

# Welcome

## YCAP 2016 FALL SYMPOSIUM in conjunction with ICC YAF

### *A World Tour of Recent Legislative and Judicial Developments*

Thursday, 13 October 2016

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### *A World Tour of Recent Legislative and Judicial Developments*

**Moderator:**

Alexandra Mitretodis, Associate  
Fasken Martineau DuMoulin LLP  
(Vancouver, Canada)



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## YCAP 2016 Fall Symposium: Recent Developments in North America

October 13, 2016

**GIBSON DUNN**

Brussels • Century City • Dallas • Denver • Dubai • Hong Kong • London • Los Angeles • Munich • New York  
Orange County • Palo Alto • Paris • San Francisco • São Paulo • Singapore • Washington, D.C.

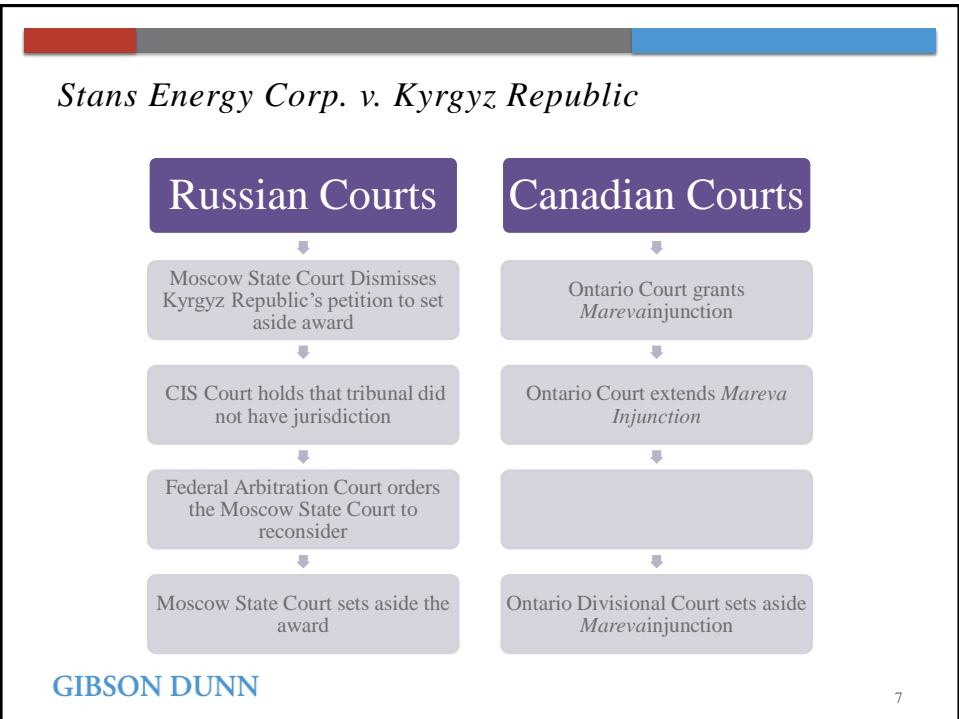
### *Stans Energy Corp. v. Kyrgyz Republic*

#### **Article 11. Procedure of settlement of disputes arising in connection with implementation of investments**

*“Disputes as regards implementation of investments within the framework of this Convention shall be considered by courts of justice or courts of arbitration of the countries that are participants in disputes, the Economic Court of the Commonwealth of Independent States and/or other international courts of justice or international courts of arbitration.”*

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- Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*
- December 2004: COMMISA files demand for arbitration with ICC
  - November 2006: Tribunal issues Preliminary Award upholding jurisdiction and enjoining PEP
  - December 2007: Mexican Congress changes forum and SOL for claims related to public contracts
  - May 2009: Mexican Congress enacts Section 98, ending arbitration for claims related to administrative rescission
  - December 2009: Tribunal issues Final Award, finding that PEP breached the contracts and awarding \$300 million in damages
  - August 2010: SDNY confirms award, PEP appeals
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### *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*

- September 2011: Relying on Section 98, the Eleventh Collegiate Court in Mexico holds that PEP’s rescission was not arbitrable and orders that the award be annulled
- February 2012: Second Circuit grants PEP’s motion for vacatur and remand in light of Eleventh Collegiate Court’s decision
- August 2013: SDNY again confirms award, PEP appeals
- August 2016: Second Circuit upholds SDNY judgment
- Holding: “[G]iving effect to the subsequent nullification of the award in Mexico would run counter to United States public policy and would . . . be ‘repugnant to fundamental notions of what is decent and just’ in this county.”

