Editorial

Arbitration, contractual practice of globalization

To paraphrase George Augusto Niaradi, in the current globalized world, arbitration is perceived as “a positive example of globalization’s contractual practice”. Procedure intended to dispute settlement by arbitration is disconnected from legal culture and constitutes, as Laurence Kiffer said, an irreplaceable asset for businesses. In this context, knowledge of arbitration’s national laws is essential for practitioners. We devote a large part of this newsletter to this Comparative law in arbitration: arbitration in Russia through the institutions’ independence and impartiality issue or Recognition and enforcement of arbitral awards in Latin America. The language of arbitration, our report in this newsletter, is also an essential issue.

Remains that the hushed world of arbitration is also question of communication and networking: Patricia Peterson and Philippe Cavalleros return for us on the latest developments in arbitration during the congresses of two great international associations of lawyers, the IBA and the UIA, this fall. You will have an overview of these meetings, “wonderful platform for networking among peers where business cards are exchanged from the first glance”.

All will gather at the 17th Annual IBA International Arbitration Day being held this week in Paris.

So please read on.

Baudouin Delforge, Chairman of the International Chamber of Paris

POINT OF VIEW

Arbitration comparative law

Russian Courts’ Crusade against “Pocket Arbitrations” : current Russian Courts’ Practice In Relation to the Independence and Impartiality of Arbitration Institutions

By Andrey Loboda, Lawyer at the Moscow’s Bar, Partner in the lawfirm « LFP Loboda, Filiminov and Partners », PhD at the International Law School of the Moscow State University of International Relations (MGIMO), CAIP Arbitrator, Alternative member at the ICC Arbitration Court, at the Marine Arbitration Chamber of Moscow and at the International Arbitration Commission of the ICC for the Russian Federation, member of the board of the Russian Arbitration Association;

and Ksénia Stepanova, Lawfirm « LFP Loboda, Filiminov and Partners », jurist, PhD candidate at the International Law School of the Moscow State University of International Relations.
In modern Russian practice, large companies are participating in creation of standing arbitration institutions which are called to consider disputes within their corporate structure and with their clients. Such arbitration institutions remain under direct or indirect influence and control of these institutions.

The arbitration tribunals acting under the rules of such institutions evoke suspicion as regards their ability to act independently and impartially. Some judges of the Russian Supreme Arbitrazh Court use the expression “pocket arbitrations” in order to describe this sort of institutions.

In its most recent decree adopted on October 29, 2013, No. ВАС-8445/2013 the Presidium of the Supreme Arbitrazh Court decided to set aside an award of tribunal acting under the rules of the Gazprom Arbitration Institution.

The arbitral award was rendered in favour of Yamalgazinvest, an affiliate of Gazprom. Yamalgazinvest initiated arbitration proceedings against NefteGasProject in relation to an alleged breach of an engineering contract. The case was considered by a panel consisting of three arbitrators. The parties appointed two of them. The presiding arbitrator was appointed by a decision of these two co-arbitrators. Thus the bodies of the arbitration institution were not involved into the procedure of formation of the arbitration tribunal. Nevertheless the Supreme Arbitrazh Court held that the requirement of impartiality established by law (Art. 18 of the Federal Law on Arbitration, 2002) was not complied with. Moreover the Supreme Arbitrazh Court reiterated its previous opinion (decree of May 24, 2011, ВАС-17020/2010) that the regulation of arbitration shall comply with the fair trial requirement imposed on the courts by the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 - Art. 6(1). The Russian court is of the opinion that a standing arbitration institution shall comply with the subjective and objective impartiality tests as established by the decision of the European Court on Human Rights in re Hauschildt v. Denmark (1989). Though the Russian Supreme Arbitrazh Court cites in its decree this judgement of the European Court on Human Rights, in fact, the concept of impartiality it the decree at hand is the Russian court’s own invention.

In the opinion of the Russian court subjective impartiality means that an arbitrator must show no bias or personal prejudice in deciding a specific case; the notion of objective impartiality is related to the independence of the arbitration institution, which must be financially and structurally independently. Accordingly, the Russian court decided that as the objective impartiality test was not met, the subjective independence and impartiality of the particular panel shall not be taken into account. To the contrary, the European Court on Human Rights is of the opinion that the subjective test refers to the personal conviction of a particular judge and the objective test examines ascertainable facts which may raise doubts about a judge. The subjective impartiality of a judge is to be presumed. None of the factors considered by the Russian court gave ground for analysis of the impartiality of the members of the arbitration tribunal. Instead the Russian court referred to the examination of the position of the arbitration institution.

To prove the objective dependency of this arbitration institution from Yamalgazinvest, the court i. a. referred to the following facts. First, the arbitral tribunal is established by Gazprom, a parent company of Yamalgazinvest. Second, Gazprom provides the arbitration institution with premises, vehicles, communication means and other facilities. Third, Gazprom provides with the financial support to this arbitration institution. Fourth, the list of arbitrators is to be approved by the chairman of the board of Gazprom.

