YEAR 7 | Ed. 30

YAR

YOUNG ARBITRATION REVIEW

The First Under40 International Arbitration Review

www.yar.com.pt

YAR

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EDITION 30 • JULY 2018

AUTHORS

Prof. Pierre Tercier

Nadine Lederer

Tatjana Gorst

Marta Cura

Daniel Greineder

Rodica Turtoi

Mihika Gupta

Avinder Laroya

Veronika Pavlovskaya

Zeina Obeid

Claudia Pharon

Gonçalo Malheiro

SUBSCRIPTIONS

To subscribe YAR – Young Arbitration Review, please contact rodrigo.cabral@yar.com.pt; pedro.s.uva@yar.com.pt; goncalo.malheiro@yar.com.pt

Annual subscription: € 299

[NOTE FROM THE DIRECTORS]

This summer edition represents the 30th edition of YAR, a round number which entails another round number of exciting participations: ten diverse articles on several subjects of international and domestic arbitration.

To start with, we are honored to include distinguished Professor Pierre Tercier as the kick off author of this edition. Following our tradition of inviting renowned and senior practitioners to write the prefaces & introductory notes of our Review, Professor Pierre Tercier accepted our invitation and provided appropriate advice to young lawyers on the responsibility of the exercise of justice, which, as said author claims, stands as one of the most fundamental and delicate tasks of life in society.

Interestingly, young authors address complex issues with due success, notably the one of cross border insolvency and the interaction of cross border insolvency with international commercial arbitration. In this regard, Ms. Mihika Gupta addresses a subject where there is no harmonizing supranational instrument and few conflict rules exist, therefore demanding the tribunal to take careful actions when insolvency proceeding are ongoing in parallel with pending arbitration proceedings. Furthermore, Ms. Tatjana Gorst writes on SIAC´s proposal on cross-institution consolidation protocol, following a very detailed and interesting line of reasoning. She concludes that SIAC's Proposal is not exactly a welcome novelty in multi-party, multi-contract disputes and other alternatives exist that may turn out to be more efficient and cost-effective way.

For those who enjoy reading about new issues with a predictable impact on a midterm basis, we have also two exciting topics to offer.

One of the articles is about the impact of the concept and technology of artificial intelligence in international arbitration, the commonly approached as "A.I. in I.A.". In "Machine Arbitrators – The new generation of arbitrators?", Ms. Nadine Lederer approaches the topic in a comprehensive way, raising the question whether artificial intelligence stands as a potential threat, or chance, for international arbitration. To the most skeptical, it may still sound like science-fiction - in the words of the author - but also disturbing that computers may actually take over the role of legal professionals, including arbitrators, in a not too distant future.

The second article, by Ms. Avinder Laroya, entails a comment on regulatory issues regarding blockchain technology and smart contracts, as well as on the use of arbitration as the procedure of choice for dispute resolution. Ms. Laroya refers to the start of the virtual currency evolution and the continued growth of international transactions which means that there is potential for the significant increase in cross border disputes, thus making international arbitration a natural choice and an attractive procedure.

Still one of the hottest topics in the last years, third party funding (TPF) stands as a topic firmly on the table, being approached in this summer edition by three of our authors . On one hand, Ms. Marta Cura, with an overview focusing on the Reasons, Risks and Regulatory Approach of TPF. On the other hand, Mr. Daniel Greineder and Ms. Rodica Turtoi lean to a comparative and original comment on the topic, cruising through the historically English law approach, the legislative changes and case law in several jurisdictions and ending with an analysis of the recent ICCA's Report on the topic, in "Acceptance and Anxiety: Third-Party Funding in International Arbitration".

Finally, domestic arbitration in Belarus and in Lebanon, by Ms. Veronika Pavlovskaya, Ms. Zeina Obeid and Ms. Claudia Pharozas, respectively, as well as a brief comment on a still hot Court´s decision on "Achmea", a case which promises to have serious consequences for around two hundred Intra-BITs in the EU and that will surely represent a very important landmark in the development of investment treaty arbitration, according to the author, Mr. Gonçalo Malheiro.

In light of the above, one may say that the panoply of topics of this summer edition is, at the very least, appealing and will hopefully meet the expectations of our readers.

We wish you all a pleasant and enjoyable summer!

Lisbon, 27th July 2018
Gonçalo Malheiro and Pedro Sousa Uva

[ARTICLES]

[INTRODUCTORY NOTE]

Medieval town of Gruyeres, home to the world-famous Le Gruyere cheese, canton of Fribourg, Switzerland | jakobradlgruber

THE CHALLENGE OF ARBITRATION

By Prof. Pierre Tercier

International arbitration is in constant development and constant change. In constant development because the disputes subject to this method are increasing to the point of gradually making it the usual way of resolving disputes; in constant change because it is becoming a true business with all the risks attached to it.

These two phenomena combined could, if we are not careful, fundamentally undermine the economic system or even international politics. The stakes are high. In commercial arbitration, and even more so in investment arbitration, arbitrators are given almost absolute powers to settle disputes the values of which are large and the outcomes of which may have a direct influence on the functioning of companies, including the largest ones, but also States. For this they receive a private mandate for which they are remunerated and can earn significant amounts.

The choice of the arbitrators is therefore central: First, for the parties and their counsel who place all their trust in the people to whom they give this power; the temptation may be great for them to make choices that are not necessarily guided by the desire to find the most independent arbitrator. At the same time, those who may be candidates in arbitrations may be tempted to build their reputation and thus their success on commercial considerations that go beyond the fundamental role assigned to them.

These risks must not be ignored or underestimated. It is not a question of a professional activity like any other, but of the exercise of justice, one of the most fundamental and delicate tasks of life in society. As much as the others, the judiciary is the key to the rule of law; it is the courts that guarantee the balance of power and respect for the law. A state whose judges are weak or worst corrupt is threatened in its very foundation.

The arbitrators have a responsibility at least comparable to that of the judges, if not even greater insofar as they can act practically without being subject to control; their decisions are final and binding.

The responsibility of the arbitrators depends on their mandate. Every effort must be made to guarantee independence and quality, and there are many who do it (arbitrators, councils, judges, institutions). As always, however, the best way is to teach and prepare young lawyers who want to enter the world of arbitration, as an arbitrator or as a counsel. It is they who must be educated, not only in order to master the procedure and the techniques, but particularly to be aware of the considerable responsibility which will be theirs. What is not acquired at this stage can only be recovered with difficulty.

Pierre Tercier
Professor Emeritus of the University of Fribourg (Switzerland)
Honorary President of the ICC International Court of Arbitration (Paris)

Sebastien Decoret

MACHINE ARBITRATORS – THE NEW GENERATION OF ARBITRATORS?

By Nadine Lederer

I. Introduction[1]

"Legal tech" and "artificial intelligence" ("AI") have become real buzzwords in the current legal discourse. In particular the impact of AI on the legal profession is an upcoming hot topic. While the concept and technology of AI are not completely new, it has only recently gained traction within the legal field to such an extent that it is not only discussed by the tech-savvy, but rather by the entire legal community.[2] This also includes the area of dispute resolution in general and arbitration in particular, which long had been considered outside the scope of AI.[3]

New technologies and digitalization are already transforming the way disputes are arbitrated. There is a growing use of the Internet as well as of communication and information technology in support of arbitration proceedings.[4] For example, correspondence and filings primarily take place electronically via email, cloud-based applications are used to transfer, manage and store documents, and procedural hearings are increasingly held by telephone and video conference.[5] Furthermore, online dispute resolution ("ODR") providers offer platforms which aim at resolving disputes online.[6]

These developments show that, albeit hesitantly, arbitration has increasingly shifted to the online world. This, however, comes with a word of caution – due to the advent of AI, the digitalization process will not stop at merely taking arbitration "online".[7] Disruptive AI technologies will continue to fundamentally influence the process of arbitration as well as the performance of legal services. Can these technologies advance to such a level that machines can replace human arbitrators in their role as fact finders, decision-makers and adjudicators one day? This is the main question this contribution seeks to deal with. To that end, it first deals with the current state-of-the-art AI technologies and capabilities (II.). The following part (III.) takes a look into the future and examines the challenges that robotized arbitration might present, before finally concluding (IV.).

II. State-of-the-Art AI Technologies

In its current form, AI employs technologies such as machine learning and natural language processing. The former refers to a technology that enables a program to complete a task by studying a set of data without being explicitly programmed.[8] The latter enables programs to scan and examine documents, identify relevant passages and analyze them.[9] Some programs with these features are already available in the legal sector today: for example, Watson[10], Ross[11], Lex Machina[12] and Compas[13] possess natural language skills and the capability to review thousands of decisions within seconds.[14] On this basis, some of these systems can predict the outcome of a case.[15]

Though AI possibly has infinite potential, currently, its scope of application is still limited. It is mainly used for decision support rather than as a substitute for the judgment of a third-party neutral.[16] The results are still ultimately supervised by humans, partly because of the complexity of dispute resolution, resulting in particular from the applicable law and human variables like fairness judgments and heuristics.[17]

III. A Glance into the Future: Robot Arbitrators – Science-Fiction or a Realistic Scenario?

With the further development and improvement of AI, computer programs will in the future potentially offer completely autonomous solutions and thereby possibly even supplant human arbitrators.[18] The expression "robot arbitrators" generally refers to a more advanced form of AI: decision-making AI.[19] According to experts, sophisticated AI technologies will be able to reason like human arbitrators by 2045.[20] Future arbitration clauses might thus not concern the choice between ad hoc or institutional arbitration anymore, but between human or robot arbitrators.[21] Instead of choosing a human arbitrator on the basis of nationality, legal expertise, language skills, and know-how, parties might prefer to use a sophisticated software program in order to resolve their dispute in a fast and cost-efficient way.[22] However, the interplay between international arbitration and AI raises a multitude of legal challenges, including issues of algorithmic bias (1.), a machine's lack of key human characteristics such as empathy and emotions (2.), as well as the annulment and enforcement of awards issued by robot arbitrators (3.).

1. Algorithmic and Data-Driven Bias

Human arbitrators are not always completely rational and their judgment may be affected by behavioral and systemic bias.[23] Apart from issues of apparent bias, the quality of the human decision-making process can be influenced by subconscious or cognitive bias and other typical human weaknesses, such as fatigue (in the sense of the well-known phenomenon of the "sleeping arbitrator") and memory gaps.[24] That said, computers are generally regarded as dispassionate tools that are free of prejudice, psychological heuristics and immune against the aforementioned human flaws. Against this background, it sounds like a promising opportunity that AI might probably be able to produce better decisions than humans, which would ultimately be in the interest of justice.[25] AI decision-making could thus be the panacea for any conflicts of interest, cognitive bias, and attempted bribery of arbitrators.

But are computer programs actually completely immune to all issues of bias?[26] Software is developed and programmed by human software engineers who also feed the machines with data in order to build algorithms. In light of this, it cannot be excluded that the software might be affected by some form of algorithmic or data-driven bias. More specifically, there is a risk of hidden bias to the extent that it could be built (unintentionally) into a data set or algorithm by software engineers.[27] Bias may be inherent in a program to the extent that it favors one party or reflects a preference for certain values if the software engineers themselves were not independent or impartial.[28] The situation is aggravated by the fact that bias can be easily hidden under a well-crafted computer interface.[29] This is in particular likely since, with regard to AI technologies, the exact decision-making process is not visible to the users and thus even more of a black box.[30] This gives rise to concerns because it may not be possible for credulous users to identify bias in procedures or outcomes and they consequently accept the decision out of ignorance.[31]

Against this background it becomes clear that, when technology is used in the decision-making process itself, the fundamental principles of independence and impartiality do not only have a legal, but predominantly a technological dimension.[32] As long as it is ensured that the respective algorithm is well designed and uses a bias-free, neutral decision matrix without favoring any of the parties, it clearly provides advantages that actually cannot be completely guaranteed with human actors due to the above elaborated fallibilities.[33] In this respect, regulation is required. For example, professional ethical guidelines concerning the development and programming of AI technologies by software engineers could be developed, which are comparable to those legal instruments already existing for the legal profession,[34] namely the IBA Guidelines on Conflicts of Interest in International Arbitration.

2. Computer Programs' Lack of Emotional Processing and Empathy

While human arbitrators may be straddled by the shortcomings mentioned above, they do also possess many positive characteristics: decision-making by human arbitrators involves emotional intelligence, psychological insights, diplomacy, fairness, compassion, discretion as well as the ability to explain a decision.[35] This also involves empathy which means the ability to understand the intentions of others, foresee their behavior and recognize the emotions they are feeling.[36] Although arbitrators base their decisions on proven facts and law, some cognitive exercise is also expected from them in order to fully understand the case.[37]

Computer programs cannot accurately feel, read or predict the emotions of the parties and they lack empathy.[38] With increased reliance on AI and the subsequent replacement of human arbitrators, the whole computer-driven process will become entirely emotionless and impersonal, without any non-verbal communication such as gestures, postures, tonality of voice, and facial expressions. In this respect, it might be doubtful whether computer systems can settle disputes in a reasonable and appropriate way.[39] This is due to the inability of the system to respond to inputs and to assess the provided meaning besides the written text of the respective agreement and other documents.[40] Moreover, computer systems may not be able to explain themselves and to provide the parties with a reasoned decision.[41]

It has, however, to be distinguished between several scenarios in this respect: AI might actually provide a well-suited solution for simple, straightforward, document-based cases with a high level of repetition and standardization, such as small, low-value e-commerce disputes and other minor conflicts arising from online transactions.[42] Those disputes, which are already today frequently handled by way of ODR, often do not involve difficult legal questions. Generally, there will be no need to examine the parties' behavior and the circumstances surrounding the case more closely. The parties rather strive for a quick, uncomplicated solution of the matter than an extensive assessment of every detail of the case. Also the fact that the system may not be able to issue a reasoned decision does not necessarily present an obstacle. Under many national arbitration laws and institutional rules, this is not a mandatory condition since the parties are free to waive the requirement of a reasoned award.[43]

Those straightforward conflicts are clearly different from complex, high-value disputes involving complicated legal issues, non-repetitive fact patterns and sophisticated parties. Given the lack of a system of precedent and of a comprehensive dataset from which the programs could learn due to the confidentiality of many awards, AI might not be solely able to solve those disputes.[44] Moreover, there is no indication that computers will soon be able to interview witnesses and to assess the parties' and witnesses' credibility.[45] In such complex cases, a hybrid approach may nonetheless be adopted by appointing a mixed panel of human and robot arbitrators.[46] This leads to the interesting question on how the deliberations should take place in such a scenario.[47] The computer might either take a decision-making or a decision-supporting role. For example, in a first step, the computer program could do all the necessary preparatory work by establishing the facts, analyzing relevant case law and suggesting a possible outcome. This would be beneficial both in terms of time and cost efficiency. Moreover, by organizing the case and preparing a solution, AI could help the human arbitrators to better understand the dispute. They would then take a supervisory role and only focus on the key questions for which the system may not be able to suggest an appropriate solution. In this respect, the human arbitrators may also discuss with the parties which issues they consider to be crucial and where they feel more comfortable in receiving a human evaluation. Alternatively, the arbitrators could first draft the award and then consult with the computer program as a supplement which would double-check the draft award for factual and legal errors and suggest changes to be approved by the human arbitrators.[48] Instead of acting as an arbitrator, the computer might also take the role of a tribunal secretary.[49] This would, however, require that the computer merely performs administrative tasks whereas the human arbitrators would not delegate their core decision-making function. In the case that parties designate a computer as a sole arbitrator, it might also be an option to give them, under limited circumstances, the possibility of an appeal to a human tribunal.

3. Annulment and Enforcement of Awards Rendered by Robots Arbitrators

Another question concerns how the use of robot arbitrators fits in the current legal framework, in particular whether awards issued by machines would be enforceable under the New York Convention[50] ("NYC") and national arbitration laws. Are awards that are rendered solely and autonomously by party-appointed machine arbitrators "arbitral awards" in the sense of Article I(1) NYC and of national arbitration laws? The NYC as well as the UNCITRAL Model Law on International Commercial Arbitration (2006) and many national laws do not include a definition of this term. Generally, an award is regarded as a decision by an arbitral tribunal on a legal dispute between the respective parties that is in line with their arbitration agreement and settles the disputed issues in a final and binding manner.[51] Article I(2) NYC clarifies that the term "arbitral award" includes "*awards made by arbitrators appointed for each case*" and "*those made by permanent arbitral bodies to which the parties have submitted*". When referring to "arbitrators", the drafters of the NYC most likely had in mind only human arbitrators, although the NYC does not include a specific definition or reference to arbitrators as physical persons. Also many national arbitration laws do not include such a specification or do at least not expressly forbid the appointment of robot arbitrators, which could be seen as a legal loophole enabling the parties to designate a computer as an arbitrator.[52] Currently, the European Union also considers providing robots with electronic personality in cases where they take autonomous decisions or otherwise interact with third parties independently.[53] Since arbitral proceedings generally allow for a high degree of flexibility and party autonomy is the guiding principle, the applicability of the NYC and national arbitration laws should not be denied in cases where parties mutually agree on appointing a computer as an arbitrator which renders an award in line with their agreement.

However, it is argued that awards issued by machine arbitrators would violate the international public order as they lack the abovementioned key human characteristics and that they should therefore be set aside or held unenforceable.[54] This line of argument is not convincing. The concept of public policy only includes the infringement of fundamental principles which would outrage everybody's sense of justice or shock good morals.[55] It is a very flexible concept without a fixed content, but rather subject to constant change over time, depending on the varying ideas of morality and the specific circumstances of each individual case.[56] The technological development should hence be taken into consideration, in particular the fact that technology is omnipresent and dominating our daily life in almost every area. The legal domain should thus not form an exception by completely banning AI. Moreover, the overall desirable goal behind taking arbitration online should be considered: technology-assisted and technology-based arbitration can help to optimize arbitration by making the proceedings more efficient, faster and less expensive. In addition, it could facilitate access to justice. This does not violate fundamental moral values, but, on the contrary, ensures the enforcement of rights. Only under extreme circumstances a violation of public policy should therefore be considered.

IV. Conclusion: AI as a Potential Threat or Chance for International Arbitration?

To some, it may still sound like science-fiction and also alarming that one day, computers will have the necessary skills to take over the role of legal professionals in general and arbitrators in particular. However, AI, algorithms and automation do not


Munich - Germany - Bogenhausen - 1896 | Foottoo

necessarily need to give rise to suspicion and concerns. System design will become essential in order to take full advantage of the potential that technology and AI can offer. Through the development of computerized arbitral proceedings and the use of autonomous systems relying on AI, new stakeholders enter the legal arena, i.e. software developers and ODR platform providers.[57] Software engineers and the legal profession have to cooperate in order to build and improve the systems; the latter in particular need to understand the technical architecture behind the systems and make software engineers familiar with the applicable legal requirements.[58] Poorly designed or managed computer programs or their misapplication would not only lead to an increase in time and costs, but in the worst case could even result in the unfair treatment of a party.[59] Therefore, systems have to be developed in such a way that they ensure due process, transparency and include neutral decision-making algorithms.[60] One major advantage of machine-rendered adjudication will be the ability of computers to provide decisions within short periods of time. Yet, a careful balance must be found between efficiency and due process in order to avoid that a system may unduly give preference to efficiency at the expense of justice.[61] Provided that AI technologies are carefully designed and thoughtfully used, they can be an essential component in assisting parties to efficiently resolve their dispute, thereby facilitating access to justice.[62] These days, arbitration is increasingly subject to the criticism of being too expensive, slow and inefficient. AI and technology-based proceedings could actually help to bring arbitration back to where it originally was: a quick and efficient dispute resolution mechanism.

The question, however, is how quickly the market will accept this relentless development and when users will finally be ready to appoint robot arbitrators. Similar to any disruptive innovation, the future success of AI in international arbitration very much depends on the extent to which user trust can be built.[63] Despite the numerous benefits AI technologies could offer in terms of time, costs and efficiency, some parties might still feel more comfortable in appointing human arbitrators. Here, they know better what to expect and it responds to their presumptive preference for human interaction.[64] Historically, all forms of alternative dispute resolution have faced public distrust at some point in time and the concept of "trust" has therefore deep roots in the context of dispute settlement.[65] Adding technological components to the dispute resolution process and shifting it to the online world adds further challenges to the task of developing trust and confidence.[66] Users must therefore be assured that the AI technologies deployed are designed in a sophisticated way and that their rights are safeguarded, both in relation to procedural fairness and privacy. However, as soon as there is widespread acceptance and the credibility of AI technologies is established, then who would prevent parties from appointing robot arbitrators, especially in arbitration where freedom of choice is the paramount principle?[67]

Nadine Lederer

1 The views expressed herein are solely those of the author, and do not represent the view of Hogan Lovells or its clients.
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Singapore | Kjersti Jorgensen

IS SIAC'S PROPOSAL ON CROSS-INSTITUTION CONSOLIDATION PROTOCOL A WELCOME NOVELTY IN MULTI-PARTY, MULTI-CONTRACT DISPUTES?

By Tatjana Gorst

1. General on consolidation

Consolidation of two or more proceedings *with compatible* arbitration agreements is undisputedly beneficial. Whether it is avoiding duplication in the arbitral process,[1] saving on overall legal fees, witnesses' time, preparation efforts and other expenses, or preventing inconsistent results,[2] "*consolidation permits more efficient and cost-effective dispute resolution.*"[3]

The contractual restrictions of the arbitrators' powers, however, limit their possibility to act judicially and *order* the consolidation.[4] What is even more troublesome, most institutional rules do not allow cross-institutional consolidation, even when parties consent thereto.

In an effort to address the practical shortcomings of the lack of provisions allowing for cross-institutional consolidation, the Singapore International Arbitration Centre ("**SIAC**") made a proposal for establishment of a mechanism for cross-institutional consolidation of related disputes through adoption of a new "protocol".[5] Essentially, the Proposal provides for two different options:[6]

1. A new standalone *mechanism*, in which applications are to be decided by an *ad hoc* committee, composed of members of the concerned institutions.

2. A new separate single *institution* with a mandate to decide on applications based upon its own set of rules, providing for objective criteria[7] according to which the institution would make decisions.

The first option is more promising, although, according to SIAC, "*the second option has the benefit of simplicity*".[8] Contrary to SIAC's argument in this regard, its realization requires many resources; yet its outcome, justification, and efficiency are still questionable.

First, establishing a permanent institution is financially burdensome. Second, it is time consuming. Next, who shall decide on how many institutions will be represented? Further, the Memorandum refers to "leading" institutions.[9] This statement is ambiguous, resulting in further unsettled and controversial issues, such as: How many institutions? Which ones? Who is to decide what standards determine the "leading" ones? This is a subjective matter that does not necessarily lead to a just, rational, and impartial outcome. Not only that, but it is also difficult to justify why one institution, which is absolutely unfamiliar with the dispute, should decide on a matter that directly impacts the arbitration agreement(s) and the arbitration(s).

