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YOUNG ITA FORUM: 2019 – A YEAR IN REVIEW

by Subhiksh Vasudev & Léocadia Lakatos

On January 15, 2020, Young ITA held its forum in Paris, where the panelists discussed key developments in international arbitration. Following is the report from the event, with thanks to Subhiksh Vasudev and Leocadia Lakatos of Quinn Emanuel Urquhart & Sullivan.

I. THE FORUM

Young ITA commenced its Forum with welcoming remarks by Alexander Leventhal (Quinn Emanuel Urquhart & Sullivan, Paris) on behalf of Young ITA, setting the stage for the panel discussion and introducing Alexander Fessas (Secretary General, ICC International Court of Arbitration). The Forum was hosted by Dechert LLP and several arbitration practitioners and law students from all over the world attended.

Sara Koleilat-Aranjo (Senior Associate, Al Tamimi, Dubai) presented on the topic of "Chevron and the Legitimacy of the Arbitral Order" and discussed the recent developments in the Chevron saga in which a "sham" arbitral institution in Egypt rendered an arbitral award of approximately US$18 billion against Chevron. Ms. Koleilat-Aranjo reported that in September 2019, the US District Court for the Northern District of California refused to enforce the award citing several "procedural irregularities".[1] In the absence of a common legal definition of an arbitral institution, she referred to a recent Egyptian Court of Cassation judgment (October 22, 2019) which defined the characteristics of an arbitral institution to be "internationally or regionally well-known" and "have gained the trust" of clients over the years in the fields of international business, trade, and investment. Ms. Koleilat-Aranjo questioned whether, as part of the checks and balances safeguarding the sanctity of arbitral proceedings, arbitral institutions ought to be regulated, by drawing attention to the recent regulation efforts in the Russian Federation, which

[1] *Waleed Al-Qarqani, et al. v. Chevron Corp., et al.*, No. C 18-03297 JSW, Order Granting Chevron's Motion to Dismiss the Petition to Confirm Arbitration Award, Sept. 24, 2019 (N.D. Cal. 2019).

has led to a drastic limitation on accessibility to certain internationally-recognized arbitral institutions. In regards to the arbitrators' exposure to criminal liability, she highlighted that, in the Chevron case, the members of the arbitral tribunal, and of the "sham" arbitral institution in Egypt, were criminally prosecuted and convicted for forgery, among other things, in Egypt.

Ana Gerdau de Borja (Associate, Derains & Gharavi, Paris) presented on the topic of "Corruption: Between Law and Reality" and discussed the Court of Appeal of Paris' decision in the *Alstom v. ABL* case (Apr. 2019).[2] There, the court refused the enforcement of an ICC award on the ground of violation of international public policy, for the reason that it provided ABL a payment of bribes based on intermediary agreements concluded between Alstom and ABL to secure public contracts in China. Ms. Gerdau de Borja also discussed the Hague Court of Appeal decision in the *Bariven* case (October 2019),[3] where the Court set aside the ICC award on the grounds that the contract was procured by corruption. She explained that the court found the tribunal's approach in setting the threshold for corruption to be based on clear and convincing evidence was too strict. Lastly, Ms. Gerdau de Borja discussed some developments in Peru, where the Prosecutor's Office accused several arbitrators of specific passive bribery and initiated criminal proceedings against them.

Rocío Digón (Consultant, White & Case) presented on the topic of "Federal Court Discovery and Arbitral Proceedings" and discussed two recent decisions rendered under 28 U.S.C. § 1782, a federal statute that allows a litigant to a legal proceeding outside the US to request a district court to authorize discovery in the US for use in a proceeding before a foreign court or tribunal.

In *Abdul Latif Jameel v. Fedex* (September 2019), the 6th Circuit interpreted the term "foreign tribunal" broadly enough to include the DIFC Court, where a commercial arbitration was pending and where the applicant sought to use the evidence (in the form of deposition testimony and documents) requested from the

[2] *Alstom Transport S.A. v. Alexander Brothers Ltd.*, Paris Court of Appeal (Apr. 10, 2018).

[3] *Wells Ultimate Service LLC v. Bariven S.A.*, The Hague Court of Appeal (Oct. 22, 2019).

respondent.[4]

In Re Application of Del Valle Ruiz et al. (October 2019), the 2nd Circuit granted the applicant's discovery request against one of the respondent's affiliates, since it was headquartered within its jurisdiction, and held that for the discovery from those affiliates that were not headquartered or incorporated in the district where the application was filed, the applicant would have to demonstrate that the requested evidence arose from the conduct of such corporation in that particular district.[5]

Ms. Digón further explained the court's holding that the location of evidence was immaterial for the purpose of discovery under the 1782 proceeding, as long as it was within the requested party's possession, custody, or control. She further observed that the impact of these decisions is the likely increase in the number of applications under Section 1782 in certain Circuits, which could result in a US Supreme Court decision resolving the Circuit split on whether a private international commercial arbitration constitutes a "foreign tribunal" for purposes of the statute.