It is noteworthy that the respondent did not object to the competence of the arbitration. NefteGasProject raised the arguments related to the lack of impartiality only in its application to the state court after it discovered that the award is made in favour of the claimant. Nevertheless the Supreme Arbitrazh Court did not decide that the respondent is estopped from using the relevant defence. In the eyes of the court consideration of a dispute by “pocket arbitration” violates the public policy.

The above mentioned decree of the Supreme Arbitrazh Court was preceded by a number of similar decisions in respect of the “pocket arbitrations”.

In Sberbank v. Sofid, Sofit and Alexander Shyt’, the Supreme Arbitrazh Court decided to set aside the award of a panel of the arbitration institution under the Centre for Arbitral Proceedings. This arbitral institution was founded i. a. by Sberbank – decree of July, 16, 2013, ВАС-1567/2013.


On application of the Department of the Federal Service on Customers’ Rights Protection and Human Well-Being Surveillance for the Tatar Republic the Supreme Arbitrazh Court by its decree No. ВАС-3364/2013 of September 17, 2013, acknowledged unlawful arbitration clauses of the energy-supply contracts with customers of Tatenergosbyt. These clauses provided for the competence of the Energy Arbitration Court. The decree cites the rules of consumer protection legislation. But it is noteworthy, that according to the Russian registry of companies this arbitration was established by a non-commercial organisation created by Tatenergo – parent company of Tatenergosbyt.

All the considered cases lay in the sphere of domestic arbitration, regulated by the Russian Federal Law on Arbitration 2002. The matters related to international commercial arbitration are governed by the relevant Russian law 1993 based in general on the UNCITRAL Model Law 1985.

Without doubt the rationes of these cases influence to some degree the regulation i. a. in the sphere of international arbitration.

The negative reaction of Russian state courts to the practice of the “pocket arbitrations” and the very existence of the institutions influences and undermines the business community trust to arbitration in general.

Russian courts often tend to restrict arbitration instead of controlling and ascertaining the independency and impartiality of
The importance of the issue

Although according to the statistics in international arbitration, most awards are voluntarily enforced, the effectiveness of the procedure for recognition and enforcement of awards remains a key aspect of the attractiveness of arbitration as an alternative in the field of international business. Hence the importance of facilitating and harmonizing the “exequatur procedure” whereby a State Court recognizes a foreign (or “non-domestic”) arbitral award as such and renders it enforceable on the territory of the State to which the request is made.

Partial unification of the procedural rules through international conventions.

The most important treaty in this area, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958 under the auspices of the United Nations (the “New York Convention”), specifically set out common standards governing certain aspects of enforcement, such as documents to be provided by the applicant (Article IV), the possible grounds for refusal of enforcement (Article V) and the option enabling the enforcement judge to order a stay of proceedings against a foreign arbitral award suspended or set aside in the jurisdiction of origin (Article VI).

Although there are also regional treaties that address this issue in Latin America, the New York Convention remains the most favorable and the most specific convention.

General observations regarding the enforcement procedure in Latin America

(i) Court with jurisdiction and type of proceedings: Bolivia, Brazil, Chile, Colombia, Panama, Peru and Uruguay have centralized jurisdiction for dealing with applications for enforcement in their respective Supreme Courts (the Superior Tribunal of Justice in the case of Brazil). In Ecuador, the provincial courts have jurisdiction for this purpose, while Argentina, Mexico, Paraguay and Venezuela prefer to apply common rules on jurisdiction, according to which the application for enforcement must be made before the courts of first instance with jurisdiction depending on the subject and the territory. In all these jurisdictions, the enforcement procedure is adversarial.

(ii) Evidence requested from the applicant: while in all the jurisdictions studied, the rules on this subject have been unified by the Convention, in practice, according to a study recently published by the International Chamber of Commerce, only Ecuador and Mexico have remained faithful to the New York Convention on this aspect. However, most jurisdictions in Latin America are more formalist than the New York Convention: in some countries such as Argentina, Bolivia and Panama, the applicant is required to produce the entire contract which contains the arbitration clause. In others, such as Brazil and Chile, this is not required, but these jurisdictions impose, however, other administrative requirements that go beyond the letter of the Convention (although they are not considered to be substantial). Colombia, Peru and Uruguay require not only the production of the entire contract containing the arbitration clause, but also add some administrative requirements beyond those included in the text of the Convention. Finally, Venezuela seems to be less demanding than the Convention, as the production of the arbitration agreement signed by the parties to the arbitration is not systematically required.

Brief overview of the application of the New York Convention in Latin America

The New York Convention assumes the binding force of foreign arbitral awards: Article V exclusively lists however, two types of grounds for refusal of enforcement: (a) those whose existence must be raised and proven by the party opposing enforcement (paragraph 1), relating to the invalidity of the arbitration agreement, to non-compliance with the adversarial principle, among others, and (b) those that can be raised *ex officio* by the enforcement judge (paragraph 2), such as non-arbitrability of the subject-matter of the dispute according to the law of the State of the enforcement judge or violation of the public policy of that State.

