Philippe FORTUIT
Attorney at Law
Member of Sorbonne-Affaires-Finance/Ladef Department
28 rue Marbeuf -75008 PARIS
Phone: 01 85 73 35 70 - Fax: 01 85 73 35 71
E-mail: pf@pfortuit-avocats.fr

The Emergence of a New Energy Law in Corporate Governance in Europe, the Middle East and Africa, and the Transformation of Dispute Resolution and Arbitration in the Energy Sector of these Regions

Introduction

- **Global warming caused by the use of fossil fuels has become a major global issue that now falls within the strategic mission of corporate governance bodies.**
- The intuition that southern countries are the first to be affected by global warming is confirmed by numerous converging studies, including a recent report produced in collaboration between the United Nations and the Regional Collaboration Center in Dubai in April 2023, which emphasizes that ***"Middle Eastern and North African countries are among the most vulnerable in the world to the likely impacts of climate change."***
- This report confirms very alarming predictions of rising temperatures, water scarcity, and chronic drought. The report also emphasizes that ***"it is essential to involve the private sector in efforts to adapt to climate change."***
- This is when corporate governance must play its part in the fight against the harmful effects of fossil fuel use around the world.

- This transformation is so evident that **the 2022 report by the French Financial Markets Authority (AMF) is entirely devoted to it**. **One author observes that "addressing social and environmental responsibility issues (CSR) is part of the general mission of directors, which is to ensure, in all circumstances, that the interests of the company are protected"** *(IFA, Directors of listed companies and corporate social responsibility, Sept. 2007, p.10).* CSR is therefore becoming an important component of corporate governance.

- **The close ties between countries in the Middle East, Africa, and Europe, including France, suggest that the emergence of a new energy law in corporate governance (I) in these regions calls for changes in dispute resolution and arbitration in the energy sector in the Middle East and Africa (II).**

I)The emergence of a new energy law in corporate governance

A)Disclosure requirements

(i) In Europe

- **The European Union has adopted the principle of double materiality for CSR rules**: "*The CSRD [The Directive on the disclosure of sustainability information by companies, or Directive 2022/246] is part of a comprehensive response to the climate emergency and societal challenges. It imposes stricter requirements, broadens its scope and introduces innovative methodological tools such as the principle of double materiality.* ***This key concept requires companies to assess:***

    - ***financial materiality****: how sustainability issues affect the company's performance;*
    - ***impact materiality****: how the company's activities influence the environment, society, and governance.*" - (***CSRD: an ambitious framework for sustainable transparency, but at what cost? - Law and Heritage, No. 353, January 1, 2025)*****.**

- **Corporate Sustainability Reporting Directive "CSRD"** transposed into French law on December 6, 2023: **non-financial reporting requirements for listed European companies and large companies meeting certain thresholds** (two of the following three thresholds: 250 employees, total assets of more than €20 million, turnover of €40 million), and subsequently for listed small and medium-sized enterprises once they reach certain thresholds (two of the following three thresholds: between 10 and 250 employees, turnover between €700,000 and €40 million, total assets between €350,000 and €20 million): description of how social and environmental obligations are taken into account in the tasks of the governance bodies: Board of Directors, Supervisory Board, Chairman, Chairman of the Management Board, Chairman of the Supervisory Board; description of how environmental and societal issues are taken into account in the company's strategy *(Directive (EU) 2022/2464 of the European Parliament and of the Council).*
- **Article 40 bis of the CSRD introduces an important new feature: its reporting provisions will apply not only to European companies, but also, above certain thresholds, to foreign companies established in Europe** (with turnover of more than €40 million in the European Union and a branch with turnover of more than €40 million or a subsidiary in the European Union).
- **Article 29 ter of the CSRD provides for the adoption by delegated acts of the European Commission, on a proposal from the EFRAG** (European Financial Reporting Advisory Group), of CSR standards known as "European Sustainability Reporting Standards." These delegated decisions by the European Commission herald a significant and rapid increase in CSR rules for the governance of European and foreign companies operating in Europe *(LexisNexis, La semaine Juridique Entreprise et affaires, No. 5, February 2, 2023, "The CSRD Directive, a new model for non-financial reporting in the service of corporate sustainability," Béatrice PARANCE)*.

