

**Contemporary Issues in
International Arbitration and Mediation**

The Fordham Papers 2009

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International Arbitration
and Mediation**

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**Arthur W. Rovine
Editor**

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Contents

| | |
|---|-------|
| <i>Introduction: Convergence in International Arbitration</i> | ix |
| <i>Arthur W. Rovine</i> | |
| <i>A Tribute to Aron Broches</i> | xxiii |
| <i>Contributors</i> | xxvii |
| <i>List of Abbreviations and Acronyms</i> | xlvii |

Part I Investor-State Arbitration

| | |
|---|-----|
| Overview of Investor-State Arbitration: The Regressive Character of the 2004 U.S. Model BIT | 3 |
| <i>Stephen M. Schwebel</i> | |
| The Investor's Choice of ICSID and Non-ICSID Arbitration Under Bilateral and Multilateral Treaties | 5 |
| <i>V.V. Veeder</i> | |
| A Further Update on Most-Favoured-Nation Treatment—In Search of a Constant Jurisprudence | 15 |
| <i>Meg Kinnear</i> | |
| Annulling the Annulment: More on Contracts and Treaties | 83 |
| <i>Francisco Orrego Vicuña</i> | |
| Arbitrator Integrity and Investor-State Disputes | 100 |
| <i>William W. Park</i> | |

Part II
Arbitrator Ethics

| | |
|---|-----|
| Cost Concerns in the Drafting of Arbitral Awards—An Issue of Ethics | 133 |
| <i>Arthur W. Rovine</i> | |
| Bias in International Commercial Arbitration Versus Investment Arbitration: Are There Different Standards? Should There Be? | 146 |
| <i>Sophie Nappert</i> | |
| Arbitrator Bias: A Russian Perspective | 155 |
| <i>Ivan Marisin and Irina Sergeeva</i> | |
| Arbitrator Bias in Countries with No or Reduced Arbitration Tradition | 169 |
| <i>Ignacio Gómez-Palacio</i> | |

Part III
Damages in International Commercial Arbitration

| | |
|---|-----|
| The Problem with Damages in International Arbitration | 185 |
| <i>Lawrence W. Newman</i> | |
| Presentation of Evidence and Legal Issues Relating to Damages: Tactics and Pitfalls | 195 |
| <i>Hilary Heilbron, QC</i> | |
| Damages—Standards for Compensation and the Role of Experts | 209 |
| <i>Richard H. Kreindler</i> | |
| Damages in International Commercial Arbitration: Methods of Calculation | 223 |
| <i>Andrea Saldarriaga and Mark Kantor</i> | |
| Compounding Interest in Interest: The Global Economy, Deflation, and Interest | 261 |
| <i>John Y. Gotanda</i> | |

Part IV
The Theory and Philosophy of International Arbitration

| | |
|---|-----|
| Overview | 291 |
| <i>W. Michael Reisman</i> | |
| Arbitration, Rhetoric, Proof: The Unity of International Arbitration Across Cultures | 293 |
| <i>Laurence Shore</i> | |
| Three Philosophies of International Arbitration | 305 |
| <i>Emmanuel Gaillard</i> | |
| Is Arbitration a Service to Business or to the Legal Profession? | 311 |
| <i>Catherine Kessedjian</i> | |

Part V
Investor-State Mediation

| | |
|--|-----|
| Investor-State Dispute Mediation: The Benefits and Obstacles | 323 |
| <i>Edna Sussman</i> | |
| Should Mediation of Investment Disputes Be Encouraged, and, If So, by Whom and How? | 339 |
| <i>Jack J. Coe, Jr.</i> | |
| Conciliation and BITs | 358 |
| <i>Gabriel Bottini and Veronica Lavista</i> | |
| Investor-State Mediation: Is There a Future? | 374 |
| <i>Tillmann Rudolf Braun</i> | |
| Investor-State Mediation: Observations on the Role of Institutions ... | 389 |
| <i>Margrete Stevens and Ben Love</i> | |

Part VI
Mediation in the Context of Arbitration

| | |
|--|-----|
| Reflections on Culture in Med-Arb | 421 |
| <i>Tai-Heng Cheng</i> | |
| Will the Next Generation of Dispute Resolution Clause Drafting Include Model Arb-Med Clauses? | 429 |
| <i>Kathleen M. Scanlon and Kathy A. Bryan</i> | |
| <i>Index</i> | 437 |

Introduction: Convergence in International Arbitration

Arthur W. Rovine

*Director, Fordham Law School Conference on International Arbitration and Mediation
New York, New York, USA*

At the Fourth Annual Fordham University Law School Conference on International Arbitration and Mediation, held in New York on June 15-16, 2009, Emmanuel Gaillard said, as he has said elsewhere, that “we are today witnessing the emergence of a transnational arbitral legal order that meets the criteria of a genuine legal order, independent of, but based on, national legal orders.” In this emerging arbitral legal order, arbitrators “will recognize the arbitrators’ freedom to apply transnational procedural rules, transnational choice of law rules or even transnational substantive rules. They will disregard rules that offend transnational public policy, even where those rules have been selected by the parties or form part of the law of the seat of the arbitration. They will also, where appropriate, recognize an award that has been set aside in the so-called country of origin for idiosyncratic reasons, which need not be given an absolute international effect.”¹

Gaillard is perhaps not alone in this view. A now famous example of a similar thought is Lord Wilberforce’s statement during the second reading in the House of Lords of the English 1996 Arbitration Bill, as it then was, in which he said,

I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt,

¹ Emmanuel Gaillard, “Three Philosophies of International Arbitration,” in this volume at pp. 305-310. See generally Emmanuel Gaillard, *Aspects Philosophiques du Droit de L’Arbitrage International* Martinus Nijhoff Publishers (2008); *Legal Theory of International Arbitration* (forthcoming).

regarded as a freestanding system, *free to settle its own procedure and free to develop its own substantive law.*²

In another paper I wrote that there is an evolution toward an international arbitral legal order “slowly, but decidedly moving in that direction, from generally accepted practices, to procedural rules, to substantive rules. That has been the essential history of international arbitration, and that will be its essential future.”³

What is an international or transnational arbitral legal order? How is it properly defined? Is it, in the words of Lord Wilberforce, “a freestanding system, free to settle its own procedure and free to develop its own substantive law”? What is the evidence for the evolution of such an order or system? What phenomena are driving the international community toward the establishment of a transnational arbitral legal order?

In my view, a transnational arbitral legal order may be defined as a legal structure accepted by the great majority of nations, including the major economic and trading nations, of the practices, procedures and substantive rules of law that have emerged and are emerging from the process of international arbitration, both commercial and investor-State international arbitration, resulting in a system that is independent of national legal orders, though dependent upon State power to enforce or annul awards with narrow discretion, and dependent upon majority State recognition of the legitimacy of the arbitral process and of arbitral awards. Thus, the arbitral order is not and cannot be totally independent of the State juridical process and State power. Rather, it is an international arbitral order because of the general convergence of international arbitral procedure and law and majority State acceptance thereof and the consequent freedom of States and arbitrators to render decisions within the framework of that order and independently of any national legal order.

² *Hansard*, col. 778, Jan. 18, 1996 (emphasis added), cited in V.V. Veeder, “Whose Arbitration Is It Anyway—The Parties’ or the Arbitration Tribunal’s: An Interesting Question?” in *Leading Arbitrators’ Guide to International Arbitration, Second Edition* 343, n. 2 (2008). Veeder notes “I was present in the House of Lords as Lord Wilberforce spoke these words; and until I checked Hansard, I thought I had misheard him. When I did check Hansard, I suspected a stenographic mistake; but having checked with the speaker, it was not.”

³ Arthur W. Rovine, “Polite Cross Examination: A Symbolic Step Toward Further Uniformity in International Arbitration?” in Lawrence W. Newman & Ben Sheppard eds., *Cross-Examination in International Arbitration* (forthcoming).

Gaillard puts his transnational approach in this way:

In the transnational approach, one may believe that each time the law of the place of arbitration takes a dated or idiosyncratic view, other countries or the arbitrators themselves are not bound to follow that view. That is either because natural law so prescribes (as argued by René David in the 1950s),⁴ or because, in terms of the validity and legitimacy of the arbitral process and of the ensuing award, the understanding of a vast number of States must be given a greater weight than that of an isolated country, be it that of the seat of the arbitration. I am personally an advocate of the latter view.⁵

There are many key points and questions here. First, among the questions, Gaillard says that “each time the law of the place of arbitration takes a dated or idiosyncratic view, other countries or the arbitrators themselves are not bound to follow that view.” But suppose the view of the place of arbitration is not dated or idiosyncratic. Are countries or arbitrators then bound to follow that view? State courts might be, pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁶ Arbitration tribunals? I would think not. Clearly, no arbitration tribunal is legally required to follow the view or decision of another tribunal even if the law of the State enforces the arbitral award. They may wish to, for many reasons, but legal compulsion is not among them. Does an international arbitral legal order lead to a different conclusion? Certainly not at this stage of arbitral legal development. Further, who decides what is dated or idiosyncratic? The answer, presumably, is the great majority of nations. And by what standards? That matter is not generally agreed, and it will have to be worked out case by case, over time, like so much in the development of a legal order.

Second, among the key points, for a true international arbitral legal order, we are positing the requirement of acceptance by the great majority of States, including for this purpose the major economic powers engaged in international trade and commerce. Further, the majority of States must accept the practices, procedures, awards, and substantive rules of decision that emerge from the process we call international arbitration. I am suggesting

⁴ René David, “*Droit naturel et arbitrage*,” in *Natural Law and World Law: Essays to Commemorate the Sixtieth Birthday of Kotaro Tanaka* 19 (1954).

⁵ Gaillard, “Three Philosophies of International Arbitration,” *supra* note 1.

⁶ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

that we are seeing a slow convergence in these areas that come to us from the process of international arbitration. There are several manifestations of convergence, discussed below.

In sum, the transnational arbitral legal order is dependent upon the State but is nevertheless a legal order of its own because of an existing and further evolving harmonization of arbitral process and law, accepted by the great majority of nations. Within this structure, the *country of origin* of an arbitral award loses much of its privileged legal status. As Gaillard put it, “the understanding of a vast number of States must be given a greater weight than that of an isolated country, be it that of the seat of the arbitration.”⁷

Judicial support for this doctrine is found in the now-famous *Putrabali* case,⁸ in which the *Cour de Cassation* of France purported to affirm the existence of an arbitral legal order independent of any national legal order, meaning, among other things, that an international arbitral award set aside outside of France might still be enforced within France. As Philippe Pinsolle puts it, the *Cour de Cassation* decision affirmed that “an international arbitral award is not anchored in any national legal system and it qualifies the arbitral award as an *international judicial decision*.”⁹ The award is separate from the place of arbitration and from all national legal orders.

Furthermore, since, according to the *Cour de Cassation*, an international arbitral award qualifies as an “international judicial decision,” it does not require the blessing of any national court to be recognized and enforced. Characterizing and accepting an international arbitral award as an international judicial decision has, as an immediate consequence, the recognition of an international arbitral order.¹⁰

⁷ Gaillard, “Three Philosophies of International Arbitration,” *supra* note 1.