With respect to the application of these grounds for refusal, the case law overview of the countries in the region studied can be summarized as follows:

(i) The exclusive and limited nature of the grounds for refusal listed in the New York Convention is generally upheld by the case law which rejects applications for enforcement based on grounds involving a review of the merits of the arbitrators’ decisions.
However, it can be noted that the case law is very much attached to its own domestic legislation, which occasionally leads some domestic courts to apply restrictions or conditions not included in the New York Convention, under the pretext that the Convention refers to the procedural law of the forum, or in other cases, to admit appeals based on constitutional law against foreign arbitral awards. It should, however, be noted that most countries in the region have modernized their legislations on arbitration, and therefore the standards governing the enforcement of foreign arbitral awards generally promote the recognition and enforcement of the latter.

Although the courts refuse enforcement of awards made in the absence of evidence of the contract or arbitration clause, they grant it when there is evidence of implied consent to arbitration by the parties.

In order to determine the existence of a lack of consent or non-arbitrability of a subject, the courts use a conflict of laws approach, that is to say, they base their findings on the law they consider as applicable in the case at issue, be it the lex contractus or the lex fori, or the law of the seat for the capacity of a company.

Allegations of improper constitution of the arbitral tribunal will be rejected if the court finds that the parties were able to choose the arbitrators, that the institutional rules chosen by the parties had been complied with, or that the alleged ignorance of the applicable law by the arbitrators did not prevent the party from proving the existence and content of the law.

There are examples of reasonably broad interpretation of the scope of the arbitrators’ mission allowing the enforcement of the awards in question.

Case law allows for enforcement of arbitral awards rendered in absentia if the defendant was duly informed of the arbitration proceedings and was not physically unable to be represented before the arbitral tribunal sitting abroad; and distinguishes the parties’ objections as to the substantive review, which it dismisses.

Judges generally admit that international public policy of the forum is more restrictive than that of its domestic public policy. Furthermore, they refuse enforcement for awards that are contrary to a domestic judgment on the same issue, or if there are proceedings pending on the same issue (lis pendens).

Conclusion
This brief overview of the legislation and case law of Latin America jurisdictions regarding the enforcement of foreign (or non-domestic) arbitral awards reveals generally positive developments in these countries, which nevertheless involve some exceptions, driven by an increasing awareness of the courts of the limited scope of the judicial review of such awards, which enables them to avoid falling into the “traps” set out for them in many cases by the parties challenging the enforcement.

* The opinions expressed in this article reflect those of the author alone. Hughes Hubbard cannot be held liable for any inaccuracies contained in this article.
This article in full version with all cited references can be found on the CAIP website (www.arbitrage.org).

The accession of Brazil to the Vienna convention on Contracts for the International Sale of Goods

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On March 4th 2013, Brazil - one of the world’s leading economies – accessed to the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention) and became 79th state party. Approved by the Congress in October 2012, the convention will enter into force for Brazil on April 1st 2014.

It is considered that the two third of the international transactions of goods are governed by the Vienna convention of 1980, including major trading partners of Brazil, like China, Mercosur, the United States, Canada and several other European countries.

The Vienna convention of 1980 provides a modern and fair standard for uniform contracts of goods’ sale. It renders goods exchange through the world more predictable. Without the Convention, it may be difficult to determine the proper law of a contract between two commercial partners from different countries: the buyer’s law, seller’s law or a third state’s law. Consequently, a conflict may cause substantial legal costs concerning the applicable law, even before to approach the merits.

Brazil, as well as the 78 other states parties to the Convention, can now take an advantage of a common set of rules thanks to the Vienna Convention, reducing risks and arbitration costs, which will be in fine beneficial for companies and consumers.

The Vienna Convention will enter into force for Brazil on April 1st 2014 in accordance with the article 99 (2) which stipulates that "(...) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the
Accession of Brazil to the Vienna Convention will provide security for the goods’ sale with its biggest commercial partner, China, which is a state party since 1988. According to the Ministry of development, industry and international trade of Brazil, 17% of goods exported by Brazil in 2011 – equivalent to 44.3 millions of dollars – went to China and 14% - either 32.7 billiards – of all goods were imported from China.

Before Brazil joined the Vienna Convention, dissimilarities between Brazilian and Chinese trade laws generated transaction costs for the both countries, in particular costs for obtaining legal advice in general or particular national consultations, for drafting contracts and all other costs in an unknown foreign legal system.

The Convention does not permit to exclude existing national laws – in reality national legislations are still applicable to merchants on internal market. However, it is interesting to note that the Vienna Convention was strongly inspired by internal law reforms on contracts, including China’s law.

For Latin America, adherence of Brazil to the Vienna Convention can have important implications on the trade. Only few countries from the region have not joined the Convention yet. The lack of predictability in terms of applicable law and important differences between Brazilian law et legal systems of its most important trade partners represent considerable legal risks and costs of transaction for merchants. These risks are now very reduces.

Brazil, can also act as a catalyst for other Portuguese-Speaking countries that could follow him. Having the biggest economy among Portuguese-Speaking countries, Brazil is considered as a model for others. Other Portuguese-Speaking countries could benefit from the development of the research on the Vienna convention in Portuguese, which will be widely promoted by Brazilian accession.

