CPR
International Institute for
Conflict Prevention & Resolution

Arbitration Committee Meeting

Date: September 14, 2022
Time: 12:30 – 1:30 (ET)
Location: Online (Zoom)

Attendees:

Denton Nichols
Lorraine de Germiny
Shourya Arora
Hatem Soliman
Mateus Aimoré Carreteiro
Conway Blake
Helena Tavares Erickson
Surya Gopalan
Marc Goldstein
Erin Gleason Alvarez
Lawrence Newman
John Buckley
James Reiman
David T. Lopez
Shigeki Obi
Donald Rose
Adolfo Jimenez
Marisa Marinelli
Ulyana Bardyn
Peter Rosen
Nawi Ukabiala
Bernardo Cremades
Analia Gonzalez
Michael Nolan
Allen Waxman
Ken Reisenfeld
Rose Marie Wong
Peter Pettibone
Michael Lampert
Charles Patrizia
Viren Mascarenhas

Minutes

1. Update on CPR Arbitration Committee Taskforces

Ms. Erickson invited updates as to the status of work of the Task Forces of CPR's Arbitration Committee. Mr. Lampert provided an update on the Transparency Task Force. He said that the Task Force convened two weeks ago and would be in a position to report to the Committee in November. He explained that the main part of that report would be a recommendation on whether CPR should change any of its rules on transparency. Ms. Marinelli provided an update on the Task Force on Challenges and Procedures. She explained that the Task Force would look at those rules where CPR has discretion and report on whether any change in the procedures followed in exercising discretion under the Rules is warranted. Ms. Erickson explained that it was still possible to join the work of the Challenges and Procedures Task Force, and that in-house counsel were particularly encouraged to join. Please email her at herickson@cpradr.org if interested.

2. Panel discussion on the comparative assessment of the approaches taken by courts regarding the enforcement of foreign arbitral awards that have been annulled or set aside by the courts of the seat of arbitration

Mr. Mascarenhas introduced the panel discussion and asked each panelist to introduce themselves. The panelists comprised: Mateus Aimore Carreteiro, Partner at Veirano Advogados; Conway Blake, International Counsel at Debevoise & Plimpton; Lorraine de Germiny, Partner at Lalive; and Hatem Soliman, Founder of Soliman Esq.

Mr. Mascarenhas noted that the impetus for the topic of discussion was the recent decision of U.S. Court of Appeals for the Second Circuit in *Esso Expl. and Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.* In that case, the Second Circuit revisited the standards elaborated upon in its earlier decision in the *COMMISA v. PEP* decision. Mr. Mascarenhas explained that, in the U.S., courts tend to defer to the decisions of courts of the seat of arbitration, save for where the judgment setting aside the award was considered repugnant to fundamental notions of justice. Mr. Mascarenhas described the findings of the Second Circuit in the *Esso* case, which were consistent with that approach. He further explained that a general application of that rule observed in case law is where a state-owned enterprise award-debtor succeeded in setting aside an award at the seat in its home jurisdiction, U.S. courts may then consider more closely whether it is truly appropriate to recognize that set aside decision.

Mr. Blake described the U.K's approach. He explained that there were many similarities to the U.S. approach. U.K. courts, he said, read the word "may" in Art. V(1)(E) of the New York Convention as denoting some discretion, but not a large discretion. There is no broad latitude to refuse enforcement. Mr. Blake described the facts and findings of two decisions to illustrate the way U.K. courts have approached the issue. First, *Yukos v. Rosneft*, where a U.K. court did not recognize a Russian court judgment setting aside an award in Yukos' favor because there were credible allegations of natural justice breaches. Second, *Malicorp v. Egypt*, where the court deferred to a Cairo court decision setting aside an award where alleged irregularities were not proven. Mr. Blake explained that the same principles of recognition and enforcement applied in the offshore jurisdictions following English law.

Ms. De Germiny addressed the approach of Swiss and French courts. She explained that Swiss courts were generally deferential to the courts of the seat and would therefore not typically enforce an award annulled at the seat. She cited a May 2022 decision of the Swiss courts to note that Swiss law does not entirely exclude the possibility that exceptional circumstances may warrant deviation from that approach, but noted that as yet there has been no Swiss decision ever enforcing a foreign award set aside at the seat. She explained that France takes a different view and is very open to resurrecting and enforcing awards set aside at the seat. She said that, in French law, there are limited grounds for refusing to enforce an award and those grounds do not include the fact that an award has been set aside at the seat. She explained that the French approach is grounded in Art. VII of the New York Convention, which French courts interpreted to pre-empt Art. V(1)(E).

Mr. Soliman explained that Egypt generally follows Switzerland in its approach, even though it is based on the French legal system. He noted, however, that there is some recent uncertainty as to whether this will remain the case. He explained

that in 2021 the Egyptian Parliament adopted a new law amending the scope of the authority of the Supreme Constitutional Court to give it a role in the enforcement of foreign arbitral awards. He said that the wording of the law was very broad and in tension with the Egypt Arbitration Law, which had previously been interpreted and applied exclusively by the Cairo Court of Appeal. He said that he expected more clarity in the coming year on how the two courts would interact and what this would mean for the enforcement of foreign arbitral awards. He explained that other Arab countries tended to follow a similar practice to Egypt.

Mr. Carreteiro addressed the approach in Brazil and Chile. To illustrate, he focused on a study of a recent case of *EDF v. Endesa*. In that case, an award was annulled by Argentina's courts (the courts of the seat), but EDF (the award-creditor) sought enforcement in several countries, including Chile and Brazil. Courts of both jurisdictions declined to enforce the award, giving deference to the decision of Argentina's courts. For the Chilean court, this was grounded in Article 246 of the Chilean Civil Code, which reflected Art. V(1)(E) of the New York Convention. For the Brazilian court, this was grounded in Article 36 of the Brazilian Arbitration Act.

3. Closing remarks and CPR announcements

Ms. Erickson and Trubenstein provided closing remarks, noting upcoming meetings of other CPR Committees and the joint CIArb Accelerated Route to Fellowship Training. See Upcoming Events | CPR International Institute for Conflict Prevention & Resolution (cpradr.org).

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