News and Notes from

Institute for TRANSNATIONAL ARBITRATION

The Institute for Transnational Arbitration

A Division of

The Center for American and International Law

Volume 40 | First Quarter 2024 | Number 1

12TH ITA-IEL-ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION IN HOUSTON

Conference Report by Sophia Sepulveda Harms (King & Spalding, Houston)

I. "Ensuring the Independence and Impartiality of Experts in Arbitration" (January 18, 2024)

Moderator: Eugenie Rogers (Baker McKenzie, Dallas)

Panelists: Christina L. Beharry (Foley Hoag, Washington, D.C.), F. Teresa Garcia-Reyes (Baker Hughes, Houston), Miguel A. Nakhle (Compass Lexecon, Houston), Charline Yim (Gibson, Dunn & Crutcher LLP, New York)

Discussion during the first conference panel was grounded in a hypothetical case study about an expert who was preeminent in the field of metallurgy, particularly with regard to the composition of bedplate and other wind turbine component technology. Moderator Eugenie Rogers initiated conversation by introducing the expert's background, including his former employment with company Wind Co. and his experience testifying for Wind Co. on 13 separate occasions. Ms. Rogers then asked the panelists what factors they would consider in hiring the expert for a potential dispute.

Speaking from an in-house counsel perspective, Ms. Teresa Garcia-Reyes noted that beyond looking at traditional factors like education, experience testifying, and general expertise, she would also look at the expert's specific sub-specialty and engage her company's technical team to determine whether the expert was appropriate for the particular technical issue in dispute. On this topic, Ms. Charline Yim noted that a key role for external counsel is to determine how the expert may fit into the larger case strategy.

On the topic of disclosures, Mr. Miguel Nakhle emphasized the importance of an expert's independence, and encouraged experts to be transparent from the beginning of any potential engagement.

Ms. Rogers then introduced a scenario in which the expert and an arbitrator in the hypothetical dispute interacted infrequently as members of the same golf club and asked the panelists about disclosures in this context. Ms. Christina Beharry responded with a discussion of the various guidelines for arbitrators that require disclosure of past and present relationships, particularly where they involve economic benefits, and noted that similar guidelines do not exist for expert appointments. She concluded that, while there may not be a duty to disclose in this particular situation, it is best practice to exercise a degree of caution beyond that required by the applicable guidelines.

The panel concluded on the topic of expanding the pool of viable experts to become more inclusive of women, minorities, and younger experts. Mr. Nakhle questioned the tradeoff between engaging an expert with niche experience who had been appointed many times versus an expert who may be deemed more credible and impartial. Ms. Beharry observed that due to the small pool of experts in the area of damages and niche fields, and the tendency for counsel to re-appoint experts with whom they are familiar, there is a risk of a lack of diversity of thought in awards. Critics of Investor–state dispute settlement ("ISDS") raise the argument that the system is controlled by a small group of insiders. To avoid this, Ms. Beharry suggested creating profiles of female and minority experts, considering an established expert's "second in command," or encouraging experts to co-testify to widen the pool of testifying experts. Ms. Garcia Reyes added that companies and external counsel should each consider expert selection as among their Diversity, Equity, and Inclusion ("DEI")-related efforts.

F. Teresa Garcia-Reyes (Baker Hughes, Houston), Christina L. Beharry (Foley Hoag, Washington, D.C.), Miguel A. Nakhle (Compass Lexecon, Houston), Charline Yim (Gibson, Dunn & Crutcher LLP, New York), and Eugenie Rogers (Baker McKenzie, Dallas)

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II. "Adapting to New Energy Contracts: How Will Energy Transition Change Arbitration Practice?" (January 18, 2024)

Moderator: Ruxandra Esanu (Wordstone Dispute Resolution, Paris)

Panelists: Clea Bigelow-Nuttall (Pinsent Masons LLP, London), Nathan O'Malley (Musick, Peeler & Garrett LLP, Los Angeles), Irina Tsveklova (Weil, Gotshal & Manges LLP, Houston)

Ms. Irina Tsveklova kicked off this panel's introductory remarks with a discussion of the investment shift to clean energy projects driven by agreement among nations to reach a net zero emissions target by 2050. These efforts have already tripled renewable capacity and increased investment in nuclear, carbon capture storage, and hydrogen projects. Ms. Tsveklova predicted that the new technologies, products, and services associated with the transition, as well as pressure from shareholders and businesses to meet emissions targets, will cause the energy transition to touch every sector of the economy.

Ms. Clea Bigelow-Nuttall then commented on the results of the Queen Mary University 2022 Energy Arbitration Survey and how they compare with the reality of energy disputes today. She noted that while it remained true that some of the main drivers of energy disputes include price volatility, supply chain issues, and regulatory uncertainty, the community has seen more energy transition disputes than predicted. Contrary to survey respondents' belief that the risk to the global supply of energy could set back the energy transition, Ms. Bigelow-Nuttall pointed out that the need to establish alternative sources of reliable energy in the face of persistent and emerging global conflict has had the opposite effect.

Speaking to the prevalence of arbitration clauses in renewable energy transactions, Ms. Tsveklova posited that the preference for arbitration depended on the type of transaction (such as mergers and acquisition versus project development) and the nature of the client. Mr. Nathan O'Malley noted that renewable projects often present as domestic transactions, even where asset owners/operators are located outside of the United States ("U.S."), due to their use of domestic subsidiaries to carry out the transaction. He added that renewable energy contracts are often drafted by the domestic offtaker side of transactions, which tend to prefer domestic litigation or arbitration due to the concern that arbitrators with experience in the renewable energy field will favor the asset owner/operator.