⁸ *Societe PT Putrabali Adyamulia v. Societe Rena Holding*, Cass. Civ. 1 (June 29, 2007). See Philippe Pinsolle, “Recent Significant French Judicial Decisions Involving International Arbitration,” in Arthur W. Rovine ed., *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008*, at 115-18 (2009).

⁹ *Id.* at 117 (emphasis in original).

¹⁰ *Cf. In the Matter of the Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996), in which the U.S. District Court for the District of Columbia enforced an award against Egypt and refused to recognize the Cairo Court of Appeals decision annulling the award. Hans Smit has stated that “The *Chromalloy* court arguably recognized the Egyptian court’s susceptibility to bias.” See Hans Smit, “Annulment and Enforcement of International Arbitral Awards: A Practical Perspective,” in Lawrence W. Newman and Richard D. Hill eds, *The Leading Arbitrators’ Guide to International Arbitration* 604, n.39 (2d ed. 2008). See also *Baker Marine Ltd. v. Chevron Ltd.*, 191 F.3d 194 (2d Cir. 2000), in which the U.S. Court of Appeals for the Second Circuit

But is this approach in *Putrabali* based solely upon the particular details of French law, statutory or judge-made, or is there a more general foundation underlying a transnational arbitral order? This is the point, in my view, at which general acceptance and convergence establish themselves as requirements. If the great majority of nations, including the major economic powers, accept an evolving uniformity of arbitral process and law, then I believe we may appropriately stipulate that we are witnessing the emergence of an international arbitral legal order.

The purpose of this Introduction is simply to indicate the first and most rudimentary step, that is, a gradual harmonization in international arbitration, supported by most nations. The questions of the relationship between an arbitral order and State power, certainly including judicial power, are separate and complex questions. But those questions are not reached unless and until we can appropriately state that harmonization is occurring. That is the starting point and the theme of this Introduction.

I will, however, say this much about the relationship between a developing arbitral uniformity and State power: as international arbitral convergence develops, State agencies, including the judiciary, will be less likely to interfere with the arbitral process, whether procedural or legal. This is not to say that State agencies will have lost the power to interfere. Most assuredly they will not have lost that power. It is to say, nonetheless, that given a more or less uniform set of arbitral processes, procedures, and rules of law, the State judiciary will be less likely and willing to interfere. Nor is it to say that arbitration will have lost its dependency on State power for legitimacy and uniform approaches to enforcement. That too will not be the case. But it is to say that legitimacy and uniform approaches to enforcement are more likely to be forthcoming. That is certainly the case where, as currently, States are adopting arbitration statutes and regulations that resemble each other, that are much alike, in most instances now the United Nations Commission on International Trade Law (UNCITRAL) Model Law, which has been adopted in one form or another by 67 State bodies, with the number always increasing and never decreasing.

Why should that be so? Why are States adopting arbitration statutes that closely resemble each other? Precisely because the system and process of international arbitration, as it has developed, has been found satisfactory—for the most part—by State and commercial users and has thus been

denied a Nigerian party's petition to enforce an award annulled by the Nigerian Federal High Court. Smit, *supra*, maintains that "The *Baker Marine* court arguably recognized that, because both parties to the arbitration were Nigerian, the Nigerian court was unlikely to be one-sided."

generally accepted. States apply the system in similar ways because they are responding to pressures in a globalized economy from their business communities and other users of the system who see it as the most appropriate method for resolving often complex international commercial and investor-State disputes. Further, the more uniform international arbitration becomes, the more likely are States to view it as an independent arbitral legal order, much as they accept their own and other sub-State orders, because of legal requirements or convenience or both. State interference with a uniform arbitral process and law means disruption, and that is less likely to occur if the arbitral process and law are perceived as satisfactory not just to individual nations, but to the great majority of nations and users.

What are the manifestations of convergence in transnational arbitration? What is the evidence for this developing uniformity that allows us to speak of a transnational arbitral legal order or system? I begin with practices and procedures.

By far the most significant of the innumerable procedural developments in the development of a transnational arbitral legal order is the 1958 New York Convention.¹¹ As of October 1, 2009, there were 142 parties to the convention, of the U.N.'s 192 members, including all of the major economies with the exception of Taiwan. The establishment of a legal obligation to enforce international agreements to arbitrate and to enforce foreign arbitral awards are obviously monumental steps in the direction of convergence and uniformity of the arbitral system, although unfortunately still incomplete steps.

That is, while the New York Convention provides only a very limited set of justifications for refusal to enforce an award (primarily serious procedural failures and awards constituting violations of public policy), the convention also provides that awards need not be enforced if they have been set aside (annulled, vacated) in the country of which or under the law of which the award was made. This is recognition of worldwide varying systems and reasons for setting aside arbitral awards, and those reasons may well go beyond those enumerated in the convention for authorized failure to enforce. It is also recognition, in terms of award enforcement, of a special status for a State whose law applied to the resolution of the dispute, and a State that served as the seat of the arbitration.

This is divergence, not convergence, and the question is what, if anything, is happening to bring the world of set-asides together in a limiting way. The answer is, of course, the 1985 UNCITRAL Model Law, which provides precisely the same limited grounds for set-asides as the New York Conven-

¹¹ See *supra* note 6.

tion provides for permitting a refusal to enforce. As noted, legislation based on the text of the Model Law has been adopted in 67 countries and including several states of the United States—California, Connecticut, Illinois, Louisiana, Oregon, and Texas. Even noting that adoption of an arbitration law based on the Model Law text leaves significant room for divergence from that text, the Model Law is a very substantial step in the direction of arbitral uniformity. Narrowing the grounds for setting aside awards, and bringing those grounds into line with the New York Convention, necessarily results in greater uniformity of enforcement, and fewer set-asides, even acknowledging different interpretations of key concepts, such as “public policy.” And while 67 ratifications leave us with a long way to go, the direction is positive. States are signing on. They are not dropping out.

At another level of convergence are the procedural rules of the several international arbitration institutions. As examples, the arbitration rules of the International Chamber of Commerce (ICC), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), International Centre for Settlement of Investment Disputes (ICSID) for investor-State arbitrations, and UNCITRAL for *ad hoc* arbitrations, are all quite similar. The details differ, but the essential approaches and concepts rarely differ in significant ways. This is extremely important in terms of convergence since courts are not likely in the first place to interfere with the rules chosen by the parties to govern their arbitration, and if the rules resemble each other, as they do, then the imprimatur of the majority takes hold as to the procedural rules themselves, their interpretation by arbitrators and arbitral institutions, and the many processes engaged in thereunder. Further, the drafters of the rules, as they amend or update them, all look to other like rules for inspiration. They try to take the best from each other and, in so doing, reinforce convergence.

There are also soft-law convergences of great importance in terms of process and procedure. The International Bar Association (IBA) has issued guidelines and rules on the taking of evidence in international arbitration and on conflicts. They are not legally binding, but they constitute a narrowing of the common law/civil law divide in key areas, are increasingly accepted in international arbitration, and are often recognized by the judiciaries of many States as sources of decision. Similarly, the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings¹² have made a highly valuable contribution in terms of how parties and tribunals establish the procedures and

¹² See <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

processes of their arbitrations, such as schedules, production of documents, dates for submission of pleadings, etc. There is far more uniformity now in how international arbitrations are structured and conducted than there was even ten years ago.

Parties and arbitrators now normally contribute to a pre-hearing conference to set the parameters for the case, resulting in Procedural Order No. 1, a framework order for the entire case. In major cases, this order routinely calls for a full-scale memorial with factual and legal arguments, with attached evidence, then the like counter memorial, reply and rejoinder, document production, without depositions or interrogatories, hearings lasting usually a week or sometimes two weeks, with fact and expert witnesses, witness statements, perhaps limited direct examination of witnesses, and full cross-examination. These processes are routine and fully accepted by parties, their counsel, and arbitration tribunals. Having expert witnesses meet and confer and report to the tribunal on areas of agreement and disagreement is becoming more common, even if not seen in the majority of arbitrations. Witness conferencing is another technique growing in popularity. Post-hearing submissions continue to be well known and accepted by the participants.

Of significance in this procedural convergence is that both advocates and arbitrators are gradually moving away from the procedural norms to which they had long been accustomed in their home countries and are moving to the generally accepted procedure of international arbitration.

There are still, needless to say, fairly widespread variations in process. An arbitration panel made up of three Americans is likely to run a different process from a panel made up of three Europeans, especially with respect to document production, including electronic documents. But as noted, those variations are diminishing, as the common and civil law divide narrows and gradually converges into a single approach to arbitral procedure and process.

Perhaps most striking of all is the development of international arbitration, in Lord Wilberforce's terms, as a freestanding system, "free to develop its own substantive law."¹³ There is little question now that international arbitration is slowly developing its own substantive law. This is seen most clearly in investor-State arbitration and less so in international commercial arbitration.

In my view, we are witnessing an approach to deciding investor-State cases that is closely akin to that of common law judges. Of course, as is universally accepted and noted here, an arbitration tribunal is not legally bound by the findings and awards of any other tribunal. There is no doctrine of

¹³ See *supra* note 2.

binding precedent or *stare decisis*. There is no hierarchical legal structure compelling arbitral tribunals to follow the awards of other arbitral tribunals.

Yet, having said that, international arbitrators, certainly arbitrators in investor-State disputes, frequently decide as if they were common law judges. More frequently than not, they cite previous awards, at least the best awards among them, and accept or reject them in whole or in part, or distinguish them. Rarely are prior awards ignored. The best are viewed as persuasive authority, even though not binding, and lead toward accepted substantive law in key legal areas of investor-State arbitration. As Jan Paulsson noted, “That a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes.”¹⁴

The phrase “special jurisprudence” in the foregoing sentence could be thought to connote a somewhat narrow field of the law. But that reading would be incorrect. Investor-State arbitration involves an enormously important and broadly based substantive area addressing the legal relationships of investors and their hosts throughout the world, covered by a network of over 2,700 bilateral investment treaties (BITs), including BITs among developed and developing countries, among developed countries, and among developing countries. The great majority of these treaties require arbitration in case of disputes, and the great majority of the treaties include the same or similar obligations involving expropriation, non-discrimination, fair and equitable treatment, most-favored-nation treatment, etc. The similar obligations, the similar dispute resolution techniques, and the tendency to look to persuasive prior awards for guidance have all joined to produce convergence in crucial areas of international law. In my view, while we do not have a *jurisprudence constante* with respect to any international investment law issues, we are headed slowly but surely in that direction. We have a far greater understanding and acceptance now about what constitutes a compensable taking, a violation of the obligation of fair and equitable treatment, and non-discriminatory treatment than we did when ICSID was first established in 1966. More uniform norms and standards have emerged as well from arbitrations under multilateral treaties, such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty, and trade-related obligations under the aegis of the World Trade Organization.

Why is convergence taking place, albeit slowly, in these areas of international arbitration law? There are a few very obvious reasons. One of the central reasons is simply easy availability of prior awards to a far greater

¹⁴ Jan Paulsson, “International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law,” *ICCA Congress Series No. 13* (2007).

extent than ever. Arbitrators read prior awards and are clearly influenced by them, again at least the best among them. Most investor-State awards are accessible on the Internet, and that alone makes their citation more likely to occur and their influence more pervasive than is the case with international commercial awards.