- **A draft directive known as “*OMNIBUS*” aims to limit the scope of the CSRD by significantly reducing it**. Thus, "*only large companies with more than 1,000 employees and a turnover exceeding €50 million or a balance sheet total of €25 million will now be subject to sustainability reporting requirements. The scope of the CSRD is reduced by almost 80%, excluding SMEs in particular. However, companies not subject to the reporting obligation will be able to comply on a voluntary basis (voluntary reporting standard for SMEs)*." This change would, however, strengthen the consistency of the European sustainability framework by aligning the thresholds of the CSRD with those of the CS3D, which remain unchanged.
- Secondly, CSRD reporting itself is simplified by the abandonment of sector-specific standards. The aim is to avoid an overload of non-essential information.
- Finally, Directive No. 2025/794, adopted on April 14, 2025, readjusts the CSRD timetable and provides for a two-year postponement of reporting obligations for companies that are not yet required to implement the scheme and for listed SMEs (i.e., companies in waves 2 and 3, which were required to apply the scheme in 2026 and 2028, respectively).not yet required to implement the regime and for listed SMEs (i.e., companies in waves 2 and 3, which were due to apply the regime in 2026 and 2027).

(ii) In Africa and the Middle East

While the European Union applies a principle of double materiality, financial and impact, the countries examined (1.) in **the Middle East and Africa generally follow a principle of single materiality, financial or impact, but rarely both together.**

1. Oman, the United Arab Emirates, Saudi Arabia, Kuwait, Bahrain, Jordan, Malawi, Ghana, Tunisia, Zambia, Tanzania, Kenya, Nigeria, South Africa, and Botswana.

The diagram below illustrates this phenomenon:

Diagram from the guide on disclosure of information relating to sustainable development issued by the Botswana Stock Exchange (BSE)

→ **GRI (the Global Reporting Initiative) is the most popular set of standards in all regions of the world, with a usage rate of 64% in the Middle East and Africa** *(Survey of sustainability reporting 2024, KPMG).*

The case of Botswana:

- Significantly, **Botswana applies the double materiality principle adopted by the European Union in its reporting**.
- In August 2024, the Botswana Stock Exchange (BSE) published a guide on the disclosure of information relating to sustainable development. This guide is a guidance tool intended for use by locally listed companies **on a voluntary basis**. The guide is based on recent developments in global standards, particularly those of the European Union, on information disclosure, and thus on the CSRD and the draft standards developed by EFRAG *(Botswana Stock Exchange: Guidance on Sustainable Development Disclosure - published in June 2023)*.

B) Obligations to act

- **French law *(i),* a pioneer in this area, and European Union law *(ii)* impose obligations on companies in terms of CSR. These rules necessarily have a direct or indirect impact on companies in the Middle East and Africa:**
  - **A direct impact** if they have at least one subsidiary in these territories;
  - **An indirect impact** when companies in the Middle East or Africa have an interest in complying with these rules in order to preserve their commercial relations with European companies.

(i) In France

a) The PACTE Law: introduction of CSR rules into French positive law

- **In France, the PACTE Law of May 22, 2019**, introduced two important articles into the Civil Code that bring SER obligations within the scope of companies' statutory missions.

- **Article 1833 of the Civil Code states that "*Every company must have a lawful purpose and be formed in the common interest of its partners. The company shall be managed in its corporate interest, taking into account the social and environmental issues of its business*."**

- **Article 1835** stipulates that *"(...) the articles of association may specify a purpose consisting of the principles that the company adopts and for the observance of which it intends to allocate resources to the exercise of its activity*."

- This development, which some dream will become a revolution, is accelerating the transformation of governance into a body of **mandatory rules**: all companies are now affected by CSR obligations, whether large or small, listed or unlisted, civil or commercial, with limited or unlimited liability.

- A company's failure to anticipate CSR issues related to its business could result in liability. To guard against this risk, companies are strongly advised to include their CSR concerns and the resources they have devoted to addressing them in their corporate documents and communications with customers.

b) Duty of care

- **France, a pioneer in establishing a duty of care**:

In France, Parliament adopted the law on the duty of parent companies on March 27, 2017, which justifies taking action to combat climate change. **This law establishes a duty of care for companies with more than 5,000 employees, which are required to draw up a vigilance plan containing the measures they are taking "to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of individuals and the environment, *resulting from the activities of the company and those of the companies it controls*** *within the meaning of II of Article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom we have established commercial relations, when these activities are related to these relations*" (*Article L.225-102-4 of the French Commercial Code*).