Ms. Bigelow-Nuttall opined that many different types of disputes are likely to emerge from the energy transition, including decommissioning and nuclear disputes. Regarding the latter, she noted that the complexity, size, regulatory regimes, and political implications of such projects may prompt actors to evaluate alternatives to arbitration, such as standing dispute adjudication boards. Mr. O'Malley commented that new technology, funding issues, and infrastructure problems may also contribute to disputes. Ms. Tsveklova posited that regulatory changes that affect government incentive programs are likely to lead to both disputes and adjustments to contractual provisions, noting that offtake agreements increasingly include change of law provisions that allow the parties to renegotiate the economics of a transaction where a regulatory shift has an adverse effect on a party to the project.

In closing, the panelists commented on the ways the energy transition may affect their practice. Ms. Bigelow-Nuttall offered her expectation that disputes will diversify, owing to new players, technology, rules under which arbitrations are taking place, and an expanding pool of arbitrators. Mr. O'Malley predicted that the legislative push to meet emissions targets might shift the balance of power in transactions to that of the asset owner, which may result in more international arbitration clauses in renewable energy contracts.

Clea Bigelow-Nuttall (Pinsent Masons LLP, London), Nathan O'Malley (Musick, Peeler & Garrett LLP, Los Angeles), Irina Tsveklova (Weil, Gotshal & Manges LLP, Houston), and Ruxandra Esanu (Wordstone Dispute Resolution, Paris)

III. "Keynote Address: An Overview of the Impact of Recent Geopolitical Disruption on International Business" (January 19, 2024)

Speaker: The Hon. Mark W. Menezes (United States Energy Association, Washington, D.C.)

Mr. Mark Menezes began his keynote address on the second day of the conference with an introduction to the United States Energy Association and its historical efforts to assist countries in reaching independence with regard to their energy supply. He spoke specifically of the association's partnership with other organizations to help Ukraine to disconnect its grid from Russia over many years, which they were able to complete prior to the Russian invasion of Ukraine.

Mr. Menezes launched the substance of his talk by discussing where the world is globally in terms of energy use and consumption. Referring to the COP28 agreement to reach net zero emissions by 2050, he pointed out that population shifts in the developing world will place additional pressures on Organization for Economic Cooperation and Development ("OECD") countries to address rising emissions in developing countries where populations are expected to increase. These pressures are exacerbated by developing countries' easy access to coal, which will require developed countries to make alternative energy sources available globally in order to meet new demands.

Speaking to the continued prevalence of traditional fuel sources, Mr. Menezes noted that the current global demand for oil averages 100 million barrels per day, with the U.S. standing as the largest user and producer of oil. He posited that significant importers of U.S. oil, including South Korea and Japan, are currently dependent on foreign supplies for their energy source and will consequently require assistance from countries like the U.S. to reach decarbonization goals. He added that despite these efforts, organizations like Organization of the Petroleum Exporting Countries ("OPEC") predict that use of fossil fuels will continue to rise over the coming year for several reasons, such as the increased population in developing countries, the aspirational nature of net zero goals, and the lack of formal mandate in countries like the U.S. to reduce emissions by a certain time period.

Mr. Menezes also discussed the geopolitical issues surrounding energy production and use. He noted that 17 of the 100 million barrels of oil produced per day travel through the Strait of Hormuz, placing a premium on that fuel due to the instability and crises often characterizing the region. With regard to the Russia-Ukraine conflict, he explained that U.S. exports of natural gas have increased to Europe amid the ongoing conflict.

Beyond these more traditional threats to global energy supply, Mr. Menezes stated that the reliance on foreign suppliers for the mining and refining of rare earth minerals needed for battery production will introduce new challenges and potential disputes. He referenced a recent legal battle between China's Canmax Technologies and Premier African Minerals as an example of the types of disputes that are likely to arise in the future. He added that cyberattacks on energy systems present another new type of geopolitical risk to energy security, as energy systems have become increasingly dependent on and connected to the internet.

The Hon. Mark W. Menezes (United States Energy Association, Washington, D.C.)

IV. "The Impact of Wartime and Related Sanctions on Arbitration Proceedings and the Enforcement of Awards" (January 19, 2024)

Moderator: David Y. Livshiz (Freshfields Bruckhaus Deringer LLP, New York)

Panelists: Laurie Achtouk-Spivak (Cleary Gottlieb Steen & Hamilton LLP, Paris), Alexander G. Fessas (ICC International Court of Arbitration, Paris), Charlene Sun (DLA Piper, New York)

Turning to the topic of sanctions and the way that arbitration institutions navigate associated challenges, Mr. Alexander G. Fessas spoke from his perspective as Secretary General of the International Court of Arbitration ("ICC"). He noted that in furtherance of its principle of neutrality, the ICC Court has maintained an Office of Foreign Assets Control ("OFAC") license since the international community first imposed sanctions against Iran, which has since expanded to cover jurisdictions like Russia. As a result, the Court is not precluded from administering matters involving sanctioned entities, and sanctioned parties are not precluded from taking advantage of the international arbitration system. Indeed, the ICC Court has handled over 400 cases involving sanctions in some capacity. Mr. Fessas explained that the biggest challenge the ICC Court has faced with regard to sanctioned entities relates to banking and the transfer of funds, due to the different regulatory regimes implicated.

Ms. Charlene Sun then addressed the added complications of sanctions in enforcement litigation against sovereigns. Speaking to the preliminary issue of anti-suit injunctions, with which parties have attempted to evade agreements to arbitrate in the U.S. or against a U.S. party, Ms. Sun explained that courts have been willing to enjoin foreign parties when it comes to arbitration agreements executed in the U.S. Nonetheless, the issuance of

an anti-suit injunction in a foreign jurisdiction is likely to affect enforcement of an award in that jurisdiction.