José Manuel Garcia Represa (Partner, Dechert LLP, Paris) presented on the topic of "Discounted Cash Flow Valuation – Not So Rare Anymore?" and discussed the recent developments of valuations based on the discounted cash flow method ("DCF"), particularly in the mining industry. He explained how the DCF has now become a standard valuation technique for income-generating assets, commonly used by international tribunals when the asset has a history of profitability. However, Mr. Represa also pointed out to cases where tribunals refused to apply the DCF, where the asset had not yet begun generating cash flows, especially given the uncertainty involved, and instead preferred to award damages on the basis of the sunk costs. In discussing this trend, he pointed out to *Tethyan Copper v. Pakistan*,[6] in which the tribunal accepted to value a non-producing mining project on the basis of a "modern DCF" approach, consisting of factoring the "risk" of future cash flow

[4] *Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019).

[5] *In re: Application of Antonio del Valle Ruiz & Others for an Order to Take Discovery For Use in Foreign Proceedings Pursuant to* 28 U.S.C. § 1782, 939 F.3d 520 (2nd Cir. 2019).

[6] *Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (July 12, 2019).

generating in each item of revenue, cost, and then discounting the result at a risk-free rate to present value. Mr. Represa noted that this method had also been used by a commercial arbitration tribunal (with the same presiding arbitrator as in Tethyan) back in 2017.

Ilija Mitrev Penusliski (Counsel, Shearman & Sterling, Paris) presented on the topic "Treaty 'Modernization': Where Is the Pendulum Swinging?" and discussed the Energy Charter Treaty (ECT) treaty modernization, driven primarily by the EU and its Member States. He recalled that this modernization is part of a series of reforms of other treaties which in recent years have led to a complete rethinking of the international investment regime. As examples, Mr. Penusliski pointed out to the Achmea decision, the adoption of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and the United States-Mexico-Canada Agreement (USMCA), the discussion on Investor-State Dispute Settlement within UNCITRAL Working Group III, the UNCTAD's Reform Package for the International Investment Regime, and the ICSID's "most extensive review to date" of the ICSID rules and regulations.

Mr. Penusliski explained that while the progressive items (e.g., environmental protection, labor standards, anti-corruption, etc.) will remain soft law at best, some of the useful and needed amendments will be dwarfed by a scaling down investment protection and imposing restrictions on who can bring a claim and under what circumstances. Arguing that States should be subjected to full rule of law policing, and investors should likewise be obligated to engage in responsible and sustainable business conduct under the scrutiny of adjudicators., Mr. Penusliski questioned why a concept that has been central to investing and investment protection should be practically eviscerated from modern treaties.

José Manuel Garcia Represa (Partner, Dechert LLP, Paris) presented on the topic "Is There a Future to Dual National Claims?" and addressed the future of dual national claims in non-ICSID investment arbitration, since the Article 25 of the ICSID Convention expressly exclude such claims. Mr. Represa took the audience on the comparative tour of the three latest arbitrations involving claims by various members of Garcia Armas family against Venezuela, following the expropriation of its food

distribution business. He first discussed Serafín García Armas and Karina García Gruber v. Venezuela (UNCITRAL/PCA Case No. 2013-03), in which, on February 13, 2019, the French Cour de Cassation (No. 17-25.851) quashed the Paris Court of Appeal's partial annulment of the Tribunal's decision on jurisdiction. There, the Court found that it had failed to properly draw the legal consequences from its own findings. In the end, the Tribunal issued its award on the merits on April 26, 2019, ordering Venezuela to pay some US$357 million.

Mr. Represa then turned to Manuel García Armas et al. V. Bolivarian Republic of Venezuela (UNCITRAL/PCA Case No. 2016-08), where, in its December 13, 2019 award, the Tribunal denied having jurisdiction on the basis that, under the 1995 Spain-Venezuela BIT, the signatory states never consented to arbitrate any disputes with dual Spanish-Venezuelan nationals.

Lastly, Mr. Represa discussed Luis García Armas v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/16/1), involves another family member, a Spanish citizen, and now in front of the same Tribunal is still ongoing.

Ilija Mitrev Penusliski (Counsel, Shearman & Sterling, Paris) presented on the topic "Climate Change Arbitration: To Adopt and Adapt?" and covered the very critical, in the second hottest year, issue of climate change in arbitration. Mr. Penusliski raised a question whether the world of arbitration should adopt and adapt climate change. He observed that climate change disputes will proliferate due to direct efforts to deal with climate change (*i.e.*, cutting emissions and transitioning from fossil fuels), endless construction (from building sponge cities to rebuilding bushfire-scorched Australia), and new realities of risk allocations. To illustrate his point, he took the example of potential delays resulting from construction workers impossibility to work because of the warmth. Mr. Penusliski, detailed three events that have been of importance in 2019: (i) the Urgenda case, in which the Dutch Supreme Court held that international human rights obligations required the Dutch Government to lower emissions by 25% through to 2020; (ii) the claim brought by a US mining investor against Canada due to the Alberta's decision to phase out coal by 2030 without any compensation for coal miners; and, (iii) the ICC's seminal report on climate change and arbitration, which analyzed the types of climate change disputes seen to date,

and addressed the suitability of arbitration to resolve them. In conclusion, an open question remain and confirm the need for arbitration to adopt and adapt: how to deal with these disputes expeditiously?