The first option takes into account the fact that the parties have chosen specific institutions to administer their dispute and it is precisely those institutions that get to decide whether to consolidate. Still, this option does not fully resolve the initial problem, and it also requires time and financial resources. In order to finalize this idea, the institutions are yet to decide on criteria. Similarly as the second option, this results in further unsettled issues: "Existing arbitral institutions" is a wide-ranging term. Which institutions are to take part in the negotiations and the deciding? Did SIAC foresee *every* institution? Is the negotiation-stage foreseen as a conference?

Practitioners believe that the Proposal's success depends on the proper balance between <u>efficiency</u> and <u>party autonomy</u>.[10] This balance seems equated with a reduced risk of satellite disputes, inconsistent awards, and additional costs.[11] Another implied balance is between <u>fairness</u> and <u>party autonomy</u>.[12] Procedural fairness relates to the procedures used by the tribunal, rather than the actual outcome reached. The concept means "*conforming with the established rules*."[13]

Party autonomy, which is the cornerstone of arbitration, is limited by the mandatory provisions of the *lex arbitri*. However, the limitations should not go beyond that. If efficiency or/and fairness are allowed to prevail, that could lead to frequent party manipulation.

In the matter at hand, party autonomy does not only require that, among others, a party of the arbitration initiates the consolidation. On the contrary, it calls for the appointed/selected-by-the-parties *tribunal* to make decisions that finalize the dispute, as well as decisions that influence the proceedings in any way.[14]

When parties adopt institutional rules, it is because they want *those* rules to provide the procedural framework.[15] As SIAC's President explains, "*by selecting divergent arbitration procedures…, and/or appointing authorities, the parties expressed their preference for incompatible dispute resolution mechanisms*".[16] Contrary to this, under the Proposal, parties are deemed to have accepted the possibility of consolidation through their choice of the applicable institutional arbitral rules in the arbitration agreements.[17] The parties would have the option to opt-out. But in reality, very few (if any) would do this.

Parties may not be keen on the idea that by choosing specific rules, they also accept that their proceedings shall be conducted in accordance with other rules, which they never agreed to and which might have major differences. Being informed[18] of the inclusion of the Protocol in the rules does not rise to level which satisfied parties' consent.

Automatic and involuntary "acceptance" of such a protocol is not in line with an arbitration agreement that provides for a particular institution. If we were to accept the first proposed option, then the "joint committee" will even *select* the rules applicable for conducting the consolidated arbitration.[19] This directly contradicts party autonomy. If we go a step forward, recognition and enforcement of an award may be refused if the procedure was not in accordance with the agreement of the parties.[20]

Further on, each consolidation should: (i) arise out of party autonomy, *and* (ii) be decided by the entity dealing with the dispute directly, *i.e.* the respective tribunal(s). In fact, the tribunals are the bodies that are most apt to decide if consolidation is justified in the respective case. In that way, it would be the tribunal (who is already dealing with the parties and the dispute) who gets to decide. Which tribunal? This should be defined in the revised rules.[21]

One need not forget the principle of competence-competence enshrined in every institutional rules and relevant national legislation. It is the tribunal that has the mandate to decide on the existence, validity, legality, and scope of the parties' arbitration agreement.[22] The Proposal establishes a system where the relevant *institutional body* decides. That is *indirect* denial of the principle of competence-competence.[23]

Besides, the Memorandum provides for neither express, nor implied consent of the parties. It does provide that consolidation should be applied for,[24] but there is no indication that the new mechanism also requires the consent of the concerned parties. Does that mean that the mechanism can impose it? In no situation should this outcome be allowed.

Arbitral institutions do not have the mandate to force consolidation on the parties. It is true that parties chose institutional rules as basis for organizing and conducting the arbitration. The institutions themselves are merely a procedural aiding "tool". They are established to *administer* the proceedings.[25] Allowing the institutions to make a decision which would have an impact on the mandate of the tribunal(s) is not part of their own mandate.

Practice will show, however, if parties are attracted by the increase in efficiency or deterred by the potential impact on their autonomy.[26]

It is undisputed that parallel/multiple proceedings have numerous disadvantages. So, a change in the current situation is more than welcome. After all, all rules are dynamic in nature. They change in line with the advancement of arbitration practice and business relations. However, the change needs to be realistic, efficient, and widely-supported. SIAC's Proposal is not entirely such. There are other means to fight or even prevent guerrilla tactics, and to achieve better efficiency in resolving multi-party, multi-contract disputes. The institutions have more than one option available in order to allow for consolidation of two or more

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arbitrations conducted under different rules.

As already discussed, SIAC proposes a Protocol which requires modification of institutional rules and establishing a new mechanism. A quicker, more practical and more efficient step would be to modify institutional rules so that they are more uniform. It is much more efficient to amend the present rules and just to "exclude" the condition/requirement that the two arbitrations need to be conducted under the same rules,[27] than it is to create a whole new mechanism.

The Proposal states that "*the consolidation provisions of existing institutional rules* ***of leading arbitral institutions*** *do not permit the consolidation of arbitrations that are subject to different sets of institutional arbitration rules… even if they satisfy the other criteria for consolidation*."[28] Indeed, the current arbitration rules of SIAC,[29] ICC,[30] SCC,[31] Swiss Rules of International Arbitration,[32] ICDR,[33] CIETAC,[34] etc. expressly provide for consolidation of two (or more) arbitrations pending under the respective institutional rules. Nevertheless, the current VIAC Rules of Arbitration and Mediation [35] the WIPO Arbitration Rules,[36] and the CAS Procedural Rules[37] impliedly *allow* any "kind" of consolidation. Those rules do not contain a condition the two arbitration proceedings to be conducted under the same set of rules. Consequently, two proceedings under different rules *can* be consolidated under those two sets of rules.[38] Precisely this example should be taken into account for the future steps.

Now, arbitral institutions just need to unify the consolidation-provisions. This is more probable to reach success and efficiency. After all, in order to "solve" this pending problem, the institutions would anyhow need to discuss the matter directly and even "negotiate" the most efficient and satisfactory solution. Moreover, institutions will be more inclined to agree on unification whilst preserving their authority.[39]

Inconsistencies will always be present with regard to decisions on consolidation. Even if the first option were to be accepted, the "joint committee" would still be formed on a case-by-case basis. The objective criteria provided in the yet-to-be-adopted Protocol would apply to every arbitral institution, but it will still be applied differently depending on the circumstances.

Having this in mind, it would be more efficient if the step taken by institutions is to unify the rules. In this way, institutions and practitioners will be able to see how practice develops and whether cases like this appear at all, *before* so many resources are spent on establishing a mechanism, without having any guarantee of its success. Consequently, the "loss" will be lesser if proven that cross-institutional consolidation is not as desired as assumed.

Lastly, the SIAC's Proposal (primarily the first option) seems not to take into account *ad hoc* arbitrations. The author's proposal is to modify the arbitration rules in a way that would also include consolidation with *ad hoc* proceedings.

To answer the initial question: in view of the author, SIAC's Proposal is not a welcome novelty in multi-party, multi-contract disputes. The perceived weakness in multi-party, multi-contract arbitrations can be resolved in another, more efficient and cost-effective way.

Tatjana Gorst

1 Michael Darowski, Arthur Yap, "*Could Related Arbitrations Administered By Different Institutions be Consolidated?*", 24 January 2018, available at: https://gowlingwlg.com/en/insights-resources/articles/2018/could-related-arbitrations-administered-by-differe.
2 "*Chapter 11: Multiparty Issues in International Arbitration*", in Gary B. Born, "*International Arbitration: Cases and Materials*", second edition, Kluwer Law International, 2015, p. 933.
3 Singapore International Arbitration Centre, "*Proposal on Cross-Institution Consolidation Protocol*", 19 December 2017, available at: http://siac.org.sg/our-rules/rules/69-siac-news/551-proposal-on-cross-institution-consolidation-protocol.
4 Kaj Hober, "*Chapter 9: Parallel Arbitration Proceedings – Duties of the Arbitrators: Some Reflections and Ideas*" in B.M.C. Sanz-Pastor and J.D.M. Lew (eds.), "*Parallel State and Arbitral Procedures in International Arbitration*", Dossiers of the ICC Institute of World Business Law, Volume 3, Kluwer Law International, 2005, p. 254.
5 "*Proposal on Cross-Institution Consolidation Protocol*", *supra* note 3. Also, see "*Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol*", paras. 19-20, 42, available at: http://siac.org.sg.
6 *Ibid.*, para. 1.
7 Section III of the Memorandum.
8 "*Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol*", *supra* note 6, para. 14.
9 *Ibid.*, para. 7.
10 Markus Burianski, Maximilian Clasmeier, "*The Singapore International Arbitration Centre's proposal on cross-institutional consolidation of arbitrations*", 20 February 2018, available at: https://www.whitecase.com/publications/alert/singapore-international-arbitration-centres-proposal-cross-institutional.
11 Philippa Charles, "*SIAC's proposal for a protocol on cross-institutional consolidation of arbitrations: too much complexity to be beneficial?*", 12 January 2018, available at: https://www.stewartslaw.com/news/siacs-proposal-for-a-protocol-on-cross-institutional-consolidation-of-arbitrations-too-much-complexity-to-be-beneficial/.
12 Paragraph 1 of the Memorandum: "… [*protocol] would result in significant gains in efficiency and* ***fairness*** *for parties that seek to resolve their disputes through arbitration*." [emphasis added]
13 This definition is provided at: https://www.merriam-webster.com/dictionary/fairness.
14 Interim relief, stay of proceedings, consolidation, etc.
15 Gavin Margetson, James Clarke, "*Joining the dots: SIAC proposes cross-institution consolidation of arbitrations*", 22 January 2018, available at: https://www.blplaw.com/expert-legal-insights/articles/consolidation-by-collaboration-siac-proposal-on-cross-institutional-consolidation.
16 Gary Born, "*International Commercial Arbitration*", Kluwer Law International, second edition, 2014, p. 2584, in "*Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol*", *supra* note 6, footnote 5.
17 *Ibid.*, para. 8.
18 *Ibid.*, para. 9.
19 It could be new rules that the parties have not stipulated, or one set of arbitral rules stipulated by the parties in one of the arbitrations.
NOTE: This, of course, does not refer to the situations when the parties have not chosen the rules themselves. In that case, it is well established that the tribunal shall determine the relevant rules of procedure. For instance, Article 19 of the UNCITRAL Model Law.
20 As provided for in Article V(1)(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Such award can also be resisted on public policy grounds as per Article V(2)(b) of the Convention.
21 One option is the tribunal who was approached first. Another option is both tribunals jointly.
22 "*Chapter 7: International Arbitration Agreements and Competence-Competence*", in Gary Born, "*International Commercial Arbitration*", Kluwer Law International, second edition, 2014, p. 1047.
See also, Phillip Landolt, "*The Inconvenience of Principle: Separability and Kompetenz-Kompetenz*", Journal of International Arbitration, Kluwer Law International, 2013, Volume 30 Issue 5, p. 511.
23 This, of course, does not apply in the situation when the proceedings are at such an early stage that the tribunal has not been constituted yet.
24 For instance, *Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol*", *supra* note 7, paras. 7(a), 13(a), etc.
25 See, for instance, Rule 1.1 of the SIAC Rules, Article 1(2) of the ICC Arbitration Rules, Article 1 of the SCC Arbitration Rules, etc.
26 "*Proposal on Cross-Institution Consolidation Protocol*", *supra* note 3.
27 *Supra* notes 33-39.
28 "*Memorandum Regarding Proposal on Cross-Institution Consolidation Protocol*", *supra* note 7, para. 4.
29 Rule 8.
30 Article 10.
31 Article 15.
32 Article 4.
33 Article 8.
34 Article 19.
35 Effective as of 1 January 2018, Article 15: "*(1) …* ***two or more arbitral proceedings*** *may be consolidated if:*
1.1 the parties agree …; or
1.2 the same arbitrator(s) was/were nominated or appointed;
and the place of arbitration … is the same " [emphasis added]
36 Effective as of 1 June 2014, Article 47: "*Where an arbitration is commenced that concerns a subject matter substantially related to that in dispute in other arbitral proceedings pending under these Rules* ***or involving the same parties****, the Center may order,* ***after consulting with all concerned parties and any Tribunal*** *appointed in the pending proceedings…*" [emphasis added]
37 Effective as of 1 January 2017, R 39(6): "*Where a party files a request for arbitration* ***related*** *to an arbitration agreement and facts similar to those which are the subject of a pending ordinary procedure before CAS, …may, after consulting the parties, decide to consolidate the two procedures*." [emphasis added]
38 To the author's understanding, it is only VIAC, CAS, and WIPO. There could be more, if more extensive research is conducted.
39 SIAC's proposal would lead to a situation in which institutions either: (i) potentially "lose" their sovereignty to a new separate institution (second option), or (ii) partially give up their power by allowing other institution(s) decide on relevant matters (such as the objective criterion, etc.).

Hamburg | Leonid Andronov

THIRD-PARTY FUNDING: REASONS, RISKS AND REGULATORY APPROACH

By Marta Cura

Abstract

This article will focus on Third-Party Funding in international arbitration as an alternative source of financing disputes that has seen tremendous growth over the past decades. It will cover the reasons for engaging in Third-Party Funding, the risks therein, and the regulatory discussion around it. For this, the article will delve into the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration and the recently released Report from the International Council for Commercial Arbitration and Queen Mary University of London.

1. Introduction to Third-Party Funding

1.1. Definition and Reasons

As international arbitration further grows in popularity as the preferred method to resolve international disputes, Third-Party Funding (TPF) follows closely, as parties, for various reasons, seek to contain their legal costs. For funders and other investors, international arbitration is a particularly attractive area of investment. Some of the factors contributing to the popularity of TPF are the high volumes of the claims, higher predictability of the outcome than in litigation, the high enforceability of arbitral awards[1], the industry expertise of the decision-makers, the expectation that the proceedings will progress in a speedier manner, and the potentially lower evidentiary costs. As a consequence, several jurisdictions have relaxed their regulations on TPF or wholly removed prohibitions thereon[2]. With the purpose of helping the international community in providing a framework for TPF, the International Council for Commercial Arbitration (ICCA) set up the Third-Party Funding in International Arbitration Task Force, a joint project with Queen Mary University of London, and recently released its report (Report). The Report assesses some of the critical aspects of TPF in international arbitration[3]. This highly anticipated project was the result of various forces driving the sharp increase in the demand for dispute financing and the need to harmonise current practices.

Notwithstanding the fact that TPF is no longer a new phenomenon, it is still unable of being defined in a clear-cut manner[4]. Put simply, TPF involves an entity, with no prior interest in the dispute, funding one of the parties — in practice, most commonly the claimant. The classic type of TPF is given on a non-recourse basis with repayment contingent on success, i.e., the funder cannot recover from the funded party if the outcome of the dispute is unsuccessful. In such a scenario, the funder will be limited to recovering the proceeds the funded party is capable of recouping, if any[5]. Typically, the funder will initially pay the funded party's legal fees and possible "out-of-pocket costs" (e.g. expert fees, arbitrator fees, arbitral institution fees, discovery related fees)[6]. In case of an order, award or judgment rendered against the funded party, the funder also settles these costs, therefore carrying a significant burden of risk of the arbitral outcome[7]. Depending on the respective funding agreement, it may, as well, provide for the payment of the opposing party's attorney fees in case of a lost arbitration proceeding or when the arbitrator orders it to do so.

Mainly four driving forces are contributing to the exponential increase in use of TPF. The first regards reasons of public policy of increasing access to justice, which is discussed in more detail below. The second is the growing number of companies seeking a way to pursue meritorious claims without disrupting their businesses[8]. The third is linked to financial uncertainties deriving from the 2008 global financial crisis. In its aftermath, hedge funds, banks and other financial investors have been seeking investment opportunities that are uncorrelated to possible unstable financial markets[9]. Finally, the fourth driving force, which is relatively recent compared to the others, stems from well-resourced companies with a thriving balance sheet, which would allow them ample room to pay for dispute resolution[10]. These choose TPF freely as an alternative funding possibility. Together, the aforementioned factors have changed the way TPF has developed in recent years.

1.2. Participants

The primary participants in the funding process are the claim holders, funders, lawyers and, potentially, funding brokers[11]. The vast majority of recipients of TPF are claimants[12]. These vary in kind. There could be a claimant who lacks the financial resources to pursue a claim in arbitration. For instance, because it invested into a failed project. Obtaining funding from an investor for the arbitral proceedings could potentially be the only means it can seek to remedy its losses[13]. Alternatively, there could be a claimant who has sufficient funds, but the company it wishes to pursue a claim against is much bigger, thus putting the claimant at a disadvantage. Even large corporations with more than adequate resources are increasingly resorting to TPF as a way of allowing them to effectively manage their disputes without negatively impacting their balance sheets[14].

Law firms play a key part in the funding process. Even though they are not party to the funding agreement, their role is still of the utmost importance. They help claimants, in a first step, to decide whether they should explore the possibility of TPF and, if so, how to approach it. Hereby, they are playing a central role in bringing claimants and funders together. Funders therefore look to establish long-lasting relationships with law firms in the hope of future referrals[15]. It is legitimate to conclude that claimants rely very heavily on the expertise of their law firms for advice relating to TPF and all its intricacies.

Lastly, also specialised funding brokers may be involved in the funding process. They come into play when the party seeking funding does not wish to address the market directly. The broker advises on potential financing options, has access to a broad range of funders and can also manage the process. Some funding brokers introduce the claimant to the whole or a subset of the funding market, while acting on behalf of the claimant, while others act on behalf of the funders[16].

2. Advantages of Third-Party Funding

TPF brings substantial advantages to corporate clients, as well as, to the entire dispute resolution system.

2.1. Access to Justice

Historically, TPF was considered as being primarily a mechanism by which financially distressed claimants could obtain access to justice. Access to justice is a core fundamental right and a central concept in the broader field of justice[17]. It is an enabling and empowering right in so far as it allows individuals to enforce their rights and obtain redress[18]. In some instances of TPF, outside financing is necessary for a claim to proceed at all. Such is the case of an impecunious claimant or one facing liquidity or budgetary challenges[19]. Impecuniosity is the plainest form of TPF — one party lacks the financial means to pursue a dispute, and someone else provides these means hoping for return on its investment.

It is a fundamental characteristic of any meaningful legal system to provide open and equal access to arbitration for parties who want to avail themselves of it. But even if a party has the financial means to start arbitration proceedings, access to justice is not always equally achievable for all parties. This is mainly due to problems arising out of bargaining imbalances[20]. If one of the parties is much smaller than the other, the dispute could pose very different settlement dynamics for each party[21], i.e., even if the weaker of the parties has a strong case on the merits, it would feel compelled to accept a low settlement offer that would liberate it from the costs of further pursuing arbitration. This is to say that the ultimate resolution of the case could likely be influenced as much by the bargaining imbalances between the parties as by the underlying merits of the case[22]. Such imbalances can be substantially eliminated with the help of TPF, permitting financially constrained parties to pursue a meritorious claim properly[23].

Validation is yet another reason for parties to seek TPF. Before a funder picks a claim to invest in, he will conduct extensive due diligence to ensure the project is going to yield return. By having its case analysed, the TPF seeker may start to shape its case strategy and perhaps even encourage early settlement, once the other party discovers that the claim is being backed by a funder[24].

While TPF can promote access to justice, the vast majority of applications seeking TPF are rejected by funders, on the grounds that they are either not capable of yielding sufficient profit or are too risky to invest in[25].

2.2. Third-Party Funding as a Choice

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Nowadays, as mentioned above, TPF is not so much directed at impecunious parties anymore, in order to grant them access to justice. Rather a rising number of companies with adequate resources use TPF out of choice. Therefore, the funding market today is mainly focused on large, well-resourced, corporate entities[26]. Despite having the resources to afford the costs of their disputes, these entities choose this model to manage risk and to reduce legal budgets. Herewith they take the costs of pursuing arbitration off their balance sheets and are able to pursue other business priorities instead of allocating resources to finance an arbitration matter[27]. By doing so, corporations can proceed with arbitration while retaining control on their exposure to loss[28].

3. Disadvantages and Risks of Third-Party Funding

Although TPF has many advantages, there are several downsides that have to be taken into account. One economic disadvantage is that by preparing the case for presentation to a possible funder, the party seeking funding can (and in all likelihood will) incur substantial costs, which he may not recover, if the funder declines to fund its claim. Even if successful, these preparatory costs as well as any costs of negotiating the funding agreement will still be borne by the funded party, as funders are usually not liable for any costs incurred before a funding arrangement is entered into[29]. Another disadvantage emanating from the business model of TPF, is that a successful claimant will ordinarily have to pay a significant part of his recoveries to the funder. This can be done, for instance, by the funder either retaining a multiple of the amount advanced to pursue the claim or by obtaining a percentage of the damages recovered, whichever is greater[30].

A different aspect to consider is that although funders are generally not permitted to exert undue control or influence the arbitration proceedings in any way, to some extent there may be loss of autonomy on the part of the funded party. The funder may put its interests ahead of the client's interests[31]. This can either be by encouraging to pursue non-meritorious claims[32], or by discouraging the settlement in favour of fighting for a more significant recovery[33], hereby reversing the right of approval of the settlement. This occurs in particular when a settlement might not be the most beneficial.

Additionally, a substantial amount of issues could arise if TPF was to remain largely unregulated. Some of the concerns that have been raised in past debates are the following: 1) the possible waiver of the attorney work product doctrine when the client discloses privileged documents to a potential funder[34]; 2) the potential waiver of the attorney-client privilege when the client discloses privileged information to a potential funder[35]; 3) the potential conflicts of interest that may arise if the funder meddles in the attorney-client relationship[36]; 4) the potential use of the legal system for financial speculation[37]; 5) herewith the possible future bundling, securitisation, and trading of legal claims[38]; and 6) whether the funding of investment arbitration claims on the side of the investor or defences on the side of the host-state comports with the spirit of the investor-state dispute resolution system[39].

Moreover, the exponential growth in the number of funded arbitration claims together with the small number of funders, and the relationship between funders and the law firms actively involved in international arbitration are some of the contributing factors adding to the concern regarding the potential for conflicts of interest and the rising need for greater transparency[40]. Examples for such conflict scenarios can derive from the party-appointment of arbitrators: namely, when individual arbitrators are repeatedly appointed in cases involving the same funder, or the arbitrator appointed by a funded party already has a relationship with the funder[41].

4. Regulatory Approach

Taking all of these reasons into account, disclosure obligations are considered key in tackling conflicts of interest. It is analysed in the Report whether the existence of a funding agreement must or should be disclosed to the decision-maker or the opposing party. Disclosure obligations in arbitral processes are a common instrument to foster transparency. There are both party and financial disclosure obligations in place, in order for arbitrators to check for potential conflicts of interest. This is essential to safeguarding the integrity of the arbitral award and to curtail the risk of post award challenge. Arguments in favor of disclosure related to funding agreements range from avoiding conflicts of interest, preserving transparency, complying with procedural good faith, refraining from abuse of the arbitral process and ensuring the party remains in control of its claim[42]. Those encouraging more disclosure requirements of the funding agreements are also concerned, from a practical point of view, that the very foundation of the arbitral award might be questioned, and a court might either deny the award's enforcement or set it aside based on conflicts of interest should the parties not disclose funding agreements to the arbitrators[43].