Continuing on this thread, Ms. Sun next discussed the legal and practical considerations affecting a creditor's ability to enforce against a sanctioned entity. Using the *Crystallex v. Venezuela* enforcement proceedings in the Delaware courts as an example, Ms. Sun noted that enforcement efforts to attach shares of CITGO prior to the imposition of sanctions in 2019 has resulted in a line of creditors who want to participate in the sale. Now that sanctions have been imposed, Venezuela has attempted to argue that because the sanctions have limited Petróleos de Venezuela, S.A. ("PDVSA")'s ability to transfer its shares and use them as an asset, the commercial use prong of Foreign Sovereign Immunities Act ("FSIA") cannot be satisfied for purposes of attachment. While this argument failed to gain traction in the Delaware courts, Ms. Sun concluded that the extent to which sanctions affect the commercial nature of sovereign property in other future cases may depend on the specific characteristics of the property sought and attached.

V. "Political Risks in Big Energy Projects: If Not Investment Treaties, Then What?" (January 19, 2024)

Alexander G. Fessas (ICC International Court of Arbitration, Paris), Laurie Achtouk-Spivak (Cleary Gottlieb Steen & Hamilton LLP, Paris), David Y. Livshiz (Freshfields Bruckhaus Deringer LLP, New York), and Charlene Sun (DLA Piper, New York)

Moderator: Ann Ryan Robertson (Locke Lord LLP, Houston)

Panelists: Silvia Marchili (White & Case LLP, Miami), Alberto Ravell (ConocoPhillips, Houston), David Weiss (Mayer Brown LLP, Houston)

By way of introduction to the panel discussion, Mr. David Weiss provided a brief overview of the historical alternatives to investor state arbitration, including gunboat diplomacy, sanctions and economic pressure, and litigation in the courts of either the host state or investor's state. He noted that neither states nor investors found these alternatives particularly satisfying.

Transitioning into the purpose and benefits of the investment arbitration system, Ms. Silvia Marchili pointed out that the system was simply created as a tool to enforce the rule of law and to protect the basic premise on which the investment was made. It was revolutionary that the system allowed investors to file disputes against an entire government before a neutral panel to enforce their basic rights as protected under the treaty. Mr. Weiss added that unlike commercial arbitration, ISDS does not require contractual privity with a state nor the accompanying negotiations for contractual protections. In principle, access to a treaty also reduces political risk and should therefore reduce the cost of the project. Mr. Alberto Ravell emphasized that access to a Bilateral Investment Treaty ("BIT") is important for reducing risk but is "not a silver bullet."

The panelists then addressed backlash against the system, with Mr. Weiss noting that backlash is gaining traction, especially in Europe and the U.S., and Ms. Marchili adding that what used to be marginal criticism from countries in Latin America has now become mainstream. Analogizing to an Argentine short story called "Progress Was Better Before," she posited that much of the criticism of ISDS is backward looking, and the proffered alternatives – like contractual arbitration and diplomacy – fail to address the criticism on which the backlash is based.

Amid the backlash, Mr. Ravell discussed how in-house counsel approach their risk analysis before making an investment. He explained how he conducts a comprehensive due diligence on the country, which may include contacting local counsel, examining the state of the judiciary, reviewing corruption reports, and assessing access to local courts. In conducting his review of the treaty network in place, he examines the type of BIT that is available, the definitions within the treaty, access to international arbitration, and requirements of the seat, among other considerations. Noting that the treaty should serve as a means to bolster other underlying protections, Mr. Ravell stated that contractual protections, including stabilization clauses, risk allocation clauses, and price review mechanisms are other critical parts of the investment protection toolkit.

Ms. Marchili added that contractual protections are particularly challenging to obtain because negotiations with government agencies require significant leverage. Beyond stabilization clauses, she noted that force majeure clauses are also a relevant means of protection, especially where they include protections against adverse acts of the State.

Turning to potential alternatives to investment treaties, Mr. Weiss discussed how the political risk insurance market has become sophisticated and bespoke, allowing investors to tailor their policies to address specific risks. Nonetheless, due to the prohibitive cost of obtaining coverage to match all the substantive protections of a treaty, this is not a functional alternative by itself, but rather another tool in the investor protection toolkit. He stated that the only real alternative is contractual arbitration, where the contract provides for arbitration outside the sovereign and the scope of the governing law provision is broad enough to provide the investor with protection according to customary international law. For these investments, he posited that investors will need to price the risk of not having access to ISDS into the price of the contract, which will ultimately hurt economies.

Mr. Ravell emphasized the importance of maintaining dialogue and a strong relationship with the host government in order to prevent an investment dispute from ever reaching the arbitration phase. For her part, Ms. Marchili noted that her practice has seen an increased focus on the pre-dispute point of the dispute timeline, in which counsel plays an important role in providing creative advice on how the parties can work to align their interests and prevent further escalation.

Ann Ryan Robertson (Locke Lord LLP, Houston), David Weiss (Mayer Brown LLP, Houston), Silvia Marchili (White & Case LLP, Miami), and Alberto Ravell (ConocoPhillips, Houston)

VI. "2023 Year in Review: The Top 10 (Or Close to 10) Developments in International Energy Arbitration" (January 19, 2024)

Speakers: Kevin O'Gorman (Norton Rose Fulbright LLP, Houston), Laura Sinisterra (Debevoise & Plimpton, New York)

The second half of the day began with a discussion of some of the most significant developments in 2023 related to international energy arbitration. Ms. Laura Sinisterra began by discussing the market disruptions stemming from the conflict in Ukraine, which have caused price disputes and contract termination cases.

Mr. Kevin O'Gorman then highlighted three developments in 2023 that presented "tricky waters for arbitrators." On this topic, he first discussed the English High Court's finding of fraud on the tribunal in *Nigeria v. Process & Industrial Developments Ltd.*, noting that the reviewing judge was concerned that the illustrious tribunal in the underlying cases had missed various important issues. Mr. O'Gorman then addressed the importance of discretion among arbitrators through his discussion of the *National Iranian Oil Company v. Crescent Petroleum* case, in which the ICC upheld the National Iranian Oil Company's challenge to arbitrator Charles Poncet for public remarks perceived to be incendiary, provocative, and offensive toward Muslims. Mr. O'Gorman closed this topic by discussing the conviction and sentencing of Spanish arbitrator Gonzalo Stampa to 6 months in prison after he issued a USD 15 billion award against Malaysia, in contempt of the Madrid High Court of Justice's 2021 annulment of Stampa's appointment as sole arbitrator.