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### Enforcement of Investor-State Awards under the ICSID Convention

- ICSID Convention: does not permit national courts of contracting states to refuse recognition and enforcement of ICSID awards
- 22 U.S.C. § 1650a: FAA does not apply to enforcement of ICSID awards; U.S. federal courts have exclusive jurisdiction over actions to enforce ICSID awards.
- *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*: holds that § 1650a permits a district court to look to the forum state’s law to determine whether *ex parte* recognition of an award is permitted. The *ex parte* petition in this case was permissible because New York law permits recognition of a foreign judgment on an *ex parte* basis (with 30 days notice). Currently on appeal.
- *Micula v. Gov’t of Romania*: holds the opposite—that an ICSID award holder must bring a plenary action with proper service of process to convert the award into an enforceable domestic judgment.

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## Comprehensive Economic and Trade Agreement between the EU and Canada (CETA)

- July 5, 2016: the European Commission provided formally proposed CETA to the Council of the EU.
- Replaces 8 existing bilateral investment agreements.
- Establishes a permanent investment tribunal (Article 8.27) and an appeal tribunal (Articles 8.28 & 8.29)
- Explicitly preserves the right to regulate and pursue public interests relating to health, safety, or the environment. (Article 8.9)
- Includes list of elements that could potentially give rise to a violation of Fair and Equitable Treatment. (Article 8.10)
- Defines Indirect Expropriation. (Article 8.12 and Annex 8-A)
- Provides for complete transparency (Article 8.36)
- Prohibits parallel proceedings before domestic courts or international tribunals (Article 8.22 & Article 8.24)
- Promulgates rules on ethics (Article 8.30)

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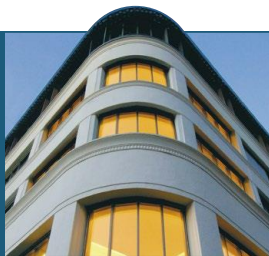
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**YCAP 2016 FALL SYMPOSIUM in  
conjunction with ICC YAF**

***A World Tour of Recent Legislative  
and Judicial Developments***

**Cristina Birks, Associate**  
Borden Ladner Gervais (Montreal, Canada)

LALIVE



**Don't hold your breath,  
and other lessons from  
Europe**

YCAP Fall Symposium - A World Tour of  
Recent Legislative and Judicial Developments

Sam Moss

Toronto, 13 October 2016

LALIVE

The lessons we can draw from a few recent European developments

1. Don't hold your breath
2. Take things step by step
3. You can have your cake and eat it

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1. Don't hold your breath

- CETA from the European perspective: where are we?
- European Commission (EC) designated CETA as a "mixed agreement"
  - ... without prejudice to EC's position in ongoing ECJ case re Singapore treaty

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## 1. Don't hold your breath (cont'd)

Bumpy road ahead for CETA in Europe:

- 18 October – Meeting of EU Trade Ministers
- Yesterday – German Constitutional Court
- 27 October – EU-Canada Summit (?)
- Early 2017 – European Parliament approval (?)
- 2017 + ... – Ratification by Member States (?)

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## 2. Take things step by step

Swiss Supreme Court Decision 4A\_628/2015, 16  
March 2016

- Dispute resolution clause provided for mandatory conciliation prior to arbitration
- What is consequence of failing to comply with mandatory pre-arbitral condition?
  - Merely damages for breach?
  - Dismissal for lack of jurisdiction?
  - Suspension of arbitration?