A second and powerful reason is the network of treaties containing similar or identical rights and obligations, with arbitration as the single most preferred mode of dispute resolution within the treaty structure. The system as such is decentralized, but it converges in substance and procedure because the treaties so provide.

A third variable is the relatively small number of arbitrators who decide the cases and advocates who argue them. They know each other, meet at conferences, write articles and books on investment arbitration, and read each other's writings. They form a community and help shape each other's views. Governments also form a community with respect to these matters. They too act before tribunals, write model BITs, communicate with each other, and of course negotiate new BITs that are heavily influenced by prior awards¹⁵ and by the pressures of users, particularly the business community.

The new BITs tend to reinforce convergence, even as they introduce new approaches to particular problems. One significant example is the growing acceptance of the position that regulatory takings are not expropriations requiring compensation. Put another way, they are not compensable takings. Several new BITs, influenced by prior awards, now so provide, and our understanding of what constitutes a compensable taking in international law has been made more precise and harmonized by those new BITs with such provisions, and by prior awards so holding. Of course, that still leaves the question of what constitutes a regulatory taking, and the cases will continue to address that matter.

Finally, as noted, the concerned users of the system, whether States, companies, or individuals, are, for the most part, satisfied with the outcomes, whether of process, procedure, or law. The users want predictability of outcome and want to know the limits of activity permitted investors and host

¹⁵ See John Beechey & Antony Crockett, "New Generation of Bilateral Investment Treaties: Consensus or Divergence?" in Arthur W. Rovine ed., *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* 5-25 (2009). Gabrielle Kaufmann-Kohler, in her "Overview of the Investor-State Arbitration Articles" in *id.*, states that "Two aspects are particularly striking about the new BITs. The first one is the influence that arbitral awards have exercised on the drafting of the new treaties. . . . If the latter influence—of awards on awards—is still questioned, the former—of awards on treaties—appears well established." *Id.* at 3. The second aspect she cites is the increasing emphasis on public interest, in terms of both procedure and substance.

States. They are generally interested in promoting convergence as they come to understand and require stability in the process and law of international arbitration.

As difficult and slowly evolving is convergence in investor-State arbitration, it is far more difficult in international commercial arbitration and for clear reasons. While one can speak meaningfully of a growing uniformity of process and procedure in international commercial arbitration, that is hardly true of legal structure. Why is that the case?

Perhaps of primary significance, the cases are not accessible to the same extent, and when they are, the range of issues is virtually limitless, rendering harmonization difficult. The annual *ICCA Yearbook Commercial Arbitration*, edited by Albert Jan van den Berg, publishes international commercial cases, primarily ICC awards (with the names of the arbitrators and parties deleted), three years after their issuance, to allow time for possible judicial proceedings involving actions for set-asides or enforcement. Yet accessibility is not at the same level as investor-State awards since most of those awards are on the Internet, and most international commercial awards are not. One might think that access to awards in hard copy volumes should not make research more difficult than on-line access. But the latter is clearly easier and faster, and it shows in the results.

In addition, the range of factual and legal issues in international commercial arbitration is far more diffuse than in investor-State arbitration, where there are similar treaties with similar clauses and quite often similar investments and treatment by host States. And the general governing law of the commercial transaction may be anywhere, with the more precise governing law normally being the contractual arrangements themselves. The great majority of disputes in international commercial arbitration are decided by reference to whether any of the contract stipulations have been breached, not whether one or another of a few treaty clauses have been breached. The international commercial system is not just decentralized, it is virtually non-existent as a “system” insofar as concerns the law. As noted, process and procedure in international commercial arbitration are another matter, indicating a growing uniformity and in the same fashion as investor-State arbitration.

Are there any indications, however tentative and preliminary, of a slowly developing legal uniformity and harmonization in international commercial arbitration? One possible source of convergence is the 1980 U.N. Convention on Contracts for the International Sale of Goods (CISG), a frequent framework for addressing matters of international sales dealings, contracts and disputes.¹⁶ The convention, which entered into force in 1988, had over

¹⁶ United Nations Convention on Contracts for the International Sale of Goods (1980), available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>.

70 parties throughout the world as of 2009, representing some three-quarters of the total international trade in goods. Of course, the CISG addresses but one major subject in international commerce (i.e., the international sale of goods). There is no single convention addressing the international sale of services. Even so, the CISG is akin to the U.S. Uniform Commercial Code (UCC) written largely for the international community, and, as such, the fact patterns that fall within its provisions, its applicability to particular cases, and the decisions thereunder, address a very large number of factual and legal issues. The CISG text contains 101 detailed articles.¹⁷ This is certainly reflected in the growing number of judicial decisions and arbitral awards on CISG issues.

My thanks to Professor Albert Kritzer of the Pace University Law School, who has provided me with information on a Pace project and endeavors concerning the CISG.¹⁸ As in investor-State arbitration, making the decisions readily available will be the best spur to further convergence of decision making with respect to CISG proceedings. The Internet is clearly a help in this endeavor.¹⁹ At the moment, there is also an opportunity relating to the arbitral case law of the People's Republic of China. Because the China International Economic and Trade Arbitration Commission (CIETAC) has been more forthcoming in giving Pace access to their arbitral awards on CISG proceedings than have other arbitral institutions, Pace has more such awards from CIETAC than from any other arbitral institution. About half of the translated texts of arbitral awards on CISG cases that Pace has come from CIETAC (currently over 300 such case texts, and CIETAC and others are sending more such cases that will also be translated). To help counsel and arbitrators access this material, Pace has prepared an article-by-article table of contents to case law annotations for each provision of the CISG.²⁰

¹⁷ In sharp contrast, the United States-Jordan BIT (June 12, 2003), to take but one example, contains 16 articles, along with a brief annex and protocol.

¹⁸ See the Pace University Law School Web site at <http://cisgw3.law.pace.edu/cisg/text/queenmary.htm1>. The importance of convergence in decision making in CISG proceedings is discussed in several articles on the Global Jurisconsultorium by Camilla Andersen that Pace Law School has published on its database.

¹⁹ Pace University Law School has a collection of ICC awards in CISG proceedings that may be identified by going to the Pace country case schedule at <http://cisgw3.law.pace.edu/cisg/text/casecit.html> and clicking the "ICC Arbitration" link. Within that collection one will, from time to time, encounter awards that cite other arbitral awards, particularly other ICC awards.

²⁰ See <http://cisgw3.law.pace.edu/cisg/text/PRC-anno.html>. To illustrate the manner in which these annotations can be used, and assuming a question on damages under the CISG, since Article 74 of the CISG deals with damages, the Article 74 button on the table of contents should be clicked, thus gaining access to translated

Yet even with a single treaty, such as the CISG, any meaningful convergence in international commercial arbitration may well not be reached, certainly not any time soon, given (1) the large number of topics within the CISG, (2) that judicial proceedings are more prevalent than arbitral proceedings in the resolution of sales of goods disputes, and (3) the fact that there are many more subject matters of international commerce than the sale of goods. There are, of course, other areas with specialized arbitrations, such as the International Maritime Organization and the Court of Arbitration for Sport, among others.

Specialized treaties that contain provisions on narrow topics can make a difference in terms of uniformity, both through general prescriptions and the more narrowly drawn clauses. Whether general or detailed, most treaty clauses require a great deal of case-by-case analysis before they are fully understood. Article 7 of the CISG provides as follows:

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The phrase “the need to promote uniformity in its application” is a plea for convergence in the manner in which CISG is applied, thus including both judicial and arbitral approaches to resolving disputes thereunder. Further pressure toward uniformity is seen in Article 9(2), which provides that

The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

texts of several hundred CIETAC arbitral awards and Chinese court rulings on damages, with links to over 700 arbitral awards and court rulings on this subject worldwide. While the foregoing materials are in English, there will also be a CISG-China Web site. For a link to the preliminary framework of the emerging CISG-China Web site, see <http://aff.whu.edu.cn/cisgchina/en/index.asp>.

The more closely phrased clauses also require interpretation and analysis over time. For example, Article 74, on damages, provides as follows:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Virtually every substantive word and phrase in Article 74, mostly familiar to those who deal with investor-State arbitration, is abstract. Terms such as “damages,” “the loss,” “loss of profit,” “consequence of the breach,” “foresaw or ought to have foreseen,” “in the light of the facts and matters of which he then knew or ought to have known,” and “as a possible consequence of the breach of contract” are all subject to interpretation under varying circumstances and yield no easy path toward uniformity.

The conclusion from all of the foregoing is that a slowly developing international arbitral legal order requiring a consensus or near general acceptance of international arbitral process, procedure, and law may be discerned in investor-State arbitration but only dimly in international commercial arbitration. In the latter domain, there is a gradually evolving uniformity in process and procedure, but with respect to the law, there is a very long way to go.

A Tribute to Aron Broches

Arthur W. Rovine

Before we begin the conference this morning, I wish to pay tribute to an individual whose photograph you see on the large screen behind me. Some of you knew him. More have heard of him. Most of you, I'm sure, have never heard of him. His name was Aron Broches, known to his friends and colleagues as Ronnie.

Broches was a Dutchman and grew up in the Netherlands. He was Jewish. He got his university degree from the University of Amsterdam in 1939. That was not a good time for a young Jewish man to be in the Netherlands. The German invasion came the next year, on May 10, 1940. Broches' entire family was wiped out; his immediate family, his extended family, they all perished. But Broches survived.

The reason he survived was simply that he was here in New York City. He had come to New York with his wife Kitty and attended law school right here at Fordham Law School. I had the staff check the records and, sure enough, there it was, Aron Broches J.D. 1942. A perilous time in Europe, but he was here. Thank goodness he was here.

After graduation, he went to work for the Dutch Embassy in Washington. From 1942 to 1946 he was legal adviser to the Netherlands government and to its Economic Mission in Washington, DC. You recall the Dutch government and Queen Wilhelmina were in exile in London at the time. Broches, one of the founders of the World Bank, participated in the 1944 Bretton Woods Conference as a delegate from the Netherlands. Bretton Woods established the International Bank for Reconstruction and Development (IBRD), often called the World Bank, and the International Monetary Fund (IMF), these being the key post-war international economic and financial institutions designed for a prosperous world economy.

Broches went to work for the World Bank after the war, joining its Legal Department in 1946, becoming its director in 1956, the Bank's general counsel from 1959 to 1972, and then both general counsel and vice president from 1972 to 1979, when he retired. Broches was a key World Bank official in establishing the legal underpinnings of the bank's operations.

But for this annual Fordham conference on international arbitration and mediation, including investor-state arbitration, Broches was a crucial figure. He was particularly interested in questions involving international

investment, that is, private companies and individuals investing in foreign countries, and he saw the problems. He wrote a treaty, virtually single-handedly wrote a treaty, called the Washington Convention, which entered into force in 1965. The convention established the International Centre for Settlement of Investment Disputes (ICSID), which today is the world's leading institution for the arbitration under its convention and arbitration rules of disputes between governments and foreign investors. Broches was the first Secretary-General of ICSID, from 1967 to 1980.

The ICSID Convention and rules today are the heart of our system of investor-state arbitration. In these ways Broches made an enormous contribution to the field of international arbitration and the institutional system pursuant to which investor-State disputes are handled.

After he completed his last term as Secretary-General of ICSID in 1980, Broches joined the law firm of Howard Holtzmann. Howard is here today, and I'm going to ask him to say a few words about Ronnie.