The signature of the Vienna Convention and growing familiarity of judges, lawyers and interested parties with its provisions should permit to promote modern legal concepts stated by the Convention, which can be tested and probably adopted by national legal systems, constituting an important phase in the development of the normalized world and a positive example of contractual practice of globalization.

REPORT

The language of the arbitration

The choice of the arbitration language

By Irina Guérif
General Secretary of the CAIP

The choice of the arbitration language is frequently considered as a trivial decision, to the extent that in international arbitration, the language of arbitration is almost not considered by the parties while drafting an arbitration clause. However, this choice – or rather this lack of choice – may conduct to overwhelm procedure and to a substantial rise of arbitration’s costs, due to the lengthening of the arbitration period because of parties’ possible disagreement on this matter.

Furthermore, the arbitration language influences parties on the choice of their lawyers and arbitrators, who should feel comfortable with the agreed language. Finally, the choice of the arbitration language may conduct to an inequity between parties during the arbitral proceedings.

The arbitration language, component of the adversarial principle

Concurring with this opinion, the Paris Court of Appeal, in its decision of April 2nd 2013, highlighted the importance of the arbitration language. The Court annulled in part an arbitral award on the grounds of failure to respect the arbitration language consisting in the breach of the adversarial principle (on the basis of article 1520-4 of the French code of civil procedure) : “Considering on the one hand that WINDMOLLER was permitted to produce documents only partially translated in its sole discretion except BLOWPACK to translate the rest, and on the other hand permitting the president to translate partially himself without any criterion of selection mode even though the agreed language of arbitration was French, the arbitral tribunal which based its sentence exclusively on an expert report on which were attached partially translated documents, breached the adversarial principle”.

In another context, the Paris Court of Appeal had a chance to pronounce on the adversarial principle grounds. By the decision of June 23th 2005, the Paris Court of Appeal decided that producing documents in German during the pleading is not a breach of the mission, and does not consist in a breach of the adversarial principle and if the claimant’s lawyers did not understand German, it is not proved that the claimant himself, based in Zurich, was not able to consult the documents already known by her.

By a decision of April 11th 2002, the Paris Court of Appeal considered that “it cannot be claimed before the arbitral tribunal that it has breached the adversarial principle by accepting a case submitted in French, whilst the rules adopted by the parties did not force them to use exclusively English and the claimants who argue unequal treatment between parties, cannot succeed without
Finally, we will refer to the decision of June 21st 2010 of the Paris Court of Appeal. In this decision, the file submitted was produced by one party in Spanish to two Spanish-speaking arbitrators whereas the agreed language of the arbitration was English. The Paris Court of Appeal decided that the absolute equity between the parties was satisfied if the content was not different and considering that arbitrators did not use during the debates the documents in Spanish and that files had also been produced in English.

Some difficulties resolved by the CAIP’s Rules of Arbitration

Generally, parties agree on the arbitration language in the contract, in the arbitration clause or in Terms of reference. In the absence of choice, it is up to arbitrators to determine the arbitration language. However, this choice is frequently problematic and a source of tensions when the parties are of different nationalities.

This point has led to the evolution of the CAIP’s Rules of arbitration in order to resolve efficiently all the misunderstandings concerning the arbitration language.

In its precedent version, the CAIP’s Rules of arbitration provided that documents submitted in foreign languages have had to be translated in French and that hearing would be in French. If the case needs it, the CAIP’s Chairman used to decide that proceedings held in English and that the translation of evidences into English.

The present CAIP’s Rules of arbitration (entered into force from September the 1st of 2011), provides an article (rule 25) giving parties the possibility to choose any of the languages proposed by the Rules of Arbitration. French is the arbitration language by default unless agreement between parties. If there is a disagreement among the parties, it is up to the Arbitral tribunal - and not any more to the Chairman of the CAIP – to decide on this issue by taking a procedural order drafted in French if it is not possible to reach a parties’ agreement on any other language.

The new CAIP’s Rules of arbitration gives parties a large choice of arbitration language, and permit, in case of disagreement among parties, to make it settled by arbitrators in accordance with the actual state of positive law.

The principal criterion used to settle this issue is the language of the contract. However, this it is a clue which may be insufficient to choose a specific arbitration language. This is why the Rules of Arbitration add that arbitrators will also take into account all other relevant circumstances in order to determine the arbitration language.

In a flexibility preoccupation, rule 25 paragraph 4 of the Rules provides that evidences which are not produced in the arbitration language should be translated, except in case of dispute on the accuracy of the translation.

However, not all the documents have to be translated in the arbitration language. Paragraph 5 of the same rule provides that: “At the request of a party, and taking into account the circumstances of the case and the arbitration procedure used, the Arbitral Tribunal may nevertheless decide to accept the production, without a translation, of documents drafted in a language other than the language of the arbitration”. This provision allows parties, on the one hand, to reduce translation’s costs and on the other hand to expedite the conduct of arbitral proceedings.

Finally, it must be noted that the language of arbitration covers the language applicable to various elements: submissions, evidences, debates during the hearings, witness hearings, arbitral award... Nothing prevents the Arbitral tribunal to determine a different language depending on the element involved, in order to optimize proceedings (authorize, for example, the hearing of witnesses in their native language or in language in which they are fluent). In this hypothesis, the CAIP hires a translator to make sure that the testimony, questions and answers are accurately translated; the costs of this service, advanced by the Chamber, are then shared by the both parties or at the expense of the one who asked for translation.