The speakers followed this conversation by turning to a few notable enforcement case developments in 2023. Ms. Sinisterra discussed enforcement efforts in the D.C. Court of Appeals related to European renewables cases in the wake of widespread withdrawal from the Energy Charter Treaty. Mr. O' Gorman focused on three specific cases, including that of *Chevron v. Ecuador*, where he noted that Ecuador lost its final appeal to set aside Chevron's USD 8.6 billion award against it in the Dutch courts. He also discussed the D.C. District Court decision against Russia in the context of the Yukos shareholder awards, in which the court found Russia did not have immunity under the FSIA from the enforcement of the awards. Mr. O'Gorman concluded by discussing the series of bad acts carried out by the judgment debtor in *Yegiazaryan v. Smagin*, which served as the basis for the U.S. Supreme Court decision that unlawful frustration of enforcement efforts in the United States may be sufficient to satisfy the "domestic injury" requirement for RICO claims.

In a "scan of the horizon," the speakers closed by highlighting several issues to watch over the coming year, including: 1) whether Dutch courts will finally confirm the Yukos shareholder awards against Russia and reject set aside proceedings; 2) Venezuela's recent referendum, and the country's attempts to regain the province of Guyana; 3) the potential auction of CITGO in Delaware to satisfy creditors of Venezuela; and 4) whether this will be the year that the U.S. constitutes a state-to-state dispute panel against Mexico under the USMCA to handle complaints with regard to the energy market.

Kevin O'Gorman (Norton Rose Fulbright LLP, Houston) and Laura Sinisterra (Debevoise & Plimpton, New York)

VII. "Identifying, Quantifying, and Proving Damages in Energy Projects: How to Incorporate Risks in Calculating Damages Based on Unforeseen Circumstances?" (January 19, 2024)

Moderator: Richard D. Deutsch (Pillsbury Winthrop Shaw Pittman LLP, Houston)

Panelists: Veronica Irastorza (The Brattle Group, San Francisco) John Burritt McArthur (Law Office of John Burritt McArthur, Berkeley), Dr. Blanca Perea (FTI Consulting, Miami), Almir Smajlovic (Secretariat Advisors, LLC, Houston)

The final panel of the conference began with a presentation by Mr. Almir Smajlovic, who discussed the concepts of risk and uncertainty in the quantum context. He explained that risk, which involves the abnormality of cash flow returns, differs from that of uncertainty, which involves the unpredictability and ambiguity of what lies ahead. Noting that the latter is not easily determinable, he explained that analysis of uncertainty generally falls into one of three buckets: 1) estimation versus economic uncertainty, both of which he noted are always prevalent in any quantum exercise; 2) micro versus macro uncertainty, implicating company-specific uncertainty and economy-specific uncertainty, respectively; and 3) distinct versus constant uncertainty, where distinct uncertainty – such as regulatory changes – are difficult for experts to predict. Mr. Smajlovic posited that renewables are likely to fall into the distinct uncertainty bucket, due to the prevalence of shifting regulations, while estimation uncertainty related to the youth of a company may also play a role.

Dr. Blanca Perea then discussed market risks specific to renewable projects, opining that modelling the energy transitions of full economies has illustrated that the transition will not be as easy as advertised. She noted that the strategy among many countries has been to plug as much renewable energy into the power market as possible, resulting in billions of dollars-worth of investments that are not properly accompanied by transmission networks or energy storage. Dr. Perea closed her discussion with reference to renewable energy efforts in Chile, explaining that saturation of the market with renewables means that the prices for electricity in places where renewables have been injected will be close to zero, which will ultimately result in economic curtailment.

Ms. Veronica Irastorza addressed the differences between sovereign risk and country risk. She explained that if a government has financial problems and cannot pay its obligations – representing sovereign risk – this does not necessarily affect an oil company in the country that sells in the global market. Conversely, instability and protests that characterize country risk may affect an oil company operating in that country without

Richard D. Deutsch (Pillsbury Winthrop Shaw Pittman LLP, Houston), John Burritt McArthur (Law Offce of John Burritt McArthur, Berkeley), Almir Smajlovic (Secretariat Advisors, LLC, Houston), Veronica Irastorza (The Brattle Group, San Francisco), and Dr. Blanca Perea (FTI Consulting, Miami)

affecting a government's ability to pay its obligations. She argued that these more precise understandings of country and sovereign risk will have an effect on the quantification of damages, particularly where contract clauses have already accounted for certain sovereign or country risks.

Mr. John Burritt McArthur closed the panel with a discussion of reasoned awards and the risk of vacatur that arises from awards which fail to address the merits of damages models on which a dispute may turn. He noted that while reasoned awards are a standard default provision under many institutional rules, arbitrators often skimp on the damages analysis, deciding instead to pick one damages model over another based on the credibility of the expert, rather than the legal theory on which the damages model rests. Referencing his research into hundreds of domestic and international awards, he noted that failure to explain the reasoning behind decisions related to issues like liquidated damages or sanctions clauses, choices among price indices, or the choice of valuation date, among other issues, will leave an award vulnerable if the dispute turns on interpretation of such issue.

NEW DISPENSATION OF THE LIMITATION PERIOD FOR THE ENFORCEMENT OF ARBITRAL AWARDS IN NIGERIA

Article by Oladapo Mare (Banwo & Ighodalo, Nigeria)

1. Introduction

In May 2023, the Arbitration and Mediation Act ("the AMA") came into force and included robust and commendable changes to the limitation period for the enforcement of awards. Notably, the AMA came into force shortly after the Supreme Court affirmed a significant principle on the period for enforcing an award in Nigeria under the 1988 Arbitration and Conciliation Act ("the ACA"), which concerned the limitation period of the enforcement of awards under the laws predating the AMA. This article considers the status of the limitation period for the enforcement of awards in Nigeria prior to the AMA, the effect of the new provisions of the AMA on the limitation period, and the new concerns that these provisions pose.