4.1. The 2014 IBA Guidelines

The first official attempt to put a duty on the parties to disclose a TPF agreement in all cases as a matter of procedure were the 2014 International Bar Association's (IBA) Guidelines on Conflicts of Interest in International Arbitration[44]. The revised General Standard 6(b) and the Explanation to General Standard 6(b) include express references to TPF and broadly define third-party funder as an entity that has a "direct economic interest in the award". It further includes a requirement that arbitrators disclose connections to funders when relevant to the case. In order for arbitrators to determine whether their connection to a funder may be relevant, General Standard 7(a) and the Explanation to General Standard 7(a) provide that the arbitrator has the power to order the parties to disclose their funding. Disclosure of such connections should reduce the risk of calling into question an arbitrator's impartiality or independence based on information learned after the appointment.

4.2. The ICCA-QMUL Report

More recently, the Report analysed in general the implications of lack of disclosure of a TPF agreement. The Report's aim is not to propose any new or unique rules or guidelines regarding how potential conflicts between funders and arbitrators should be analysed, or when such potential conflicts should lead to recusal or disqualification[45]. It rather addresses the narrower issue of how, when, to what extent and by whom the identity and existence of a funder should be disclosed. Therefore, enabling arbitrators to make proper assessments regarding potential conflicts of interest[46].

The Report offers a series of principles, which are the result of the internal discussions held during its preparatory works. In contrast to the IBA Guidelines where the disclosure initiative would be triggered by the arbitrator, the Report suggests that a party and/or its representative should, on *its own initiative*, disclose the existence of a TPF arrangement and the identity of the funder to the arbitrators and the arbitral institution or appointing authority[47]. Furthermore, this should be done as either *part of a first appearance or submission*, or *as soon as practicable* after funding is provided or an arrangement to provide funding for the arbitration is entered into[48]. The Report goes on to state that the arbitrators and arbitral institutions should have the authority to expressly request that the parties and their representatives disclose whether they are receiving support from a third-party funder and, if so, the identity of the funder[49]. Additionally, arbitrators and arbitral institutions should, in light of these disclosures, assess whether any potential conflicts of interest exist between an arbitrator and a third-party funder. They should then evaluate the need to make further appropriate disclosures or take other appropriate measures that may be required under applicable laws, or guidelines[50].

5. Outlook

It remains unclear if and how TPF is going to be regulated in the future. Regulations on the national level create disparities among jurisdictions, thus inviting forum-shopping with parties selecting the law most favourable to them or silent on the matter[51]. It is also necessary not to over-regulate TPF as doing so could limit its use and application[52]. Ultimately, one set of rules could hardly comprise all of the continuing issues and concerns raised by TPF. Though it appears that international guidelines, such as the 2014 IBA Guidelines and those proposed in the Report, are contributing to practice harmonisation, these are non-compulsory. Nevertheless, such a guidelines approach could be, for the time being, the adequate solution, as it might lay the foundation to generally accepted principles potentially followed by the international community at large.

1 Third-Party Funding in International Arbitration, Second Edition, Lisa Bench Nieuwveld and Victoria Shannon Sahani, Chapter 1, p. 6; Thus far there are 159 jurisdictions in which a party can enforce an award through the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")
2 e.g. Singapore, see Report, p. 5
3 The Report does not, however, address several issues that are regulated at the national level, p. 7
4 The European Arbitration Review 2017, Global Arbitration Review, C. P. BOGART, "Third-Party Financing of International Arbitration", p. 33
5 Report p. 18
6 Report, p. 20
7 Third-Party Funding in International Arbitration, Second Edition, Lisa Bench Nieuwveld and Victoria Shannon Sahani, Chapter 1, p. 1
8 Third-Party Funding in International Arbitration, Second Edition, Lisa Bench Nieuwveld and Victoria Shannon Sahani, Chapter 1, p. 6
9 *Ibid.*
10 *Ibid.*
11 *Ibid.*
12 *Ibid.*
13 *Ibid.*
14 *Ibid.*
15 Report, p. 22
16 Report, p. 23
17 Access to Justice in Europe: An Overview of Challenges and Opportunities, European Union Agency for Fundamental Rights, March 2011, p. 5
18 *Ibid.*
19 The European Arbitration Review 2017, Global Arbitration Review, C. P. BOGART, "Third-Party Financing of International Arbitration", p. 33
20 *Ibid.*
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*
25 "A few third-party funders operating in different jurisdictions were informally asked to estimate the percentage of parties whose cases they ultimately fund among those that seek their services. The responses from those funders ranged from less than 1% to around 5% of the parties who seek their services." by Victoria Shannon Sahani, *in* http://arbitrationblog.kluwerarbitration.com/2015/07/06/the-impact-of-third-party-funders-on-the-parties-they-decline-to-finance/ (2015)
26 Report, p. 20
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28 The European Arbitration Review 2017, Global Arbitration Review, C. P. BOGART, "Third-Party Financing of International Arbitration", p. 33
29 Ashurst Quick Guidelines, 13 January 2017, Third-Party Funding in International Arbitration
30 For example, "In a London-seated ICC arbitration, the Tribunal ordered the Respondent to pay the Claimant's costs on an indemnity basis. This costs award included the amount the Claimant had to pay its third-party funder ("TPF") as a result of prevailing in the arbitration. The TPF had provided funding of around £ 650,000, in exchange for an uplift of either 300% of the funding or 35% of the damages recovered, whichever was greater." *in http://arbitrationblog.kluwerarbitration.com/2016/10/08/recovery-of-third-party-funding-ordered-by-icc-tribunal-and-confirmed-by-the-english-high-court-an-under-theorised-area-of-the-law/* (2016)
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40 Ashurst Quick Guidelines, 13 January 2017, Third-Party Funding in International Arbitration
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43 The European Arbitration Review 2017, Global Arbitration Review, C. P. BOGART, "Third-Party Financing of International Arbitration", p. 35
44 However, as noted by NIEUWVELD / SAHANI, the IBA Guidelines are purely voluntary and many parties do not reference the IBA Guidelines in their arbitration agreements
45 Report, p. 84
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ACCEPTANCE AND ANXIETY: THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

By Daniel Greineder and Rodica Turtoi

Third-party funding ("TPF") in international arbitration, both commercial and investor-state, is well and truly upon us. The leading funders provide funding in the order of US$ 10 billion, usually to claimants.[1] The chattier legal journals report moves to and from prominent funders, much as they do the moves of leading lawyers from one law firm to another. Representatives of funders are sought-after conference speakers. Although it seems no longer to be quite the "hot topic" that it recently still was, third-party funding remains a popular subject on the conference circuit, as well as in academic and professional commentary.[2] This is perhaps unsurprising in a professional community that prides itself on its capacity for reflection and change.

As described below, debate and even legislation have on occasion followed economic developments[3]. The market has embraced third-party funding. Bringing high value litigation and arbitration claims is expensive. Lawyers' fees sometimes run into millions of euros. The fees of financial, technical and industry experts may be almost as high, and to these the usually rather more modest fees of the arbitrators need to be added. Parties to arbitrations sometimes claim specific performance or declaratory relief, but commercial arbitrations tend principally to revolve around damages. Parties will make an initial financial outlay with a view to recovering a substantially larger amount from their counterparty in damages. It is not surprising that they will be open to flexible means of financing, where, in simplified terms, the funder foots all or part of the upfront costs of the claim in return for a cut of any damages.

It is harder to substantiate whether third-party funding also fulfils the more idealistic goal of facilitating access to justice, as funders sometimes claim[4]. On this argument, funding enables impecunious claimants to bring claims that they would not otherwise have been able to bring.

At least in broadly pro-arbitration jurisdictions, debate about the legitimacy of third-party funding *per se* is now largely theoretical. The authors of the ICCA Report, published in April 2018, observe that positions on both sides of the debate have softened in recent years[5]. Acceptance, subject to whatever reservations, is high. At the same time, TPF poses a challenge to international arbitration and litigation. The resolution of private law disputes generally involves the determination of the rights, obligations and interests of parties as against each other or *inter* *se.* In arbitration, this focus is reinforced because parties contract to appoint a unique tribunal specifically to resolve their disputes. TPF introduces an outsider to proceedings, who is neither party to any underlying contract nor procedurally a party to the arbitration or litigation. Other than in the financial outcome, the funder has no interest in the dispute.

This article first addresses examples of recent legislation allowing and facilitating TPF, while imposing only limited regulation. Accepting TPF by abolishing any historical, public policy prohibitions against it is only a first step. Users of arbitration need to fit TPF into existing relationships between parties, counsel, arbitrators and arbitral institutions.

In a further step, the article considers the ICCA Report as an illustrative response to some of the difficulties or anxieties facing arbitration users. That report is by no means the only important recent discussion of the subject nor was it uncontroversial.[6] However, the contributors include leading figures in the arbitration world, under the co-chairmanship of William W. "Rusty" Park, Stavros Brekoulakis and Catherine A. Rogers. To some extent the report therefore represents current thinking.[7] Finally, the article makes some suggestions for further discussion of TPF.

Historically, English law broadly prohibited

As Lord Justice Tomlinson has pointed out in a 2016 decision "[t]*hird party funding is a feature of modern litigation*".[8]

While third party funding is well-acknowledged and accepted now in England, the doctrines of champerty and maintenance have for a long time represented an insurmountable obstacle for third-party funding under English law. *"In plain terms, maintenance is the support of litigation by a stranger without just cause. Champerty, a form of maintenance, is the support of litigation by a stranger in return for a share of the proceeds."*[9]

Although the two doctrines are different, they have numerous common characteristics. Therefore, commentaries and even legislation tend to address them together.

However, this approach has evolved in the last decades. Already in 1967, the Criminal Law Act abolished certain offences, among which maintenance and champerty:

"*The following offences are hereby abolished, that is to say—*

(a) any distinct offence under the common law in England and Wales of maintenance (including champerty, but not embracery), challenging to fight, eavesdropping or being a common barrator, a common scold or a common night walker […]"[10]

Further, in its next section, the Criminal Law Act of 1967 provides that:

"*(1) No person shall, under the law of England and Wales, be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect.*

(2) The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."[11]

Nevertheless, as explained by scholars, although the torts and crimes of maintenance and champerty have been abolished, "*the common law doctrines of champerty and maintenance still apply to funding agreements and extend to private dispute resolution methods, such as arbitration*".[12]

English case law also weighed in on the issue, with Lord Justice Simon Brown observing in *Hamilton v. Al Fayed* that

"*the pure funding of litigation (whether of claims or defences) ought generally to be regarded as being in the public interest providing only and always that its essential motivation is to enable the party funded to litigate what the funders perceive to be a genuine case*".[13]

This represents the first form of TPF. The second form is the so-called commercial funding. On this second form, the *Excalibur* case noted the following:

"*It is true that the facilitation of access to justice is an incidental by-product of commercial funding, but that is not the essential motivation of the commercial funder. The commercial funder is an investor who hopes to make a return on his investment. For that reason, justice will usually require that, if the funded proceedings fail, the funder or funders must pay the successful party's costs*"[14]

With regard to international arbitration specifically, the Commercial Court refused the setting aside of an arbitral award that awarded the costs of third-party funding to the claimant and held that "*the arbitrator's interpretation of 'other costs' was correct, in that it extended in principle to the costs of obtaining third party legal funding*". As a result, "*the arbitrator was entitled to interpret 'other costs' so as to include the costs of third party funding*".[15]

Legislative changes and case law

TPF is perfectly admissible under Swiss law, in particular, following the notable Swiss Supreme Court's Decision of 2004 which provided that a law forbidding the financing of legal proceedings provided for an inadmissible restriction to economic freedom and should thus not be enacted[16].

The leading arbitration jurisdictions have not remained indifferent to the change of attitude towards third-party funding and its significant increase in popularity and use. As a result, the last couple of years have seen legislative advancements in several common-law jurisdictions where the matter of third-party funding was still unsettled. However, the Irish Supreme Court in a decision of June 2017 reaffirmed the common law principle that forbids maintenance and champerty.[17]

a. <u>Singapore</u>

Singapore adopted legislation that provides for the "[a] *bolition of tort of maintenance and champerty" and the "[v]alidity* *of certain contracts for funding of claims*" in February 2017, while Hong Kong passed an Ordinance regarding third-party funding in arbitration and mediation in June 2017.

These changes were welcomed by the arbitration community and led to numerous commentaries and articles analysing their provisions and effects. Given the enthusiasm manifested by users and lawyers, the update of the legislation was judged necessary for both jurisdictions in order for them to maintain their positions among the preferred seats.

Singapore decided to abolish the tort of maintenance and champerty for international arbitration and related proceedings. It was not unexpected, given that Singapore remains the most popular arbitration seat in Asia. [18] The Civil Law (Amendment) Act 2017 provides that certain contracts for funding of claims are valid:

"*A contract under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty*".

However, the nuance is that the section containing the provision above applies "*only in relation to prescribed dispute resolution proceedings*". These proceedings are either international arbitration proceedings, or court or mediation proceedings related to international arbitration proceedings.[19]

b. Hong Kong

Similarly, Hong Kong's Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 provides that its purpose is "*to ensure that third party funding of arbitration is not prohibited by particular common law doctrines*". It is interesting to note that the ban on maintenance and champerty has been inherited from the United Kingdom and while the latter has eliminated it in both in relation to litigation and arbitration, Hong Kong's approach has changed only towards third-party funding in arbitration and mediation. When it comes to court litigation, the ban remains in place with the exception of three particular categories.[20]

The Ordinance does not regulate detailed aspects of third-party funding, but refers in Division 4 to the possibility of issuing a code of practice

"*setting out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration*".

c. Ireland

At the other end of the spectrum stands Ireland, where the ban on champerty and maintenance has been reaffirmed just recently by a decision of the Supreme Court of Ireland. In its decision, Denham C.J first noted that the statutes concerning maintenance and champerty continue to be in force and, as a result, "*the torts and crimes of maintenance and champerty have been retained in Ireland*".[21] Further, both represent offences "*which evidence a public policy*".[22] Nevertheless, it is worth mentioning that while the decision observed and applied the traditional statutes, it also noted the difficulties faced by plaintiffs in the financing of their claims. However, Denham C.J. concluded that the judiciary's hands are tied and a change should come from the legislature: [23]

"*It may be said that in light of modern issues, such as Ireland being an international trading State, issues arising on international arbitration, and in the Commercial Court, it might well be appropriate to have a modern law on champerty and the third party funding of litigation. However, that is a complex multifaceted issue, more suited to a full legislative analysis.*"[24]

The ICCA Report

The Task Force that compiled the ICCA Report did not initially have a particular work product in mind. The initial objective was general: "*the identification of issues that arise in relation to third-party funding in international arbitration*"[25]. The Task Force further realized the desirability of more and better informed debate as well as greater consistency in relation to TPF, while equally deciding against producing a soft law instrument[26]. The result is a set of principles dealing with disclosure of funding arrangements and conflicts of interest, privilege and professional secrecy, security for costs, and best practices for funding agreements. In spite of the intentions of the Task Force, it is likely that the recommendations will be treated as a *de facto* soft law instrument by the arbitration community. Additionally, the report provides a useful survey of different forms of TPF and some general observations on TPF in investor-state arbitration. The report excludes maritime arbitration and, more significantly, *"larger policy issues",* such as whether TPF facilitates access to justice[27]. The latter limitation results in a focus on the relationship between parties and their counsel, and the arbitral tribunal with the funder as an outsider on the periphery of the proceedings.

Chapter 3 gives a working definition. TPF is an evolving and lightly regulated sector, and it is not always easy to distinguish TPF from other forms of litigation finance, such as simple bank loans. The three key elements of the definition are that the funder should not be a party to the dispute, that the funder should provide *"material support",* and that the remuneration of the funder should depend on the outcome of the dispute[28]. The authors also look to *"functional considerations"* that distinguish TPF: the assessment of the merits of the case by the funder and control of costs of the case exercised by the funder[29]. Typically, a bank that provided a loan to finance an arbitration would not follow the proceedings closely, still less exercise any control over the proceedings[30].

While acknowledging internal disagreement on the matter, the Task Force recommends in Chapter 4 that a funded party should disclose on its own initiative the existence of a third-party funding arrangement and the identity of the funder as soon as it is practicable to do so[31].

This is an intrusive requirement given that it is not

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otherwise usual to explore how an arbitration claim is financed. The Task Force reasons that the requirement helps to allow arbitrators to check conflicts of interest between them and funders. These may arise where an arbitrator sits on the board of a funder or is instructed by a funder to provide case assessments. Importantly, this rationale is not specific to TPF. A similar potential conflict would arise if an arbitrator were a director or board member of a party or related entity to an arbitration, or had a lawyer-client relationship with it.

Disclosing and resolving potential conflicts of interest helps to avoid subsequent challenges to both the arbitrator and award, the Task Force argues. The Task Force considered and rejected the counterargument that, where parties did not disclose a funding agreement to the arbitral tribunal, the arbitrator would remain unaware of the funder's presence and not be affected by any relationship with the funder. The report suggests that it is better for *"the integrity and legitimacy of international arbitration"* [32] for conflicts to be addressed openly. There is a suggestion here that transparency is, if in doubt, the preferable policy. This is of a piece with the wider trend to encourage transparency in arbitration[33].

Consistent with the disclosure recommendations in the preceding chapter, the Task Force concludes in Chapter 5 that the existence and identity of a funder is not subject to any legal privilege, while the terms of the agreement may be subject to confidentiality obligations, including privilege, and production of the agreement should only be ordered in exceptional circumstances and then only for limited purposes in a way that allows for appropriate redaction. These fairly simple conclusions result from an arduous comparative law analysis. They provide support for – but also a counterbalance to – the conclusions of the previous chapter in broadly recognizing the confidentiality of funding arrangements.

Chapter 6 then considers costs and security for costs. The Task Force considers that the fact that a successful party is funded should not preclude it from recovering costs from the losing party. It finds that a claimant's obligation to reimburse a funder for the cost of bringing a claim in the event of a successful claim is sufficient to treat those costs as incurred by the claimant and thus recoverable. The report is more hesitant about the recovery of the costs of funding, such as any premium payable to the funder. It also recognizes that an arbitral tribunal does not usually have jurisdiction over third party funder and so cannot usually make a costs order against it directly. This indicates the difficulty of integrating a funder as a third party into the constellation of parties, counsel and the arbitral tribunal. It also shows the difficulty of overcoming the phenomenon of a "hit and run" arbitration, where a funder funds a claim, stands to benefit from a successful outcome but can as a non-party avoid paying the respondent's costs, if the claim fails[34]. Nonetheless the report goes on to advocate a nuanced approach to security for costs which treats the fact that a party is funded as of itself inconclusive as to whether to order the measure.

Chapter 7 then makes tentative suggestions for best practices in third-party funding arrangements, while acknowledging the difficulty of making prescriptions *"across a range of jurisdictions, forms of funding transactions, and lawyering norms"*.[35] The Task Force formulates best practices in relation to its own recommendations. Some of the guidance is sensible but perhaps also obvious. For example, it is recommended that any funding agreement should be in writing and that parties should take advice regarding applicable standard of confidentiality[36]. The guidance is more needed in relation to termination where the report provides guidelines for defining the terms of termination. The report also advocates defining the control over the day-to-day management over cases.

Chapter 8 then concludes the main body of the report with reflections on TPF in investment arbitration. At the outset, it notes that the recommendations identified in the previous chapters apply to both commercial and investment arbitration[37]. The report acknowledges that policy considerations arise in relation to investment arbitration that do not arise in the same form in commercial arbitration. Those considerations are often a product of the controversy surrounding investment arbitration itself. The report acknowledges rather than resolves them.

In simple terms, it appears from the Report that because the legitimacy of investment arbitration is less widely accepted than that of commercial arbitration, financial products commodifying and facilitating investment claims are more controversial. What to one person may appear as an infringement of national sovereignty is to another a legitimate means to obtaining justice.[38]

The discussion of whether TPF increases the number of frivolous claims is particularly interesting and applicable to commercial arbitration. To sceptics increasing the availability of funding and allowing claimants to bring claims with other people's money lowers the threshold to do so. Funders typically argue that they have no interest in funding weak claims and review them critically. The ICCA Report runs into the difficulty that the argument is difficult to resolve in general terms. Where a funder funds a portfolio of claims, it will balance risks with rewards.[39] Just as a portfolio manager running an investment fund might include high risk stocks in a mixed portfolio, a funder might take similar risks in its own portfolio. The issue may be more complex than the report acknowledges. What makes a good claim may be a matter of opinion and context. A desperate litigant, who otherwise has no recourse against a respondent, may reasonably accept the risk of losing a weak claim. A litigant with a similarly weak claim but who is in a strong negotiating or commercial position may be well-advised to drop the claim and move on.

Framing Future Debate

Given the ferocity of the debate surrounding TPF, the ICCA Report's conclusions are modest. The cautious recommendations for good practice run to about two pages compared with over 200 pages of analysis and substantial annexes. Such modesty suggests that the ICCA Report's most significant conclusion may be that, while TPF poses some challenges, it does not have any major impact on arbitral proceedings, or at least not on the narrowly conceived relationship between parties and arbitrators with which the ICCA Report is concerned. This is not surprising, since TPF is a commercial product whose commercial success depends on its compatibility with existing procedures. Without that, it would be unattractive to users and thus customers. One may disagree with individual findings, as indeed the contributors occasionally disagreed amongst themselves. The pertinent question is not how to improve on the ICCA Report, which is probably as good as a report with that remit can be, but rather how to frame any future debate.

Wherever that debate may lead, TPF seems not to lend itself to "soft law" regulation by arbitral institutions or associations. Soft law instruments can work well, such as in the case of the IBA Rules on the Taking of Evidence, where, under the applicable law of the seat, arbitral tribunals already enjoy considerable control over the parties and procedural discretion to organize proceedings. In that case, guidelines identifying good practice may provide a useful point of reference. The exact legal status of soft law instruments is controversial at the best of times[40]. In the case of TPF, there is the additional problem that the funder is not a party to the proceedings and arbitral tribunals or institutions can usually only reach the funder through the parties that they fund. Significant regulation of TPF will likely take the form of either national legislation with limited international effect or self-regulation, such as the Code of Conduct issued by the Association of Litigation Funders.