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## 2. Take things step by step (cont'd)

*“Le Tribunal fédéral envisage [la question] sous l’angle de l’art. 190 al. 2 let. b LDIP relatif à la compétence du tribunal arbitral. (...) Il le fait en quelque sorte par défaut, dans l’impossibilité où il se trouve de rattacher semblable grief à un autre motif de recours (...).”*

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## 3. You can have your cake and eat it

English High Court, *Essar Oilfields Services v. Norscot Rig Management*, 15 September 2016

- Are third party funding costs recoverable?
- s. 59(1) Arb. Act: "... the costs of the arbitration [include] (c) the legal or other costs of the parties"
- art. 37(1) ICC Rules: "The costs of the arbitration shall include ... the reasonable legal and other costs incurred by the parties for the arbitration."

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Be careful who you have lunch with

Austrian Supreme Court, Docket 18 ONc 3/15h, 19  
April 2016

- Can lunch with a party's counsel give rise to doubts as to an arbitrator's impartiality and independence?

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***A World Tour of Recent Legislative and  
Judicial Developments***

**Tim Robbins, Associate**  
Norton Rose Fulbright (Singapore)



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**YCAP Fall Symposium**  
*Update on the Middle East and Africa*


Joseph Chedrawe  
Toronto, Canada, 13 October 2016

## Agenda

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- 1.** Arbitration Laws in the Middle East
- 2.** Special Jurisdictions in the Middle East
- 3.** Arbitration in Africa



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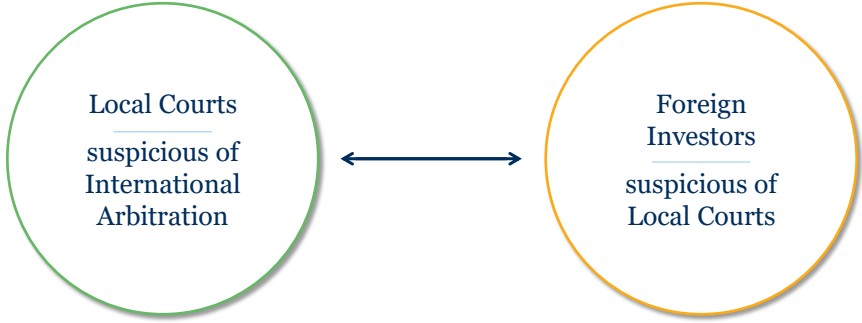
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Arbitration Laws in the Middle East

Section **1**

Arbitration in the Middle East: 2 opposing suspicions


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Local Courts  
suspicious of  
International  
Arbitration

Foreign  
Investors  
suspicious of  
Local Courts

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## Arbitration Laws in the Middle East

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1. UAE
2. Saudi Arabia





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## Special Jurisdictions in the Middle East

# Section 2

### Special Jurisdictions - DIFC

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**Foreign Award** →  Dubai International Financial Centre →  **محاكم دبي DUBAI COURTS**

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## Arbitration in Africa

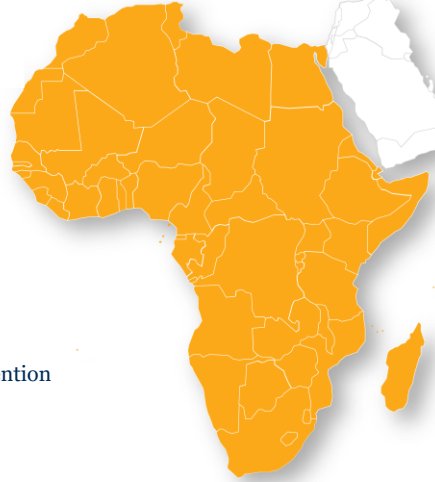
**Section 3**

## Arbitration in Africa

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Why are African arbitrations predominantly seated outside Africa?

1. Prejudice towards African courts
2. Enforceability of awards
3. Limited signatories to New York Convention
4. Local court interference
5. Limited adoption of UNCITRAL Model Law



## Thank you

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### Contact