2. Old Dispensation of Limitation Period for the Enforcement of Award

The ACA, which was the primary law on arbitration in Nigeria, did not contain a provision governing the period for enforcing an award. Specifically, the ACA had no provisions on a limitation period for arbitral proceedings. Instead, the applicable statute of limitation was either the Limitation Act or the Limitation Laws of the states.

Under the 2003 Limitation Law of Lagos State, the period for the enforcement of an award, including international awards, is six years from the date the cause of action arose. That is, a party has six years from the date the original cause of action arose to commence arbitration, to obtain an award, and to proceed to the courts for the enforcement of the award. Prior to *Sakamori Construction (Nig) Ltd. v. Lagos State Water Corporation*, there were divergent views on the rule applicable to the limitation period for obtaining an award because the Supreme Court had contradicting judgments in *Kano State Urban Development Board v. Fanz Construction Co. Limited* and *City Engineering Nig. Limited v. Federal Housing Authority. See Kano State Urban Development Board v. Fanz Construction Co. Limited*, (1990) 4 NWLR (Pt. 142) 1; *City Engineering Nig. Limited v. Federal Housing Authority*, (1997) 9 NWLR (Pt. 520) 224.

In *Kano Urban Development Board*, the Supreme Court relied on *Halsbury's Laws of England*, and first determined that absent intention to the contrary, every arbitration agreement is deemed to contain a provision that the award will be final and binding on the parties; it then held that the issuance of an award constitutes the end of that proceeding and gives rise to a new cause of action based on the parties' agreement to perform the award. This statement was misconstrued by lawyers to mean that the limitation period consequently runs from the date the arbitral award was issued. By contrast, in *City Engineering Nig. Limited*, the Supreme Court relied on *Murmansk State Steamship Line v. Kano Oil Millers* and held that the limitation period runs from the date of the accrual of the cause of action in the arbitration agreement and not from the date of the arbitral award. *See Murmansk State Steamship Line v. Kano Oil Millers*, (1974) 12 SC 1. The Supreme Court in *City Engineering Nig. Limited* also sought to clarify that *Kano Urban Development* should not be construed that a new cause of action arises following the issuance of an arbitral award. *City Engineering Nig. Limited* at 243 ¶¶ C – H. These decisions opened the door for lawyers to make divergent arguments on the issue of when the limitation period for an award begins to run.

This door, however, was shut by the recent decision of the Supreme Court in *Sakamori Construction (Nig) Ltd. v. Lagos State Water Corporation*. Specifically, the Supreme Court found that "[f]undamentally, an action to enforce arbitration award cannot be brought after the expiration of six years from the date on which the cause of action accrued[.]" *Sakamori Construction (Nig) Ltd. v. Lagos State Water Corporation,* (2022) 5 NWLR (Pt. 1823), at 375 ¶¶ F – G. Under this old regime, the rule regarding the enforcement of an arbitration award under the ACA regime was absolute. There were no exceptions to the period of enforcement except for: (i) where the cause of action accrued afresh as a result of admittance or partial payment of the debt; (ii) where the Lagos State Arbitration Law is applicable; or (iii) where the arbitration agreement is under seal.

This rule can be seen in *Sakamori Construction (Nig) Ltd.,* where the Supreme Court held that:

> [A]n action to enforce an arbitration award cannot be brought after the expiration of six years from the date on which the cause of action arose by virtue of Section 8(1)(d) of the Limitation Law of Lagos State, see *Murmansk State Steamship Lime v. Kano Oil Millers Ltd.* (1974) 12 SC 1... the appellants' cause of action under the agreement with the respondent arose before 27th March 2000, in line with the above cited cases the implication is that the appellant cannot enforce an arbitral award in respect of the said contract after 27th March 2006. Therefore, the lower Court on 7th June 2011 referring the parties to an arbitration in respect of which any arbitration award thereon cannot be enforced by virtue of the above provision of the Limitation Law of Lagos State and the supporting decisions referred to above, as such an order on arbitration is a futile order. *Sakamori Construction*, at 392 ¶¶ B – F.

3. The New Dispensation under the AMA

A new dispensation has been ushered in by the AMA, which modified the limitation period for the enforcement of an award in Nigeria. Specifically, Section 34 of the AMA contains the general rule of application and the exceptions.

Section 34(1) of the AMA states that all "applicable statutes of limitation shall apply to arbitral proceedings as they apply judicial proceedings," meaning that the principles and provisions set out in the general statutes of limitation will continue to apply to actions subject to arbitration. The provisions of the AMA therefore only will supplement those statutes and offer exceptions for the award enforcement process.

Section 34(2) provides the exceptions to computing time where there are certain supervening events:

> In computing the time prescribed by a statute of limitation for the commencement of judicial, arbitral or other proceedings in respect of a dispute which was the subject matter of:
>
> (a) An award which the court orders to be set aside or declare to be of no effect; or
>
> (b) The affected part of an award which the court orders to be set aside in part or declare to be part of no effect;
>
> The period between the commencement of the arbitration and the date of the order referred to in paragraph (a) or (b) shall be excluded.
>
> Supervening events thus will be excluded when computing the period of limitation.

Section 34(4) is the pivotal provision that introduces the new dispensation and provides that: "[i]n computing the time for the commencement of proceedings to enforce an arbitral award, the period between the commencement of the arbitration and the date of the award shall be excluded." Namely, once an arbitration proceeding has commenced, the limitation period is suspended until an award is issued. Notably, Section 34(4) does not remove the time limitation for the enforcement of an award (*i.e.*, six years from when the cause of action arose). Instead, it only suspends the time pending when an award is obtained.