Perhaps as a result of being a "hot topic", debate about TPF has sometimes focused on its novel and distinctive aspects. Now that it is a largely accepted feature of arbitration, it should be seen in the context of the commercial realities and practices of arbitration, and not an imagined world in which only the named parties use their own money to bring claims to enforce their rights. For example, the fear of "hit-and-run" arbitrations predates TPF. Precariously funded claimants have long brought speculative claims. In arbitration as opposed to litigation, it is arguable that, in voluntarily entering into an arbitration agreement, a party assumes the risk that its counterparty will do so. Equally, the question of how claims are financed rarely arose before TPF, because arbitral tribunals and parties did not pose it, and not because the answers would have been straightforward. Commercial parties may use any number of financial products to bring claims. Shareholders or parent companies, who may strictly be third parties to an arbitration agreement, finance and in effect pursue claims on behalf of the named claimants, which may be subsidiaries or even mere shell companies or special purpose vehicles, registered in offshore jurisdictions and remote from the place of performance.

Not every difficult question raised by TPF reflects a problem with TPF. Discussion of TPF has exposed areas where the legal and procedural position in arbitration is acknowledged to be unclear anyway. This applies, for example, to questions of privilege or confidentiality. It was never easy to identify applicable rules, where an arbitral tribunal is seated in one jurisdiction, and lawyers from different firms, possibly acting as co-counsel for the same side, are based in different jurisdictions again. Even where the rules are reasonably clear, the practices are untidy. Confidential information may be passed around within a group of companies, witnesses who have left the company, expert witnesses and, of course, any number of international lawyers and their support staff. Arbitrators themselves may be bound by different rules of professional conduct and secrecy. The sharing of information by parties and their counsel with funders only adds a new facet to a notoriously intractable problem.

Finally, future debate must address questions which go beyond the immediate relationship between parties and arbitral tribunals. For this to be possible, stakeholders need more facts and greater commercial understanding. It is all too easy to make abstract arguments for or against TPF as improving access to justice. One issue is the potential over-commercialization of arbitration or any form of private law dispute resolution. The basis of a claim is typically a contractual right of a particular natural or legal person. Financial products should provide a means to giving effect to that right. It is important therefore that parties retain control of their claims and the right is not reduced to a commercial gamble.

With the continued rise of funding, the role of funders as major stakeholders in arbitration may need to be better understood as they gain financial strength and influence, particularly where they fund whole portfolios of cases involving a single law firm or major corporate group. It remains to be seen how they use that influence. None of this is an argument against TPF or for greater regulation *per se.* Rather, TPF has confronted users of arbitration with the economic stakes of arbitration, which were sometimes overlooked. It is only proper to encourage a future debate that is alive to those stakes.

Daniel Greineder and Rodica Turtoi

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18 *See* White & Case and Queen Mary 2018 International Arbitration Survey: The Evolution of International Arbitration, p. 9.
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CROSS BORDER INSOLVENCY AND ITS INTERACTION WITH INTERNATIONAL COMMERCIAL ARBITRATION

By Mihika Gupta

INTRODUCTION

Commercial contracts containing arbitration clauses have become a norm in the business world. Given the multinational nature of commercial business in today's globalized world means that the effects of insolvencies are often felt across numerous jurisdictions. The probability of interaction between these traditionally distinct areas law is thus rising.

This interaction is an area of growing interest as the two legal sectors are extremely diverse, while insolvency laws are more focused on transparency, based upon rules to protect the interests of various stakeholders, the cornerstone of arbitration lies in party autonomy and confidentiality.

Often the case is that insolvency proceedings override other agreements and laws and embroil the debtor in its legal matter. Thus the question of choice of law is more than often raised in an interaction between arbitration and insolvency law.

The multiplicity of different insolvency laws in different jurisdictions affect a party's capacity to engage in an arbitration and the enforceability of any arbitral award as well as an arbitrator's willingness to continue with an arbitration. In the event an arbitration continues alongside insolvency proceedings, the effects of the insolvency cannot be ignored as they ultimately affect the award.

In corporate insolvency matters, generally the debtor's property remains with the debtor entity. Pursuant to the insolvency laws of some States, permission of the appointed representative to the insolvent debtor is required to proceed with any claims made in an arbitration.[1]

In addition, some corporate restructuring regimes may result in claims against a party to an arbitration being compromised without that party's approval, by operation of law.

In the case of insolvency regulation, the policy objectives include the equality of creditors' claims, a transparent and accountable process, a coordinated distribution of assets, compliance with public policy and powers and authority derived from both statute and judge made law. [2]

The fundamental purpose of insolvency laws is to maximize the value of an insolvent debtor or for a debtor's restructuring and to provide an effective system for the collective satisfaction of claims made against an insolvent entity.[3]

This paper seeks to evaluate the intersection of these two different areas of law. A comparative study is done to study this collision of laws in countries like Germany, France, England and the United States (US). An analysis is done of the basic question regarding whether an arbitration should continue if one party is declared insolvent, and the aftermath of the insolvency proceedings affecting the arbitration, in other words, the effect of an insolvency proceeding on a corporate entity and the entity's agreements to arbitrate.

II. INTERNATIONAL LEGISLATION ON CROSS BORDER INSOLVENCY

1. Model Law on Cross-border Insolvency

One of the most promising elucidations to the cross-border insolvency infamy is a well-crafted piece of model legislation from the United Nations Commission on International Trade Law ("UNCITRAL") appropriately titled the Model Law on Cross-border Insolvency ("Model Law").[4] The Model Law was formulated with the goal of creating a uniform, harmonized and equitable framework, which would in turn address the issues surrounding cross border insolvency.

While the purpose of this paper is not to delve into the provisions of the Model Law, briefly put the document provides of the recognition of foreign insolvency proceedings and aims at cooperation among the representatives of insolvency estates.

A concept referred to as modified universality emerged as a result of countries compromising on the previously followed principle of universality. Universality meant that all cross- border insolvencies should be unified into a single case. [5] Modified universality on the other hand means a recognition of foreign insolvency proceedings while respecting domestic law. An example of this is seen in the U.S. Bankruptcy Code, which, contains an early embodiment of this principle: it provides that, where a principal insolvency proceeding is pending in a foreign jurisdiction, the U.S. proceeding may be considered an "ancillary" proceeding and the U.S. bankruptcy court should recognize and give support to the foreign "main" proceeding.[6]

Similarly, in the Model Law there is also a distinction drawn between a main and non-main foreign proceeding. A main proceeding is as the name would suggest, a proceeding taking place in the debtor's center of main interests or COMI, and a non-main proceeding takes place anywhere else the debtor has an "establishment," defined as a place of operations where the debtor carries out non-transitory economic activity.[7]

Accordingly, the insolvent debtor's COMI is presumed to provide the primary law that should govern the proceeding.[8]

2. European Union Insolvency Regulation

Apart from the drafting of the Model Law, in the year 2000, after 40 years of debate and study, the countries of the European Union (with the exception of Denmark) adopted the European Union Insolvency Regulation ("the Regulation")."[9]

The Regulation, similar to the Model Law, recognizes the concepts of a main proceeding and a proceeding that is non-main or secondary to the main proceeding.[10]

The drafting of the Model Law and the Regulation was done to ease the difficulties of cross border insolvency proceedings, and it was hoped that these documents may lead to more effective administration of cross-border insolvencies.[11] It is not denied that progress has been made on some front, especially in coordination of cases across various countries. Yet neither the Model Law nor the EU Regulation has been able to solve the problems that continue to plague cross-border insolvency proceedings involving large business enterprises.

For instance, firstly, there are no provisions in the two documents that effectively deal with enterprises of multiple entities or business groups, but the case model is based on a single legal unit.

In addition to the above, the COMI principle has proved difficult to apply. Primarily because litigants are perpetually advocating for different jurisdictions to be the COMI. This is a result of a non-uniform interpretation of the very concept of COMI, and what forms the center of main interests standard. It is so often that courts in various jurisdictions issue conflicting and, often, contradictory decisions on what constitutes the debtor's true center of main interests.

Coordination and cooperation as guiding principles of the documents are nevertheless applied only "to the maximum extent possible," [12]

Legislation of a general rule such as "cooperation" has not overcome the conflicts that exist among estates and estate representatives. Even where cooperation is possible between estate administrators regarding principles such as asset preservation, the lack of a single forum in which to seek enforcement of rights limits the scope of any agreement, usually to a set of procedures called a protocol for facilitating communication and negotiation among parties.

ARBITRATION AND THE INSOLVENCY CLAIMS PROCESS

There are several manners in which arbitration and cross border insolvency are intertwined. While most national insolvency laws impose a moratorium to halt domestic lawsuits and often arbitrations as well when an insolvency proceeding is brought.[13] It is possible that this moratorium could extend to other countries as well, increasing the importance of being able to identify the claims-arbitration rule that applies.[14] In most countries, however, there is a dearth of authority determining whether the claim will ultimately be resolved in arbitration, with the award being conclusive in the insolvency case on the merits of the parties' dispute.

1. Recognition of Insolvencies by Arbitral Tribunals

As was pointed out by the Swiss Supreme Court, the rules and principles applying to recognizing an insolvency before national courts cannot, in all cases, be transferred to arbitral tribunals. They might not apply at all or require being adapted to meet the needs of arbitration.

Existing case law is very inconsistent in the way it deals with the recognition of an insolvency by arbitral tribunals. Also, the rare scholarship discussing this issue comes to conflicting conclusions.

In recent years, international arbitral tribunals have faced an increasing number of cases involving parties subject to insolvency proceedings.[15] The existing case law suggests that arbitral tribunals and courts often distinguish between insolvencies that were commenced in the country of the seat of the arbitration or insolvencies that were commenced in countries other than the one of the seat of the arbitration.

1.1. Insolvency Commenced at the Seat of the Arbitration

Where insolvencies are commenced in the country where the arbitral tribunal is seated, arbitral tribunals, usually, automatically recognize these insolvency proceedings. In such cases, arbitral awards often lack reasoning as to why the existence of the insolvency was taken into account.

For instance, in an arbitration seated in Geneva between a Swiss and an Italian party, the Swiss insolvency to which one of the parties became subject was impliedly recognized.[16] Upon the commencement of the insolvency, the arbitration was stayed based on Swiss insolvency law (Article 207 SchKG).[17] Alternatively, in an arbitration seated in Paris between a Saudi Arabian and two French companies, one of the French parties became subject to French insolvency proceedings.[18] The tribunal simply acknowledged the fact that a French court commenced insolvency proceedings against one of the French companies without giving further explanations.[19] The tribunal, rather, requested the parties to elaborate directly on the effects of the insolvency on the arbitral proceeding.[20]

1.2 Insolvency Commenced outside the Seat of the Arbitration

The situation is different with respect to insolvencies commenced in countries other than the one of the seat of the arbitral tribunal. There is no clear method that is displayed by case law as to how recognition of insolvencies is approached. In the past, some of the arbitral tribunals completely ignored the existence of such insolvencies, others assessed whether they could recognize the insolvency according to certain recognition rules, while others automatically recognized them. Thus, the criteria and concepts used for the determination of a recognition varied considerably.

A tribunal seated in Syria did not recognize the French insolvency to which the claimant was subject.[21] The tribunal based its reasoning on the principle of territoriality and argued that the French decision commencing the insolvency could not have any effects in Syria.[22] Another tribunal seated in Tunis took a similar approach.[23] The case involved a Cameroonian claimant and a French defendant, with the defendant being subject to insolvency proceedings in France. The tribunal disregarded the insolvency since it considered itself "not bound by a particular national law and, least of all, by the French law that is completely foreign to the present proceeding." [24] In another case, an arbitral tribunal seated in Tokyo did not recognize the insolvency of the Korean defendant. [25] The court argued that Korean insolvency law had only active territorial effects, and would not apply to litigation and arbitration outside of Korea. Accordingly, the arbitral tribunal seated in Japan did not observe the insolvency.[26]

In particular, more recent case law shows a trend in favor of recognition. This could be understood as a result of the increasing awareness that insolvency is part of the nature of business and trade, which no longer is restrained by national borders but is global. [27]

2. Choice of applicable law

2.1 *Existing rules on applicable law in national courts*

National courts designate the law applicable to the effects of an insolvency according to the conflict-of-law rules of their "lex fori", or law of the forum.

The law applicable to an arbitration is the foundation of the procedural law is the "lex arbirti", which is in fact the (arbitration) law of the country where the seat of the arbitration is.[28] The parties are not able to derogate from the mandatory rules of the lex arbitri. The legislation that operates the insolvency proceedings is known as the lex concursus.[29]

Arbitration depends on party autonomy, to the extent that no rules have been decided on, the tribunal has the liberty to adopt the rules of procedure it considers appropriate.[30] Likewise, any lacunae in the rules chosen by the parties would have to be filled in by the tribunal, giving consideration to general principles of proper arbitral procedure, by drawing inspiration from the lex arbitri, or otherwise. The major limitation is, however, the mandatory procedural provisions of the lex arbirti.[31]

The function of the lex fori is partially adopted by the legal framework of the lex arbitri, which does not contain a comprehensive conflict-of-law system. Thus, arbitrators do not simply face a conflict-of-law problem, but a "conflict of conflicts-of-law" problem. The discretion of the arbitral tribunal regarding its conflict-of-law approach is limited by court review at the seat of the arbitration and at the stage of enforcement of the arbitral award.

Parties to an international arbitration are free to choose the seat as well as the governing procedural and substantive law of the proceeding. An incidence of this could be that they could

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also choose the lex concursus, being a purely academic debate, this choice could lead to the possibility of shopping for the applicable insolvency law has repeatedly been brought up. For instance, such an option met with great interest in the corporate world during the legislative process of the Regulation.[32] Some insolvency law scholars urge, based on theories of law and economics, that an option to choose the applicable lex concursus would serve the purposes of efficiency,[33] while other commentators[34] deny such effect.

Even though the possibility of a choice of the applicable law to the effects of an insolvency complies with the principle of party autonomy, it inevitably collides with fundamental principles of insolvency law. The lex concursus and the forum concursus are intertwined in the field of international insolvency law.[35] As a matter of fact, a choice of the applicable insolvency law would disconnect the lex concursus from the forum concursus. A separation is considered unfeasible since insolvency law, as currently framed, is a mandatory system, unlike the international arbitration system which has fewer limitations (particularly only the mandatory provisions of the lex arbirti) and no insolvency authority or court is willing to conduct an insolvency proceeding according to a law other than its own lex concursus or the law referred to by the applicable cross-border insolvency rules. [36] As a result, a choice of the lex concursus detached from a forum concursus is scarcely conceivable.[37]

Even though party autonomy governs several aspects of international arbitration, the law applicable to the effects of an insolvency cannot be agreed upon by the parties.

Along the same lines, public policy is another bar to freedom of choice of law, since violation of the public policy of the lex arbitri is one of the grounds for setting aside of the arbitral award. Moreover, the place of the insolvency procedure, which is most likely the place of enforcement of the award will most definitely[38] also affect the application of rules of arbitral procedure and so the tribunal should take into consideration the public policy of that state as well.[39]

The status of the respondent debtor company, including as to whether it is capable of entering into agreements with third parties or capable of participating in certain pending procedures, is in most cases determined by the law of the place of incorporation of the company.

2.2 *Effect of applicable laws on claimant creditors*

Cross border insolvencies gives rise to a number of foreign creditors, who also have a standing to participate in the domestic proceedings and should be treated on par with domestic creditors.[40] Since the provisions governing insolvency laws are mandatory national laws, the Model Law and the Regulation provide for recognition of insolvency proceedings pending in another jurisdiction, a third country, and enforcement of the court decisions and orders made by courts and authorities in that third country.

Apart from the internal problems a cross border insolvency may face, there is another major risk of parallel litigation or arbitration wherein, the outcome of the foreign court or arbitral proceedings might be compromised by the insolvent status of the debtor company.

Often, the claimant if successful in an arbitration against the respondent who is also an insolvent debtor, will have to enforce the judgment or award at a place of where the debtor holds assets. This will often be the jurisdiction where the debtors company is incorporated and thus where the insolvency proceedings are pending.

In cases where the debtor company may have assets located in a third jurisdiction, the creditor might attempt to enforce the judgment or award there. However, the insolvency procedure may produce effects there, too. Domestic law in most states may not allow for enforcement actions against assets of insolvent companies, on the basis of its conflict rules, lead to the application of the lex concursus, which may require stay of litigation or execution actions. For instance in a US case, the law of the forum (Sweden) was applied and it was held that fulfilling the rights of an individual creditor may result in jeopardizing the rights of other creditors and hence the arbitral award was not enforced.[41] Thus in both cases the creditor is at a disadvantage.

The lex arbitri governs the issue whether the tribunal is under an obligation to discontinue the pending arbitral proceedings (either terminate or suspend). This is why the tribunal must not continue the proceedings if the law of the seat mandatorily requires, for instance, suspension. However, if the law of the seat allows the arbitral proceedings to continue in spite of the insolvency procedure in the country of incorporation or the law of the seat does not regulate the matter at all, the tribunal has the discretion to discontinue the arbitration or to stay the arbitration by exercise of its powers to manage the arbitral process. This may prima facie appear to be an unusual situation, since court proceedings are normally stayed to give priority to arbitration, not vice versa. But there is a reason for an arbitral tribunal, in the specific case of insolvency, to give priority to mandatory insolvency procedures at the place of insolvency and thus one of the potential places of enforcement instead. The reason to do so is to safeguard the interests of the parties and render an enforceable award, given the risk of handing down an award that may contravene public policy of the lex concursus.

The following case studies highlight the above interaction.

1. <u>Nortel Networks case analysis</u>

A perfect example of the difficulty of coordinating cross-border insolvency proceedings is provided by the major cross-border cases involving Nortel Networks Ltd., which had operations that were integrated but dispersed in 140 jurisdictions throughout the world. The parent companies filed in Canada, the European subsidiaries filed in the U.K., and the U.S. subsidiaries filed in Delaware. The Delaware bankruptcy court recognized the Canadian and the U.K. proceedings, respectively, as foreign main proceedings under chapter 15 of the Bankruptcy Code, on the premise that Canada was the center of main interests of the Nortel parent and the U.K. was the center of main interests of the European subsidiaries.[42]

The problem arose when the US and Canadian Courts both held that the efforts by the Pension Regulator to liquidate the amount of the group's pension violated their respective bankruptcy stays.[43] However the English proceedings continued nonetheless.

The issue that comes out is that the Model Law's broad and general principles of cooperation and communication did in no manner provide assistance.[44]

2. <u>Elektrim case analysis</u>

Elektrim was a Polish company that became involved in an astounding muddle of litigation and arbitration throughout the first decade of the new century.[45]

Vivendi, a venture partner of Elektrim, launched an arbitration proceeding against the Polish concern in London. Shortly before the first hearing in the arbitration, an insolvency proceeding for Elektrim was opened in Poland. The administrator of the insolvency took the position that Polish insolvency law abrogated the arbitration clause in the contract between the parties, leaving the matter to be resolved in court. Vivendi claimed English law, which would not halt the arbitration, governed the status of the arbitration.[46]

Under English law the arbitration was permitted to go forward, even though the court recognized that the Polish proceeding was the "main" proceeding under the Regulation.

However, under Article 142 of the Polish bankruptcy law, all arbitration agreements to which the debtor is subject are rendered void on the opening of bankruptcy proceedings, and all pending arbitrations must be terminated. The law is of mandatory effect. Elektrim's bankruptcy was governed by that provision.[47] Thus applying Polish law, the lex concursus, the arbitration should come to an end since under Article 142 of the Polish bankruptcy law the arbitration agreement was now void.

However, the English Court held that in cases where the arbitration had already commenced, the effect of the opening of main insolvency proceedings on whether it continued was governed by the lex arbirti, as mandated by Article 15 (here English law), but where no arbitration was yet pending, then the effect of the opening on the arbitration was governed by Article 4.2(e) (here Polish law as the lex concursus). Since the LCIA arbitration had started, the law that decided whether it continued was English law (lex arbitri,Article 15), not Polish law (lex concursus,Article 4.2(e)). It all depended whether or not an arbitration had started.

Elektrim was also involved in a second arbitration, in Switzerland.[48]

The Swiss arbitral tribunal ruled that Polish law controlled and dismissed Elektrim from the multiparty arbitration. The Swiss Supreme Court agreed. While the Polish insolvency rules did not operate directly in Switzerland, under Swiss conflicts principles, the law of the insolvency jurisdiction should control and, thus, the arbitration should be halted as against the insolvent debtor. Thus, the two cases involving the debtor Elektrim reached opposite results.

The results just described may or may not have been correct under the relevant laws. The purpose is to examine how cases like Elektrim are hypothetical examples to explore the choice-of-law rules explicitly or implicitly adopted in these cases and to consider which of them would make the best sense from a policy point of view.

EFFECT OF INSOLVENCY PROCEEDINGS ON THE ARBITRATION AGREEMENT

German, [49] French,[50]and English [51] insolvency laws do not per se invalidate arbitration agreements of the debtor that were concluded prior to the commencement of the insolvency. U.S. case law does not indicate that the commencement of an insolvency would render an arbitration agreement per se invalid or unenforceable.[52] It is rather for the U.S. bankruptcy court to determine whether in certain subject-matters (e.g. core bankruptcy proceedings) the arbitration agreement should be enforced. But this is a question of subject-matter arbitrability and not of validity of arbitration agreements.

Under Swiss law, the commencement of an insolvency does not affect the validity of preexisting arbitration agreements. The Swiss Federal Supreme Court explicitly confirmed this.[53]

This, however, does not restrict the parties in their right to set conditions to the validity of the arbitration agreement. Namely, parties are free to agree on the condition that the arbitration agreement should be deemed invalid in case of an insolvency. [54]

Insolvency law provisions that invalidate preexisting arbitration agreements of the debtor are only found in rare cases. Arbitration agreements under U.S., English, French, German, and Swiss laws remain valid.

The above analysis shows that the fact of whether the type of insolvency proceeding does or does not entail a case of legal succession does not make a difference in the outcome. In both cases, the party entitled to conduct legal proceedings is bound by the preexisting arbitration agreements. This result also seems to be justified considering the effective dissimilarities between a derivative right of claim and a legal succession, which appear – at least from the procedural perspective – only minor. [55]

Beside these technical arguments, policy considerations also support the idea that preexisting arbitration agreements bind insolvency estates (represented by a trustee) or assignees. Parties originally agreed and relied on resolving potential disputes by arbitration. From a policy standpoint, it is hard to defend why one party should be able to unilaterally – through the commencement of an insolvency – elude arbitration and compel the other party to proceedings before a national court.[56] Such drastic consequences would frustrate reasonable expectations of the parties and undermine foreseeability and legal certainty, which are amongst the main objectives of arbitration.[57]Finally, the comparison with other jurisdictions shows that in all legal systems a preexisting arbitration agreement remains binding after the commencement of an insolvency proceeding.[58]

CONCLUSION

A renewed interest is being found in the interaction of cross border insolvencies and international arbitration, as their collaboration is becoming more prevalent.

In 2007, the International Insolvency Institute (III) gave a presentation to the UNCITRAL Working Group on Cross-Border Insolvency, recommending that "UNCITRAL take its largest success, the New York Convention concerning enforcement of arbitral awards, and make clear its application to international insolvency disputes."