Pursuing its international development, the CAIP’s Rules of arbitration, in addition of its English version, is now also available in Russian.

Practice under the auspices of the CAIP

In the CAIP’s practice, the arbitration language has sometimes caused difficulties, in particular when parties disagree.

For example, in a recent case which has gave rise to a procedural order of the Arbitral tribunal, the claimer argued that the arbitration language should be French, because of the commercial relationships during several years with the defendant who knew very well the arbitration clause in their contract and jurisdiction of the CAIP. He deduced that the defendant knew that arbitral proceedings would take place in Paris and therefore, the arbitration language should have been French.

The defendant opposed because all the documents notified between parties as well as the contested contract were written in English.

The Arbitral tribunal, in its order, has settled this question as following: “The arbitration language having not been agreed in the arbitration clause and parties being in dispute concerning the arbitration language, the Arbitral tribunal settles this question and determines the language of arbitral proceeding pursuant to the rule 25 of the Rules of arbitration.

The arbitration language has been defined as the language of proceedings, meaning verbal and drafted communications of the Arbitral tribunal and the parties. The Arbitral tribunal notes that the majority of documents produced during the proceedings are written in English. Indeed, not only the contested contract is written in English but also all communications of the proceedings, indicating that parties always communicated in English, the only common language used by the parties at all times.

Taking into account all these aspects, the Arbitral tribunal states in majority in favor of English – the language of the contract
Finally, when parties don’t speak the same language, this question will probably often arise. As such, the choice of the arbitration language should not be considered as a secondary aspect, but as a main aspect of a successful arbitration.

The language in an international arbitration in Vietnam

By Van Dai DO
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Arbitrator, Vice Chairman of the Scientific Council, Vietnam International Arbitration Center (VIAC).

Legal framework
That the dispute has been settled by arbitrators or by a judge, the language of proceedings is an important legal issue. Before a Vietnamese Court, everything should be done in Vietnamese language. According to article 20 of the Civil procedure code "the language and writing used in civil proceeding are Vietnamese". Furthermore, "the party which submits to the court evidence in an ethnical minorities' language or in a foreign language should join its authenticated or legalized translation in Vietnamese". (Article 84 of the Civil procedure code).

In domestic arbitration (which does not include any foreign element) the Vietnamese law on commercial arbitration (LCA) of 2010 provides also the mandatory use of the Vietnamese language: "For disputes without a foreign element, the language to be used in arbitration proceedings shall be Vietnamese, except in a dispute to which at least one party is an enterprise with foreign invested capital" (article 10 paragraph 1).

However, in international arbitration (containing a foreign element) "the language to be used in arbitration proceedings shall be as agreed by the parties" (article 10 par 2 of LCA). In practice, when an Arbitral tribunal has used Vietnamese during audience and for the award whereas arbitration clause prescribes a foreign language (because one of the party was absent at the hearing), People’s Court of Hanoi has set aside the award on the grounds of "arbitral proceedings was not in conformity with the the arbitration clause" (on this case, see Van Dai DO and Hoang Hai TRAN, Vietnamese law of international arbitration).

The issue
In international arbitration, parties often don’t agree on the arbitration language (during the drafting of the arbitration clause or during the proceedings) and, in this hypothesis, the LCA prescribes that “the language to be used in the arbitration proceedings shall be as decided by the arbitration tribunal” (art. 10 para. 2).

Other questions arise: when arbitrators decide that the arbitration language is Vietnamese, can they quote some excerpts in a foreign language (as in English) in the arbitral award, and, in the positive, can they use directly evidences in a foreign language without certified translation into Vietnamese? The Vietnamese Law is (notably the LCA) is silent about these two questions and the People’s Court of Hanoi has rendered an interesting decision in this regard (Decision n°5/2012/QDST-TTTM of 06/12/2012).

In this case, the arbitral tribunal constituted under the aegis of the Vietnam International Arbitration Center (VIAC) - the biggest arbitration center in Vietnam- had rendered an award (n°30/11) between a Vietnamese company and a Chinese company. In the absence of a choice of parties concerning procedure language, the arbitral tribunal of VIAC decided Vietnamese as language of the procedure. However, in its award, the arbitral tribunal quoted some passages in English from evidences written in English. Moreover, the arbitral tribunal directly used evidences in English without asking certified translation (pursuant to the common practice in VIAC’s arbitrations).

Once the arbitral award rendered, the Vietnamese company applied for an action to set aside on the basis of different grounds, including two of them concerning arbitration language: on the one hand, the arbitral tribunal decided Vietnamese as language of procedure but admitted submissions in English and in Vietnamese. On the other hand, the languages used in the award were both English and Vietnamese.

Solution
However, People’s court of Hanoi rendered a decision rejecting the claimant’s action to set aside. The Court said that “in accordance with the above mentioned provisions (article 10 paragraph 2 of the LAC), the fact that the arbitral tribunal has chosen the procedure language as in arbitral award n°30/11 rendered on 10/07/2012 is justified in law”.