This new regime under the AMA ushers in several advantages, particularly for the enforcement of foreign awards. Take for example, a case in which the cause of action arose on January 31, 2018; the arbitration proceeding for which belatedly commenced on November 1, 2023, because of certain difficulties; and an award for which consequently was issued on February 1, 2024, just one day after the six-year limitation period. Under the prior framework, the party seeking to enforce that award is barred from enforcing the award. By contrast, under the AMA, the period between the commencement of the arbitration and issuance of the award is excluded. In the example above, the period between November 1, 2023, and February 1, 2024, is excluded. Consequently, the party seeking to enforce the award will have three months to commence the enforcement proceedings. Overall, these new provisions create a safe space for award enforcement in Nigeria.

While this new dispensation ushered in by the provisions of the AMA offers certain advantages, it also has raised certain concerns. For example, Section 34 of the AMA does not take into consideration or make provisions regarding the limitation period when the matter is referred to the Award Review Tribunal. This gap in the AMA is noteworthy because the position of Nigerian courts is that that where a statute provides for a limitation period for a cause of action, only a statute can provide an exception or extension of time, and the court otherwise must apply the limitation of time prescribed. *See Abubakar v. Nasamu (No. 1)*, (2012) 17 NWLR (Pt. 1330) 407, at 459 ¶¶ G – H; *Akinnuoye vs. Military Administrator, Ondo State* (1997) 1 NWLR (Pt. 483) 564, at 572 ¶¶ E – G. Because the AMA does not include provisions that suspend the limitation period when the parties are before the Award Review Tribunal, this period is included in the computation of the time to enforce an arbitral award. This may in turn contribute to a decline in the utilization of the Award Review Tribunal.

Another concern raised is that computing the time under the new regime for the enforcement of arbitral awards has become more complex. Under the old rule, the courts only considered the date when the cause of action arose, the date when the writ was issued, and the date when the enforcement proceedings was commenced. *See Alhaji Haruna Kassim v. Herman Ebert*, (1966) LPELR – 25285 (SC). By contrast, under the new rule, the courts are burdened with the complexity of computing the limitation period for enforcement amidst supervening events, including the date the notice of arbitration was issued, the date the award was made, the period when the award was brought before a court, the duration of the supervening events, the date when the arbitration is commenced again wherein the parties intend to redo the arbitration, as well as the date when the matter came to court for enforcement. This complexity in computing the time may itself be a new action opening the gates to further litigation.

4. Conclusion

The AMA is a much anticipated and welcomed legislation, ushering in a new dispensation of the limitation period for the enforcement of awards in Nigeria. Before the AMA, there were no exceptions to the limitation period for the enforcement of an award. *Sakamori Construction (Nig) Ltd.* is a vivid illustration of the absolute nature and harsh effect of this rule, where parties may be left with an unenforceable and fruitless arbitral award if the award was obtained outside the prescribed period. The AMA has introduced welcomed changes, including exceptions for certain supervening events and suspends the time between the commencement of the arbitration and issuance of the award. The new framework under the AMA will encourage arbitration in Nigeria and give ample time for the enforcement of awards. Nonetheless, given the concerns highlighted above, it is recommended that the courts exercise caution when applying these provisions, keeping in mind that the objective of these provisions is to guarantee access to arbitration for efficient settlement of dispute.

Institute for
TRANSNATIONAL
ARBITRATION

NEW CODE OF CONDUCT SETS STANDARDS FOR ARBITRATORS IN INVESTMENT ARBITRATION

Article by Arslanbeg Nyyazlyyev
(OBLIN Attorneys at Law, Austria)

1. Introduction

In July 2023, the UN Commission on International Trade Law ("UNCITRAL") adopted a Code of Conduct for Arbitrators in International Investment Dispute Resolution (the "Code"). This monumental step evolved from nearly six years of deliberations initiated in 2017, when UNCITRAL tasked its Working Group III ("WGIII") with examining and formulating potential solutions for reforming ISDS.

The Secretariats of the International Centre for Settlement of Investment Disputes ("ICSID") and UNCITRAL worked together to publish a draft of the Code in 2020. Throughout the following two years, ICSID and UNCITRAL released several revised versions of the Code. Because of the long-standing deliberations on the pending Multilateral Investment Court ("MIC") and the uncertainties regarding its operation, the WGIII in 2022 bifurcated its efforts into two distinct codes: one for judges and one for arbitrators. This article will cover the code released for arbitrators, including the commentary released in October 2023.

2. Key Provisions of the Code

i. The Scope and Applicability (Articles 1 & 2)

The Code, comprised of 12 articles and accompanying commentary, applies to arbitrators and candidates:

- "Arbitrator" means a person who is a member of an arbitral tribunal or an ICSID ad hoc Committee, who is appointed to resolve an international investment dispute ("IID").
- "Candidate" means a person who has been contacted regarding a potential appointment as an arbitrator, but who has not yet been appointed.

The Code applies to arbitrators whether the arbitration is ad hoc or administered by an institution, and regardless of how the arbitrator is appointed (*i.e.*, sole arbitrator, presiding arbitrator, party-appointed, appointed by an institution). While the Code serves as standalone guidelines, it is meant to complement any conduct provisions in an instrument of consent to arbitrate. In the case of incompatibility, the provisions of the consent instrument shall preside.

ii. Independence and Impartiality (Article 3)

Arbitrators must be impartial and independent. Sub-clause 2 provides a non-exhaustive list of negative examples, which include the obligation not to:

- Be influenced by loyalty to any disputing party or any other person or entity (*i.e.*, an arbitrator should not allow any "obligation or alignment" with a person or entity. An arbitrator would not be biased solely because they share some characteristics with another individual, such as being of the same nationality, alumni, or having worked for the same law firm).
- Take instructions from any organization, government, or individual regarding any topic covered in a case. "Instruction" refers to "any order, direction, recommendation, or guidance," which can be explicit or implicit, and can come from a variety of private or public sources.
- Be influenced by any past, present, or prospective financial, business, professional, or personal relationship.
- Use his or her position to advance any financial or personal interest he or she has in any disputing party or in the outcome of the IID proceeding.
- Assume any function or accept any benefit that would interfere with the performance of his or her duties.
- Take any action that creates the appearance of a lack of independence or impartiality.