The III further recommended that UNCITRAL establish an insolvency arbitration commission to study what, if any, changes in the law are necessary in arbitration law or in insolvency law to facilitate the greater use of arbitration in cross-border insolvencies. A Committee on International Alternative Dispute Resolution was formed by the III to serve as a resource and to promote the use of alternative dispute resolution for insolvency matters.

While arbitration may give the impression of being independent from other systems of law, however due to the fact that all awards need to be enforced and recognized, it is very much connected to the court system. In fact, stakeholders in an arbitration should not be perceived as removed from any links with the national systems of law and their specifics. Tribunals apply one or another domestic law, and follow a procedure which, as flexible as it may be, should not breach basic mandatory requirements.

It is thus left up to a tribunal to take careful actions when an insolvency proceeding is ongoing with respect to one of the parties to the arbitration. Therefore, if the arbitral tribunal is concerned with the best interests of the parties, it should deal very cautiously with the potential effects that the insolvency triggers. As has been discussed in the above material, presently there is no harmonizing supranational instrument and there are scant conflict rules by reference to which it is possible to determine the different laws, which govern the potential effects of the insolvency. Thus, it is the duty of the tribunal to give a proper consideration as to whether the proceedings should continue or discontinue, while keeping the rights of the parties in mind.

Mihika Gupta

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2 Samantha Jayne Lord, *When Two Polar Extremes Collide: An Exploration into the Effects of Insolvency on International Arbitration* (2012) 15 International Trade and Business Law Review 316, 319.
3 Dough Jones, *Insolvency and Arbitration: An Arbitral Tribunal's Perspective* (Paper presented at Insol Asia Pacific Rim Region Annual Conference, Shangri-La Hotel, Singapore, 13-15 March 2011) 3.
4 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Sales No. E.99.V.3 (1997), [hereinafter UNCITRAL Model Law].
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7 UNCITRAL Model Law Part One, Art. 20.
8 Jay Lawrence Westbrook, *Locating the Eye of the Financial*Stonn, 32 BRooK. J. INT'L L. 1019 (2007)
9 Council Regulation 1346/2000, 2000 O.J. (L 160) *(EC), available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:EN:PDF [hereinafter, EuInsReg].
10 EuInsReg Arts. 2(h), 3(3). Also like the Model Law, the EU Regulation fails to define "center of main interest." Recital (13) states that the center of main interests should "correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties."
11 Jay Lawrence Westbrook, Chapter 15 at Last, 79 AM. BANKR. L.J. 713 (2005)
12 UNCITRAL Model Law, at ch. IV
13 Jonathan Sutcliffe and James Rogers, *Effect Of Party Insolvency On Arbitration Proceedings: Pause For Thought In Testing Times,* 76 ARB. 277 (2010).
14 Am. L. Inst., Transnational Insolvency: Principles Of Cooperation Among the NAFTA Countries 50, N.91 (2003).
15 ICSID Case No. ARB/08/8 (2010), Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine.
16 ICC Award with unknown number, unpublished, reported by Mantillo-Serrano, pp. 56 et seq. The law applicable to the merits was also Swiss law.
17 According to Art. 207(1) SchKG a civil proceeding involving the insolvency estate is suspended upon the commencement of an insolvency, except in cases of urgency. In ICC Award with unknown number, unpublished, reported by Mantillo-Serrano, pp. 56 the suspension happened in accordance with both parties.
18 ICC Award No. 7205 (1993), French Company v. Owner of Saudi Arabia, JDI 1993, pp. 1033.
19 *Id.*
20 *Id.*
21 ICC Award No. 6057 (1991), reported and commented by Derains, JDI 1993, pp. 1016.
22 ICC Award No. 6057 (1991), reported and commented by Derains, JDI 1993, pp. 1016, that, the arbitral tribunal reinforced its justification to disregard the French insolvency by stating that it had not received a copy of the decision commencing the insolvency and that the insolvent party had insisted that the arbitration would proceed.
23 ICC Award No. 5996, unpublished (1991), reported by Mantillo-Serrano, p. 58
24 ICC Award No. 5996, unpublished (1991), reported by Mantillo-Serrano, p. 58
25 ICC Award No. 12993 (2002), ICC ICArb. Bull.1 / 2009, pp. 105
26 ICC Award No. 12993 (2002), ICC ICArb. Bull.1 / 2009, p. 107.
27 Vidal Vidal Dominique, *Arbitration and Insolvency Proceedings: Comments on ICC Awards and Other Recent Decisions,* in: ICC ICArb. Bull. 2009, p. 68, who qualifies the criteria leading to an insolvency as belonging to the "'nature of things' in business relations" which apply domestically and internationally.
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30 UNCITRALArbitrationRules,Art.17(1);ICC Rules, Art. 22(2); London Court of International Arbitration (LCIA) Arbitration Rules, Art. 14.2; SCC Rules, Art. 19(1); Permanent Court of Arbitration (PCA) Rules, Art. 17
31 Emmanuel Gaillard,John Savage(eds), Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International 1999).
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37 Eidenmüller Horst, Wettbewerb der Insolvenzrechte?, in: ZGR 2006, pp. 469.
38 UNCITRAL Model Law on International Commercial Arbitration 1985, Art. 34(2)(b)(ii)
39 Emmanuel Gaillard, John Savage (eds), Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International 1999),
40 Arts 39 and 40, the Regulation; "the creditors from other Member States are entitled to lodge their claims in the Member State of the pending insolvency procedure." They should be duly informed of this option. See also, Model Law, Arts 13 and 14, on creditors' participation in foreign insolvency procedure and their notification. Creditors should not lose priority due to their being "foreign.
41 Victrix Steamship Co.,S.A.v. Salen Dry Cargo
42 *In re* Nortel Networks Corp., Case No. 09-10164 (KG) (Bankr. D. Del. Feb. 27, 2009)
(chapter 15), ECF No. 40 (relating to the Canadian proceedings); Order, *In re* Nortel Networks UK Limited, Case No. 09-11972 (KG) (Bankr. D. Del. June 26, 2009) (chapter *15),* ECF No. 36 (relating to the U.K. proceedings).
43 *In re* Nortel Networks, Inc., 669 F.3d 128 (3d Cir. 2011); *In re* Nortel Networks Corp., 2010 Carswell Ont. 1597 (Ont. Super. Ct.), *aff'd* 2010 Carswell Ont. 4112 (Ont. Ct. App.), *leave to appeal denied*, 2011 Carswell Ont. 303 (Can. Sup. Ct.).
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46 *Syska v. Vivendi Universal SA*, [2010] B.C.C. 348. The decision was limited to a pending arbitration; Ian Fletcher, *Effects on Arbitration Proceedings of the EU Regulation,* 22 Insolvency Intelligence 60, 60-61 (2009).
47 *Cosco Bulk Carrier Co. Ltd. v. Armada Shipping S.A. (In re* Armada Shipping
S.A.), [2011] EWHC 216 (Ch).
48 *Vivendi S.A. v. Deutsche Telekom A.G. (Elektrim),* Bundesgericht [BGer] [Federal Supreme Court] Mar. 31, 2009, 4A 428/2008, ASA Bulletin 1/2010 at 104 (Switz.)
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51 *Fulham Football Club (1987) Ltd v. Richards & Anor* [2011] EWCA Civ 855 paras. 27 et seq.; Sutton / Gill / Gearing, paras. 3.023; Mustill Michael J., Boyd Steward C., The Law and Practice of Commercial Arbitration in England, 2d ed., London Edinburgh.
52 Restatement (Third) U.S. Law of Int'l Comm. Arb. § 4–17 (T.D. No. 2, 2012).
53 BGE 138 III 714 at 3.6; BGE 136 III 107 at 2.5.
54 BSK IPRG-Wenger/ Müller, Art. 178 No. 83. See, generally regarding conditioned arbitration agreements, Rüede Thomas / Hadenfeld Reimer, Schweizerisches Schiedsgerichtsrecht: nach Konkordat und IPRG, 2d ed., Zürich 1993.
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56 Barraclough Andrew, Waincymer Jeff, Mandatory Rules of Law in International Commercial Arbitration, in: MJIL 2005, pp. 205
57 Günter Michael, Internationale Schiedsgerichtsbarkeit und Insolvenz, Zürich 2011,para. 500.
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THE LAWLESSNESS OF THE NEW FRONTIERS

By Avinder Laroya

An analysis of the legal definition of virtual currencies, the regulatory issues regarding blockchain technology and smart contracts in using arbitration as the procedure of choice for dispute resolution.

"…Looking ahead, financial stability risks could rise if retail participation significantly increased or linkages with the formal financial sector grew without material improvements in market integrity, anti-money laundering standards and cyber defences…"

Mark Carney (Governor of the Bank of England and Chairman of the G20's Financial Stability Board)[1]

In the wake of crypto mania in recent years, financial regulators and authorities are now providing guidelines and warnings to consumers about the lack of investor protection, high risk of fraud, and use of virtual currencies to facilitate money laundering and fund terrorism. Together with the risk of tax evasion and price volatility, virtual currencies present constant challenges to law enforcement agencies.

There are, at present, more than 1,500 virtual currencies (VCs) in circulation, with dozens of new schemes being launched monthly, including initial coin offerings (ICOs). Most have failed to attract users, in particular in the major currency areas. The total value outstanding has fluctuated sharply, largely from speculative activity. The global value of all VCs is currently around a fifth of the value of all euro banknotes in circulation. Of course, these figures are probably already out of date, such is the volatility of the market.[2]

Since there are no norms regarding the use of virtual currencies in the international trade of currencies, the "lawlessness of the new frontiers" is challenging the existing resources and technology used by law enforcement agencies and regulators to keep up with the pace of new innovation and disruptive technologies. States and international institutions need to commit to resources to tackle regulatory issues. The lack of innovation in technology for regulators compared to the advancement of crypto development is providing major challenges for law enforcement to keep up.

The virtual currency market is dynamic, the challenge of a none defined inter governmental approach on transfers of cryptocurrency through the development of blockchain technology and the use of smart contracts provides the potential for the use of blockchain within arbitration as well as the procedure of choice to resolve commercial disputes over litigation.

This article will:

1. Look at the legal definition of money and the legality of virtual currencies.

2. Highlight the legal issues around virtual currencies, blockchain technology and smart contracts

3. When can a cryptocurrency dispute arise?

4. Online dispute resolution and blockchain disputes

5. The use of UNCITRAL and Blockchain Technology disputes

6. Conclusion

The Legal definition of money and the legality of virtual currencies.

Technological innovation allows the introduction of virtual currency schemes; a new stateless variation of potential money is entering the market, bringing new benefit and risks to the table.[3]

Classical economists agree that money mainly serves three functions within an economy, firstly as a 'medium of exchange'; an item that facilitates the exchange, something buyers give to sellers as payment for goods or services. Secondly as a 'unit of account'; a benchmark used by people to measure and numerically record economic activity. Thirdly as a 'store of value'; an item used to transfer purchasing power from the present into the future.[4]

There are generally two academic concepts of money the Mentalist theory and the Chartalist theory.

According to the Mentalist theory, a monetary trading system is the natural equilibrium resulting from the actions of self-interested parties in a free market barter economy, an endogenous process driven by the private sector with the purpose of minimising the transaction costs related to trade, therefore focusing on the medium of exchange functions of money.[5]

The Chartalist view argues that the state implements a monetary system as a means to facilitating the fiscal basis of government money, and recognises the power of the state to mandate that certain payments be made to it combined with the ability to determine the medium in which these payments must be made. Chartalists focus on the unit of account of money, the state is the central force in the development of a monetary system, and the actual properties determining efficiency as a medium of exchange is irrelevant.[6]

Therefore, money is no longer something that exists independent of the state; it is a pillar of the sovereign.[7] When a state declares that all payments to it must be made in a certain means of payment, it creates a potential debtor. The debtors demand for this specific money implies creation of money and gives rise to a creditor.[8] Therefore the initial way to inject fiat currency is through government spending and that the function of money as a means of payment and media of exchange are a derived principle as a unit of account in which state obligations must be paid.[9]

Virtual currencies are not legal tender as such, however they are accepted by members within the virtual community as a medium of exchange and as a unit of account. There is also the distinction between virtual currencies and electronic money such as Paypal. Electronic money schemes are linked to fiat currencies and guaranteed through some legal foundation and funds are shown in the same unit of account. In contrast, virtual currencies create an independent unit of account, which only exists in digital form and used as an alternative to fiat currency, or can be converted to fiat currency.[10]

There is much speculation on how virtual currencies might transform the exchange of data and the ability to transact globally, to be an innovative disruption to the Fintech ecosystem in particular. Distributed ledger technology is still relatively new, although there are numerous examples of it being adopted, it is still in its infancy with major institutions.

The legal issues around virtual currencies, blockchain technology and smart contracts

Blockchain technology is valuable to various commercial enterprises and the tech community due to the coded control for the transfer of assets between two or more parties, more commonly known as smart contracts or crypto contracts. Smart contracts are software code within the blockchain that can control assets (cryptocurrency) that embed the terms and conditions of a contract that runs on a network. In order to qualify as a smart contract, the code must execute automatically and the transaction is traceable, unalterable and irreversible.

Traditional currencies have a trusted issuing authority that acts as a guarantor of the stability of the currency, and a legal framework that punishes counterfeiters. There are no equivalent structures in place for virtual currencies; they have neither intrinsic value, such as the commodity content of gold coins or the extrinsic value, such as the value assigned to traditional fiat currencies by the trusted public issuing authority.[11]

There are also questions with regard to the breach in performance by smart contracts that are not yet defined under international legal texts. There are implications for remedies for an aggrieved party compared to a natural language contract where for example late delivery is due to the sellers wrongdoing, the buyer is entitled to remedies from the seller. Erroneous

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codes make it more difficult to establish which party caused the breach or is liable because of it.[12]

Businesses either trading in digital currencies or seeking to raise investment through the ICO structure are without any formal guidance acting on their own interpretation of what the rules ought to be until defined regulation is put in place internationally.

This will inevitably create the requirement for the development of arbitration clauses to address blockchain technology and cryptocurrency disputes together with remedies to address wrongdoings in crypto currency transactions and disputes relating to value of digital currencies during contract negotiations.

Leidel v Coinbase

In *Leidel v Coinbase*[13] a class action complaint was made against the defendant (Coinbase) for "holding itself out as a regulated and fully compliant entity, registered with the United States Department of Treasury's Financial Crimes Enforcement Network ("FinCEN"). The agreement relied on an arbitration clause. The case was about compelling non-signatories to an arbitration agreement. The decision in the Eleventh Circuit affirmed that Coinbase Inc as an online platform used for buying, selling, transferring and storing virtual currency could not compel arbitration on former customers of Cryptsy (a now defunct cryptocurrency exchange).

The Court found that the plaintiff's allegations were not from the user agreement between Coinbase and Cryptsy's CEO (Paul Vernon) but from extra-contractual duties found in federal statutes and regulations, specifically the Bank Secrecy Act ("BSA").

Financial institutions generally do not owe a duty of care to third parties; there are no such provisions in the BSA absent a special or contractual relationship. The plaintiffs argument (Brandon Leidel) alleged on behalf of the class that Cryptsy's CEO laundered $8 million in stolen customer funds with the help of Coinbase. When Cryptsy opened the accounts with Coinbase one was opened in the name of Cryptsy and another in the name of the CEO. At the time of opening the accounts, the CEO agreed to be subject to an arbitration clause when he clicked to accept the terms of the Defendant's User Agreement.

Coinbase argued that the User Agreement between Cryptsy and itself controlled and that Leidel would have to submit to arbitration. The receiver consented to arbitration being a party to the contract itself. Coinbase argued that Leidel was equitably estopped from relying on the contract for the purposes of asserting rights and benefits under the agreement, it could not reject the parts they did not want (the arbitration).

The Court held under either California or Florida law, arbitration could not be compelled under a theory of equitable estoppel because Leidel's claims did not arise from the terms of the contract. The court noted the duties emanated from elsewhere, particularly the BSA and its implementing regulations to detect money laundering and other suspicious activities[14].

The Leidel decision highlights a potential pathway for aggrieved investors to avoid mandatory arbitration provisions by asserting claims that arise solely from duties owed by defendants under other duties imposed by law owed not only to the contracting parties but non-signatories also.

Tezsos case

Important lessons can also be seen in the Tezsos case[15] who raised $232 million with an ICO (the biggest ever). Eight months later it is facing four class action lawsuits.

Tezos like many other Blockchain companies used Swiss law as a jurisdiction of choice. Switzerland has a enviable history of legal certainty in relation to banking regulations, however as the case has developed Tezos has showed why this is not always the case.

Swiss law requires foundations and its board members to be independent, as Swiss Foundations have no rigid ownership structure. Whoever controls the board of the foundation, controls the foundation itself. This structure as such meant that all of the money raised by Tezos was controlled by the board members, not the couple who set up the Foundation (The Breitman's), who own a company incorporated in Delaware, called Dynamic Ledger Solution, Inc. (DLS).

It was the intention of the Breitmans and their investors that once the ICO was a success, the foundation would buy DLS and all its property rights. However as Swiss law requires foundations and its board members to be independent. Upon the purchase of the foundation buying the property rights, it was impossible for the Breitmans to sit on the foundation's board.

Swiss law states that foundations can only operate to fulfil its mission, therefore highlighting that the Swiss Foundation as a structure in ICO's is not really designed for operations and inflexible. Even the firm that started the trend of ICO structure using Swiss foundations admits

"The Swiss foundation actually is a very old, inflexible, stupid model (…) it is not designed for operations."[16]

The class action lawsuits relate to general complaints, most notably for selling unregistered securities and misrepresentation. These are serious financial offences and it will be interesting to see how the class action lawsuits will unfold.

When can a cryptocurrency dispute arise?

New legal issues will arise as digital currency gains momentum in everyday business activities. Consequently, the scope for disputes is broad.

The VC industry is relatively nascent, there is potential scope for significant growth in the use of VCs to exponentially grow. As discussed above, the current definition and regulation of such currencies vary from jurisdiction to jurisdiction. In essence VCs are borderless currencies and therefore in the event of dispute, the most appropriate procedure for disputes would be international arbitration rather than litigation.

While virtual currency transactions do not involve a third party intermediary, peer to peer interaction between the buyer and seller is not completely anonymous, the identities are encrypted and there is a transaction record that is maintained on the public ledger.

The Issues

1. Cryptocurrencies generally operate without any intermediary. Unlike a bank or government there is no defined central procedure of complaint in the event something goes wrong

2. Blockchain has incorporated two additional concepts smart contracts and decentralised autonomous organisations ("DAO's"). The legal status is unclear, whether they are self-governing corporations or another entity?

3. VC's function over a network of many thousand computers around the world, who are connected directly or indirectly through a network software known as "protocol". There is lack of clarity on the basis of legal ownership and chain of liability in the event of a DAO failure

4. Issues around jurisdiction and applicable laws where servers are non-central and spread around the world

5. The challenges during discovery when trying to access relevant data with regard to transactions and the nature of smart contracts automatically executing and enforcing obligations, leaving a element of misunderstanding in the transaction

6. New issues of contract law with the use of smart contracts for virtual currency transactions and whether they are legally enforceable and difficult to establish which party caused the breach or is liable because of it

7. Language barriers, blockchain technology are in essence smart contracts, the transactions of VC's are in code unlike regular contracts, the language of the contract is entirely in code as opposed to natural languages.

8. Validity of the smart contract as some national legislation may not recognise smart contract codes as being valid because it does not fulfil formality requirements.

9. Compliance with Article 2 (2) of the New York Convention with regard to the requirement of writing, therefore a potential issue in cross-border enforcement of awards

The benefits of international arbitration

Arbitration provides the most attractive way to resolve blockchain related disputes, offering:

Choice of decision maker: Parties are free to choose their arbitral tribunal with the requisite complex set of skills and knowledge in distributed ledger technology Fintech regulations and also in digital platforms and coding. An independent arbitrator or panel of arbitrators can be used. Such arbitrators are trusted by the parties and considered to be independent, impartial and competent.

Flexible process: The arbitral procedure can be designed by the parties to adapt to their commercial relationship and or the specific dispute. The procedure enables parties to use arbitral rules such as UNCITRAL in ad hoc and administered arbitrations. There is flexibility in procedures for discovery, the seat of the

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arbitration, governing law, language and confidentiality of process.

Legally binding: Arbitration is a process of adjudication, the decisions awarded are legally binding which can be recognised and enforced internationally in other jurisdiction national courts.

Arbitration has the potential of providing a universal solution relating to multiple jurisdictions in one proceeding. 159 state parties of the UN member states have ratified the New York Convention as of April 2018. Courts in a number of jurisdictions including the United States, United Kingdom and Canada are able to confirm the issues of validity may be resolved by arbitration without the involvement of domestic court proceedings.

Speed and efficiency: due to the flexible nature of arbitration, the features of efficient proceedings, flexibility in schedules due to the absence of pre-existing set of procedural rules. The absence of appeal routes and use of modern technology during discovery to identify keywords and document types has the potential of greatly reducing costs.

Arbitration is a defined and globally accepted dispute resolution procedure. It provides for a flexible approach to resolving complex cross border commercial disputes and dealing with the issues of lack of defined regulations and law in this fast paced area of innovation.

If each national legal system is left to its own devices, divergent positions may emerge as to the definition of blockchain as an object of ownership. Legal uncertainty arising from divergence among national laws may be mitigated if the governing law is predictable. It is not clear what law governs proprietary claims of virtual currency disputes, and the applicable law of ownership for proprietary claims of restitution. This was illustrated in MT.Gox case.

MT.Gox[17] was once the world's biggest provider of a Bitcoin exchange, it became insolvent and entered winding up proceedings due to 850,000 of its Bitcoins (worth around $473 million at the time, representing 7% of all Bitcoins in existence at the time) had disappeared.

Most of the creditors were former customers who sought to seek full recovery of the Bitcoin units of which, or the value had a contractual right to return from Mt.Gox. This case is still on-going before the Tokyo District Court and highlights crypto currency users continued dependency on traditional proceedings such as bankruptcy and class actions to settle disputes and obtain relief.

Online dispute resolution and blockchain disputes

Online dispute resolution has been in use for some time and in particular is widely used in Internet domain name disputes and in some instances business to consumer disputes.

With the advancement of blockchain technology and in the use of smart contracts, blockchain arbitration is developing. CodeLegit[18] announced the first blockchain based smart contract arbitration proceeding last year. Other models are also being developed such as Kleros in developing blockchain arbitration as the dispute resolution mechanism of choice for smart contract disputes.

CodeLegit have created their own Blockchain Arbitration Rules and appointing authority who would appoint an arbitrator, Kleros on the other hand are developing a quasi-judicial system with a general court. Tech enthusiasts are developing the use of blockchain arbitration as a means of dispute resolution as opposed to traditional arbitration[19].