I learned rather quickly that very few people here at Fordham and elsewhere in the legal community in New York had heard of Ronnie Broches, and I do mean very few. I doubt he's known by more than a few at all of the law schools in the United States and throughout the world. So, with the help of Antonio Parra, who used to work at the World Bank and ICSID, I obtained a photograph from the World Bank archives. That is the photograph you see on the screen. That photograph will be placed on a wall in the Fordham Law School Library, in a well-traveled place, so that it will be seen by a great many students and faculty alike. There will be an inscription under the photograph that will say "Aron Broches, Doctor of Laws Amsterdam, 1939, J.D. Fordham University Law School 1942, General Counsel of the World Bank 1959-1972 and its Vice-President and General Counsel 1972-1979. He was the principal architect of the 1965 Washington Convention establishing the International Center for Settlement of Investment Disputes (ICSID) and served from 1967-1980 as ICSID's first Secretary-General. ICSID became the world's leading institution for the arbitration under its Convention and rules of disputes between governments and foreign investors."

So Fordham will come to know him. There won't be many here who will say, as so many have, "I never heard of him." They won't be saying that anymore. And my hope is that many more people will come to know of his contribution to international arbitration. I am delighted to be able to say that to you.

I also am happy to see, sitting right here, Howard Holtzmann. If we can have a microphone given to Howard, I'll ask him to say a few words about Ronnie, and also about his wife, Kitty, who was a great support for Ronnie during his career, starting from the Netherlands.

HOWARD M. HOLTZMANN

We must all be grateful to Arthur Rovine for reminding us of the great contributions that Aron Broches made to the development of international dispute resolution. I will not try to add to Arthur's sensitive and comprehensive remarks. Rather, I will address the character of the man behind those accomplishments, based on many years of friendship and collaboration. Aron Broches' friends called him "Ronnie." As I think of Ronnie, there are two things that stand out in my mind. First, he was a delight to be with, and, second, he was wonderful to work with.

He was a warm companion, cheerful and ever supportive. He was a bounteous host whether in Washington where he lived or at the charming retreat that he and his wife, Kitty, built in the south of France. He insisted on high professional standards, but when referring to persons who did not live up to those standards he was never mean or demeaning. He was always good company.

The wonder of working with Ronnie was that he undertook every task with vigor and full dedication. No problem was too big to daunt him, no detail too small to be ignored by him. He brought to every project and case an encyclopedic knowledge of every aspect of international dispute resolution. That knowledge and his experience in applying it were the foundations of the solutions he created but never limited the scope of his imagination. You never heard him say, "That worked before, let's do it again." He would say, "That worked before, but here is a way to improve it in the circumstances of this particular case."

We cannot speak in memory of Ronnie without remembering his wife Kitty who was tragically lost ten years before Ronnie's death. Kitty, like Ronnie, came from Holland to the United States; she stood beside him over the years, an inspiration and constant support for his work. She was a major reason for our delight in being with them both.

It is said that Franklin Roosevelt once advised a friend who was about to speak at an event similar to this one. He told his friend to "be sincere, be brief, be seated." Mindful of that good advice, I have been sincere, I have tried to be brief and now—with a salute to Ronnie—I will be seated.

MR. ROVINE: Thank you, Howard.

I also want to take a short peek forward—not very far forward, but still forward. There have been a number of Secretaries-General since Ronnie's retirement. Exactly one week from today, on June 22, we will have a new Secretary-General. That new Secretary-General, Meg Kinnear, is also here and will say a few words to us.

MEG KINNEAR

I wanted to say thank you and to add my congratulations to your honoree today. I, too, am one of those individuals who has learned a great deal about Mr. Broches in recent months. I have been especially impressed by the extent to which he is still an inspiration at ICSID. It is striking that his vision in developing ICSID some five decades ago has steered that organization so clearly to where it is today. At the same time, I think he would be fascinated by, and probably a bit surprised at, the variety of issues and the number of cases that are the daily diet of ICSID these days. We have a top-notch staff at the ICSID Secretariat managing these cases. Together, we look forward to building on the legacy of Aron Broches in the coming months and years at ICSID, and we welcome all thoughts from stakeholders in the investor-State arbitration system on how to provide the best service possible.

Contributors

Arthur W. Rovine, Director of the Conference, has been serving as an arbitrator in international cases under ICSID, NAFTA and AAA/ICDR since he retired from Baker & McKenzie in 2005. He is also the director of the International Arbitration Conference at Fordham Law School and an adjunct professor of law at Fordham Law School.

Mr. Rovine is the current chairman of the International Law Committee of the Association of the Bar of the City of New York and a member of the College of Commercial Arbitrators. He publishes and lectures widely on various topics of international arbitration and international law.

After joining Baker & McKenzie in 1983, Mr. Rovine represented many major clients in international arbitrations, including a large number of investor-State cases at the Iran-United States Claims Tribunal in The Hague and the U.N. Compensation Commission in Geneva. He has also had cases before the International Chamber of Commerce in Paris, the American Arbitration Association in New York, the Stockholm Institute, *ad hoc* arbitrations, and international litigations in U.S. federal courts. Mr. Rovine handled many claims for and against governments, including investment disputes with Iran and Iraq, and representation of the government of Egypt in a major case against Iraq at the U.N. Compensation Commission.

Mr. Rovine's arbitration and litigation private sector clients included Rockwell International, General Dynamics, Fluor Corporation, Deloitte Touche Tohmatsu International, Touche Ross International, Combustion Engineering, John Brown Engineering, Nuclear Electric Insurance, Singer, and many others. During this period Mr. Rovine was the president of the American Society of International Law (2000-2002) and the chairman of the International Law Section of the American Bar Association (1985-1986). Mr. Rovine was also a member of the board of editors of the *American Journal of International Law* (1977-1987) and has been a member of the Council on Foreign Relations since 1987.

Prior to joining Baker & McKenzie in 1983, Mr. Rovine served in the Office of the Legal Adviser in the U.S. Department of State from 1972 to 1983. He established the *Digest of United States Practice in International Law* (1972-1974), and was then named Assistant Legal Adviser for Treaty Affairs (1975-1981). In that capacity he was responsible for the international law, constitutional law, and U.S. foreign relations law issues involved in many

treaties, agreements, and legislation, including the Algiers Accords with Iran, the termination of the Mutual Defense Treaty with Taiwan, the Taiwan Relations Act, the Panama Canal Treaties, the Egypt-Israel Peace Treaty, several human rights treaties, succession of States with respect to treaties, and the president's treaty powers. Mr. Rovine was then appointed the first United States Agent to the Iran-United States Claims Tribunal in The Hague from 1981 to 1983. In that capacity, and working with the Iranian Agent, European arbitrators, and the Dutch government, he helped establish the tribunal, adapt the UNCITRAL Rules for the tribunal, and helped develop all tribunal administrative procedures, privileges and immunities, payment mechanisms, etc. Mr. Rovine then argued cases at the tribunal on behalf of the U.S. government.

Prior to his government service, Mr. Rovine served as counsel at the International Court of Justice in the South-West Africa Cases against South Africa (representing Ethiopia and Liberia) and in the Namibia Advisory Opinion (representing the International League for the Rights of Man as *amicus curiae*). Both of these cases involved apartheid issues and practices in South Africa.

Gabriel Bottini is the National Director of International Affairs and Disputes of the Treasury Attorney General's Office of the Republic of Argentina. The Treasury Attorney General's Office defends Argentina before international arbitral tribunals and other international courts. Mr. Bottini has extensive experience in ICSID and UNCITRAL arbitrations, as well as in arbitrations under ICC rules. Mr. Bottini teaches international public law at the University of Buenos Aires, Argentina. He has lectured at many universities and international institutions around the world on issues of investment litigation and international law, and has published extensively on such matters. He has been awarded scholarships by the Fulbright Commission and other international institutions. Mr. Bottini holds a law degree magna cum laude from the University of Buenos Aires and an LL.M. from New York University School of Law. Current affiliation: Coordinator of the Department of International Affairs of the Treasury Attorney General's Office of the Argentine Republic.

Tillmann Rudolph Braun has from January 2010 been put in charge of managing the (foreign) economy policy in the Coordination Unit of the Federal Foreign Office, Berlin. He was the deputy head, Division International Investment, Debt Rescheduling, Development Banks', Directorate-General for External Economic Policy, Federal Ministry of Economics and Technology, Berlin. His professional responsibilities included, *inter alia*, the negotiating of bilateral investment treaties on behalf of the German federal

government. In the spring 2009 term, he was a Global Fellow from Practice & Government/Deutsches Haus Visiting Scholar at New York University School of Law.

Mr. Braun gained his First State Exam in Law [J.D. equivalent] from the University of Heidelberg as a scholar of the German National Scholarship Merit Foundation (*Studienstiftung des deutschen Volkes*) and his Second State Exam in Law [Bar exam equivalent] in Munich. Since 1995, he has been working for the German Federal Ministry of Economics: Directorate-General for Economic Policy, Bonn; he took a leave of absence to study for his Master of Public Administration at Harvard University from the J.F. Kennedy School of Government, Cambridge, MA; he was assistant to the special representative of the German chancellor for negotiations on compensations for former forced laborers, Count Lambsdorff, Berlin/Washington; Parliamentary Adviser, FDP Caucus in the German Bundestag, Berlin; since 2003, he returned to the Federal Ministry of Economics, Directorate-General for External Economic Policy.

Mr. Braun has published and lectured on international investment law and on Germany's bilateral investment treaties. Some of his published works include "Globalization and International Investment Law," in M. Waibel, A. Kausha, K. Chung & C. Balchin eds, *The Backlash Against Investment Arbitration* (2009); "The New German-Chinese Bilateral Investment Treaty—A Commentary and Evaluation in Light of the Development of Investment Protection under Public International Law", *ICSID Review—Foreign Investment Law Journal* 258-79 (Fall 2007) (joint publication with P. Schonard); and "Investment Protection Under WTO Law—New Developments in the Aftermath of Cancún," *Beiträge zum Transnationalen Wirtschaftsrecht*, 2004, Paper 28, University of Halle-Wittenberg.

Kathy A. Bryan is the president and CEO for the International Institute for Conflict Prevention and Resolution (CPR Institute). Ms. Bryan has devoted her career to finding the most effective and imaginative resolutions for resolving business disputes. She developed "best-in-class" litigation management techniques and created a system of regional counsel firms across the country.

Ms. Bryan is a frequent guest lecturer speaking on various litigation and ADR topics at some of the most notable venues, including the Annual ADR Congress, Inside Counsel's Annual SuperConference, the American Insurance Association, and numerous American Bar Association and State Bar Association Conferences around the United States. She has also authored articles and served as a subject matter expert for several national and legal publications, including the *Legal Times*, *National Law Journal*, *Inside Counsel*, and *American Lawyer*, and *Crain's New York Business*.

Previously, Ms. Bryan was the head of worldwide litigation for Motorola and a corporate vice president of Motorola's Law Department with a career than spanned 16 years with the company. She was also in private practice at Herrick & Smith and Hemenway & Barnes in Boston, MA, and Steptoe & Johnson in Phoenix, AZ, where she concentrated in commercial litigation. Ms. Bryan earned a Bachelor's of Arts degree from the University of Massachusetts in Boston, and a law degree from Northeastern University School of Law.