The commentary cites the 2014 International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines") as helpful assistance in this regard.

iii. Limit on Multiple Roles – "Double-Hatting" (Article 4)

Article 4 had sparked a lot of debate throughout the discussions; ultimately, it was determined that the Code would allow double-hatting in limited circumstances. Specifically, absent an agreement from the disputing parties, the Code prohibits arbitrators from concurrently participating as a legal representative or an expert witness in any other proceeding involving:

a. The same state measure(s);

b. The same or related party (parties); or

c. The same provision(s) of the same instrument of consent.

Additionally, there are cooling-off periods in place: one year for the same provisions and three years for cases involving the same measure(s) or party (parties).

iv. Disclosure Requirements (Article 11)

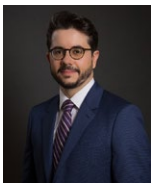
Both arbitrators and candidates have a duty to disclose any circumstances that might cast doubt on their impartiality or independence. This encompasses financial, business, professional, or personal relationships with disputing parties, legal representatives, and other individuals involved in the arbitration. The Code emphasizes a continuous and proactive approach to disclosure, urging arbitrators to remain vigilant and opt for disclosure in uncertain scenarios.

3. Comments

The Code's establishment heralds a new era for investment arbitration, offering clarity to all stakeholders about expectations and boundaries. However, the enforceability of the Code remains a subject of debate. One pathway is the voluntary adoption of the Code, while another is the integration of the Code into existing arbitral institutions or consolidation into a future multilateral ISDS reform instrument.

In the interim, the investment arbitration community eagerly anticipates the Code's impact on arbitrator challenges, its impact on existing soft law instruments like the IBA Guidelines, and its potential adoption in international commercial arbitration contexts.

INSTITUTE FOR TRANSNATIONAL ARBITRATION EXPERTS...IN THE NEWS UPDATES



Supporting Member **Gaillard Banifatemi Shelbaya LLP** has designated **Andre Marini** as their Advisory Board representative under 40.

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Supporting Member **Gaillard Banifatemi Shelbaya LLP** has designated **Mohamed Shelbaya** as a member of the Advisory Board.

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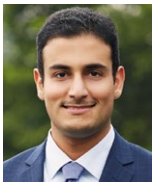

Dr. M. Altamimi (Alfaisal University) has joined ITA as an Academic / Government / Non-profit Member.

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Sustaining Member **Baker Botts LLP** has designated **Brandt Roessler** as an Advisory Board representative under 40.

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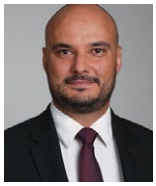

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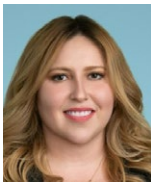

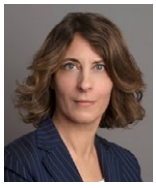

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Mark McNeill of **Quinn Emanuel Urquhart & Sullivan LLP** has joined ITA as an Associate Member.

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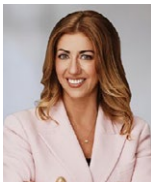

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Supporting Member **Sonia Bjorkquist** has designated **Osler, Hoskin & Harcourt LLP** as a member of the Advisory Board.

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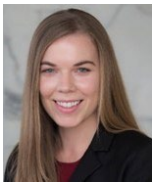
Maria Gritsenko has joined ITA as a Correspondent Member.

Brian W. Gray of **Brian Gray Law** has joined ITA as a Correspondent Member.

Rhianna Hoover of **Debevoise & Plimpton LLP** has joined ITA as a Correspondent Member.



Daniel Boyle of **DJ Boyle LLC** has joined ITA as a Correspondent Member.

Marinn Carlson of **MCarlson Arbitration PLLC** has joined ITA as a Correspondent Member.

Priyal Bhalerao is a current Legal Intern at **Singhania & Co. LLP** in London, specializing in public policy, international law, and dispute resolution. Recently, he completed a LL.M. in Comparative and International Dispute Resolution (with merit) from Queen Mary University of London. During the program, he completed his thesis (with distinction) entitled "Arbitration in Merger and Acquisition: In-depth Analysis on Multi-party and Multi-contract Disputes."

Advisory Board Member **John Bowman** taught International Energy Arbitration this fall for the eighth year at the Georgetown University Law Center. In November 2023, the Edinburgh University Press published his review of Professor Evaristus Oshionebo's 2021 book, *Mineral Mining in Africa: Legal and Fiscal Regimes*, in its journal, Global Energy Law and Sustainability (Vol. 4, Issue 1-2, pages 232-238). John is working on a new course on International Mining Disputes and the Energy Transition. Moreover, he serves as an arbitrator in international and domestic energy disputes and as an expert on international petroleum contracts.

José Antonio Moreno Rodríguez is the head of **Altra Legal** and a sitting arbitrator in cases at ICSID, Permanent Court of Arbitration ("PCA"), and ICC. He will preside over the consultative committee of a project undertaken by the International Institute for the Unification of Private Law ("UNIDROIT") and the ICC Institute on World Business Law on international investment contracts and arbitration. The project will explore the interaction between the UNIDROIT Principles of International Commercial Contracts and provisions usually included in international investment contracts, and will seek to address several recent developments in this area.

SCOREBOARD
OF ADHERENCE TO TRANSNATIONAL ARBITRATION TREATIES
(as of March 6, 2024)

ABBREVIATIONS

NY United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly, 1958 New York Convention)
ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly, ICSID Convention 1965)
IA Inter-American Convention on International Commercial Arbitration (commonly, Panama Convention) (1975)
USBIT United States Bilateral Investment Treaty
TIP US Treaties with Investment Protection Provisions
ECT Energy Charter Treaty (1998)
MC United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (commonly, Mauritius Convention) (2017)

SYMBOLS

S Signed, but not ratified
R Ratified, acceded or succeeded
A Subscribed, but not signed, ratified or paid
(*) Capital-exporting country under MIGA
N/A Not applicable

CHANGES FROM PREVIOUS ISSUE

NY None.
ICSID None.
IA None.
USBIT None.