UNCITRAL and Blockchain Technology

One of the principals guiding UNCITRAL is in its works in electronic commerce and the principle of technology neutrality, this means that the law neither requires or assumes the use of a particular technology for communicating or storing information electronically.[20] This principle ensures that the law is able to accommodate future technological developments.

In the context of blockchain contracts, UNCITRAL allows for the acceptance of an offer being expressed by means of data messages stored on a blockchain (Article 11) thus enabling the requirement of Article 2(2) of the New York Convention to be overcome according to the doctrine of functional equivalence[21].

The Model Law on Electronic Commerce (1996) (EC Model Law) sets out the conditions which a data message must meet to fulfil the purposes and functions of the paper based requirements of writing and signature (Articles 6 and 7). A data message stored in a blockchain is deemed to meet the requirements of writing and signature, although States may under their legal systems exclude the performance of a contract by an automated system[22].

Conclusion

At the heart of determining what remedies are applicable under common law, the first question that has to be faced, as regulations are being drafted, is to how to categorise and define virtual currencies.

As referred to above, there is increased world wide discussion around greater governmental regulation and oversight. The use of existing Fintech regulations and remedies in the interim will be used to resolve any disputes. In particular where digital currencies are permitted to be used in purchasing investments, currency trading and transactions using cryptocurrencies to purchase real assets.

At present there is uncertainty in the legal issues and the restitution of blockchain based claims. UNCITRAL texts are equipped in dealing with smart contracts to a certain extent as they recognise automated contracts and offer enforcement solutions through online dispute resolution[23].

The current gap in establishing liability in smart contracts requires international text to remove any ambiguity that is currently evident in the use of smart contracts to ensure there is a trust in the process as this would boost international digital trade[24].

Technology continues to constantly evolve; we are at the start of the virtual currency evolution. The continued growth of international transactions has the potential for the significant increase in cross border disputes. There is an incentive for businesses to seek a more adaptable, comprehensive and efficient resolution procedure than the national courts. This makes international arbitration a natural choice and an attractive procedure.

Avinder Laroya

Endnotes

1 (Aitken, 2018)
2 (European Central Bank , 2018)
3 (Plessis, 2014)
4 (Mankiw, 2011)
5 (Goodhart, 1998)
6 (Plessis, 2014)
7 (Goodhart, 1998)
8 (S, 1998)
9 (Semenova, 2007)
10 (European Central Bank, 2012)
11 (European Cetral Bank , 2018)
12 (Hourani, 2017)
13 (Justia US Law, 2017)
14 (Roy, 2018)
15 (Richard Seeborg, 2018)
16 (Mueller)
17 (Wieczner, 2018)
18 (Reuter, 2017)
19 (Yeoh, 2018)
20 (UNCITRAL, 1996)
21 (UNCITRAL, 1996)
22 (Takahashi, 2017)
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Belarus | grigory_bruev

INVESTMENT ARBITRATION IN THE EASTERN EUROPE: BELARUSIAN JOINDER

By Veronika Pavlovskaya

"A bad corn promise is better than a good lawsuit" – this rule does not work in Belarus within the investor-state disputes any more. The first ICSID claims (but not the first investment claims) against Belarus have been registered. Before that, Belarus had stayed the only Eastern European country not involved in the investment arbitration for quite a long time. We analyzed the approximate matters of the pending investment claims against Belarus, as well as the Belarusian legislation regulating resolution of the disputes in the investment sphere in the article below.

There is a first time for everything

Belarus signed the ICSID Convention on July 10, 1992, and the Convention entered into force for our country on August 9, 1992. The Belarusian investment "lifeline" was ideally straight and clear for more than 25 years until January 31, 2018. This day became extremely remarkable for the Belarusian arbitration society, as on this day the first ICSID claim in history of Belarus has been registered[1].

This event divides the investment history of Belarus into two parts: the era of negotiations and cooling-off periods finished, long life to international investment arbitration.

Raise of the investment arbitration in the Eastern Europe: true or false

Apparently, there were more cases within these 26 years, when the disputes between Belarus and the investors were expected to transform into ICSID claim. However, to respect of the state bodies and the investors all these issues found the decision through negotiations.

For example, misunderstandings with *Ford* in 2000 were resolved without resorting to arbitration or litigation[2]. In fact, the investor sold the shares to the other private company, and left the market.

However, the day when the first ICSID claim against Belarus has been submitted.

It must be noted that rise of arbitration in general and international investment arbitration in particular is a tendency for the Eastern Europe: ICSID administered and currently administers 60 cases[3], where respondent is an Eastern European country. 35 of these cases (58.33%) were initiated after 2010.

The situation is almost the same in the PCA: 42 cases with an Eastern European country as a respondent, 27 of these cases (64.29%) are initiated after 2010.

The numbers demonstrate the rise of international investment arbitration in the Eastern Europe within the last 8 years. It seems that parties are now inspired by cases such as *Yukos* v. Russia and *Naftogaz* (Ukraine) v. *Gazprom* (Russia), from which they see that arbitration, be it commercial or investment arbitration, actually works.

This growth will be even more noticeable in the future, when the effectiveness and efficiency of investment arbitration becomes obvious to the parties of the investment agreements in this region. We can assume that the quantity of the investment cases will rise significantly, especially using the mechanisms of third-party funding. This fact can be positively taken by the lawyers; however, the states will not be optimistic about such way of dispute resolution.

But again, statistics can make the picture more positive to the state as 20 cases against an Eastern European country in ICSID were decided in favor of the state in comparison to 11 cases decided in favor of the investor.

The Czech Republic takes the first place in the top of the Eastern European countries that stood as respondents in investment claims. Poland, Russia and Ukraine are the runners-up in this regard. Hungary and Ukraine head the list of successful respondents – states in favor of which most awards in the cases against them are rendered.

For example, there are currently 6 cases against Hungary, 5 cases against Bulgaria, 4 cases against Ukraine, 2 cases against Czech Republic and no cases against Poland pending in ICSID now.

Moreover, the rise of investment arbitration is reasonably expected as there is a growth in quantity of the investment agreements concluded. Mathematically, it leads to the growth of possible disputes between its signatories. In particular, in Belarus the provisions including such instrument as an investment agreement were adopted in 2001. However, the first investment agreement with Belarus was executed by the Lithuanian investor only in 2007[4].

In comparison, as of 1 January 2016 1,844 investment agreements between investors and Belarus were concluded (493 of them by the foreign investors)[5]. Not all of them still remain in force, but these numbers brightly illustrate the situation. It took Belarus and investor 6 years to start using this instrument and execute the first investment agreement, as well as 9 years to conclude the other 1,843 agreements.

Jurisdictional issues of the investment dispute settlement in Belarus

There are four levels of sources applicable to the relations between the investor and the State:

1. Investment agreement;

2. Obligatory requirements of the national legislation;

3. Bilateral Investment Treaties (BITs);

4. International investment treaties (IITs).

In Belarus the normative legal act which has a detailed list of requirements to the investment agreements is President's Decree No. 10 dated 06.08.2009. It stipulates that investment agreements shall include the body and the procedure for settlement of the disputes. Therefore, the first source for determination of the dispute resolution procedure is the investment agreement. In practice, the foreign investors usually prefer to include the provision on resolution of their disputes in the ICSID into the investment agreements.

The Belarusian national legislation sets the requirements to the investment agreements (for example, term of the realization of the investment project, rights and obligations of the parties, their liability, right of Belarus for unilateral termination of the investment agreement), as well as general approach to investment dispute settlement.

In particular, this approach becomes obvious from the wording of the Law of the Republic of Belarus No. 53-Z dated 12.07.2013 "On Investments"[6], the Law No. 63-Z dated 12.07.2013 "On Concessions"[7] and the Law No. 345-Z dated 30.12.2015 "On Public and Private Partnership"[8], which are the key normative legal acts regulating foreign investors activities in Belarus.

The above mentioned laws provide the obligation for the investor and the state to settle the disputes through negotiations. The term for such negotiations (the cooling-off period) is also set by these laws and is usually of 3 months.

As a general rule, the investment dispute under the investor's choice may be settled:

- by the arbitration court constituted for settlement of the certain dispute (*ad hoc*) in accordance with the UNCITRAL Arbitration Rules, if the parties have not agreed otherwise;

- before the ICSID, in case the foreign investor is a citizen or legal entity representing the state which is a party to the ICSID convention.

However, this dispute shall not fall under the exclusive jurisdiction of the Belarusian state courts.

The Law "On Concessions" has additional provisions allowing states to waive the judicial immunity, provisional measures and enforcement. That is a unique provision that has been tested by inclusion into this Law.

Now, the possibility to set the general rule for the state to waive the immunity in relation with investors is widely discussed in the legislative bodies. On the one hand such step brings a

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huge risk for the state; on the other hand it gives the additional guarantee to the investors. It is understandable that this step cannot be taken easily.

Additionally, the obligation to reimburse the real loss in full is determined in the referred Law.

However, the three laws above mentioned stipulate that if the international investment treaty contains other procedures for settlement of disputes, the provisions of the international treaty shall prevail.

It must be noted that currently Belarus has 63 BITs and 8 IITs in force (including the Treaty on Eurasian Economic Union and the energy Charter Treaty). It is almost the same as in other Eastern European countries: for example, Ukraine has 72 BITs and 6 IITs, Poland has 60 BITs and 68 IITs, the Czech Republic has 79 IITs and 68 IITs, Russia has 79 BITs and 6 ITs. That shows that the EU-countries have more IITs concluded than the countries from former Soviet Union. However, the latter are not required to apply the results of the *Achmea case*, where the Court of Justice of the EU has decided that intra-EU BITs are incompatible with the EU law. The fact that this decision does not influence the former Soviet Union countries leaves the BITs as the additional instrument for the foreign investors and the state.

In the first ICSID claim against Belarus the claimant *Grand Express* applied to ISCID in accordance with the provisions of the IIT – Treaty on Eurasian Economic Union (the EAEU Treaty)[9], in particular, under the chapter 7 of Annex No 16 to the EAEU Treaty. The approach was also used in the *Manolium Processing case* (the claim is administered by the PCA under the UNCITRAL Arbitration Rules; please find the details below).

Pursuant to cl. 84 and 85 of the Annex No. 16 the disputes between the state and the investor from the other state shall be decided through negotiations, if possible. The cooling-off period is 6 months starting from the day when the written notification by any of the parties is made.

Under Annex No. 16, investors have the choice to resort to of 4 different dispute resolution mechanisms.

In particular, after the 6-month period upon the choice of the investor the dispute may be submitted for settlement to:

1) the competent national court of the host-state;

2) international commercial arbitration at the Chamber of Commerce of any state agreed by the parties of the dispute;

3) ad hoc arbitration where the tribunal shall be composed and act in accordance of the UNCITRAL Arbitration Rules, if the parties do not agree otherwise;

4) the ICSID for settlement of the dispute in accordance with the provisions of the ICSID Convention (if it entered into force for both states of the parties of the dispute) or in accordance with the Additional Facility Rules (if the ICSID Convention have not entered into force for both or one of the parties of the dispute). It is known that the ICSID Additional Facility Rules are applicable in the *Grand Express case*.

Thus, the EAEU Treaty allows the investor to choose investment or commercial arbitration institution for dispute settlement in the sphere of foreign investments. However, if the investor has already chosen the national court or international commercial arbitration court, this dispute cannot be transferred to other state court or arbitration institution. The investor's choice of the body for resolution of the dispute is final pursuant to clause 86 of Annex No.16.

The EAEU Treaty also contains general provisions that the decision on the dispute is final and binding for both parties. Under clause 87 of the Annex No. 16 each state, which is a party to the EAEU Treaty, is obliged to provide enforcement of such decision in accordance with its legislation.

What is it all about, or the matter of the first dispute against Belarus

Negotiations between investors and Belarus have been followed by the public for a long time. The arbitration community was trying to guess which of the cases would show up as the first claim before ICSID against Belarus.

But, what is known about the first "divorce" between Belarus and the Russian investor?

In accordance with the article published in the Belarusian press [10] the investment agreement between the parties was concluded in 2008. Under this agreement the Osipovichi Railcar Manufacturing Plant CJSC was established.

Grand Express (Russian Federation) owned 74% of the Osipovichi Railcar Manufacturing Plant. The other 26% were owned by the Belarusian Railways. The parties under the investment agreement were going to build the plant that could produce 2.5 thousand of rail cars and 2 thousands of tank containers annually. The buildings were constructed, and the equipment was bought.

However, in reality the amounts expected to be produced were not received. Belarus accused the investor who neither provided effective sale of the goods, nor granted direct investments.

The situation became even worse in 2015 considering the non-ability to fulfill the obligations under the lease agreement between the Belarusian Railways and VTB-Leasing concluded in 2014 and the credit agreement with the Eurasian Bank on Development. The credit in the amount of 63.5 mln US Dollars was granted to the plant under the government guarantee.

Then, *Grand Express* offered Belarus to hold the financial recovery procedures through the emission of the shares majority of which were to be owned by Belarus.

Belarus acting in favor of the investment project and its international obligations agreed to support the investor in fulfilling the obligations before the Eurasian Bank on Development, while the Belarusian Ministry of Finances paid the amount of credit to the Bank in full.

However, in the end, the Osipovichi Railcar Manufacturing Plant was declared bankrupt by the Economic Court, and its liquidation procedure was triggered. The decision to sell the facilities and the equipment of the plant through tender procedures was taken.

Thus, it seems likely that the press has described accurately the matter of the first case against Belarus pending in the ICSID.

The dispute shall be resolved in accordance with the ICSID Additional Facility Rules[11].

Here the claimant invoked the Agreement for Encouragement and Mutual Protection of Investments in the Member States of the Eurasian Economic Community 2008 and the EAEU Treaty. It shows that the claimant has chosen the fourth mechanism provided by the EAEU Treaty as ICSID Convention has not entered into force there.

For the time being, the composition of the tribunal is being formed in this ICSID Case.

We also admit that *Grand Express'* claim is not the only claim submitted to arbitration and related to the Osipovichi issue.

Additionally, in December 2017 *Parallel.UK* (Russian Federation) submitted the claim against Belarus to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC)[12]. *Parallel.UK* is a company connected to the owners of *Grand Express* and bought the debts of one of the Russian banks, thus becoming the creditor of the Osipovichi Railcar Manufacturing Plant. Recently, the dispute has been decided in favor of the state[13].

Nonetheless, it is exciting to see that the investors initiated two parallel proceedings related to one plant before different institutions (what is remarkable, both investment and commercial arbitration are pending) applying different legal instruments to explain the jurisdiction of both tribunals and to support the arguments on substance.

For now, Belarus has never officially published its position yet.

The claim seldom comes alone, or Delta Belarus Holding case

On March 22, 2018 the second ICSID claim against Belarus has been registered[14].

The claim has been submitted by *Delta Belarus Holding BV* (Netherlands) on the basis of the BIT between Belarus and the Netherlands concluded in 1995 with the ICSID Convention Arbitration Rules applicable.

There is even less information about the substance of the case than in the *Grand Express case*. The only thing known about the dispute is that it is related to the banking enterprise. *Delta Belarus Holding BV* has the same owner as Delta Bank which is under the liquidation procedure now[15].

The last to be mentioned (but not the least) – Manolium Processing case

It is a challenging period for Belarus now, as there is one more dispute in the PCA with the Russian investor, who initiated arbitration in 2018 as well[16].

The dispute has arisen from the investment agreement under which *Manolium Processing*, the Russian private company, has been planning to build elite residential cluster in the territory of the former trolley bus parking facilities. In addition the investor has been obliged to construct the new trolley bus parking and give 1 mln US Dollars for construction of the

Belarusian National diamond-formed Library.

In 2014, the investment agreement was terminated, and the land plot was taken back from the investor. New trolley bus parking which has been constructed by the investor is given to Minsk[17].

Belarus also stayed silent with the comments upon the case.

However, Belarus' arguments might be connected with the strict land regulations. In particular, the land plot can be given without the tender and for free exclusively for realization of the investment project under the investment agreement. After its termination the land plot shall be given back to Belarus as the investor has no legal ground for its further usage.

If the investor fails to give the land plot back, such investor may be considered as a "squatter" who uses the land plot without any authorization. Moreover, the investor will be obliged to pay the fee for lease of the plot calculated on the basis of the coefficient that amounts to 10, i.e. the fee will be 10 times higher than the price for leasing in the general conditions when the land is legally granted to the investor.

In this case Belarus considered the further usage of the land plot by the *Manolium Processing* illegal as the investment agreement was terminated in 2014. Therefore, the position of Belarus might refer to the fact that the land plot shall be given back together with payment of lease fees multiplied by the coefficient "10".

The claim has also been submitted in accordance with the Annex 16 to the EAEU Treaty.

The case shall be resolved in accordance with the UNCITRAL Arbitration Rules. Currently the tribunal is being constituted.

The press also mentioned that *Manolium Processing* is going to submit two more claims against Belarus. However, the situation on these claims still stays in the shadows and not available to the public.

Instead of conclusion

A new era of investment arbitration for Belarus started in 2018 with 3 cases administered by the ICSID and the PCA.

This scenario sets up the trend for all countries from the Eastern European region and brings new challenges and new possibilities for both investor and the state to protect their rights and interests.

The first steps have already been taken by the investors. Now one of the most intriguing issues are which arguments will be chosen by the Belarusian representatives to support the position of the state.

However, one thing seems obvious: the history of Belarus in investment arbitration is being made right now. It is a new prospective for development of the investment sphere in our country.

In fact, the legislation on investments in Belarus is going to be reformed soon. The subject-matters of these first investment disputes shall be deeply analyzed to find out the right directions for the reforms. Apparently, such approach will make the investment climate in Belarus more preferable for investors and lessen the number of the potential investment claims in the future. Only time will tell.

Veronika Pavlovskaya

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4 *Ekaterina Zabello. Investment paradoxes:* http://www.belmarket.by/investicionnye-paradoksy
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14 Case details - Delta Belarus Holding BV v. Republic of Belarus (ICSID Case No. ARB/18/9): https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/18/9
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16 Case view - Manolium Processing v. The Republic of Belarus: https://www.pcacases.com/web/view/161
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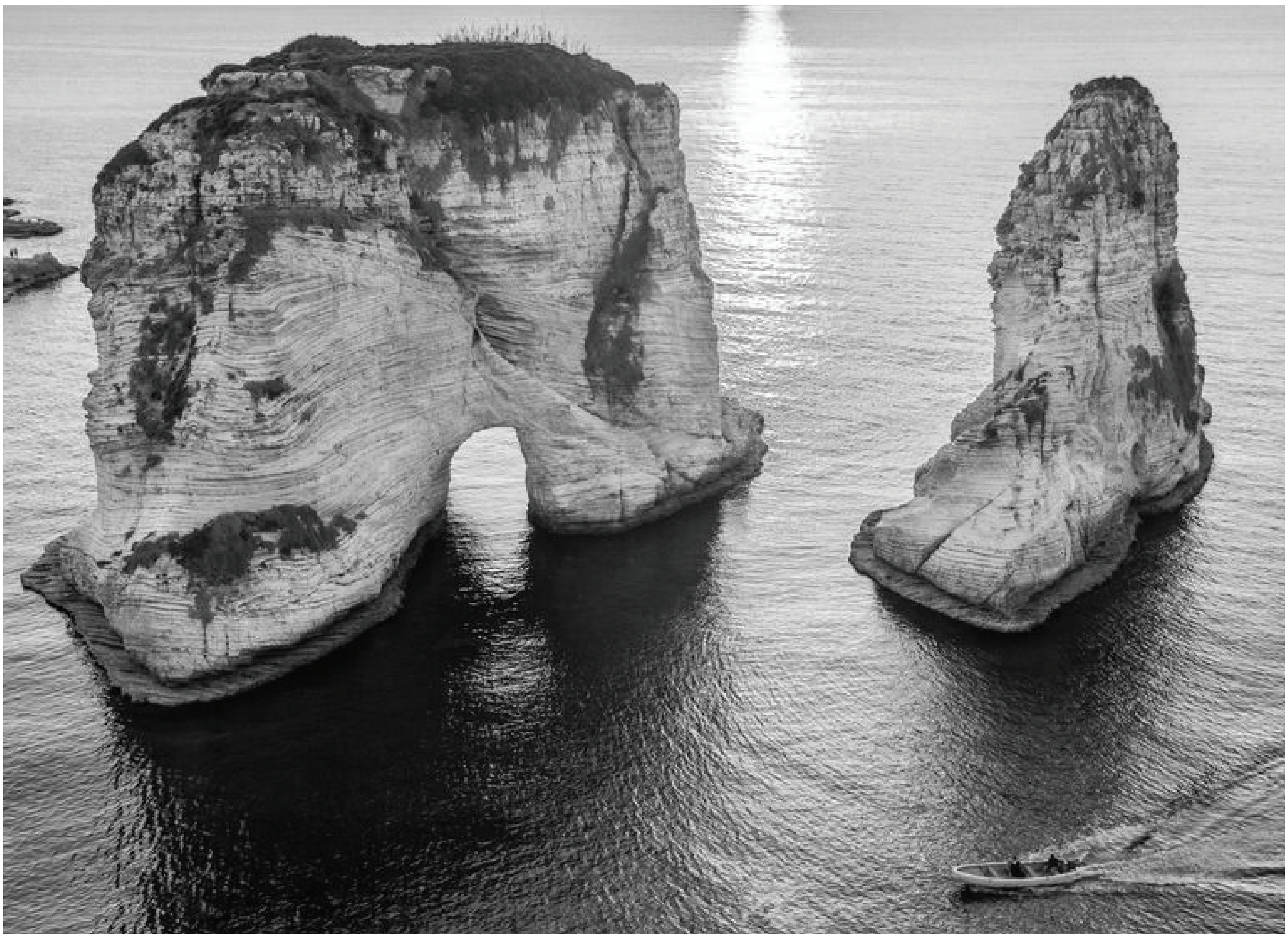

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ARBITRATION IN LEBANON IN TIMES OF CRISIS RECOVERY

By Zeina Obeid and Claudia Pharon

1. INTRODUCTION

Over the last decades, Lebanon has been through and over crises. Perhaps its position, at a crossroads of civilizations and as a religious and cultural melting pot, can explain the potential for disagreements and crises in the country, combined with a paradoxical ability to overcome them, through the resilience and tolerance which comes with such cultural exposure.[1]

Modern Lebanon was established in 1920 under the tutelage of France, following the defeat of the Ottoman Empire in the First World War. Prior to this period, and for approximately four centuries, the Lebanese political system, which functioned under Ottoman tutelage, had known different structures with varying degrees of semi-autonomous status, depending on the power of the local prince or governor and his relationship with the Ottoman authorities.[2]

Following the French mandate, which lasted from 1920 to 1943, Lebanon enacted legal codes and procedures reflecting the French civil law practice. Most of these elements have been retained in the legal system to date.[3] For instance, the Lebanese Code of Obligations and Contracts of 1934 (the "Lebanese Civil Code") is inspired by the French Civil Code. It was originally drafted in French and only subsequently translated into Arabic. Lebanese lawyers therefore routinely look at French cases and jurisprudence to fill any gaps in the Lebanese Civil Code.[4]

The period of relative prosperity Lebanon went through after its independence was shattered by the outburst of the civil war in 1975. After fifteen years of civil unrest, between 1975 and 1990, the arduous journey for the reconstruction and development of Lebanon began in 1991. The Lebanese government, represented by the Council of Development and Reconstruction ("CDP"), entered into agreements with various private entities which lead to putting in place the plan *Horizon 2000 for the Reconstruction and Development of Lebanon,* comprising notably the electricity, education, infrastructure and health sectors. These public initiatives were undertaken in parallel to a number of private initiatives, notably for the reconstruction and construction of facilities throughout the country, which continued beyond the original plan and are still ongoing to date.[5]

Furthermore, in late 2010, the discovery by the US

Company Noble Energy, Inc. of the Leviathan gas field, encompassing Syrian, Lebanese, Israeli and Cypriot maritime territory, ushered a new wind of hope for the Lebanese economy. Although doubts have been raised as to the transparency in which oil and gas operations would be conducted, efforts to create an efficient legislative framework for such operations are noticeable.