This law is currently being invoked by associations in French courts against subsidiaries of Total in connection with an oil exploration project in Uganda and Tanzania, located partly in a national park.

(ii) In Europe

- **On June 1, 2023**, the **European Parliament adopted the "CSDDD**" (***Corporate sustainability due diligence)* directive. This directive was definitively adopted** by the European Parliament and the Council on June 13, 2024. Article 1 defines the purpose of the directive, namely **to establish rules on the due diligence obligations of companies regarding their actual and potential adverse impacts on human rights and the environment, in relation to their own activities, the activities of their subsidiaries, and the operations of the value chain carried out within the framework of established business relationships**. The provision also specifies that this Directive establishes rules on liability for breaches of the due diligence obligation.
- **On February 26, 2025**, **the European Commission presented a draft "omnibus" directive**, i.e., a set of measures aimed at **simplifying the body of legislation governing sustainability requirements imposed on economic actors in order to "stimulate" the competitiveness of European companies**. The CS3D directive is targeted, with the following changes in particular:

    - The desire to "*reduce due diligence obligations by focusing on companies and their direct business partners and reducing the frequency of periodic assessments of their partners from once a year to once every five years*."

    - "The removal of the conditions for European civil liability provided for by the European Union, with the directive deferring to the internal liability regimes of the Member States." The proposed directive also requires Member States not to set a ceiling on fines.

    - "*in the event of imminent risks of damage or damage that has already occurred, companies would no longer be obliged to terminate relations with trading partners*" (*Stormy weather for sustainability legislation ("Vigilance," "CSRD," "Taxonomy") – (Dalloz Revue de sociétés and the Omnibus Directive: The Commission announces a new set of proposals to simplify sustainability requirements for companies – DALLOZ news*).

(iii) In Africa

- **Resolution 490 of December 5, 2021**, **adopted by the African Union**, which includes almost all African states, **issued a non-binding recommendation for an impact assessment for all mining projects that goes beyond environmental impact assessment** and also covers the social, cultural, economic, and human rights impacts on indigenous communities.

- **On July 22, 2022**, **the African Union also issued a general observation on the obligations of states to regulate private actors involved in the provision of social services. This rule is non-binding**. It states that in order to fulfill their duty of reasonable care, companies must take measures to identify real and potential risks of human rights violations throughout their operations, prevent them, and mitigate them where necessary.

C) The creation of a new type of ecological damage

(i) In France

- **It is the role of governing bodies to anticipate the environmental risks faced by companies and to take the necessary preventive measures. It is therefore their duty to take into account the emergence of a new type of damage with potentially dramatic financial consequences**: **ecological damage**.

- **In France**, the oil spill caused by the sinking of the oil tanker **Erika**, chartered by Total, led to a ruling by the Court of Cassation that **established a separate category of ecological damage, now governed by the law of August 8, 2016. This ecological damage has several unique characteristics:**
  - it constitutes a **new category of damage** in addition to the types of damage traditionally eligible for compensation;
  - it can only be **claimed by a limited number of people**, depending on their status and interest;
  - it is **compensated primarily in kind** and, if this is not possible, by damages paid to the environment or the State.

- The law also created a number of criminal offenses punishable by prison terms and heavy fines, such as the crime of ecocide, punishable by up to 10 years' imprisonment and a fine of €4.5 million, emphasizing the risk incurred by companies that underestimate the importance of ensuring sustainable governance compatible with the new CSR provisions.

- Compensation for this damage may weigh heavily on companies in the Middle East and Africa if they or one of their subsidiaries cause ecological damage on French territory.

(ii) At the international level

- **Ecological damage was recognized by the International Court of Justice** in a dispute between Costa Rica and Nicaragua, in two judgments dated December 16, 2015, and February 2, 2018 *(Case concerning Costa Rica v. Nicaragua, International Court of Justice, December 16, 2015, and February 2, 2018, General Case No. 150)*.