The International Institute for Conflict Prevention & Resolution is a primary multinational advocate and resource for avoidance, management, and resolution of business-related disputes, both domestically and overseas. CPR Institute's wealth of intellectual property and published material has educated and motivated general counsel and their firms around the world toward an increased reliance on alternative forms of dispute resolution rather than litigation. CPR's proprietary panel of esteemed arbitrators and mediators has provided resolutions in thousands of cases, with billions of dollars at issue, worldwide.

Tai-Heng Cheng is associate professor of law and associate director of the Center for International Law at New York Law School, and senior legal advisor to the New York law firm of Hogue Newman Regal & Kenney, LLP.

He specializes in international litigation and arbitration. He is a member of the panels of neutrals of the ICDR, CPR and HKIAC. He has served as arbitrator and counsel in disputes governed by ICC, UNCITRAL, JAMS and CEITAC rules, as well as multijurisdiction proceedings in the United States and abroad.

Professor Cheng is Honorary Fellow of the Foreign Policy Association. He also serves as member of the Academic Council of the Institute for Transnational Arbitration, the American Law Institute, and the International Commercial Disputes Resolution Committee of the New York City Bar Association. From 2008-2009, he served on the Awards Committee of the American Society of International Law.

He is admitted to practice before the courts of the State of New York, including the U.S. district courts for the Southern and Eastern Districts of New York and the U.S. Court of Appeals for the Second Circuit. U.S. federal courts have cited and relied on as authoritative Professor Cheng's book, *State Succession and Commercial Obligations* (2006).

He holds a Doctor of the Science of Law degree and a Master of Laws degree from Yale Law School, where he was Howard M. Holtzman Fellow for International Law. He also holds a Master of Arts degree and a law degree with first class honors from Oxford University, where he was Oxford University Scholar. Professor Cheng previously practiced law at Simpson Thacher & Bartlett LLP in New York.

Jack J. Coe, Jr., is a professor of law at Pepperdine University Law School and a specialist in private international law, with an emphasis on international commercial disputes. He has argued investor-State claims before NAFTA Chapter 11 tribunals and acted as arbitrator in complex disputes under the ICDR Rules. Professor Coe is also an Associate Reporter for the American Law Institute *Restatement (Third) of The U.S. Law of International Commercial Arbitration*, is former chair of the Disputes Division of the ABA's International Law Section, and was for several years chair of the Academic Council of the Institute for Transnational Arbitration. He continues to consult with governments and multinational corporations regarding commercial and direct investment disputes under the NAFTA and bilateral investment treaties and his declarations as expert have been filed before ICSID tribunals and federal courts.

Professor Coe is a regular speaker in Europe, Latin America, and Asia before learned and professional societies, and has helped organize numerous conferences and programs related to international dispute resolution. He has written many articles on arbitration, private international law, and related topics, and has authored the books, *Protecting Against the Expropriation Risk in Investing Abroad* (with R.C. Allison, 1993), *International Commercial Arbitration-American Principles and Practice in a Global Context* (1997), and *NAFTA Chapter 11 Reports* (ed., with Brower and Dodge, 2006).

Coe's academic training includes an LL.M. at Exeter, where he was a Rotary International Graduate Fellow, the Diploma of The Hague Academy of International Law, and a Ph.D. from the London School of Economics. He has also been a clerk to the Honorable Richard C. Allison at the Iran-United States Claims Tribunal, The Hague.

Emmanuel Gaillard is a Professor of Law and heads Shearman & Sterling's International Arbitration Group. He has represented major corporations, States and State-owned entities in over 300 international arbitration cases. He has acted as sole arbitrator, party-appointed arbitrator, or chairman in more than 50 international arbitrations. He is also frequently called upon to appear as an expert witness on arbitration law issues in international arbitration proceedings or enforcement actions before domestic courts.

Emmanuel Gaillard has written extensively on all aspects of arbitration law, in French and in English. He is a co-author of *Fouchard Gaillard Goldman on International Commercial Arbitration*, the leading publication in this field, a second edition of which is under way. He teaches international arbitration and private international law at the University of Paris XII. His latest work includes a legal theory of international arbitration, based on his 2007 course at The Hague Academy of International Law (*Aspects philosophiques du droit de l'arbitrage international*, with an English version titled *Legal Theory of International Arbitration*).

Emmanuel Gaillard is also recognized as one of the worldwide experts on ICSID (International Centre for Settlement of Investment Disputes) and international investment arbitration. He has published since 1985 a yearly feature in the *Journal du Droit International*, commenting on ICSID decisions and awards. In 2004, he published a seminal volume on ICSID arbitration case law entitled *La Jurisprudence du CIRDI*. A second volume covering the years 2004-2008 was published in 2010.

Emmanuel Gaillard is a member, appointed by France, of the ICSID Panel of Arbitrators. He advises the French government on investment treaty issues. He also assists as an expert on investment panels of OECD (Organisation for Economic Co-operation and Development) and UNCTAD (United Nations Conference on Trade and Development) and participates as an observer in the works of UNCITRAL (United Nations Commission on International Trade Law) on the drafting of the new UNCITRAL Arbitration Rules.

Emmanuel Gaillard chairs the International Arbitration Institute (IAI).

Ignacio Gómez-Palacio is a law professor, arbitrator, and practicing attorney. L.D. (Universidad Nacional Autónoma de México), LL.M. (University of Michigan, Ann Arbor). With a career spanning more than forty years, Gómez-Palacio has published several books and articles in the field of foreign investment, international investment law, arbitration, electoral law, and legal education; served for a decade as senior consultant for the U.N. Center on Transnational Corporation (currently UNCTAD); and has taught international business transactions, international commercial arbitration, comparative and Latin American law, and international law on foreign investment, as law professor at the National University of Mexico, Iberoamericana, universities of California at Davis, Florida, Hong Kong, Beijing, New Mexico, Baja California Norte, and others. He is the former president of the Instituto Mexicano para la Justicia (2001-04), founding partner of Gómez-Palacio y Asociados (since 1976), and active arbitrator (commercial and ICSID Investor-State arbitration). As well, he serves as external counsel to Mexico's Ministry of Foreign Relations, <http://www.g-pasoc.com>.

John Y. Gotanda is professor of law, associate dean for research, and director of the J.D./M.B.A. Program at Villanova University School of Law.

Professor Gotanda's scholarly interests focus on damages in international law and international commercial arbitration. He is the author of *Supplemental Damages in Private International Law* (Kluwer Law International, 1988) and has written numerous articles that have been published in the *American Journal of International Law* and the *Oxford University Comparative Law Forum*, as well as in law journals at Columbia, Georgetown,

Harvard, Michigan and Vanderbilt. His latest project, “Damages in Private International Law,” was recently published in *Recueil des cours*. Professor Gotanda’s scholarly writings have been cited by courts, tribunals, and commentators, including most recently by the U.S. Supreme Court, U.S. courts of appeals for the second, ninth, and eleventh circuits, U.S. district courts in Illinois and the District of Columbia, arbitral panels deciding cases under the rules of the International Chamber of Commerce, and tribunals deciding cases under the International Centre for Settlement of Investment Disputes (ICSID).

Professor Gotanda has spoken widely on the subject of damages in international law. He recently gave a series of lectures on damages at The Hague Academy of International Law, spoke on monetary remedies in international arbitration at Gray’s Inn in London at the invitation of the British Institute of International and Comparative Law, presented papers on the awarding of interest at the Annual Conference of the ICC Institute of World Business Law in Paris and at the Geneva Global Arbitration Forum, and spoke on the awarding of damages under the United Nations Convention on the International Sale of Goods at Tokyo University, Wuhan University, and the University of Stockholm.

Professor Gotanda has served as an expert on damages for the U.S. Department of Justice, the U.S. State Department, and the Office of the U.S. Trade Representative. He is a member of the Advisory Council of the United Nations Conventions on Contracts for the International Sale of Goods and the Rapporteur for the Council’s Opinion on Calculating Damages under the CISG. He also is a member of the Academic Council of The Institute for Transnational Arbitration, an Associate Editor of *Transnational Dispute Management*, and an Associate Member of the ICC Institute of World Business Law.

Hilary Heilbron, QC, is a barrister practicing as an advocate in both international arbitration and commercial litigation from Brick Court Chambers, London. She became a QC in 1987. She also sits regularly as an international arbitrator. She is a Deputy High Court Judge and is an accredited mediator.

She is the author of *A Practical Guide to International Arbitration in London* published in March 2008 and the chapter on damages in international arbitration in the second edition of *The Leading Arbitrators’ Guide to International Arbitration*. She is a regular speaker and contributor on international arbitration and other international legal topics. She is also a former chairman of the City Disputes Panel and former vice chair of the International Litigation Committee of the IBA. She was previously chairman of the London Common Law and Commercial Bar Association and of the International Practice Committee of the Bar Council. She is currently a vice chair of the litigation committee of the International Law Section of the IBA.

Howard M. Holtzmann is a long time leader in the field of international arbitration. He is a member of the USA delegation to UNCITRAL. A former Chair of the American Arbitration Association, he received its Sylvan Gottshall Medal for exceptional service in the field of international arbitration (1980). In 2006, they presented him with their highest honor, the peacemaker Award, given “for work to further peace throughout the world”. He was the senior American Judge of the Iran-US Claims Tribunal in The Hague for thirteen years, and was also a member of the Claims Resolution Tribunals for Dormant Accounts in Switzerland.

He has written extensively on international law, most recently as co-author (with E. Kristijansdottir) of *International Mass Claims Processes: Legal and Practical Perspectives*, published in 2007 by Oxford University Press. His earlier book, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration-Legislative History and Commentary*, (co-authored with J.E. Neuhaus, 1988), was awarded an ASIL Certificate of Merit.

A graduate of Yale College and Yale Law School, he endowed them a Chair in International Law.

For his pioneering arbitration activities, he was decorated by the Swedish government as a Commander of the Royal Order of the Polar Star (2003). In Austria, he was awarded the Silver Medal of Honor of Vienna (2006).

Mark Kantor was a partner in the Corporate and Project Finance Groups of the firm until he retired from Milbank, Tweed, Hadley & Company. He currently serves as an arbitrator and mediator, and teaches courses in international business transactions and in international arbitration as an adjunct professor at the Georgetown University Law Center (Recipient, 2006 Fahy Award for Outstanding Adjunct Professor). He is also a Senior Research Fellow at the Vale Columbia Center for Sustainable International Investment.

Mr. Kantor is a qualified arbitrator and a member of the American Arbitration Association Commercial and International Panels, the AAA’s Large Complex Case Roster, the AAA/ICDR’s Energy Arbitrators List, the ICC Arbitrator Database, The Chartered Institute of Arbitrators, the London Court of International Arbitration list of arbitrators, the National Futures Association roster of arbitrators, the roster of arbitrators of the Hong Kong International Arbitration Centre, the CPR Panel of Distinguished Neutrals for Banking and Finance, the CPR International Panel and the CPR Energy Committee. He is a fellow of the Chartered Institute of Arbitrators and is listed in *Who’s Who Commercial Arbitration*, *Chambers USA* (International Arbitration), and *The Best Lawyers in America* (International Arbitration; Washington, DC).