The commented decision deserves our approval because it takes into consideration the flexibility of arbitration compared to the court proceedings and is in accordance with doctrinal suggestions. As we have mentioned several times, ”in arbitral proceedings evidences and proofs submitted by parties don’t need to be translated in the same language because lots of arbitrators have a good command of foreign languages and can directly use evidences and proofs submitted by parties. For example, if the arbitration language is the Vietnamese but arbitrators have a good command of English or of French, evidences and proofs in English or in French don’t need to be translated into Vietnamese” (for example Van Dai DO, The advantages of arbitration in Vietnam, in Revue Entreprise et Droit, 47/2012).

Finally, thanks to this decision, the Vietnamese judicial practice is very close to the French one. Actually, the Paris’ Court of appeal has already ruled that “the Arbitral tribunal cannot be criticized on the grounds of an infringement of the adversarial principle, of a breach of equity among the parties, and consequently of violation of the rights of the defense, only for rejecting a
Consequently, if no litigation at all. But -

Comparable. Ours,

Arbitration's costs are often single out by firms which can examination oral submissions advantage to have a proper procedure overdeveloped. Arbitration has evolved. Somehow, it has found its way cruise. Standards arising from practice have changed -

At the time, it was used to describe arbitration as fast, unobtrusive and inexpensive. 

Young, Emmanuel Gaillard had just founded arbitration practice at Shearman & Sterling, while today it is one of the leaders with Freshfields. Things have changed a lot. 30 years ago, we practiced only arbitration and no litigation at all. It was also the end of an era: the arbitration area was a closed circle of pioneers like Berthold Goldman, Guy Danet, Francis Mollet-Viéville and Georges Flécheux... The Paris arbitration's world was also a reflection club: links had developed between academics, practitioners and judges, participating in making Paris a special place, a stronghold where progresses were possible.

You left the law firm in 2007. Why?

Following internal dissensions, I decided to leave without a clear destination. I was approached by my current partners, and the idea seemed to make much sense. Eric Teynier has followed quasi the same course as me: he was trained for years alongside Emmanuel Gaillard and then has developed its own expertise by participating in the launch of the litigation practice within Ernst & Young, with EY Law. This reinforced our image of specialized law firm which Yves Derains' law firm already had 25 years ago.

At the time, it was used to describe arbitration as fast, unobtrusive and inexpensive. Here too, things have changed...

Arbitration has evolved. Somehow, it has found its way cruise. Standards arising from practice have developed - or even overdeveloped - to create syncretism between common law rules and those of civil procedure. In a globalized world, it is a huge advantage to have a proper procedure disconnected from habits of each legal culture. 

Certainly, we finally created a "factory" by establishing a "standard" procedure: a mixture of Civil Procedure - mostly written and oral submissions - and elements of Common Law - production of evidences close to "discovery", witnesses' preparation, cross examination's procedures... Upon arrival, extremely cumbersome and costly procedures which are a factor of excesses; but which can although be very positive because it aims to give an international dimension to proceedings.

Arbitration’s costs are often single out by firms...

A few years ago, the ICC conducted a study on arbitration’s costs which showed that these were precisely due to lawyers and to their procedural skill. Lawyers have a responsibility in increasing arbitration’s costs, this is indisputable. In a specialized firm like ours, price always situate in much lower than the great law firms of Place Vendôme (in Paris), where the price per m2 is not comparable.
What is your view on ad hoc arbitration compared to institutional arbitration?

My view is similar to that of many General Counsels: institutional arbitration provides greater predictability, security and efficiency. However, it is probably necessary to moderate this affirmation: ad hoc arbitration can be dangerous if it is not framed. UNCITRAL has ensured to develop a specific framework for ad hoc arbitration which today provides some security. It should also take into account the experience of arbitrators: with parties and arbitrators accustomed to arbitration, the ad hoc procedure will run well.

What do you think about Paris as seat of Arbitration?

In recent times, when the ICC Arbitration Court was questioning about a possible relocation, we have created with Alexis Mourre an association entitled “Paris, the Home of International Arbitration”. The idea was born during our travels abroad: the Swiss and English, for example, communicate all the time. So we first create communication tools that we broadcast abroad, emphasizing the advantages of our capital. The association has managed to find its place and each year organizes a major event in the “Hôtel de ville” in Paris. At the publication of the decree of 2011 reforming arbitration, we issued a commentary of text in 6 languages. We also created a website (www.parisarbitration.com). This is an extremely important point. The association will have a crucial role to play at the 17th Annual IBA International Arbitration Day on February 14, 2014 in Paris. The challenge is significant from all points of view: it is estimated that approximately 100 arbitrations take place every year in Paris, this is about 100 weeks of hearing with costs of hotels, taxis, restaurants, etc... A real economic challenge for the capital.

You also spent a lot of time volunteering for the Paris Bar Association. What is your role?

