowed*". The panel was moderated by Alice Meissner (*Partner at Fieldfisher Austria and Chair of ECAA*) and included Antje Baumann (*Partner at Baumann Disputes*), Ania Farren (*Partner at Fieldfisher UK*), Tim Meng (*Managing Partner at Golden Gate, China*), Marily Paralika (*Partner at Fieldfisher France*), and Avi Zamir (*PhD and lawyer at A. Gabrieli & Co, Israel*). Each speaker focused on one jurisdiction, particularly discussing Germany, the UK, China, Greece, and Israel.

The floor was initially ceded to Ms. Baumann, who presented some key elements of the Draft Bill for the organization of the German Arbitration Law. Notably, the Draft Bill contains a provision addressing concurring and dissenting opinions in awards. Arbitrators may put in writing a concurring or dissenting opinion in order to express views deviating from the arbitral award or from the reasons on which the award is based. This concurring or dissenting opinion will be annexed or attached to the award. However, parties are free to provide otherwise in their arbitration agreement. In the Draft Bill it is stated that there can be oral arbitration agreements for commercial transactions. This provision is considered quite controversial as it has given rise to concerns relating to legal uncertainty it entails. In fact, if this provision is enacted, the statute will return to the law of 1998. Concurrently, the Draft introduces the possibility of conducting oral hearings via videoconference, reflecting contemporary trends in dispute resolution practices.

Ms. Farren then spoke about the key changes proposed in the Final Report and Bill resulting from the Review of the 1996 English Arbitration Act. Firstly, a significant amendment pertains to the law governing the arbitration agreement. In the absence of an express choice by the parties, the law of the seat will be the governing law of the arbitration agreement. There is also an interesting change concerning challenges to awards regarding jurisdiction. Under the new provision, parties are granted the latitude to raise new objections or introduce new evidence, provided they can demonstrate that such evidence could not have been presented earlier before the arbitral tribunal. Importantly, this process will no longer entail a full rehearing. It was also noted that while there is not going to be any provision on confidentiality, the arbitrator's duty of disclosure will be codified. Lastly, this Draft introduces a provision borrowed by a process that already exists in many arbitral rules: it is the possibility to make an arbitral award on a summary basis.

Mr. Meng explored the Chinese "Draft Amended Arbitration Law" with its proposed revisions to the Chinese Arbitration Law issued on 30 July 2021. The speaker underscored various principles embedded within the Draft law. Firstly, the arbitrators are expected to operate in good faith. Secondly, the law emphasizes the importance of efficiency in arbitration proceedings, thereby promoting online hearings. Thirdly, the Draft advocates for due process, ensuring that parties are afforded a 'full opportunity' to represent themselves. Additionally, new concepts are introduced in the Draft, such as the competence-competence principle and it confirms the independence of the arbitration agreement. Notably, a new provision mandates that the arbitration seat be physical unless the parties agree otherwise, designating the place of the arbitration institute as the default seat.

Ms. Paralika proceeded to elucidate some of the innovations brought forth by the new Greek arbitration law enacted February 2023. Rooted in the UNCITRAL model law, this legislation introduces several provisions, notably addressing multi-party arbitration. An entirely new addition is the allowance for the joinder of third parties. Moreover, the law facilitates the consolidation of multiple arbitration proceedings. If two arbitration cases involve the same parties and arbitrators, they can be consolidated, even without the parties' consent. However, if the cases are before different tribunals, consolidation necessitates mutual consent to determine the tribunal hearing the consolidated cases. Concerning interim measures, the greek law does not provide a list of interim measures that the tribunal can order, rather, it combines the various possibilities offered by the model law. Furthermore, the law provides that the arbitration agreement will be valid if it's valid under any one of three laws: the law applicable to the arbitration agreement, the law of the contract or the law of the seat.

Additionally, parties are given the possibility for the tribunal to issue a supplementary award, should the tribunal have omitted some of the parties' claims in the issued award. Finally, the law permits parties to waive in advance the right to apply for the annulment of the award.