Mr. Kantor is the editor-in-chief of *Transnational Dispute Management*, an on-line global portal focusing on transnational disputes. He is also a mem-

ber of the ADR Advisory Board of the International Law Institute, the editorial board of *Global Arbitration Review*, the board of editors of the *Journal of World Energy Law and Business*, and the board of editors of the *Banking Law Journal*. Additionally, he serves as a contributing editor to *International Legal Materials* (American Society of International Law), a member of the Assistant Editorial Board for investmentclaims.com and an associate editor of the *Oil-Gas-Energy Law Intelligence Service*. He is vice chair of the DC Bar International Dispute Resolution Committee, having served as chair from 2004 until 2007. He serves as the chair of the Washington, DC chapter of the Chartered Institute of Arbitrators. Among other publications, Mr. Kantor is the author of *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International 2008), named Best Book of 2008 in the OGEMID Awards.

Mr. Kantor's principal transactional focus has been in the area of domestic and international investments and financings. He has represented sponsors and financial institutions in complex project financings and other infrastructure projects, structured and off-balance-sheet financings, and workouts and restructurings. He has considerable experience with the energy, power, telecommunications, air carrier, and financial services industries. In addition, Mr. Kantor has represented acquirors, sellers, and financing parties in numerous M&A transactions.

Catherine Kessedjian is director of a master program in European law, deputy director of the European College of Paris, and professor of European business law, private international law, international dispute resolution and international commercial arbitration at the University of Panthéon-Assas, Paris II, France.

She is regularly invited to teach in different countries, either at regular programs or as a visiting. In 2004, she was appointed a Hauser Global Professor at New York University School of Law where she teaches international commercial transactions and a seminar on rule making processes in a global world. She currently acts as mediator or arbitrator in a selected number of transnational disputes either ad hoc or under the auspices of, among others, ICSID, the ICC, LCIA and the AAA.

Before joining Paris II, she was deputy Secretary-General of The Hague Conference on Private International Law (1996-2000), on secondment from the Université de Bourgogne in France. At The Hague Conference, she was in charge of the preparation and monitoring of the negotiations for a proposed worldwide convention on jurisdiction and judgments. She was also in charge of commercial matters, including electronic commerce. Prior to joining The Hague Conference, Catherine Kessedjian taught international business transactions, European business law, including competition law,

international dispute resolution, and participated in several specialized seminars in international litigation and international commercial arbitration. She was the director of the European Law Center of the Université de Bourgogne and of a post-graduate program for international business lawyers. She was a practicing attorney in Paris from 1982 to end of 1998, focusing on transnational litigation and international business transactions. She received her legal education from the University of Paris (Doctorate) and the University of Pennsylvania Law School (LL.M.).

Meg Kinnear is currently Secretary-General of the International Centre for the Settlement of Investment Disputes (ICSID) at the World Bank. She was formerly the Senior General Counsel and Director General of the Trade Law Bureau of Canada, where she was responsible for the conduct of all international investment and trade litigation involving Canada, and participated in the negotiation of bilateral investment agreements. In November 2002, Ms. Kinnear was also named chair of the Negotiating Group on Dispute Settlement for the Free Trade of the Americas Agreement.

From October 1996 to April 1999, Ms. Kinnear was executive assistant to the deputy Minister of Justice of Canada. Prior to this, Ms. Kinnear was counsel at the Civil Litigation Section of the Canadian Department of Justice (from June 1984 to October 1996) where she appeared before federal and provincial courts as well as domestic arbitration panels.

Ms. Kinnear was called to the Bar of Ontario in 1984 and the Bar of the District of Columbia in 1982. She received a Bachelor of Arts (B.A.) from Queen's University in 1978; a Bachelor of Laws (LL.B.) from McGill University in 1981; and a Master of Laws (LL.M.) from the University of Virginia in 1982.

Ms. Kinnear has published numerous articles on international investment law and procedure and is a frequent speaker on these topics. She is a co-author of *Investment Disputes under NAFTA* (published in 2006 and updated in 2008 and 2009). She has also co-authored texts on Canadian legal procedure including *Federal Court Practice* (1988-1990, 1991-1992, and 1993-2009 annually) and *1995 Crown Liability and Proceedings Act Annotated*, (1994).

Richard H. Kreindler is a Partner of Shearman & Sterling LLP, resident in its Frankfurt office, and has specialized in international arbitration and litigation matters since 1985. He is a member of the New York and Paris Bars. He is also an honorary professor of law at the University of Münster, Germany, where he has taught for over a decade.

He has handled numerous commercial, construction, infrastructure, and investment arbitrations throughout the world under the rules of the leading

arbitration regimes and institutions as counsel, party-appointed arbitrator, sole arbitrator, chairman, and expert witness. He has served in an editorial or advisory capacity for *Arbitration International*, *International Arbitration Law Review*, *International Legal Materials*, *Arab Law Quarterly*, *Arbitration & Dispute Resolution Law Journal*, *World Arbitration and Mediation Report*, *Revue de Droit des Affaires Internationales*, the ICC Institute of World Business Law, and *Restatement 3d—U.S. Law of International Commercial Arbitration*, among others.

Among his arbitration-related treatises are *Strafrechtsrelevante und andere anstoessige Vertraege als Gegenstand von Schiedsverfahren: Zum Vorgehen von Schiedsgerichten bei Rechtsverletzungen von Vertragsparteien* [Illegal and Other Objectionable Contracts as the Subject of Arbitration] (Verlag Recht und Wirtschaft), *Transnational Litigation: A Practitioner's Guide*, 3 Vols. (Oceana/Oxford), and *Transnational Litigation: A Basic Primer* (Oceana/Oxford). He has also authored over 350 other publications and presentations on dispute resolution topics.

He is a graduate of Harvard, Munich, Columbia, and Münster Universities. He is a fellow and chartered arbitrator of the Chartered Institute of Arbitrators, London. He is chairman of the IBA Evidence Rules Subcommittee charged with revisions to the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration.

Veronica Lavista holds a law degree and a masters degree in finance from Di Tella University in Argentina, and is currently pursuing an LL.M. in International Legal Studies at New York University. Prior to that, she worked at the Treasury Attorney General's Office in Argentina in international arbitrations.

Ben Love is an associate in the Houston office of King & Spalding LLP and specializes in international arbitration and public international law. Mr. Love advises and represents clients in international commercial and investment arbitration matters, including proceedings under the ICSID, ICC, and UNCITRAL Arbitration Rules. He also advises clients on investment structuring for treaty protection, as well as on the enforcement of foreign judgments and arbitral awards. Mr. Love holds B.A. and J.D. degrees from the University of Texas and a D.E.S.S. from Université Paris I Panthéon-Sorbonne. Before joining the firm, Mr. Love was a clerk at the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (ICC).

Ivan Marisin is senior partner of the Litigation and Dispute Resolution Practice at Clifford Chance's Moscow office. He specializes in all aspects of

litigation and arbitration, domestically and internationally. Mr. Marisin has acted in some of the most high-profile disputes involving construction, tax, banking, contractual and commercial issues, share buyout offers, recover of debts and assets, restructuring, bankruptcy, and repossession.

Mr. Marisin is a member of the Moscow Advocates Association and also an arbitrator at the ICAC (International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation), VIAC (Vienna International Arbitral Centre of the Austrian Federal Economic Chamber) and other arbitration centers. Mr. Marisin is a frequent speaker at seminars and conferences and an author of numerous publications. He is also an editor of the Russian journal *Arbitration*.

Sophie Nappert is a dual-qualified lawyer in Canada and in the UK. She is an arbitrator in independent practice, based in London. Before becoming a full-time arbitrator, she was Head of International Arbitration at a global law firm.

Sophie is trained and has practised in both civil law and common law jurisdictions. Sophie is ranked in Global Arbitration Review's Top 30 List of Female Arbitrators Worldwide and is listed in the International Who's Who of Commercial Arbitration. She is commended in the legal directories as '*one of the top new-generation arbitrators*'.

Areas of expertise include: energy and natural resources, construction, infrastructure, hotel and leisure, telecoms, joint ventures, concession agreements, Russia, Kazakhstan and the Caspian region, the Energy Charter Treaty, investment treaty disputes and disputes against State parties.

Sophie is a regular speaker at conferences and seminars on issues of arbitration and international law. She is also a guest lecturer at Columbia Law School, Harvard Law School and McGill University Faculty of Law.

Education

- University of London: LL.M. (Masters Degree in Law) with Merit, King's College London.
- McGill University (Canada): Bachelor of Laws (Common Law), (LL.B.), Bachelor of Civil Law (B.C.L.).
- Institute of International and Comparative Law (Magdalen College, Oxford): Diploma in Public International Law.

Lawrence W. Newman was the founder, with the late Professor Henry de Vries, of the New York litigation department at Baker & McKenzie, which has since concentrated on international litigation and arbitration. Mr. Newman and his colleagues achieved international prominence in the 1980s, when the New York litigation department represented more claimants against the gov-

ernment of Iran arising out of the revolution in that country than any other law office in the world. Mr. Newman has handled cases in trial and appellate courts in New York and other areas of the United States involving such matters as contract and fraud disputes and violations of the federal securities law and of the Racketeer Influenced and Corrupt Organizations (RICO) Act. Mr. Newman has represented clients in arbitrations under the rules of major international arbitration organizations in Europe and the United States and has served as an arbitrator in such proceedings. Prior to joining Baker & McKenzie, he was, for five years, an Assistant U.S. Attorney in the United States Attorney's Office for the Southern District of New York, where he specialized in the investigation and trial of securities fraud cases.

Mr. Newman is the co-author (with David Zaslowsky) of *Litigating International Commercial Disputes* (West Group, 1996) and *The Practice of International Litigation* (2d ed.); he is the editor of *Enforcement of Foreign Judgments* (three volumes), *Attachment of Assets* (two volumes), and *Securing and Enforcing Judgments in Latin America*. He is the co-editor, with Professor Andreas Lowenfeld and Chief Judge John M. Walker, Jr. of the Second Circuit Court of Appeals, of *Revolutionary Days—The Iran Hostage Crisis and the Hague Claims Tribunal; A Look Back*. He is the co-editor of, and a contributor to, *International Arbitration Checklists* (two editions) and *The Leading Arbitrators' Guide to International Arbitration* (two editions). He is the co-editor of, and a contributor to, two treatises on cross-examination, *Take the Witness: The Experts Speak on Cross-Examination* and *Take the Witness: Cross-Examination in International Arbitration*. He has been, since 1982, the author and co-author of the *International Litigation* column in the *New York Law Journal*.

Mr. Newman was Chairman for four years of the International Disputes Committee of the New York City Bar, is currently the Chairman of the Arbitration Committee of the International Institute for Conflict Prevention and Resolution (CPR) and is a member of the Advisory Committee of the Restatement of International Arbitration of the American Law Institute. Mr. Newman is a member of the College of Commercial Arbitrators and is an Adjunct Associate Professor of law at Fordham Law School, teaching a course on International Arbitration. Mr. Newman is a frequent speaker on international arbitration and litigation and is the founder of the Leading Arbitrators' Symposia on the Conduct of International Arbitration, which have been held in various cities in the United States, Europe and Asia, including annually for the past six years in Vienna. Mr. Newman has been listed as a highly rated lawyer in International Arbitration in various national and international directories of lawyers and is listed in numerous editions of *Who's Who*. He is a graduate of Harvard College and the Harvard Law School.