In light of these observations, this article will start with a presentation of the legal framework for potential post-crisis disputes in specific areas which are key to Lebanon's reconstruction and recovery efforts, underlying the central role that arbitration is to play in the resolution of disputes in these sectors (**Section II**). The article will pursue with an outline of the main features of the Lebanese Arbitration Law[6] which provides an efficient and modern framework for the resolution of disputes through arbitration (**Section III**).

II. POST-CRISIS DISPUTES: LEGAL CONSIDERATIONS AND BUSINESS EXPECTATIONS

The existence of efficient dispute resolution mechanisms are important elements which investors take into account before engaging in business transactions and investments in a given country. This Section explores the main mechanisms put in place for the resolution of potential disputes in two areas which are key to reconstruction plans in the country, namely the construction industry and the oil & gas sector.

A. Dispute Resolution in the Construction Sector

Due to the frequent complications relating notably to delays and unfulfilled expectations, disputes in the construction industry are common, and Lebanon is no exception to this tendency.

The majority of construction contracts in Lebanon still adopt the Fourth Edition of the FIDIC 1987 (Red Book) Form of Contract which provides for arbitration as a dispute resolution mechanism of last resort. The 1999 Edition of the Red Book, which puts emphasis on dispute avoidance, is increasingly used in the Middle East and is expected to gain in popularity in Lebanon in the coming years.

a) The Procedure under Clause 67 of the Red Book's 1987 Edition

Under Clause 67.1 of the Red Book's 1987 fourth edition, the first step that a Party must take when a dispute arises out of a construction contract is to refer a given dispute to the Engineer for determination, who should in turn render his decision within a period of 84 days.

The Contractor and the Employer must generally comply with the Engineer's decision while reserving their right to seek its reversal in a subsequent arbitration. Thus, if any of the parties is dissatisfied with the Engineer's decision or if the Engineer fails to render a decision within 84 days, then either the Employer or the Contractor may give a notice to the other party of its intention to commence arbitration. If no notice to commence arbitration has been submitted by either party, then the Engineer's decision becomes final and binding upon the parties.

It should be noted that where a notice of intention to commence arbitration has been submitted, the parties are required to attempt to settle such dispute amicably before commencing arbitration, or alternatively, wait at least 56 days before proceeding to arbitration.[7]

b) The Revisions Brought by the Red Book's 1999 Edition

In the 1999 edition of the Red Book, the Engineer decision procedure has been replaced by the Dispute Adjudication Board ("DAB") procedure.[8]

Thus, under Clause 20, before a dispute can be referred to arbitration, it is has to be referred to the DAB.[9] Importantly, a new Clause 20.4 headed "Avoidance of Disputes", has been introduced, which states as follows:

"If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. Such informal assistance may take place during any meeting, site visit or otherwise. However, unless the Parties agree otherwise, both Parties must be present at such discussions. The Parties are not bound to act upon any advice given during such informal meetings, and the DAB shall not be bound in any future Dispute Resolution process and decision by any views given during the informal assistance process, whether provided orally or in writing.

If a dispute of any kind whatsoever arises between the Parties, whether or not any informal discussions have been held under this Sub-clause, either Party may refer the dispute in writing to the DAB according to the provisions of Sub-Clause 20.5..."

Under Clauses 20.6 and 20.7, once a DAB decision has been given, it will either be subject to a notice of dissatisfaction or in the absence of such notice, it will become final and binding. Where a notice of dissatisfaction in respect to a DAB's decision has been issued, the arties must attempt amicable settlement prior to the matter being referred to arbitration. If settlement is not reached within 56 days, then the dispute may be referred by either party to arbitration.[10]

c) Wide Use of Arbitration in Construction Disputes in Lebanon

Given the heavy reliance on the Red Book's FIDIC Conditions in Lebanon and the broader Middle East, arbitration has become *"so widely used in construction over the last 20 years that many consider it the primary approach for dispute resolution"*.[11] Its characteristics, including privacy or the flexibility of arbitral procedures, which allow for the appointment of a specialized construction arbitrator, tend to answer better business expectations in the construction sector than litigation proceedings. They are also more adapted to the needs of international parties, who would often be unwilling to attend national court proceedings.

Arbitration has proved to be an efficient way for resolving complex construction disputes, although their settlement through amicable means is certainly recommended, and the use of alternative methods such as mediation is being increasingly considered by professionals in Lebanon.

B. Development of an Oil and Gas Legislative Framework in Lebanon and Dispute Resolution

a) Promoting a Favourable Framework for Energy Investments in Lebanon

Following the discovery of the gas reserve in the Eastern Mediterranean Basin, Lebanon enacted its first oil and gas legislation, namely the Offshore Petroleum Resources Law ("OPRL") of 2010, which regulates petroleum activities in Lebanon's Exclusive Economic Zone.[12] The process of regulating the oil and gas sector in Lebanon has been long, and the delays encountered may be attributed to major regional crises over the years. Further, such process is not yet complete, with a number of additional laws needing to be enacted in order to promote confidence in the Lebanese petroleum investment environment, and to ensure greater transparency towards the public.

Lebanon is considered as a "relatively high risk" location for foreign direct investment, scoring 54.1 out of 100 (100 being the lowest risk country) in the BMI Trade and Investment Risk Index in the first quarter of 2018, hence ranking itself 8th out of 18 MENA countries.[13] The context of political uncertainty, nurtured by the relatively short life of Lebanese governments, the regional tensions and ongoing war in Syria, altogether decrease the ability to attract investors in general, and more particularly foreign direct investors. Additionally, the maritime boundaries dispute with Israel, over a triangular area of sea of about 860 square kilometres, creates an additional level of uncertainty for potential investors in the region particularly in the oil and gas field.[14]

In this context, a number of important laws are being currently drafted and discussed in order to create a favourable environment for business transactions and investments in the oil and gas sectors. The Petroleum Asset Management Department ("PAD") Law,[15] would establish a new department at the Ministry of Finance—the PAD— which would assist the Minister of Finance in drawing up an investment mandate for a Sovereign Wealth Fund ("SWF").[16] The PAD would also be responsible for auditing the companies operating in the petroleum industry with a view to ensuring the collection of a 20% income tax.[17]

Furthermore, knowing that the OPRL covers only offshore activities, another law—the Onshore Exploration Law—is being discussed to cover onshore activities, including the development, production and decommissioning of resources.

Finally, a number of laws, including the OPRL but also the Right of Access to Information Law of 2017,[18] the Petroleum Transparency Law (currently being discussed in Parliament)[19] and the plan to join the Extractive Industries Transparency Initiative ("EITI")[20] are meant to contribute to an improved transparency in the sector.

b) The Model Exploration and Production Agreement ("EPA") and Dispute Resolution

In addition to these efforts to regulate the oil and gas sector, one of the most significant steps towards an investor-friendly environment in Lebanon has been the approval in January 2017 of decrees 42/2017 and 43/2017 by the government which moved forward with its plans to explore Lebanon's natural resources.[21]

While decree number 42/2017 divided Lebanon's exclusive economic zone into ten blocks,[22] decree number 43/2017 includes the "Tender Protocol", which outlines the bidding process and evaluation criteria for selecting the consortium to allocate an exploration license, and the "Model EPA", which is a model contract between the Lebanese State and the selected group of investors. In December 2017, as part of the first offshore licensing round, the Council of Ministers approved the award of two exclusive petroleum licenses for exploration and production for blocks 4 and 7, thus issuing its first two EPAs based on the two decrees.[23] Further, in May 2018, the Council of Ministers agreed to initiate preparations for Lebanon's second offshore licensing round, which is scheduled to be officially launched by the end of 2018.[24]

It is well admitted that EPAs and energy investments more generally, have often been the source of arbitration disputes. Thus, in the first half of 2018, 24% of cases registered under the ICSID Convention and Additional Facility Rules were related to "Oil, Gas and Mining" disputes.[25] Furthermore, according to the ICC's 2016 Statistical Report, 13% of the disputes registered under the ICC Arbitration Rules related to the energy sector.[26]

This fact has been taken into consideration in the Model EPA which includes provisions on dispute resolution in Articles 37 and 38. Article 37 according to which "*a dispute shall be resolved, if possible, by negotiation between the Parties*". If such negotiation fails, the Model EPA specifically provides for a right to resort to either arbitration or expert determination. According to Article 37 of the EPAs, "*Arbitration and sole expert determination as aforesaid shall be the exclusive method of determining a dispute pursuant to this EPA*", with Article 38 providing that arbitrations shall be seated in Paris under the ICC Rules.[27]

c) Dispute Resolution between private actors and State entities

Further improvements have been recently undertaken in the legislative and arbitral sectors through the recent Lebanese Public Private Partnership Law ("PPP Law") N°48 "Regulating Public Private Partnerships" passed on 9 September 2017. This law was enacted ahead of the CEDRE Conference[28] held in Paris on 6 April 2018, which resulted in over 11 billion USD in pledges of financial assistance, being attributed to help the

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recovery efforts in the country.[29]

The new PPP Law provides that the partnership contract with private parties shall specify the chosen dispute resolution mechanism, which can include mediation and domestic or international arbitration.[30]

It should be noted that Article 762 of the Lebanese Code of Civil Procedure ("LCCP") provides that the relevant Lebanese administrative body's prior authorisation should be sought to ensure the enforceability of the arbitration clause contained in administrative contracts.[31]

Although the PPP Law provides that arbitration is an acceptable method of dispute resolution, to the extent that PPPs qualify as administrative contracts, it remains recommended for private parties to ensure that the specific clause contained in their partnership agreement is pre-approved by the relevant authorities, until this issue is definitively clarified and in order to avoid any procedural hurdles in the future.

In addition to the enactment of the PPP law, Lebanon provides a favourable and attractive legal framework to investors with its arbitration-friendly legislation and a judiciary well versed in arbitration. This is also reinforced by the fact that Lebanon is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention")[32] and to about fifty Bilateral Investment Treaties.[33]

In light of the potential role that the Lebanese arbitration law could play notably in PPPs, it is worth exploring more closely its main characteristics together with its application by national judges.

III. AN OVERVIEW OF THE MAIN FEATURES OF ARBITRATION IN LEBANON

The Lebanese Arbitration Law provides a suitable framework for arbitrations seated in Lebanon both for national and international actors involved in business transactions as well as those willing to invest in Lebanon.

A. The Current Lebanese Arbitration Law

The current Lebanese arbitration legislation is widely influenced by the French arbitration law,[34] and bases its provisions on the 1980s French arbitration legislation.[35] The LCCP which was enacted by Law 90/83 dated 16 September 1983, with amendments resulting from Law No. 440 dated 29 July 2002, devotes an entire chapter (Chapter 2) to arbitration, with a distinction being made between domestic arbitration (Articles 762 to 808 of the LCCP) and international arbitration (Articles 809 to 821 of the LCCP).

Pursuant to Article 809 of the LCCP, arbitration is deemed international "when it involves the interests of international trade". The Lebanese courts have interpreted this statutory provision by holding that the international nature of an arbitration is determined by the international character of the economic transaction underlying the arbitration, and the extent to which it involves a cross-border flow of goods, persons or services.[36] Factors that are not taken into account when determining whether an arbitration is international include the nationality of the parties or arbitrators, the place of the arbitration, the residence of the parties or the place where the contract was concluded. Additionally, the application of a foreign law or procedure will have no bearing on the definition of an arbitration as international.[37]

B. The Initiation of Arbitral Proceedings under the Lebanese Arbitration Law

a) Formal requirements for an enforceable agreement

The Lebanese courts are knowledgeable about international arbitration and apply its most fundamental and recognised principles such as the separability of the arbitration agreement from the main contract.[38]

Further, unlike in domestic arbitrations, where the written form of the arbitration agreement is required as a condition for its validity, there is no particular requirement for an international arbitration agreement to be valid other than the parties having consented to it.[39]

As explained above, regarding administrative contracts, one important formal requirement to bear in mind concerns contracts made with the Lebanese State or with other State entities whereby the enforceability of an arbitration agreement is subject to prior authorization by the Council of Ministers upon a recommendation of either the relevant minister or the relevant regulatory authority (*autorité de tutelle*).[40]

b) Arbitrability of disputes

Before engaging in arbitration proceedings in Lebanon, it is important to bear in mind the scope of disputes which can be referred to arbitration. Indeed, the Lebanese legislation clearly defines certain types of disputes which are subject to the exclusive jurisdiction of the State courts – i.e., are not arbitrable:

(1) Issues relating to personal status (age, nationality and adoption) and social status (marriage and divorce). However, an exception is allowed by virtue of Article 1037 of the Lebanese Civil Code regarding financial compensation arising from personal status matters. In this case, arbitration will be confined to the compensation sought;

(2) Non-negotiable personal rights such as the right to human dignity, the right to physical integrity, the right to privacy, the right to food (food allowance), etc. However, any dispute relating to monetary compensation in connection with any of those personal rights is capable of being arbitrated;

(3) Rights of succession. Arbitration over acquired hereditary rights is nevertheless possible if the value of such right is determined;

(4) Issues of public policy which include all matters considered by law as guaranteeing social, economic or political interests;

(5) Issues of insolvency. Article 490 of the Code of Commerce provides that State courts have exclusive jurisdiction to deal with insolvency matters;

(6) Issues of employment contracts and social security, which fall under the exclusive competence of the local Labour Arbitration Court; and,

(7) Contracts for commercial representation (Article 5 of Decree Law No. 34 dated 5 August 1967, although the Lebanese courts have adopted a more permissible stance towards the arbitrability of such disputes in specific circumstances.

C. The Conduct of the Arbitral Proceedings under the Lebanese Arbitration Law

a) Courts' Interventions and Interim Measures

The Lebanese courts are used to act in support of arbitration, with their intervention being limited to what is necessary to ensure a smooth process. The President of the court of first instance may act as the *"juge d'appui"* (i.e., the judge acting in support of arbitration) if required to do so and can rule notably on applications for interim measures. The *juge d'appui* may also assist, *inter alia*, in the appointment of arbitrators where the parties have failed to designate an arbitrator and/or where designation of an arbitrator is not carried out by the relevant arbitral institution.[41]

Interim measures are not specifically addressed in the LCCP. It is however admitted that courts can grant provisional relief in support of arbitration when the Arbitral Tribunal is not yet constituted. In this case, an application for interim measures should be filed before the competent judge of summary proceedings, which can be done on an *ex parte* basis.

After the constitution of the Arbitral Tribunal, subsequent requests for interim measures must generally be submitted directly to the Arbitral Tribunal, which has the power to order any interim and conservatory relief deemed appropriate in accordance with Articles 789 and 859 of the LCCP. Furthermore, a party may seek an interim attachment order from the competent court to freeze the assets of the losing party pending the enforcement of an arbitral award.

Domestic courts are also competent to rule on allegations of forgery. Under Article 783 of the LCCP, where a party alleges forgery of one or more document(s) in the course of a domestic arbitration, the arbitrator shall suspend the proceedings pending the competent court's decision on the issue of forgery.[42] Pursuant to Article 812 of the LCCP, such principle also applies in international arbitration, unless there is an agreement to the contrary.

b) Principles Governing the Award of Interest and Allocation of Costs

The principles governing the award of interest and allocation of costs are liberal in Lebanon and comply with the principle of party autonomy.

Thus, under Lebanese law, interest can be applied to the principal claim and costs. The legal interest rate is of 9 percent in civil and commercial matters unless agreed otherwise by the parties.[43] Arbitral Tribunals can award both simple and

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compound interest. In commercial matters, the parties can freely determine the interest rate in their agreement.[44] In civil matters, however, usurious interests is forbidden.[45]

As far as the allocation of costs is concerned, the parties are able to recover legal fees and costs reasonably incurred, which can include arbitration costs as well as arbitrators' fees and expenses. It is usually left to the Arbitral Tribunal's discretion to decide whether it will apply the "loser pays" rule, and there is no provision in the LCCP's arbitration chapter which allows the courts to review the Tribunal's decision on costs.

D. Enforcement and Annulment of Arbitral Awards in Lebanon

The recognition and enforcement of foreign arbitral awards in Lebanon is governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), to which Lebanon acceded on 9 November 1998, albeit with a reservation of reciprocity. The provisions applicable to the recognition and enforcement of foreign or international awards in Lebanon have been implemented in the LCCP.[46]

At the enforcement stage, a Lebanese judge will not review the merits of the case, but will decide whether the foreign or international arbitration award should be granted exequatur. An exequatur, which seeks recognition of a foreign or international award in Lebanon is generally obtained through *ex parte* proceedings. In such *ex parte* proceedings, the judge will verify only the existence of the award and whether it manifestly violates international public policy.[47] Additionally, the judge may check that the award covers matters which are arbitrable. Once these conditions have been satisfied, the award is generally recognised and an exequatur is granted.

A decision granting exequatur of an international arbitral award can only be appealed on very limited grounds, which are identical to the grounds for annulment of an international award seated in Lebanon.[48] The Lebanese Arbitration Law provides no additional grounds to those based on the criteria for the recognition of awards under the New York Convention. It is, in fact, more favourable than the New York Convention in referring to a violation of "international public policy" rather than "public policy" as a ground for refusing exequatur of arbitral awards.

IV. CONCLUSION

In conclusion, considerable efforts have been undertaken by the Lebanese authorities to create a favourable framework for investments in the region. In this context, arbitration is increasingly emerging as a dispute resolution of choice where disagreements arise.

The Lebanese Arbitration Law is both modern and adapted to the requirements of a safe arbitration seat, and could efficiently be used notably in PPP relationships between private actors and Lebanese State bodies. It remains to be seen to what extent investors and local authorities will be able to overcome the political risks in the country and embrace the opportunities in the region. When assessing their investment plans in this jurisdiction, investors can find comfort in Lebanon being an arbitration-friendly jurisdiction, increasingly supportive of alternative dispute resolution mechanisms.

Zeina Obeid and Claudia Pharon

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8 Christopher R. *Seppälä, "The New FIDIC Provision for a Dispute Adjudication Board",* The International Construction Law Review Volume 14, Part 4, October 1997.
9 Save in specific circumstances set out in Sub-Clause 20.8.
10 *Ibid.*
11 Maroun Helou, "Construction Disputes from the Contractor's Perspective", Speech delivered as part of the ICC Seminar on "Arbitration in Construction Disputes: The Lebanese and Middle Eastern Perspective" (Lebanon, January 2016).
12 Law No.132 of 2010. The OPRL provides for establishment of a National Oil Company ("NOC") when necessary and after promising commercial opportunities have been verified. The NOC Law organizes the corporate governance, defines the participation methodology of the government, and starts consolidating government oil and gas assets under one legal entity ahead of the establishment of a NOC. See UNDP Lebanon, "The petroleum legislative framework for Lebanon", 23 March 2018.
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18 Law of 19 January 2017.
19 See Talal F. Salman, "The Petroleum Legislative Framework for Lebanon", 19 March 2018.
20 The EITI is a global standard for the good governance of oil, gas and mineral resources. It seeks to address the key governance issues in the extractive sectors.
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24 See Lebanese Petroleum Administration website, "Second Licensing Round", available at: http://www.lpa.gov.lb/secondlicensinground.php.
25 See ICSID Case Load Statistics (2018-1), available at: https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.
26 ICC Dispute Resolution Bulletin 2017, Issue 2, ICC Practice and Procedure at 113.
27 It should be noted that it is unclear, however, whether these are mutually exclusive, or conversely consecutive. It should be noted that although the expert determination method is meant to reduce time and costs of any subsequent arbitral proceeding, a risk remains that the challenging party attempts to drag the claimant in a lengthy process, starting with an expert determination and followed with an arbitration, in the hope to revisit the expert finding. See Ziad Obeid, "Model Exploration and Production Agreement: Dispute Resolution in the Face of Diverging Interests", International Law Journal, 16 June 2016.
28 CEDRE is an acronym for « Conférence Economique pour le Développent, par les réformes et avec les entreprises » (Economic Conference for Development through Reforms et with Businesses).
29 Rania Ghanem, "11.8 billion promised at the Paris CEDRE Conference" (Businessnews.com.lb, 6 April 2018) available at: http://www.businessnews.com.lb/cms/Story/StoryDetails.aspx?ItemID=6475.
30 Article 10 (15) of Law 48 dated 7/9/2017 Regulating Public Private Partnerships "*The dispute resolution mechanism, which can include mediation and domestic and international arbitration".*
31 Article 762 of the LCCP: "*Arbitration clauses and arbitration submission agreements relating to administrative contracts shall be enforceable only if authorized by a decree issued by the Council of Ministers following a proposal by the relevant Minister, for the State, or the relevant regulatory authority, for public law entities*". See also, Nayla Comair-Obeid, "The impact and consequences of changes in Lebanese Arbitration law", ICC Bulletin, vol.14/no.1, Spring 2003, p. 47
32 Lebanon signed the ICSID Convention on 26 March 2003 and entered into force on 25 April 2003.
33 http://investmentpolicyhub.unctad.org/IIA/CountryBits/116#iiaInnerMenu. It should be noted that some of the BIT's are signed but not in force yet such as the BIT's concluded with: Qatar, Iceland, Guinea, Gabon, Chile, Chad, Benin and Azerbejian.
34 Charles Jarosson, *Aspects de l'arbitrage international dans le droit et la pratique des pays arabes: Rapport de synthèse*, 42 Leb. Review of Arab and Int'l Arb. 6; Marie Sfeir-Slim, *Le nouveau droit libanais de l'arbitrage a dix ans*, 1993 Rev. arb. 553 [1].
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36 Beirut Court of Appeal, Third Chamber, 10 December 2001; Beirut Court of Cassation, Decision No 14/2014, 25 January 2014.
37 'Arbitration in Lebanon', in Abdul Hamid El Ahdab and Jalal El-Ahdab, *Arbitration with Arab Countries*, Kluwer Law International 2011, pp 337 – 449.
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39 See Article 763 of the LCCP.
40 See section B(c) above.
41 Article 810 of the LCCP.
42 Article 783 of the LCCP.
43 As stated in Article 767 of the Lebanese Civil Code and in Article 767 of the Lebanese Commercial Code. See also Law of 24 June 1939.
44 Lebanese Court of Cassation, Decision No 16, 22 February 1973.
45 Article 661 of the Lebanese Penal Code. See also Usury Law of 24 June 1939.
46 Articles 814-821 of the LCCP
47 Articles 795, 814 and 815 of the LCCP.
48 Article 817 of the LCCP lists the grounds to appeal a Lebanese Court's decision granting leave to enforce an international arbitral award which are as follows:
(1) Where the award has been rendered without an arbitration agreement or on the basis of an agreement which is null or void due to the expiry of the relevant time limit for rendering the award;
(2) Where the award has been rendered by arbitrators not appointed in accordance with the law;
(3) Where the arbitrators ruled without complying with the mission conferred upon them;
(4) Where the award has been delivered in violation of the rights of defense; and,
(5) Where the award has violated a rule of international public policy.
These grounds are mirrored in Article 819 of the LCCP providing for the grounds for annulment of an international arbitration award in arbitrations seated in Lebanon.