Mr. Zamir then presented some interesting provisions of the new Israeli International Commercial Arbitration Law enacted on 14 February 2024. A significant portion of these provisions closely resembles the 2006 model law, indicating a commitment to aligning with internationally recognised arbitration standards. One interesting feature of the law is the inclusion of a judicial intervention article, establishing a non-intervention principle. Regarding arbitration agreements, the law mandates that they be in writing or recorded in writing, for instance existing in email correspondence. Moreover, the new law embraces the competence-competence principle. In contrast to prevailing practices, the Israeli law diverges by not permitting tribunals to issue ex-parte measures. Lastly, an intriguing provision addresses the standard of impartiality and independence of arbitrators, introducing "justifiable doubts" as the new criterion for challenging or removing an arbitrator. On this subject, Mr. Zamir estimates that the new law sets a lower standard than the existing one.

ROLE AND MISSION OF THE ADMINISTRATIVE BODY OF AN ARBITRAL INSTITUTION: A FAIR BALANCE BETWEEN CONTROL AND FREEDOM OF PROCEEDINGS

By Florian Hamel Cooke

On Thursday 21 March 2023, as part of Paris Arbitration Week 2024, the Centre de Médiation et d'Arbitrage de Paris ('CMAP') held a conference entitled "*The role and mission of the administrative body of an arbitral institution: a fair balance between control and freedom of proceedings*". Hosted at Clifford Chance Paris, the panel was composed of members of the CMAP Arbitration Commission, including Clément Fouchard (*Partner at Reed Smith*), Kamalia Mehtiyeva (*Professor of Law at the University of Paris-Est Créteil*), Daniel Mainguy (*Professor of Law at the University of Paris 1 - Panthéon-Sorbonne*), Thibaud d'Alès (*Arbitrator and Partner at Clifford Chance Europe LLP*), and Franck Tassan (*Arbitrator and Mediator at Tassan Dispute Resolution*).

Ms. Sophie Henry (*Managing Director of CMAP*) introduced the conference by noting that the CMAP was created in 1995 by the Paris Chamber of Commerce and Industry. It assists companies willing to resolve disputes in France and internationally through mediation and arbitration. CMAP has its own rules, the latest version of which dates back to 2022. To assist parties and arbitrators throughout the process, CMAP has established a six-member Arbitration Commission, all arbitration practitioners (two law professors, two practictioners as counsels and two former arbitration users). The arbitral institution receives requests for arbitration from a wide range of sectors and handles approximately 20 arbitrations per year, whose financial stakes are variable, ranging in value from less than €500,000 to more than €10 million, not including a case recently handled involving more than €800 million. This may concern arbitration between a French and a foreign operator or between foreign operators.

The conference addressed the issue of institutional arbitration and the relationship between the parties, the arbitrators and arbitration centre throughout the arbitration process, seeking to determine whether this relationship should give arbitrators freedom of action or whether the institution should have some control over arbitrators' mission. To adress this issue, the conference was structured around two main themes: firstly, the role and missions of an arbitration centre in French international arbitration law, followed by a presentation of the specific example of the role and missions of the CMAP.

On the first point, Mr. Fouchard opened the debates by comparing ad hoc and institutional arbitration, highlighting the role of the administrative body (l'organe administratif de supervision des centres d'arbitrage). While institutional arbitration operates within predefined rules overseen by administrative bodies, *ad hoc* arbitration involves parties who manage the process autonomously. However, the freedom inherent to ad hoc arbitration may not always meet the parties' expectations. Consequently, there are rules to deal with situations where the parties cannot agree on the constitution of the arbitral tribunal. In domestic arbitration, state courts often provide assistance, such as the juge d'appui in France, playing a crucial role. The UNCITRAL Rules is a good example of this mechanism through the concept of the appointing authority set out at Article 6 of said Rules, this is referred to as *ad hoc* administered arbitration, a hybrid category in which the ad hoc arbitration is partly supervised by a third party. In contrast to the role of the arbitration institution in administered arbitration, the role of the appointing authority in *ad hoc* administered arbitration is more limited. The appointing authority may be an institution, or an individual, and appointment procedures vary from one institution to another.

Prof. Mehtiyeva turned to certain legal issues surrounding institutional arbitration that have been addressed by national jurisprudence. She addressed the legal nature of the arbitration institution's function, when contemplating whether it serves as an administrative or judicial function. Existing French case law tends to establish the purely administrative nature of such organisational functions of the arbitral institution, as opposed to the judicial function which belongs to the arbitral tribunals, although grey areas may appear in this distinction.

In this vein, Prof. Mehtiyeva raised the question whether the organisational function of the institution implies that all acts taken by the institution are necessarily of administrative nature or whether some acts taken by institution, such as rejection of consolidation of proceedings, may be qualified of jurisdictional or of hybrid nature, like under the French civil procedure, the measure of judicial administration (la mesure d'administration judiciaire).