Francisco Orrego Vicuña is professor of law at the Law School and the Institute of International Studies of the University of Chile. Has presided over numerous international arbitration tribunals in investment and commercial matters and has also served as party-appointed arbitrator. An arbitrator included in the ICSID Chairman's List, he has also been appointed to tribunals by the ICC Court of International Arbitration and the London Court of International Arbitration. He has also participated in arbitrations under the UNCITRAL Rules and the American Arbitration Association. Professor Orrego Vicuña is a member of a panel of the World Trade Organization concerning the claim of the European Community against the United States on subsidies to large civil aircraft and presides over a NAFTA tribunal. He is also a judge and former president of the World Bank Administrative Tribunal and is a judge *ad hoc* at the International Tribunal for the Law of the Sea. A well-known writer on international law and international arbitration, Professor Orrego Vicuña participates in a number of academic institutions. He has recently ended his period as vice president of the London Court of International Arbitration and serves as a member of the International Council of Commercial Arbitrators. He has ended his two-year term as president of the Institut de Droit International and presided over the Santiago Session of this institution (2007).

William W. Park is Professor of Law at Boston University, where he lectures on tax, banking, and international business transactions. After studies at Yale and Columbia, Park practiced in Paris until returning home to teach and to direct his university's Center for Banking and Financial Law. He has held visiting academic appointments at Cambridge University, as well as in Dijon, Hong Kong, Auckland, and Geneva. His books include *Arbitration of International Business Disputes*, *International Forum Selection*, *International Chamber of Commerce Arbitration* (with Craig and Paulsson), *International Commercial Arbitration* (with Reisman, Craig, and Paulsson), and *Income Tax Treaty Arbitration* (with David Tillinghast).

Park is General Editor of *Arbitration International*, a Vice President of the London Court of International Arbitration, and a member of the the International Council for Commercial Arbitration (ICCA). Park served as arbitrator on the Claims Resolution Tribunal in Zürich, convened to resolve claims by Holocaust victims and their heirs against Swiss banks, and the London-based Appeals Tribunal of the International Commission on Holocaust Era Insurance Claims. In 2008 the President of the United States appointed Park to the Panel of Arbitrators for the International Centre for Settlement of Investment Dispute (ICSID). Currently he sits on the Board of the American Arbitration Association.

W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School where he has been on the Faculty since 1965. He has been a visiting professor in Tokyo, Hong Kong, Berlin, Basel, Paris, and Geneva. He is a Fellow of the World Academy of Art and Science and a former member of its Executive Council, the President of the Arbitration Tribunal of the Bank for International Settlements, a member of the Advisory Committee on International Law of the Department of State, Vice-Chairman of the Policy Sciences Center, Inc., and a member of the Board of The Foreign Policy Association. He has been elected to the *Institut de Droit International* and is Honorary Professor in City University of Hong Kong. He has published widely in the area of international law and served as arbitrator and counsel in many international cases. He was also President of the Inter-American Commission on Human Rights of the Organization of American States, Vice-President and Honorary Vice-President of the American Society of International Law, and Editor-in-Chief of the American Journal of International Law. He has served as arbitrator in the Eritrea/Ethiopia Boundary Dispute and in the Abyei (Sudan) Boundary Dispute. His most recent books are *Stopping Wars and Making Peace: Studies in International Intervention* (with Kristen Eichensehr, eds.) (Martinus Nijhoff Publishers, 2008); *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (with Guillermo Aguilar Alvarez, eds.) (Martinus Nijhoff Publishers, 2009); *Foreign Investment Disputes: Cases, Materials and Commentary* (with Bishop and Crawford) (Kluwer Law International, 2005); *International Law in Contemporary Perspective* (with Arsanjani, Wiessner, and Westerman) (Foundation Press, 2004); *Jurisdiction in International Law* (Ashgate, 1999); and *Law in Brief Encounters* (Yale University Press, 1999), Chinese Translation, *Shenghuozhongde Weiguan Falu* [Microscopic Laws in Life] (Shangzhou Chubanshe, Taipei, 2001); A Chinese edition of his selected writings, *Understanding and Shaping International Law: Essays of W. Michael Reisman* was published by Law Press of China in 2007.

Andrea Saldarriaga graduated magna cum laude from the University of Los Andes (Colombia) and has post-graduate studies in Spain and France. After having worked at the law firm Zuleta Suarez Abogados and with the International Arbitration Group of Freshfields Bruckhaus Deringer in Paris, Andrea launched her private practice and works as an independent international consultant on arbitration and foreign investment law in New York since 2007.

She has represented private and sovereign clients in arbitration proceedings under different arbitration rules including ICSID, UNCITRAL, ICC, and AAA. She has also collaborated with arbitrators in administering

arbitral proceedings and assisting in the preparation of awards in commercial and investment cases based on international investment agreements, including various BITs, NAFTA, and the Energy Charter. She has also advised clients on litigation strategy and has worked with international institutions in analyzing the impact that investment arbitration can have in areas such as the fight against corruption. She has been invited by the United Nations Conference on Trade and Development (UNCTAD) to be part of its network of experts in international investment law and to participate in its expert meetings on Investment for Development.

Andrea is the international editorial coordinator for *Revista Internacional de Arbitraje*, and has authored a number of publications in international arbitration. She has taken part in various seminars and conferences in Europe, the United States, and Latin America, and is a visiting professor in international arbitration at University Paris X Nanterre, ESSEC Business School (Paris), and the Instituto de Empresa (Madrid).

Kathleen M. Scanlon is an experienced litigator and problem solver of commercial disputes with expertise in ADR processes. Ms. Scanlon was Special Counsel at Heller Ehrman where she co-founded the International Arbitration and ADR group and practiced in the Complex Commercial Litigation and Insurance Practice Groups.

Prior to joining Heller Ehrman, Ms. Scanlon was a senior vice president and director of Public Policy Projects at the CPR Institute for Dispute Resolution (New York, New York), an ADR coalition of leading general counsel and law firms, where she was responsible for counseling, research major publications, public policy projects, and the CPR Awards Program. She served as staff director for the revision of the CPR Arbitration Rules, the CPR Patent Commission and the CPR-Georgetown Commission on Ethics and Standards in ADR. Before that, Ms. Scanlon was a senior litigation associate at Simpson Thacher & Bartlett where she practiced in all phases of complex commercial litigation, including insurance disputes, intellectual property disputes, banking litigation, reinsurance arbitrations, and employment disputes.

After graduating from law school, Ms. Scanlon clerked for one year for the Honorable Louis L. Stanton in the U.S. District Court for the Southern District of New York. She is an adjunct associate professor of law at Fordham Law School where she teaches international arbitration and ADR ethics courses and acts as consulting director to its Conflict Resolution and ADR Program. Ms. Scanlon is a graduate of Brown University and Fordham Law School.

Ms. Scanlon has published extensively in the ADR field, including the publication of two books on drafting dispute resolution clauses and effective mediation. See <http://www.adradvocate.com/publications.html>.

Ms. Scanlon has represented clients in international arbitrations under ICC, ICDR, SIAC, and UNCITRAL Rules; domestic arbitrations under AAA, CPR, and JAMS Rules; *ad hoc* mediations of domestic and commercial disputes and JAMS mediations; and in federal and state courts.

Stephen M. Schwebel has been involved in international arbitration of investment disputes since 1954 (*Aramco v. Saudi Arabia*). He served as a judge of the International Court of Justice 1981-2000 and as Court president 1997-2000. He has been appointed arbitrator or chairman in 59 disputes, including five inter-State arbitrations. He has been a member of ICSID's Panels of Arbitrators and of Conciliators, appointed by the president of the World Bank, since 2000, and is a member of the Permanent Court of Arbitration. He is the author of *International Arbitration: Three Salient Problems* and a number of articles on international arbitration.

Irina Sergeeva is an associate in the Litigation and Arbitration Practice of the Moscow office of Clifford Chance. She specializes in all aspects of litigation and arbitration. Ms. Sergeeva has acted in a number of high-profile disputes involving banking, tax, construction, contractual and commercial issues, and recovery of debts and assets. She is also regularly involved in various pro bono projects, including those connected with the development of legal education in Russia.

Ms. Sergeeva is a lecturer at the Law Faculty of the Moscow Institute of Humanitarian Education and Information Technologies, where she teaches european law and is an author of a number of publications.

Laurence Shore is a partner in the New York office of the law firm Gibson, Dunn & Crutcher LLP. He co-chairs the firm's International Arbitration Practice Group. Laurence previously practiced law in the London office of Herbert Smith LLP (1995-2008), the U.S. State Department's Office of the Legal Adviser, and the Washington, DC, law firm of Williams & Connolly. He received his law degree from Emory University, where he was editor-in-chief of the *Emory Law Journal* (1988-89). Before pursuing a legal career, Laurence was an assistant professor of history at Queen's University, Canada. His Ph.D. (History) is from The Johns Hopkins University. His publications include "Three Evidentiary Problems in International Arbitration," *German Arbitration Journal* (Mar./Apr. 2004); "What Lawyers Need to Know About International Arbitration", *Journal of International Arbitration* (Feb. 2003); "Disclosure and "Impartiality: An Arbitrator's Responsibility," *Dispute Resolution Journal* (Feb. 2002); (with Dr. Julian D.M. Lew) "International Commercial Arbitration: Harmonizing Cultural Differences," *Dispute Resolution Journal* (Aug. 1999); Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford,

2007); "The Enduring Power of Racism: A Reconsideration of Winthrop Jordan's White Over Black," *History and Theory* (May 2005); *Southern Capitalists: The Ideological Leadership of an Elite, 1832-1885* (Chapel Hill, 1986).

Margrete Stevens is a consultant in King & Spalding's Washington, DC, office working on investment treaty claims with the firm's International Arbitration Group. Prior to joining King & Spalding, Ms. Stevens worked for nearly 20 years at the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID), where she served as senior counsel and later as acting lead counsel. Ms. Stevens is a frequent speaker at conferences focusing on international investment law issues and co-authored the first leading textbook on investment treaties—*Bilateral Investment Treaties* (Martinus Nijhoff 1995). Ms. Stevens has served as co-chair of the International Bar Association's Sub-Committee on State Mediation, is a member of the Board of the Stockholm Chamber of Commerce Arbitration Institute, and is founder of the Washington, DC, International Arbitration Club.

Edna Sussman is a full-time arbitrator and mediator, the principal of SussmanADR LLC and the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She was formerly of counsel at Hoguet Newman Regal & Kenney LLP and a partner at the law firm of White & Case LLP. Ms. Sussman serves frequently as an arbitrator and mediator on commercial, energy and environmental matters, both domestic and international, for several of the leading dispute resolution institutions including the American Arbitration Association (AAA), International Centre for Dispute Resolution (ICDR), International Institute for Conflict Prevention and Resolution (CPR), Chinese European Arbitration Centre (CEAC), World Intellectual Property Organization (WIPO), and FINRA (formerly NASD and NYSE). As a court certified mediator, Ms Sussman serves on the mediation panels of the federal, state, and bankruptcy courts in New York. As an arbitrator and mediator, she has successfully handled over 150 complex disputes in many business settings, including matters involving disputes concerning contract interpretation, energy, environment, mergers/acquisitions, accounting, intellectual property, securities, financing and banking transactions, real estate, antitrust, professional liability, insurance, bankruptcy, transnational litigation, employment and franchises.