I spent a lot of time with the Paris Bar Association in the past: with Louis Degos, since 2004, we co-chaired the Arbitration Committee. Arbitration is a cross-cutting issue in which the Paris’ Bar has an important role to play. We have sensitized the Bar with ethical problems we face. In the competition between capitals, the Anglo-Saxons had spread the rumor that our rules prevented prepare witnesses. From our French law point of view, the idea can shock but preparation of witnesses is a widespread use in Arbitration. We entered the Bar, asking that our rules concerning control and prohibition of such a preparation do not apply to arbitration. We obtained a resolution in this sense which was then followed by our Belgian neighbors. Moreover, the IBA has recently adopted new rules, the “IBA guidelines on Party representation in International Arbitration”, raising the question of the witnesses preparation, and the possibility for lawyers to do it without violation of their own ethical rules.

CONGRESSES

Return on the International Bar Association Conference (Boston, 6th – 11th October 2013)

By Philippe Cavalieros
Lawyer, Of Counsel, Winston & Strawn LLP

Grandiosity! More than 5,500 lawyers from 134 countries came together on the occasion of the International Bar Association’s (IBA) Annual Conference, to participate, in 5 days, to 222 working sessions on international law, and listen more than 1468 speakers. The place must be able to respond to excess: the city of Boston was perfect.

Welcoming indeed in the city center all participants in a congress center of 17,900 m2, and 38 meeting rooms, including the aptly named “grand ballroom John B. Veteran Hynes” (2280 m2), in honor of the former mayor of Irish origin, the transition was fully insured with the previous edition in Dublin which was, too, a success.

If the opening ceremony saw the former Secretary of State Mrs. Madeleine Albright demonstrate her infinite knowledge of world affairs, with a hint of humor and a lot of spirit, law was the topic of the following days.

Wonderful platform for networking among peers where business cards are exchanged from the first glance, the Annual Conference of the IBA is above all the opportunity to follow the news of his favorite matter. And what a new in international arbitration with the adoption of a new tool, the IBA Guidelines on Party Representation in International Arbitration of 25 May 2013, the result of two years’ work, in order to support practitioners.

According to some, these Guidelines are nothing but a useless tool which will still further complicate the arbitral proceedings (Michael E. Schneider, President's Message: Yet another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation, ASA Bulletin, Kluwer Law International 2013, Volume 31 Issue 3, pp. 497 – 501) or, according to others, a helpful tool contributing to arbitration consecration as an independent legal order (Alexis Mourre and Eduardo Zuleta, Addressing new challenges in changing times, Arbitration News, Newsletter of the International Bar Association Legal Practice Division, Vol 18, No 2, September 2013, pp. 5-7), it remains that this Guidelines constitutes at least a proposed answer to certain abuses. For example, the audacious possibility gave to the arbitral tribunal to exclude a lawyer that impedes voluntary arbitration proceedings, is a courageous reply to “Tactics Guerilla” that sometimes pollute arbitral proceedings (Guideline No. 6).

Moreover, still in arbitration, the working sessions were also an opportunity to consider for example the abuse of competition law's dominant position in arbitration law (Use and Abuse of Antitrust Issues in arbitration), or the
principle of *pacta sunt servanda* in international arbitration, and to discuss of latest trends in investment arbitration, always with the best world experts.

And if dinner came naturally conclude the work of the Arbitration Committee, with its 2,700 members - many of whom being present - it was especially remarkable to salute the Presidency of the French Alexis Mourre, who greatly represented international arbitration in the Legal Practice Division of the IBA, making an essential platform for exchange and reflection.

In this respect, a great event reflecting the vitality of this commission will be available very soon in Paris, during the 17th Annual Day of the IBA Arbitration (17th Annual IBA International Arbitration Day, February 14, 2014).

Finally, if some still doubted the advisability of participating in such a massive event, they could walk through the no less impressive rooms of the Fine Arts’ Museum of Boston, to enjoy the largest collection of Japanese works in the world outside of Japan, and thus prepare the next Annual Conference of the IBA, from 19 to 24 October in Tokyo.

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**Arbitration in Asia : return on the 59th International Association of Lawyers Congress (Macao, October 31th – November 1st, 2013)**

By Patricia Peterson  
Counsel, Linklaters (Paris office)

During the last annual congress of the international association of lawyers which took place in Macao from October 31st to 4th of November 2013, the commission “international arbitration” chaired by Patricia Peterson, Counsel at Paris office of Linklaters organized a special session on the 1st of November concerning “the arbitration in Asia”. This was the occasion to evoke in presence of international arbitration leading experts, the regional arbitral institutions and some specific issues.

**Why did you devote your entire session to the arbitration in Asia?**

We have decided to elaborate a program entirely dedicated to regional questions. This choice was determined by the place where the congress took place – in Macao – and by the increasing importance of arbitration in Asia. We assist for several years now, in the arbitration world and elsewhere, to the moving from the West to the East and to an important development of this matter in the region. Lots of Asian countries adopted the UNCITRAL Model Law on International Commercial Arbitration and will probably be tomorrow, the center of the arbitration’s development in Asia. National legal systems which are very favorable to arbitration were established in order to attract arbitrations; they will certainly become excellent seats of arbitration. During a certain period, competition mainly opposed Singapore and Hong Kong but the situation has now changed: emergent places come out, like Kuala Lumpur or Seoul, which take also into consideration arbitration’s specificities and expectations of its actors, change regularly their rules of arbitration and open new offices and hearing places, like Malaysia and the *Kuala Lumpur Regional Center for Arbitration* (KLRCA). It is important to follow the developments of arbitration in Asia, including for the arbitration practitioners based in Europe, even in absence of current arbitration cases. Inevitably, they will be asked to provide advice about the choice of Asian institution.