ECT None.
MC None.

TIP None.

NATION	NY[1]	ICSID[2]	ECT[3]	IA	USBIT	TIP[4]	MC
Afghanistan	R	R	R			R	
Albania	R	R	R		R		
Algeria	R	R				S	
Andorra	R						
Angola	R	R				S	
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Bahamas	R	R				R[23]	
Bahrain	R	R			R	R / S[24]	
Bangladesh	R	R			R		
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Belarus	R	R	S[20]		S		
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Bhutan	R						
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Bosnia and Herzegovina[7]	R	R	R				
Botswana	R	R				R[26]	
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Brunei Darussalam	R	R				R / R[27]/S[19]	
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Burkina Faso	R	R				S[22] / R[29]	
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Kiribati							
Korea (Republic) (South)	R	R				R	
Kosovo		R					
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Lao People's Democratic Republic	R					R / R[27]	
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Togo		R				S[22] / R[29]	
Tonga	R	R					
Trinidad and Tobago	R	R			R	R[23]	
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Zambia	R	R				R[30]	
Zimbabwe	R	R				R[30]	

Notes: (1) Extends to metropolitan and overseas constituent territorial subdivisions but not to overseas dependent territories. Consult UNCITRAL for definitive status, as well as for the reservations to the Convention. (2) Extends to metropolitan and overseas constituent territorial subdivisions and to overseas dependent territories unless specifically excluded. (3) 1991 European Energy Charter was signed by the the United States of America (US or USA). European Union and EURATOM have ratified the ECT. (4) Treaties signed or ratified by the US with provisions on investments. (5) See also 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. (6) ICSID Convention entered into force for Bolivia on July 23, 1995. On May 2, 2007, Bolivia denounced the ICSID Convention, with effect on November 3, 2007. The Government of Bolivia delivered notice to the United States on June 10, 2011, that it was terminating the "Treaty Between the Government of the US and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment." As of June 10, 2012 (the date of termination), the treaty ceases to have effect, except that it continues to apply for another 10 years to covered investments existing at the time of termination. (7) As of 4 February 2003, The Federal Republic of Yugoslavia has changed its name to "Serbia and Montenegro." Montenegro declared itself independent from Serbia on June 3, 2006. Bosnia & Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, and Slovenia are separated successor states to parts of the former Yugoslavia and have succeeded to the NY. The Former Yugoslav Republic of Macedonia changed its name to the Republic of North Macedonia on 12 February 2019. (8) Included in the North American Free Trade Agreement among the United States, Canada and Mexico. (9) NY: includes Hong Kong Special Administrative Region. (10) Included in the Dominican Republic - Central America - United States Free Trade Agreement. (11) NY: includes Faeroe Islands and Greenland. (12) NY: includes, inter alia, French Guiana, French Polynesia, Guadeloupe, Martinique, Mayotte, New Caledonia, Réunion, and St. Pierre and Miquelon. (13) NY: includes Aruba and Netherlands Antilles. (14) ICSID Convention: excludes Cook Islands, Niue and Tokelau. (15) NY: includes Bermuda, Cayman Islands, Gibraltar, Guernsey, Isle of Man, and British Virgin Islands. ICSID Convention: excludes British Indian Ocean Territory, Pitcairn Islands, British Antarctic Territory and Sovereign Base Areas of Cyprus. ICSID Convention: continues to include Hong Kong Special Administrative Region. (16) NY: includes, inter alia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico and US Virgin Islands. (17) West Bank and Gaza are not recognized as states by the United States. (18) United States - Peru Trade Promotion Agreement. (19) Trans-Pacific Partnership signed on February 4, 2016. (20) The State has signed the ECT and it applies it provisionally, under Art. 45 of the ECT. (21) USMCA signed on November 30, 2018. (22) Economic Community of West African States (ECOWAS) – US Trade and Investment Framework Agreement (TIFA) signed on August 5, 2014. (23) Caribbean Community (CARICOM) – US TIFA, in force on May 28, 2013. (24) Gulf Cooperation Council – US Framework Agreement signed on September 25, 2012. (25) East African Community – US TIFA, entered into force on July 16, 2008. (26) Southern African Customs Union – US TIFA, entered into force on July 16, 2008. (27) Association of South-East Asian Nations (ASEAN) – US TIFA, entered into force on August 25, 2006. (28) Central Asia – US TIFA, entered into force on June 1, 2004. (29) West African Economic and Monetary Union (WAEMU) – US TIFA, entered into force on April 24, 2002. (30) Common Market for Eastern and Southern Africa (COMESA) - US TIFA, entered into force on October 29, 2001. (31) Andean Community (ANCOM) – US Trade and Investment Council signed on October 30, 1998. (32) France withdrawal from the Energy Charter Treaty shall take effect on 8 December 2023. (33) Germany withdrawal from the Energy Charter Treaty shall take effect on 21 December 2023. (34) Luxembourg withdrawal from the Energy Charter Treaty shall take effect on 17 June 2024. (35) Poland withdrawal from the Energy Charter Treaty shall take effect on 29 December 2023.

SOURCES:

This issue was compiled by Co-Editors Crina Baltag and Monique Sasson of The Institute for Transnational Arbitration based on the following sources: United Nations; ICSID; UNCITRAL; Organization of American States; Energy Charter Secretariat; UNCTAD and the Office of the United States Trade Representative. The Scoreboard is designed to be a convenient reference and it is not intended to be relied on as legal advice. Please consult the sources directly to confirm the status of any particular ratifications, reservations, changes, special conditions or new developments.

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