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A BRIEF REPORT ABOUT THE "ACHMEA CASE"

By Gonçalo Malheiro

In a recent decision, handed down on 6th March 2018, the European Court of Justice issued a long- awaited ruling about the discussion if intra-EU investment bilateral investments (BITs) are compatible or not with EU legal system.

Following this ruling, we can easily anticipate that there will be have serious consequences for around two hundred Intra-BITs that contain similar provisions although we should note that this decision does not bind upon investment treaty tribunals. Notwithstanding, it will represent a very important landmark in the development of investment treaty arbitration.

Currently, BITs were mainly concluded between Central and Eastern European states, prior to their accession to the EU. EU investors brought 13 ISDS cases against Hungary under intra-EU BITs and the Energy Charter Treaty (ECT). It was also the high number of cases that motivated the EU Commission to start a campaign against these agreements, even starting infringement proceedings against several Member States to terminate their intra-EU BITs.

A) The Case Background:

Firstly, it is important to give the general background of this dispute.

There was a request for a preliminary hearing concerning the interpretation of Articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (TFEU). This request was made in proceedings between Slovak Republic and Achmea BV concerning an arbitral award made by the arbitral tribunal provided for by the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic ("the BIT").

Article 8 of the BIT, in which we can find the arbitration clause, provides as follows:

'1. *All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if, possible, be settled amicably.*

2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement.

3 The arbitral tribunal referred to in paragraph 2 of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal.

4. If the appointments have not been made in the abovementioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. The arbitration tribunal shall determine its own procedure applying the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

– the law in force of the Contracting Party concerned;

– the provisions of this Agreement, and other relevant agreements between the Contracting Parties;

– the provisions of special agreements relating to the investment;

– the general principles of international law.

7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.'

As part of a reform of its health system, the Slovak Republic opened the Slovak market in 2004 to national operators and those of other Member States offering private sickness insurance services. Achmea, an undertaking belonging to a Netherlands insurance group, after obtaining authorisation as a sickness insurance institution, set up a subsidiary in Slovakia to which it contributed capital and through which it offered private sickness insurance services on the Slovak market.

In 2006 the Slovak Republic partly reversed the liberalisation of the private sickness insurance market. In particular, by a law of 25 October 2007, it prohibited the distribution of profits generated by private sickness insurance activities.

Since it considered that the legislative measures of the Slovak Republic had caused it damage, Achmea brought arbitration proceedings against the Slovak Republic in October 2008 pursuant to Article 8 of the BIT.

As Frankfurt am Main (Germany) was chosen as the place of arbitration, German law applies to the arbitration proceedings concerned.

In those arbitration proceedings the Slovak Republic raised an objection of lack of jurisdiction of the arbitral tribunal. It submitted in that respect that, as a result of its accession to the European Union, recourse to an arbitral tribunal provided for in Article 8(2) of the BIT was incompatible with EU law. By an interlocutory arbitral award of 26 October 2010, the arbitral tribunal dismissed the objection.

By an award of 7 December 2012, the arbitral tribunal ordered the Slovak Republic to pay Achmea damages in the principal amount of EUR 22.1 million. The Slovak Republic brought an action to set aside said arbitral award before the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany) and an appeal to the Bundesgerichtshof (Federal Court of Justice, Germany).

The Slovak Republic expressed doubts as to the compatibility of the arbitration clause in Article 8 of the BIT with Articles 18 (the general principle of non-discrimination), 267 (the preliminary rulings procedure) and 344 (undertaking not to submit EU law disputes to any method of settlement other than that provided in the EU Treaties) TFEU.

Although the referring court did not not share those doubts, it nonetheless considered that, since the Court has not yet ruled on those questions and the questions are of considerable importance due to numerous bilateral investment treaties still in force between Member States which contain similar arbitration clauses, it was necessary to make the present reference to the European Court of Justice in order to decide the case before it.

Therefore, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings, to make a preliminary reference under Article 267 TFEU to the European Court of Justice as to whether any of those EU law provisions gave rise to an incompatibility in respect of the arbitration clause.

It referred the following questions to the Court for a preliminary ruling:

'(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may

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bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?

If Question 1 is to be answered in the negative:

(2 Does Article 267 TFEU preclude the application of such a provision?

If Questions 1 and 2 are to be answered in the negative:

(3 Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?'

In conclusion, the German court essentially asked whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT.

We recall that according to such article, an investor from a Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

The European Court of Justice, in its assessment of the case, started by recalling that *"an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system",* observance of which is ensured by the Court.

Secondly, it was considered that the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly "*the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital*".

Then, the European Court of Justice replied to the question whether the arbitral court identified in Article 8, can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU, in order to understand if its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU. The European Court of Justice concluded that a tribunal such as that referred to in Article 8 of the BIT cannot be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling.

Moving to the following question, it should be considered whether an arbitral award made by such a tribunal is, in accordance with Article 19 TEU in particular, subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling.

Regarding this point in particular, the European Court of Justice concluded that this arbitration derives from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law.

In conclusion, the European Court of Justice considered in point 56 of its decision that "*Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law*".

In paragraphs 58 and 59, the European Court of Justice stresses that "*In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above . 59.* In *those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law".*

The European Court of Justice reinforced that EY Treaties established a judicial system aiming to guarantee consistency and uniformity in the application of EU law.

In the current case, although the arbitral tribunal was called to rule on matters related to the application of EU law, it should not be considered as a Court or a Tribunal of a Member State within the meaning of Article 267 TFEU.

Based on the reasons above, the European Court of Justice ultimately ruled:

Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

B. What are the implications of this European Court of Justice´s decision?

After giving a very general background of this case, we would like to provide some comments about its relevance. We will provide just few comments recognizing that this decision has broad implications not all addressed in this brief report.

It is important to note that the European Court of Justice did not follow the opinion issued by Advocate General Wathetelet in his opinion of 19th September 2017 in which he proposed that EU law did not preclude the application of an investor-state dispute settlement mechanism established by means of a BIT between two EU Members States. This means that this is a controversial issue in which we can find very significant differences.

We must also recall that the Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, Romania and the European Commission submitted observations in support of Slovakia's arguments. Furthermore, Germany, France, the Netherlands, Austria and Finland contended that such clauses were valid. On the whole, 16 out of the 28 Member States intervened, together with the Commission.

Although this is a very relevant decision with serious consequences, it is not binding upon investments treaty tribunals.

However, this decision must be understood in a certain political context where it is clear a trend against investor-state arbitration and especially an opposition against ISDS (and, in a more general perspective, against free trade and the adoption of punitive tariffs). The European Court of Justice follows such position, trying to ensure that there is a continued jurisdiction of European courts over investment protection, presenting an opposition against a specialized court system based for companies at the international level.

In this sense, the ruling accepts the position that a system of investment dispute resolution established at the inter-state level to the EU judicial system is in contradiction with a uniform application of internal market rules applied to foreign direct investment. This distrust for what is called "BIT legal environment", that would give additional protection to EU companies against a Member State, would represent, according to some opinions, a risk against the fundamental freedoms granted by the EU legal system.

This concern for the respect of the autonomy of Union law and with an alternative system of applicable rights and obligations for individual companies that may undermine such system is a primary motivation of European Court Justice´s ruling.

In this context, it would be very interesting to see if there will be an increase, in the short term, in the number of challenges of non-ICSID disputes rendered by arbitral tribunals seated within EU and how will react tribunals seated outside the EU. On the other hand, it is still uncertain if investment treaty tribunals will be affected by "Achmea case" when they will have to decide the validity of intra-EU BITs in intra-EU investment disputes.

Predictability, in some situations, when the arbitral tribunal will decide in favor of the private investor, it is probable that the respective State will challenge the decision before the competent national courts, invoking the European Court of

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Justice´s ruling to set aside the award.

We should also bear in mind the position adopted by the European Commission, for more than ten years, trying to persuade the Member States to terminate existing EU BITs. Although few States have taken seriously this recommendation, the situation may be different from now on since Achmea judgement is part of EU law.

After the decision issued in "Achmea case", it is possible to see some opinions proposing that domestic Courts may take decisions in light of Union law, including the possibility to request a ruling by the European Court of Justice, instead of being called only at the enforcement stage. However, this may be in opposition to the nature of international investment protection regimes which prefers to have their disputes settled by institutions outsides the national judicial system.

Besides, that opens the question whether a party may file at the national courts a claim based on intra-EU investment since the investor's rights are created not by the EU legal system but by a separate agreement between States. Furthermore, we should not also forget that for some Member States, international agreements confer no rights enforceable in national courts until implemented by national legislation.

Other voices, as an alternative, also claim for a convention establishing a multilateral court for the settlement of investment disputes or to establish a new system of ISDS common to all Member States.

It is also with great expectation that it is waited the CJEU opinion on the compatibility of the Investment Court System negotiated in CETA with European Treaties, requested by Belgium in September of 2017. This will be certainly the next step in this judicial and political discussion.

Although, we may not be as pessimistic as Advocate General Wathetelet was when he stated that the right to a right to arbitrate would be "*devoid of all practical effect*", we are of the opinion that unfortunately the party autonomy is seriously undermined by this decision.

We understand that, in order to avoid the application of the jurisprudence adopted in "Achmea case", it may be argued in some situations that the judgment has no impact on pending proceedings where EU law plays no (or only an indirect) role. Moreover, as the applicable BIT remains in force, the tribunal cannot assume that *Achmea* renders the BIT void or inapplicable. It would be also possible to argue it is up to the contracting states to determine what its implications are. In any event, we shouldn´t ignore the challenges that result from the European Court of Justice´s decision.

What we can take for granted in the near future, and following "Achmea case", is a strong debate about intra-EU investment protection and the future of ISDS.

Gonçalo Malheiro

[BIOGRAPHIES]

The Founders

PEDRO SOUSA UVA

YAR co-founder Pedro Sousa Uva heads an arbitration and litigation department as Of-Counsel of the Lisbon based full service law firm pbbr.

To date, Pedro has gathered over 15 years of work experience in Dispute Resolution. Before joining pbbr, Pedro handled at Miranda law firm international disputes, often based in former Portuguese colonies in Africa or Asia. Seconded to the London office of Wilmer Hale in 2009/2010 he worked on international arbitration matters alongside a worldwide team of lawyers. Pedro started his career at Abreu Advogados, where he represented foreign and national clients in court and arbitral proceedings for nearly a decade.

Pedro holds a LL.M degree in Comparative and International Dispute Resolution from the School of International Arbitration (Queen Mary University of London). Before graduating in Law at the Lisbon Law School of the Portuguese Catholic University (2003), he studied as a scholarship student International Arbitration at the Katolieke Universiteit Leuven in Belgium in 2001/2002.Pedro is a regular speaker on arbitration events and hosts conferences, including São Paulo, Vienna and Lisbon. Recently, he has one of the invited lecturers for the 7th Post Graduation Course of Arbitration at the University Nova, in Lisbon (2018).

During the last years, Pedro authored several articles on international and national arbitration topics, notably "*International Arbitration Shifting East*", publishedin Iberian Lawer in December, 2017, "*Getting the Deal Through - Arbitration 2016*" (co-author, Portugal; 11th Edition), "*World Arbitration Reporter -2nd Edition*" (co-author, Jurisnet 2014), "*Interim Measures in International Arbitration* - Chapter 30 (Portugal)" (co-author, Jurisnet 2014) and "*Portugal finally approves its new arbitration law*" (co-author, Revue de Droit Des Affaires Internationales / International Business Law, no. 3, June 2012). His dissertation was published in the American Review of International Arbitration under the title "A *Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*".

Pedro co-chaired the Sub40 Committee of the Portuguese Association of Arbitration (APA) since 2013. He is also an active member of the Co-Chairs Circle (CCC). Pedro co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA).

The idea for YAR was born in London and put into practice by the co-founders Pedro Sousa Uva and Gonçalo Malheiro in January, 2011. It is a pioneer project as it was the first under40 international arbitration review ever made.

[BIOGRAPHIES]

The Founders

GONÇALO MALHEIRO

Gonçalo Malheiro is an associated partner of Abreu Advogados. He focuses his work on Arbitration and Litigation.

With around 20 years of experience, Gonçalo has a broad expertise in handling arbitration, civil, commercial and criminal litigation. He has represented foreign and national clients before Tribunals and Courts.

He has also handled numerous contract disputes including claims arising out of sales of goods agreements, distribution arrangements, unfair competition matters, banking and insurance, real estate, franchising disputes and corporate matters.

Gonçalo completed his LLM at Queen Mary – University of London (School of International Arbitration) and published his dissertation about interim injunctions in Portuguese Arbitration Law and a compared analysis with different jurisdictions.

Before, he already had attended a Summer Course at Cambridge University.

Between 2012 and 2015 he was Chairman of the Young Member Group of the Chartered Institute of Arbitrators and is currently member of the Chartered Institute of Arbitrators.

Gonçalo attended the 1st Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry in April 2015.

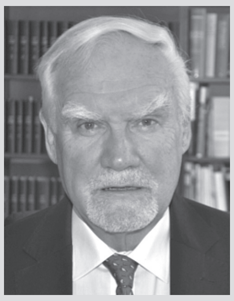
He has been a speaker in several national and international conferences focused on arbitration.

Besides publishing in English and Portuguese regarding various arbitration matters, Gonçalo is also Co-Founder of YAR - Young Arbitration Review,.

Gonçalo also co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA), of which he is a member.

Gonçalo published recently articles about arbitration in Portuguese speaking countries and recently about rules of evidence in arbitration for the book “La prueba en el procedimiento arbitral”.

[BIOGRAPHIES]



PIERRE TERCIER

Pierre Tercier is an Emeritus Professor of the University of Fribourg, the Honorary Chairman of the ICC International Court of Arbitration and a prominent international arbitrator with extensive international arbitration and dispute resolution experience. He is highly respected in the international legal and business community as an arbitrator, lecturer and author. He is a visiting professor of law at numerous universities around the world, including in Geneva, Paris, Turin and Washington DC.

NADINE LEDERER

Nadine Lederer is a German qualified lawyer and Associate in the International Arbitration Group of Hogan Lovells International LLP in Munich. Her practice focuses on domestic and international commercial arbitration. She advises national and international clients in pre-arbitral scenarios, in disputes before arbitral tribunals and in arbitration-related matters before German courts, such as enforcement actions.

Prior to joining Hogan Lovells, Nadine practiced with another international law firm in Munich, focusing on information technology law.

She holds an LL.M. degree in International Dispute Settlement (MIDS) from the Geneva University Law School and the Graduate Institute of International and Development Studies. Her master thesis dealt with online dispute resolution.

Nadine is a regional co-chair of DIS40 in Munich, the young practitioners group of the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit – DIS).

TATJANA GORST

Tatjana is a qualified lawyer and a young arbitration practitioner.

In 2013, she obtained her first LL.M. in International Law and International Relations. After gaining work experience at the USAID Small Business Expansion Project, Tatjana was admitted to the LL.M. in International Commercial Arbitration Law at Stockholm University in 2017.

After successfully completing the Program in May 2018, Tatjana moved to Frankfurt am Main. As of August 2017, she works in the Arbitration Practice Group of White & Case.

MARTA CURA

Marta is a Junior Associate at the law firm of the former president of Germany, Christian Wulff, in Hamburg. She previously did traineeships at the International Arbitration department of Wilmer Cutler Pickering Hale and Dorr in London, at Allen & Overy's Hamburg office in Corporate / Shipping Finance, at White & Case's Hamburg office, in Banking and Finance, as well as Vieira de Almeida e Associados (VdA)'s Lisbon office, also in Banking and Finance. Marta has an LL.M. in International Business and Trade Law from Fordham University School of Law (2015) and obtained her law degree from the University of Coimbra (2014). She has passed the New York State bar exam and is awaiting admission.

DANIEL GREINEDER

Daniel Greineder trained at the London Commercial Bar and has practised in the field of international commercial dispute resolution in Geneva and London. He has advised and represented parties to institutional and ad hoc arbitrations and to English court proceedings as well as to contractual price reviews and mediations. His practice focuses on technically complex cases across different industry sectors, in particular disputes arising out of M&A transactions, construction projects, JVs and supply agreements in the energy industry.

Daniel Greineder has often worked with lawyers from different common and civil law backgrounds and many of his cases involve the application of foreign law. He has extensive experience of applications for provisional measures in commercial arbitration. He is an English-qualified barrister and was called to the Bar of England and Wales in 2005.

MIHIKA GRUPTA

I am a recent graduate from National Law University, Jodhpur, where I completed a B.A. LLB., with International Trade and Investment Law as my specialty. I was on the board of editors for the Indian Journal of Arbitration Law, and Trade, Law and Development journal. I've participated in the Vis moot in Hong Kong in 2015, and further I've done a lot of internships in the field of arbitration, particularly with the HKIAC last july in 2017. Currently I am in Paris attending a summer course in International Commercial Arbitration, and in August I will join the law firm, "Trilegal" in Mumbai, India, as an associate with their general corporate practice.

RODICA TURTOI

Rodica Turtoi graduated with a dual degree from Paris 1 Panthéon-Sorbonne and Bucharest Universities. She also obtained a Master 2 in International Trade Law from Paris 1 Panthéon-Sorbonne University and a Master of Laws (LL.M.) from Cornell Law School. During her studies she was awarded a number of scholarships and prizes.

Rodica Turtoi works both as arbitration counsel as part of a team and as an arbitrator's assistant. She has a particular interest in public international law. Prior to joining the firm, she trained in the international arbitration practices of leading international firms in Paris and London. Rodica is admitted to practice in New York State (2015) and passed the Paris Bar (2016).

AVINDER LAROYA

Avinder Laroya, LLM (MIDS Geneva), MCIArb, is a Mediator and Founding Partner of Serenity Law LLP, London UK.

She is an English Lawyer authorised and regulated by the Solicitors Regulatory Authority and a Member of the Chartered Institute of Arbitrators.

Avinder advises clients on preventative dispute resolution in domestic and international commercial litigation, mediation and arbitration. Her professional experience includes negotiating and drafting agreements, partnership and shareholder agreements, consultancy agreements, breach of contract, money debt claims, agency and distribution agreements, having expertise in real estate, intellectual property and the hospitality sector.

She has knowledge of ICC, LCIA, ICSID arbitral rules and has advised business executives in cross-border or cross-cultural disputes.

Avinder is an alumnus of the MIDS (Geneva) and spends her time between Geneva and London.

VERONIKA PAVLOVSKAYA

Veronika Pavlovskaya is a Junior Associate at Arzinger & Partners International Law Firm since 2016. Before joining Arzinger & Partners' team within 4 years Veronika worked as an Assistant of the Chairman of the Permanent Commission for Youth Policy and Contacts with Public Organizations at Minsk City Council of Deputies. She also took internships at the Ministry of Foreign Affairs of the Republic of Belarus and Danone Belarus. In 2017 Veronika also worked as a lecturer of the Civil Law at the Law College of the Belarusian State University.

In 2016 Veronika was awarded the Honorable mention for Martin Domke Award for Individual Oralists at the 23rd Annual Willem C. Vis International Commercial Arbitration Moot (Vienna, Austria). Veronika is an arbitrator of the students' competitions in international law and international arbitration in Austria, Poland and Belarus (Philip C. Jessup Moot, William C. Vis Moot, ICC Lex Mercatoria).

Veronika is a Laureate of the Special Fund of the President of the Republic of Belarus for the Support of the Talented Youth and the Winner of the 23rd Republican Competition for the Best Student Research Paper.

ZEINA OBEID

Zeina Obeid is an is an associate at Obeid Law Firm in Beirut, where she practices in litigation and commercial arbitration. She has acted as administrative secretary to a number of international arbitration Tribunal's acting under the Arbitration Rules of the ICC, DIAC, LCIA, CRCICA.

Zeina holds a PhD from the Université Panthéon-Assas (Paris II) in France and an LLM from Columbia University in New York. She also holds a dual Master II in Business Law and International Dispute Resolution obtained at the University Paris II and a Masters in Lebanese Law from the Lebanese University.

Zeina is qualified to practice law both in Beirut and Paris. She previously worked at several international firms such as Dechert LLP and White & Case LLP in Paris. Prior to this, she completed internships at Castaldi Moure & Associés in Paris and the International Chamber of Commerce (ICC), Paris.

CLAUDIA PHARAON

Claudia Pharaon is an associate at Obeid Law Firm in Beirut, where she focuses on both investment treaty arbitration and commercial arbitration.

Claudia holds a Maitrise from the Université Panthéon-Assas (Paris II). She also obtained a Diploma in Legal Studies from the University of Oxford, a Master in International Law and International Administration from the Université Panthéon-Sorbonne (Paris I) and an LL.M. from Harvard Law School.

Claudia is qualified to practice law in the State of New York and is admitted to the roll of solicitors in England and Wales. Previously, she worked as a Research Associate at the Chartered Institute of Arbitrators in London. She also has former experience in private practice and in international organisations (the UNFCCC Secretariat and the OECD).

[FLACHBACK]

Lisbon Commercial Arbitration Center annual conference | under40 session |6 July 2018 "Artificial Intelligence International in Arbitration"

Artificial Intelligence is not only a trendy topic, it is the happening right now, everywhere. Most of the times unnoticed. This under40 conference gathered top tier professionals, from ahead of his time partner Oliver Bolthausen, through AI researchers and developers and on to skeptical and enthusiast arbitration practitioners. Our intention is to discuss whether AI is welcome in arbitration, containable or even manageable. The future is now, but are we ready for it?

(Event organized by APASub40 – Raquel Silva, Carla Borges, António Júdice Moreira and Pedro Sousa Uva)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