Thus, the distinction between functions is essential in the case of parties willing to challenge the function of the institution in order to determine the applicable liability regime. This debate as to the applicable regimes is crucial as certain requirements apply to bodies with a jurisdictional function whereas they do not apply to administrative bodies, for example, issues of impartiality, independence or conflicts of interest, which can be challenged on the basis of Article 6 of the European Convention on Human Rights. Other important consequences include motivation of the acts which is a requirement of validity of judicial acts. The treatment and consequences of the nature of the institution's decisions will differ from one legal culture to another and therefore need to be taken into account.

On the second point, *i.e.* the role and specific missions of CMAP, Prof. Mainguy then gave his insights on the decision-making process of the Arbitration Commission of CMAP, which is the body responsible for dealing with the difficulties encountered by the parties and the arbitrators. He described its tasks (*prima facie* assessment of the existence of an arbitration agreement, of the arbitrability of the dispute or of the multi-party nature of the proceedings, of the number of arbitrators in the absence of specification, confirmation of proposals of arbitrator appointment, challenges of arbitrators, requests for joinder, resolving questions on the application of the Arbitration Rules, assessment of fees, etc.), emphasising the importance and sensibilty of decisions on the confirmation, challenge, and appointment of arbitrators. He discussed the criteria used to determine the number of arbitrators, such as the complexity of the dispute, its sensitivity and the presence of multiple parties. He also highlighted the challenges faced in selecting arbitrators, including the need for language skills and cultural awareness, and the will to train young arbitrators. Prof. Mainguy also touched on the Commission's internal procedure for the exercise of its missions, to ensure a form of adversarial process, to set and enforce deadlines.

Finally, he discussed a very complex issue, and one that does not receive unanimous support within the Commission: the need to provide motives for some of the Commission's most sensitive decisions. The CMAP's rules state that its decisions shall not state the grounds on which they are based. However, this does not prevent the CMAP from giving reasons for certain decisions, in particular in order to make them easier to understand and accept, especially when these decisions could be considered to be on the borderline of a purely administrative decision, as Professor Methiyeva pointed out.

Mr. d'Alès then provided insights into how the CMAP provides scrutiny of the award and prioritises transparency in the way it operates. Mr. d'Alès acknowledged that scrutiny is a strange concept for a litigator before French courts to come to terms with, as it involves a third party entering the room where the decision is taken, who intervenes once the decision has been made. He observes that the primary purpose of this practice, which is found in almost all arbitration rules, is to check that all the formal requirements of an award are met, but also to ensure that the demonstration made by the arbitral tribunal is sufficiently solid to withstand criticism before the reviewing judge. He is well aware that this approach is somewhat at odds with the rules governing the secrecy of deliberations.

Mr. d'Alès underlined how the CMAP strives for a reasonable balance by comparing the way in which review works in the CMAP, the International Court of Arbitration of the International Chamber of Commerce ('ICC') and the Court of Arbitration for Sport ('CAS'). The three have some fundamental differences in approach based on the bodies in charge of the review. In the case of the CMAP, the whole Commission is in charge of the review, whereas in the case of the CAS, it is the Director General who reviews some 900 awards per year alone. In the case of the ICC, the secretariat is responsible for the review before a plenary session of the Court, which then proofread the award. Thus, the primary purpose of the review is to maximise the legal effectiveness of an award by identifying any deficiencies that could be used in an attempt to set it aside at the seat of arbitration or to review its enforcement elsewhere.

The CAS is unique in the sense that review is intended to promote uniformity in CAS jurisprudence. Finally, he discussed how the scope of review differs between the three, pointing out that while the ICC tribunal can make changes to the form of the award, the CAS President can add arguments and create precedent not previously discussed between the parties which may in turn go against the decision of the sole arbitrators.