Rocío Digón (Consultant, White & Case) presented on the topic "Singapore Convention: A Challenge to Arbitration" and discussed the potential challenges to arbitration raised by the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as the "Singapore Convention on Mediation", signed on August 7, 2019.[7] The Singapore Convention's purpose is to facilitate the cross-border enforcement of settlement agreements obtained following mediation by addressing issues of scope (Article IV) as well as grounds to refuse to grant relief (Article V).

The reception of the Singapore Convention has been mixed. Ms. Digon set out the pros, which are that the Convention created a separate enforcement regime, establishing a broad definition of mediation, and was already signed by 51 Member States, including the US and China. Finally, she concluded with the cons by questioning: Whether the Convention was really necessary considering mediation is consensual? Whether instead of differentiating mediation from arbitration; does it pull it closer? Are the parties given an "out" to avoid enforcement when they allege the mediator's misconduct and will the initial enthusiasm stall or simply plateau?

II. POLL ADDRESSED TO THE AUDIENCE

The Forum discussion ended with a live poll where the audience was asked to vote on five questions related to the previous discussions. Below is the list of presented questions and answers. In bold are answers that received the highest number of votes from the audience.

1. Whether the standard of proof for corruption allegations in international arbitration should be: **26/48 votes**
   a) Proof of corruption on a balance of probabilities;
   b) A heightened standard (clear and convincing evidence);
   c) A criminal law standard (beyond a reasonable doubt);
   d) None of the above.

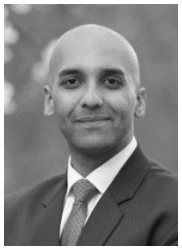
[7] United Nations Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018.

2. Whether valuation under the "modern DCF": **31/53 votes**
   a) Goes too far and should be rejected (because too speculative);
   b) Is necessary (and part of the inherent complexity and uncertainty involved in valuing profits).

3. What will be the effect of the recent case law on Section 1782?: **23/50 votes**
   a) Welcome developments that will be affirmed by other circuits and courts;
   b) A sign of the further Americanization of arbitration – with increased discovery;
   c) More costs and inefficient proceedings;
   d) Don't worry – these are outlier decisions.

4. The regulation of arbitral institutions is: **26/53 votes**
   a) Vital to the legitimacy of arbitration;
   b) Limited to the creation of arbitral institutions only (i.e. not their operation);
   c) A hindrance to the development of arbitration;
   d) Not warranted or necessary.

5. The Energy Charter Treaty: **27/49 votes**
   a) And investment arbitration, in general, will reach their expiry date soon;
   b) Must be substantially amended;
   c) Should be tweaked;
   d) Is perfect just the way it is.



SUBHIKSH VASUDEV is an Indian lawyer part-qualified in England & Wales solicitor (passed the QLTS MCT exam in January 2020). He holds a postgraduate degree from the Geneva LL.M. in International Dispute Settlement (MIDS '18). He also holds a bachelor's degree in Electronics & Communication engineering. Prior to the MIDS, over the period of six years, Subhiksh was managing his own litigation practice in India. After successfully completing a 6-month traineeship at LALIVE in Geneva, he is currently working as an international arbitration trainee in Quinn Emanuel Urquhart & Sullivan in Paris since August 2019, where he is specializing in international commercial and investment arbitration.

LEOCADIA LAKATOS is a French-Swiss international arbitration Trainee currently in Quinn Emanuel Urquhart & Sullivan Paris. She has previously interned in several law firms and arbitral institutions (Betto Perben Pradel Filhol, Baker McKenzie, Hong Kong International Arbitration Center (HKIAC)). Besides, Leocadia has also worked alongside a Solo Practitioner in Massachussetts, US, focusing on IP and Corporate litigation, while also volunteering at the Fair Employment Project. She holds an LL.M. degree from Boston University School of Law (Full Ride Scholarship) and a Master's degree from the Université Paris 2 Panthéon-Assas. In addition, she has successfully completed several certificates from Harvard Law School, Yale Law School & ESSEC Business School, and the High International Studies Institute.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

I. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

II. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a

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The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

IV. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

V. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to ITA's World Arbitration and Mediation Review, a law journal edited by ITA's Board of Editors and published in four issues per year. ITA's educational videos and books are produced through its

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