II) Transformation in dispute resolution and arbitration methods in the energy sector in the Middle East and Africa

- **The emergence of this new energy law is giving rise to new disputes and making it necessary to adapt both judicial and arbitration dispute resolution methods**.

A)The creation of a new chamber 5-12 within the Paris Court of Appeal

- **France**, which was a pioneer in being the first country to enact a law on the duty of care, is now also leading the way with the **creation of a specialized chamber within the Paris Court of Appeal**.

- The creation, within the economic division of the Paris Court of Appeal, of a chamber dedicated to emerging litigation, responsible **for disputes concerning the duty of care and environmental liability** (rotation order of January 5, 2024 - chamber 5-12), thus demonstrating the importance that the court attaches to these cases.

- The reasons for this establishment:
  - to create a chamber specializing in the settlement of disputes relating to the duty of vigilance based on Articles L. 225-102-4 and L. 225-102-5 of the Commercial Code and disputes concerning the publication of sustainability information by companies (CSDD Directive);
  - **to open up this method of dispute resolution to international players** by authorizing the use of English.

- **It has already handed down three judgments in important cases: the TotalEnergies, EDF and Suez cases** relating to the duty of vigilance arising from the law of March 27, 2017 *(Paris, Division 5 – Section 12, June 18, 2024, No. 23/14348, No. 21/22319 and No. 23/10583).*

- In the TotalEnergies ruling, the Court of Appeal interestingly asserts its jurisdiction to rule on a breach of the duty of vigilance or on liability for ecological damage.

B) Climate resolutions or “say on climate”

- The number of climate-related resolutions submitted to shareholder meetings has increased worldwide, particularly in the United States, indicating that this environmental issue is becoming a major concern in corporate strategy.

- **In France, “say on climate” is defined as “*the vote by shareholders on a resolution included on the agenda of a general meeting, at the initiative of the board of directors or one or more shareholders, relating to the environmental strategy or policy of that company, and in particular its impact on the climate*”** (*AMF report on corporate governance, December 2, 2021*).

- **Several observations can be made**:
    - Climate resolutions provoke a **power struggle between the board of directors and shareholders**, **who attempt to impose binding climate resolutions on the company's general meeting**, leading to changes in the company's climate strategy.
    - **Boards of directors are assuming their statutory role by personally developing the company's climate strategy** and then informing shareholders in the form of climate resolutions submitted for their opinion.

- The refusal of boards of directors to admit climate resolutions leading to a binding vote is sparking a debate, which the AMF is calling for to be resolved through legislative intervention.

- On June 13, 2024, the French parliament amended Article L225-105 of the Commercial Code to provide that the commercial court has jurisdiction to hear disputes relating to the refusal to include a “say on climate” consultation on the agenda.

C) The role of the International Chamber of Commerce (ICC): a leading institution in international energy dispute arbitration for the Middle East and Africa

- **The emergence of this new energy law will lead to new disputes involving the Middle East and Africa, which will naturally be referred to the ICC, the leading arbitration institution in terms of the number of arbitrations and the preferred arbitral institution for these regions, particularly due to the terms of references, a unique feature of ICC proceedings, which allows the parties to clearly define the object of the dispute in a flexible manner tailored to their needs**.

Attractiveness of the ICC and Paris in international arbitration

Number of cases (2023)

