



2023 PARIS

Newsletter

N°8, July 2022

In this Issue

Interview with
Andrew Clarke

Taxation

News: The 110th
Session of the ILO's
International Labour
Conference: a Historic
Breakthrough

Partnerships

.....



Interview with Andrew Clarke

Retired General Counsel of ExxonMobil International Limited

1) You spent almost your entire career as an in-house lawyer working for large multinational corporations. Could you tell us how your experience in many different cultures around the globe shaped your approach to legal issues?

After qualifying as a barrister in London in the early 1980's I decided to look for an in-house career. Tempting as the self-employed bar seemed, I could see how pressure and stress affected the younger practitioners. This was in the days before 'work-life balance' became a standard topic of conversation. Despite the surprise expressed by my contemporaries at the time, I have never regretted making the move. The opportunity to work on major transactions in Europe, the Near, Middle and Far East and across multiple jurisdictions has been fascinating. Nearly half my career was spent living outside the U.K., and then often travelling to other countries to negotiate contracts with other companies or concessions with governments. This required an understanding of the legal frameworks governing the contracts as well as the laws governing physical operations. On top of these technical concerns is a less clear but perhaps more important consideration relating to cultural interaction and understanding. Negotiating contracts and resolving disputes is difficult enough when the parties share a common background and culture, the potential for misunderstanding and misalignment grows exponentially when more cultures are involved. To bridge these differences, you have to be culturally sensitive, taking time to really listen to the points being made and explore the underlying concerns being expressed. This is particularly true when disputes arise. Looking back over my career I can say that I learnt much from these cultural interactions and became more tolerant of different ways of thinking. There are many more ways to negotiate and reach an agreement, or to prevent or resolve a dispute, than I would ever have known if I stayed at the Bar in England.

2) The interaction between transactional work and dispute resolution is one of the major threads in your career. Could you explain how these two fields of expertise inform each other?

The Governing Law and Arbitration clauses used to be referred to as the ‘midnight clauses’ negotiated as part of the legal boiler plate when the commercial clauses were done. Just as the rule of Law is central to civilised society, so these clauses are the foundation on which a contract rests. It is important to establish these early in the negotiations, given their impact on the interpretation and enforceability of the ‘commercial’ clauses. Clear language minimises the scope for contract reinterpretation, and loose dispute resolution mechanisms encourage parties to try and force changes through that benefit them commercially. Good behaviour is encouraged by clear transactional contract language and predictable dispute resolution mechanisms.

The time and cost involved in formal dispute resolution procedures is one of the great risks to international commerce. This is compounded by growing unpredictability both in the process and in the framework of treaties that states have signed. This increases the risk with implications for investors’ willingness to import capital and expertise to projects in foreign countries. Many states (and the EU in particular) are on a mission to reduce or remove many of the safeguards investors thought they could rely on. Transactional lawyers need to be aware of these developments so they can give suitable warnings during the company’s legal and political risk assessment. Investors may decide the risks are too great, which would have a chilling effect on new investment. We already know that the massive investment needed to facilitate the energy transition and reduce the risk of further climate change will have to draw heavily on private capital if it is to succeed, so the timing of this experiment seems extraordinary.

3) You have always been interested in legal policy and its role in the corporate and business environment. What is your analysis and your expectations of the project ADI/ILA 2023, for which you have agreed to be one of the Ambassadors?

We are facing more fundamental challenges than any time I can recall in my career: resurgence of war in many countries; pandemic impacts; disruption to food and energy supply chains; energy security and energy transition; and the drastic consequences of climate change. Addressing these challenges successfully will take the best intellects humanity can draw on, and the solutions may touch on multiple aspects of society. Among the most important will be the legal frameworks and solutions that are developed with ramifications for states, corporations and individuals. I believe that ADI/ILA 2023 can be a thought leader in many of these key areas and I am delighted to be an ambassador for the project.

WHITE PAPER — TAXATION

Coordinator :

Marilyne Sadowsky

*University Paris I Panthéon
Sorbonne*

Steering Committee :

Hugh Ault, *Max Planck Institute, Munich*

Dandi Gnamou, *Supreme Court of Benin*

Na Li, *East China University of Political Science and Law, Shanghai*

Pasquale Pistone, *University of Salerno*

Luís Eduardo Schoueri, *University of Sao Paulo*

Miranda Stewart, *University of Melbourne*

3 Questions to Marilyne Sadowsky



1) Taxation is seen as a technical subject, whereas it underpins all public policies and life in society. Can you tell us what findings the steering committee has made that inform your work?

Although taxation is often described as a technical and complex matter, it is above all a political and social fact. Historically, tax law has been the cradle of many disputes and the starting point for the greatest revolutions. Thus, taxation is closely linked to the evolution of societies and legal, political and economic institutions. In a context of internationalisation of economic activities, the exercise of the state's tax power can give rise to international tax conflicts, since taxation remains an instrument of economic policy for the State which can lead to double taxation or the lack of taxation. These findings have not escaped the attention of the steering committee, which has observed that the founding principles of international taxation established under the auspices of the League of Nations in the 1920s are evolving. While waiting for the legal realisation of the reform proposed by the OECD, this is a time of uncertainty and transition. There are now dysfunctions in tax decision-making at national, European and international levels, reflecting a democratic deficit, a loss of confidence in the state by taxpayers and the search for a new model of tax governance. Economic inequalities are growing between countries, but also within countries. An overlay of norms that are difficult to understand for taxpayers and the non-existence and inadequacy of certain concepts are arguably the main reasons for this overall complexity. Finally, the system for settling international tax disputes is showing its limits, while the implementation of the reform promises an increase in litigation. In this context, it seems necessary to rethink international taxation.