Finally, Mr. Tassan shared with the panel the role of the CMAP's commission in setting arbitrators' fees. The amount of advance on costs should be enough to cover the arbitrator's fees and administrative fees determined by the Commission. The amount of the fees is then shared equally between the claimant and the defendant, the arbitral tribunal cannot be seized until the advance has been paid in full. However, if the Commission deems it appropriate, the proceedings may commence before the tribunal as soon as the funds paid enable the arbitrators to carry out foreseeable action up to the drafting of the terms of reference. In such a case, if after the signing of the terms of reference, the full advance on costs has not been fully paid, the Commission may suspend proceedings or decide that the tribunal will rule only on some of the claims of the parties. The advance on costs may be subject to adjustments depending on the fluctuations of the case, in the amount of the dispute, or on the complexity of the arbitral proceedings. In case of a request for adjustment of the fees, the Commission takes into consideration the following factors: the evolution of the dispute over the course of the proceedings, the diligence and efficiency of the arbitrators, time spent, and the pace of the proceedings in general. In short, as mentioned earlier, the rules of arbitration are revised regularly and this year, there will be a revision of the scale of fees that should come into force during the first half of the year to take into account the fact that the CMAP is entrusted with more and more files with very significant financial issues.

CONCURRENT DELAY: WHO HAS THE FAIREST APPROACH?

By Maritina Leontiou et Saskia Dodds

On Friday, 22 March 2024, as the 2024 edition of the Paris Arbitration Week was coming to an end, Leynaud & Associés held a conference on "*Concurrent delay: who has the fairest approach?*". Taking place in the Paris offices of Reed Smith LLP, the presentation delved into a case involving delays in a construction project, all the while, exposing the varied approaches of professionals in both common law and civil law jurisdictions.

The panel included host speaker, Xavier Leynaud (*Delay Expert at Leynaud & Associés*), as well as Erwan Robert (*Associate at Reed Smith LLP*), Francis Sirard and Erin Fallon (*Both Directors and Experts at JS Held*), and Lindy Patterson KC (*Independent Arbitrator and Adjudicator at 39 Essex Chambers*).

The event began with a presentation of the speakers (attending both in person and virtually) and a definition of the subject, notably regarding concurrent delays. It was explained that concomitant delays occur when there are two delays with different causes that materialise within the same period of time. For the delays to be concomitant at common law, they must be unrelated and independent. The delays must result in a delay in the completion of the project. They must also invoke the contractual liability of different parties and there cannot be any "pacing" delays, meaning that the delays cannot be made voluntarily, nor can they be easily mitigated. Therefore, the concomitance of the delays must be both of time and of effect. This approach is that of the Common Law System.

After having introduced the subject matter, a specific case was then presented by Ms. Fallon and Mr. Leynaud. During the first three months of the project in question, the contractors estimated that there would be a 2-month delay. Subsequently, there was an additional 1-month delay caused by the employer. However, due to the existence of a "margin of error", being the amount of time that a task can be delayed without causing a delay to the entire project, it was only at months nine and ten that these projected delays started to occur and there was a resulting 2-month delay in the completion of the project.

In assessing contractual liability for exceeding the "end of milestone" delay, the panellists focused on two methods: a chronological approach, and the "but for" test. The first, presented by Mr. Sirard and Ms. Fallon, involved an evaluation of the scheduled delays as they occur. Therefore, since the employer's one month delay occurred within the stipulated margin of error, the delay was not considered critical, and the employer was not held liable for the delay incurred at the sanctionable milestone. Nevertheless, both panellists agreed that the approach taken depends on the situation and the information available.

On the other hand, presented by Mr. Leynaud, the counterfactual test – the "but for" test in England and the "what-if" test in the USA – starts at the end of the timeline when the delays have occurred and relies heavily on causation to find who is liable. Therefore, this analysis found that the employer could not apply penalties on the full 2-month delay that occurred as he/she would have been liable for a month's delay had the entrepreneur not been late. Therefore, if the project manager applied two months of penalties, it would exonerate himself of his own fault vis-à-vis the initial contractual engagements, even though the delay didn't actually appear until the penultimate month of the project. This approach therefore takes into account the concomitance of the effects on delay, which takes precedence over the date on which the delaying events took place.

In this case, penalties were only applied for one and a half months of the delay and 15 days of extension of time ('EOT') was awarded. This civil law approach is based on the theory of adequate causation.

Finally, a Q&A session was opened to the attendees during which the aptitude of such approaches was debated. Some of the argued issues on the subject include the difficulties when it comes to defining a critical delay and the lack of clarity regarding the delay analysis performed by judges in French case law.

However, it was Ms. Patterson KC who brought the discussion to an end, stating that, on one hand, both approaches are adopted in the legal system of England and Wales and that they rely entirely on the contractual terms. As a result, both panellists and attendees found that there was no better answer to the question of 'who has the fairest approach' than to conclude that "this depends" on whether one is an entrepreneur or a project manager.