ICC
ICDR
SIAC
LCIA
HKIAC
SCC
ICSID

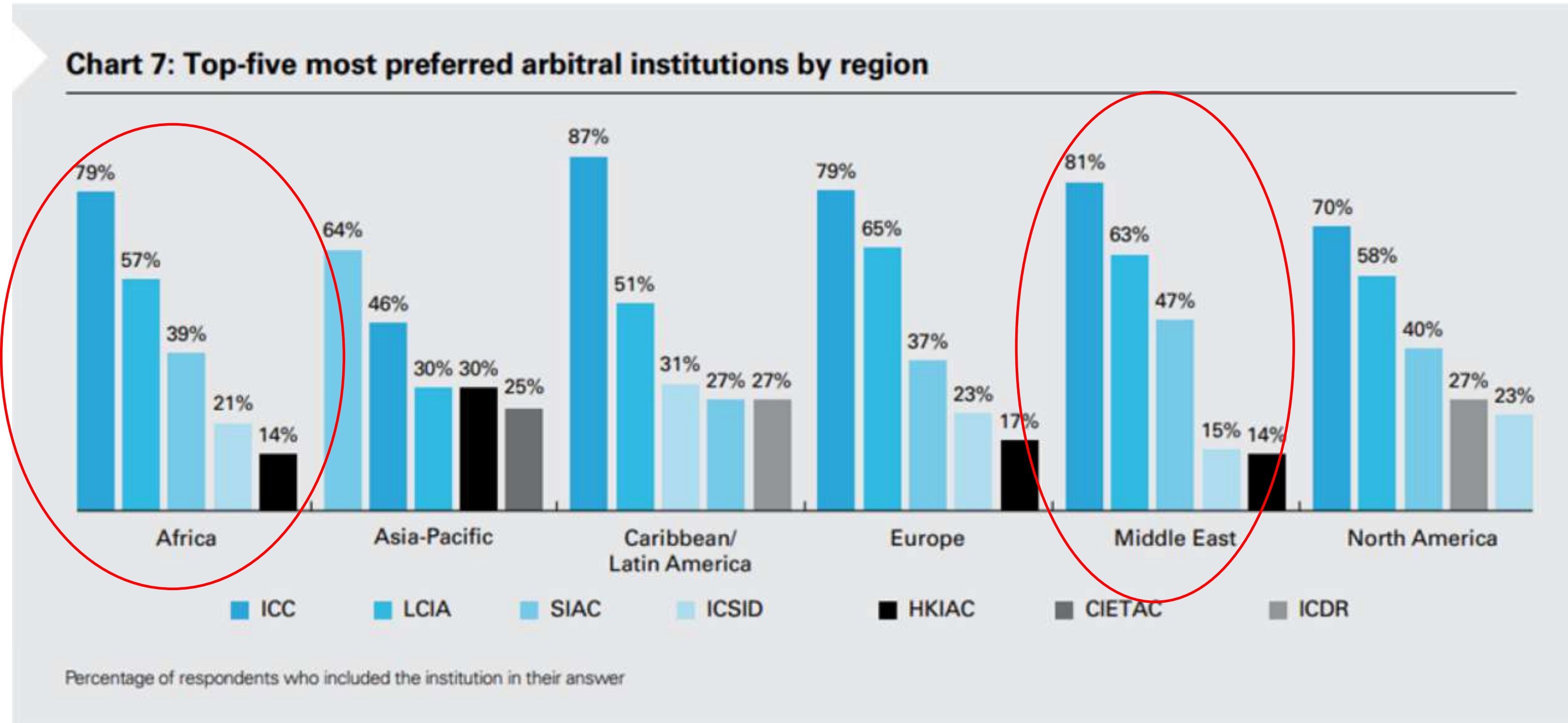
0 200 400 600 800 1000

Paris may be chosen as a seat of arbitration *although* the institution is not based in Paris

If the parties refer to ICC and choose Paris as seat of arbitration, <u>French procedural law will apply</u>.

Attractiveness of the ICC in international arbitration

The ICC ranks **first in all regions** except for Asia-Pacific, where it is outranked by the SIAC.



Source : 2021 International Arbitration Survey, White&Case and School of International Arbitration, Queen Mary University of London.

- **As a new energy law emerges, the ICC has published new arbitration rules in 2021:**

Proceedings before the ICC International Arbitration Court

Main innovations of the 2021 ICC Rules of Arbitration

The ICC updated its arbitration rules in January 2021 (ICC 2021 Rules). The aim of the reform is to further improve the **efficiency**, **transparency** and **flexibility** of ICC administered arbitrations.

01 **Prevention of conflict of interest**

02 **Joinder of additional parties**

03 **Extension of the scope of the Expedited Procedure Rules**

04 **Development of the use of new technologies and electronic communications in ICC procedures**

Thank you for your kind attention.

Philippe FORTUIT
Attorney at Law
Member of Sorbonne-Affaires-Finance/Ladef Department
28 rue Marbeuf -75008 PARIS
Phone: 01 85 73 35 70 - Fax: 01 85 73 35 71
E-mail: pf@pfortuit-avocats.fr