2) Transnational cooperation in tax matters is probably crucial. Can you draw our attention to the points of vigilance that you have identified on this issue?

Transnational cooperation has almost always existed, since the first evidence of tax cooperation between kings appears in Mesopotamia in the epistolary archives of the Palace of Mari. Cooperation is essential in tax matters, as it allows for the exchange of information between tax administrations of different countries in order to facilitate the collection of taxes and prevent certain taxpayers from evading them, but also to enable the taxpayer to avoid double taxation. Tax cooperation has accelerated since the end of the 1990s, both in the international and European areas, where many standards have been developed for automatic exchange of information and the fight against double taxation and international tax evasion. It is interesting to observe a multilateral shift in relations between States and between tax administrations. While multilateralism has always struggled to establish itself in tax matters and tends to decline in other areas, international reform has imposed it as a principle, with all the difficulties that this paradigm shift entails, particularly that of linking the various multilateral conventions to each other or the absence of an international tax tribunal to ensure the application of these new international tax rules.

3) What are the main points of vigilance that you have identified in the white paper and that you would like to see discussed during the webinar that will take place in 2023?

One of the primary points of vigilance is related to a current global concern: that of combating climate change. Fiscal policies remain an instrument that States can develop to mitigate these changes, in order to guide the behaviour of taxpayers. Another point of vigilance is that of accompanying the technological revolution that is transforming humanity, because these changes are much faster than the rule of law. Other points have been identified in order to reflect, improve or even renew international tax law. We invite all readers to take note of these proposals in order to discuss and finalise them so that together we can better build tomorrow.

News: The 110th Session of the ILO's International Labour Conference: a Historic Breakthrough

Lisa Aerts

PhD Candidate in International Law and Member of the Communications Committee ADI/ILA 2023

From 27 May to 11 June, the 110th Session of the International Labour Conference of the International Labour Organisation (ILO) took place. Three subjects, in particular, were on the agenda this year: occupational safety and health, apprenticeship, and the social and solidarity economy. At the end of the discussions, two key resolutions were adopted. The first concerns "[the inclusion of a safe and healthy workplace in the framework of the 1998 ILO fundamental principles and rights at work](#)". The second is on "[decent work and the social and solidarity economy](#)". The ILO Director-General welcomed the fact that delegates "made history" by adopting, among others, these two resolutions.

Resolution No. I raises occupational safety and health to the level of fundamental values and thus adds to the corpus of the four existing fundamental obligations: freedom of association, elimination of forced labour, abolition of child labour, and elimination of discrimination. By incorporating these new principles into the 1998 Declaration, the ILO adds to the corpus of fundamental ILO texts the Occupational Safety and Health Convention, 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

It should be recalled that when a fundamental principle or right is included in the 1998 ILO Declaration, all ILO member States undertake to respect and promote it, whether or not they have ratified the relevant Conventions. Moreover, while the incorporation of new principles has often led to greater ratification of the corresponding fundamental Conventions, the absence of signature by States does not preclude their annual follow-up, the purpose of which is to encourage the Organisation's Members to promote these principles. As this is a unilateral commitment by States without any real sanction, it is legitimate to ask whether the implementation of these fundamental principles and rights is sufficiently guaranteed by the mechanisms set up by the ILO.

A Committee of Experts on the Application of Conventions and Recommendations is responsible for the annual follow-up to the 1998 Declaration. If this follow-up is a characteristic of hard law, it is weakened by the fact that it is the governments concerned, the Member States that are signatories to the conventions, that provide the reports studied by the Committee, which can then only issue non-binding recommendations. Thus, the Commission, while welcoming the number of reports received this year (67.6% of the reports requested compared to only 42.9% the previous year), notes that barely half of these were received within the time limit, thereby disrupting the proper functioning of the monitoring mechanism. Since 2020, an urgent appeal procedure has been in place which allows, even in the absence of a report from the government of the country concerned, the application of the conventions to be examined solely on the basis of public information. This year, 25 countries are concerned by this new procedure. Finally, technical cooperation can be developed to build local capacity to put the principles into practice. Let us not forget that one of the strengths of the ILO is that it is a tripartite organisation in which not only States, but also employees and employers are represented, allowing a better understanding and application of the texts adopted by the Organisation.

PARTNERSHIPS

An updated list of the institutions having entered into a partnership with the French Branch of the International Law Association to participate in the preparatory work and discussions that will take place on the occasion of the 150th anniversary of the International Law Association (ILA) in 2023, is available at the following link:

<https://www.ilaparis2023.org/>

The Newsletter ADI/ILA 2023 n°9 will be released in September 2022.