**How was this session organized?**

The training was firmly based on practice. Four round tables dealt with arbitral institutions. The first was dedicated to institutional arbitration in Asia, with the study of practice and rules of three institutions: the Hong Kong International Arbitration Center (HKIAG), the Singapore Arbitration Center (SIAC) and the KLRCA of Kuala Lumpur. The topics included parties’ intervention, joint proceedings, emergency arbitrator and other conservatory measures, accelerated procedures, management of the procedure, confidentiality, arbitration awards control and costs... The second round table concerned exclusively arbitration in China and was focused on different Chinese procedures, treating at the same time legal system and possible practical difficulties. We have had lots of practical and very interesting advices about what to avoid when we are in such arbitration. The third round table examined issues concerning arbitral awards in Asia and exequatur of Chinese arbitral award abroad. Finally, the fourth round table dealt with investment treaty arbitration in Asia.

**Why focus on institutional arbitration? Is there ad hoc arbitration in Asia?**

In china, ad hoc arbitration is not possible for now. Arbitration is perform institutional and practices under the authority of “Arbitration commissions” such as the *China International Economic and Trade Arbitration Commission* (CIETAC). In China, the law requires that arbitral agreement identifies the “Arbitration commission” competent to settle disputes. This legal requirement has presented difficulties for example in the ICC arbitration clause. Henceforth, the ICC recommends on its website a specific clause for arbitration held in China fitting with this law requirement. Singapore is also most favorable to institutional arbitration whereas there is an old tradition of ad hoc arbitration in Hong Kong as Chiann Bao, the General Secretary of HKIAC, explained to us. It varies by country.
The Arbitration in Senegal: African and International Outlook (International Association of Lawyers’ Seminar)

The International association of lawyers (UIA), in co-operation with the Senegal Bar Association, organizes a seminar on February 28th and 1st of March in Saly concerning “Arbitration in Senegal: African and International Outlook”.

Local and international experts will talk about the practice of arbitration in Senegal including ad hoc, institutional arbitrations, concerning commercial or investment treaty matters. This seminar would be a chance for practitioners to discover one of the top destinations in Senegal.

It will be held in French and won’t be translated into English.

TALKING

Laurent Aynès joins Darrois Villey

Following the departure of Matthew Boisséson and Pierre Duprey for Linklaters (cf. our previous newsletter), the lawfirm Darrois Villey Maillot Brochier has reinforced its department Arbitration and litigation, welcoming as Partners Professor Laurent Aynès. Associate professor at the Paris I Panthéon-Sorbonne University, Laurent Aynès has developed a litigation and arbitration expertise for over twenty years in France and internationally. He is also member of the CFA and of the IAI.

Coralie Darrigade Partner at Shearman & Sterling

Coopted Partners at Shearman & Sterling on January 1st, Coralie Darrigade reinforced the department International Arbitration of the law firm. Her experience includes in particular Investment International Arbitration, energy and general commercial issues. Coralie Darrigade also represents companies and public entities in Arbitration under the aegis of the International Center for Settlement of Investment disputes (ICSID), the Stockholm Chamber of Commerce (SCC) or applying the Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Alexandra Cohen-Jonathan, new Partner at August & Dehouzy

After cooptations of Carine Dupeyron and Benjamin van Gaver in Dec. 2013, August & Dehouzy continues to develop its department Litigation, Arbitration & Criminal, welcoming Alexandra Cohen-Jonathan as Partner. Alexandra Cohen-Jonathan has been lawyer at the Paris Bar since 1994, date on which she joins Hascoët Associés. Before August & Dehouzy, she spent her entire career in this law firm where she became Partner in 2004. She is also Arbitrator at the CAIP.

Elizabeth Oger-Gross, Of Counsel at White & Case

White & Case Paris has just announced the appointment as Elizabeth Oger-Gross Of Counsel. Specialized in commercial and Investment International Arbitration, she has a significant experience on International Litigation issues. Lawyer at the New York and Paris’ Bar, graduated from the New York University School of Law, Elizabeth Oger-Gross is also graduated from SciencePo Paris and from the Georgetown University (BS, magna cum laude). She joined White & Case New York in 2003 and the Paris office in 2007.

INTERNATIONAL ARBITRATION CHAMBER OF PARIS

The International Arbitration Chamber of Paris (CAIP) is a not-for-profit institution which has a general competence in arbitration. It offers the companies of all sizes, all necessary services for their disputes resolution through the means of arbitration or mediation.

Established in 1926, the International Arbitration Chamber of Paris is the first arbitration center in France. Having resolved about 40 000 disputes arising from transactions of all commercial and industrial sectors, the CAIP has acquired today an important international reputation.