Ms Sussman is chair-elect of the Dispute Resolution Section of the New York State Bar Association and serves as editor-in-chief of *New York Dispute Resolution Lawyer*. She chairs the Arbitration Committee of the American Bar Association Section of Dispute Resolution and is a vice chair of the International Commercial Disputes Resolution Committee of the Section

of International Law of the American Bar Association and the chair of the Alternative Dispute Resolution Committee of the Environment Energy and Resources Section. She is a graduate of Barnard College and Columbia Law School. Ms. Sussman has been selected as a Best Lawyer for Alternative Dispute Resolution for 2009 and 2010 and named as an Outstanding Woman in Energy Law by Energy Law 360.

Ms. Sussman has lectured and published widely on mediation, arbitration, energy, and environmental issues. Her publications include “The Proposed U.S. Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business,” 18 *American Review of International Arbitration*: 455 (2009); “User Preferences and Mediator Practices: Can They Be Reconciled Within the Parameters Set by Ethical Considerations,” *World Arbitration And Mediation Review* (Spring 2009); “Developing an Effective Med-arb/Arb-med Process,” 2(1) *N.Y. Dispute Resolution Lawyer* (2009); “The Final Step: Issues in Enforcing the Mediation Settlement Agreement,” in *Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2008* (Arthur W. Rovine ed., 2009), “The Reasons For Mediation’s Bright Future,” 1(1) *N.Y. Dispute Resolution Lawyer* (2008); “The Energy Charter Treaty’s Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development,” 14(2) *ILSA Journal of International & Comparative Law* (2008); “Reshaping Municipal and County Laws to Foster Green Building Energy Efficiency and Renewable Energy,” 16(1) *NYU Law School Environmental Law Journal* (2008).

V.V. Veeder practises as an international arbitrator from Essex Court Chambers, 24 Lincoln’s Fields, London WC2A 3EG, United Kingdom (email: <mailto:vvveeder@compuserve.com>; > vvveeder@londonarbitrators.net <mailto:vvveeder@londonarbitrators.net>). He is an ICCA Council Member; Visiting Professor on Investment Arbitration, King’s College, University of London; Council Member of the ICC Institute of World Business Law; Vice-President of the LCIA; and Member of the Board of the Arbitration Institute of the SCC.

List of Abbreviations and Acronyms

| | |
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| AAA | American Arbitration Association |
| ABA | American Bar Association |
| ADR | alternative dispute resolution |
| AICPA | American Institute of Certified Public Accountants |
| ASA | Swiss Arbitration Association |
| BIT | bilateral investment treaty |
| CAFTA | Central American Free Trade Agreement |
| CAFTA-DR | Central America-Dominican Republic-United States Free Trade Agreement |
| CCI | Chamber of Commerce and Industry of the Russian Federation |
| CCIAG | Corporate Counsel International Arbitration Group |
| CEAC | Chinese European Arbitration Centre |
| CEDR | Centre for Effective Dispute Resolution |
| CIArb | Chartered Institute of Arbitrators |
| CIETAC | China International Economic and Trade Arbitration Commission |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| COMECON | Council for Mutual Economic Assistance |
| CPLR | New York Civil Practice Law and Rules |
| CPR | Center for Public Resources |
| DCF | discounted cash flow |
| DIS | German Arbitration Institution |
| EBIT/EBITDA | earnings before interest and taxes/earnings before interest and taxes, depreciation, and amortization |
| ECJ | European Court of Justice |

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|-------|--|
| EFTA | European Free Trade Association |
| FET | fair and equitable treatment |
| FINRA | Financial Industry Regulatory Authority |
| FMV | fair market value |
| FTA | free trade agreement |
| FTAA | Free Trade Area of the Americas |
| FTAC | Foreign Trade Arbitration Commission (Russia) |
| FTC | Free Trade Commission |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| HKIAC | Hong Kong International Arbitration Centre |
| IBA | International Bar Association |
| ICAC | International Commercial Arbitration Court (Russia) |
| ICC | International Chamber of Commerce |
| ICCA | International Council for Commercial Arbitration |
| ICDR | International Centre for Dispute Resolution |
| ICJ | International Court of Justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| ILC | International Law Commission |
| IMF | International Monetary Fund |
| IRDC | International Dispute Resolution Centre |
| JAMS | Judicial Arbitration and Mediation Services |
| LCIA | London Court of International Arbitration |
| LIBOR | London Inter-Bank Offer Rate |
| LMAA | London Maritime Arbitrators' Association |
| M&A | merger and acquisition |
| MAC | Maritime Arbitration Commission (Russia) |
| MFN | most-favored nation |
| MIGA | Multilateral Investment Guarantee Agency |
| MST | minimum standard of treatment |

| | |
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| NAFTA | North American Free Trade Agreement |
| NASD | National Association of Securities Dealers |
| NGO | non-governmental organization |
| NPV | net present value |
| OAS | Organization of American States |
| OECD | Organisation for Economic Cooperation and Development |
| OGEMID | Oil-Gas-Energy-Mining-Infrastructure Dispute Management |
| OPEC | Organization of Petroleum Exporting Countries |
| OPIC | U.S. Overseas Private Investment Corporation |
| PCA | Permanent Court of Arbitration |
| SCC | Stockholm Chamber of Commerce |
| SIAC | Singapore International Arbitration Centre |
| TBT | Agreement on Technical Barriers to Trade |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights |
| UCC | Uniform Commercial Code |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UNIDROIT | International Institute for the Unification of Private Law |
| USAID | U.S. Agency for International Development |
| WIPO | World Intellectual Property Organization |
| WTO | World Trade Organization |

Investor-State Dispute Mediation: The Benefits and Obstacles

Edna Sussman

Independent Arbitrator and Mediator

New York, New York, USA

The title of today's program is "Investor-State Mediation: Is There a Future?" As we begin our discussion of this subject, the threshold question that must be addressed is why are we talking about it at all. Can investor-State disputes really benefit from mediation,¹ or are such disputes creatures unto themselves as to which normal litigation considerations on how to achieve settlement do not pertain. When discussing this question a few years ago with colleagues, they uniformly responded that mediation would be futile in this context, as the investor had already exhausted all negotiation channels before filing the arbitration. Today one finds considerable interest in promoting mediation

¹ There is a lack of clarity in the literature on investor-State disputes as to the meaning of the words conciliation and mediation and whether they differ. There are many different styles and techniques that those working to facilitate settlement use to help resolve disputes. As used in this article, mediation is a process in which the mediator attempts to bring the parties to agreement as opposed to conciliation in which the neutral delivers his or her nonbinding opinion of the merits to the parties and makes a recommendation. The ICSID does not dictate which of these techniques should be employed, as it provides that the conciliators "may" make recommendations. ICSID Convention, Regulations and Rules; Rules of Procedure for Conciliation Proceedings ("Conciliation Rules"), Rule 22, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf. It is, however, the author's understanding that to date the conciliations at ICSID have followed the latter model with what must be viewed essentially as nonbinding evaluations of the dispute delivered to the parties. In mediation too, the mediator in trying to bring the parties to agreement often makes recommendations and even evaluations, but the distinguishing feature is whether those recommendations/evaluations are made to the parties separately in caucus or whether they are made to all parties together, something done less frequently and only with clear consent from all parties. The fundamental difference is one of the underlying philosophy and approach. The goal in mediation is to assist the parties in arriving at their own solutions as opposed to the goal being to have a conciliator evaluate the case, deliver a solution, and then attempt to get the parties to accept it.

for investor-State disputes and facilitating its development from those speaking from all perspectives: host-government representatives, administering institution representatives, and investors.

Indeed, as we consider the developments of the past several years, it becomes clear that the use of mediation in the burgeoning field of investor-State arbitrations is a subject that should be explored. Investor-State claims have been increasing in number with over 300 cases now known to have been filed, most in recent years.² Of these, over 200 have been filed with the International Centre for Settlement of Investment Disputes (ICSID).³ Over 75 countries have faced investor-State arbitration claims.⁴ With this widespread growth of arbitration of investor-State disputes, scholarly literature analyzing the possibilities of mediation in this context has emerged.⁵

It must be recognized that mediation has not been widely used in investor-State disputes. ICSID has only had a handful of conciliations registered with it. For example, in 2008 there were 31 new arbitrations filed but only one conciliation, and that was a conciliation required by the parties' contract.⁶ But mediation has become increasingly accepted as a useful dispute resolution mechanism and has had great success in the United States and the United Kingdom. In recognition of the value of mediation, the European Union adopted the Mediation Directive in 2008.⁷ Mediation has long been a part of the societal culture in many nations of the world, all part of today's global economy. The recent economic downturn has caused all parties to

² United Nations Conference on Trade and Development [UNCTAD], *Latest Developments In Investor-State Dispute Settlement*, IIA Monitor No. 1, at 1 (2009) [hereinafter UNCTAD No. 1].

³ *Id.*

⁴ *Id.*

⁵ See, e.g., Jack J. Coe, Jr., "Settlement of Investor-State Disputes through Mediation Preliminary Remarks on Processes, Problems and Prospects," in *Enforcement of Arbitral Awards Against Sovereigns* ch. 4 (R. Doak Bishop, ed., 2009) [hereinafter Coe Preliminary Remarks]; Jack J. Coe, Jr., "Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch," 12 *U.C. Davis J. Int'l L. & Pol'y* 7 (2005) [hereinafter Coe Complementary Use]; Susan D. Franck, "Integrating Investment Treaty Conflict and Dispute Systems Design," 92 *Minn. L. Rev.* 161 (2007) and sources cited therein.

⁶ International Centre for Settlement of Investment Disputes 2008 Annual Report, at 5, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2008_Eng.

⁷ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L 136) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML>.

look for cost-saving measures. All of these drivers increasingly lead to the greater utilization of mediation. Moreover, the success of mediation as a dispute resolution tool is itself creating its own momentum and growth.

Concerns specific to investor-State arbitration also suggest that mediation may lead to better results. The lack of consistency in the interpretation of treaty obligations has become a subject of discussion. The different arbitration rules available, while giving investors a choice, add to the lack of predictability. Investor-State arbitration is generally a lengthy process; the average length of an arbitration proceeding at ICSID is three years, and jurisdictional and arbitrator challenges are common.⁸ Investor-State arbitrations can be inordinately costly⁹ and subject the state to the possibility of enormous damage awards.

These issues have been recognized and were discussed during the UNCTAD multiyear expert meeting on investment for development held in Geneva in February of 2008. Apart from preventive means such as clarifying treaty language and treaty interpretation, one possibility considered to address these problems was “to enhance the role of alternative methods of treaty-based investor-state dispute resolution in IIAs [international investment agreements].”¹⁰ Mediation is one such alternative dispute resolution method.

It is generally accepted that about 80 percent of the mediated disputes settle in mediation. Only 30-40 percent of ICSID cases settle before the arbitration is concluded.¹¹ These figures suggest that if there is merit in the concept of mediation for investor-State disputes, there is much room for increasing the number of settlements. Accordingly, we review some of the salient benefits of mediation to see if they apply in the context of investor-State arbitration and identify the special obstacles that can stand in the way of settlement of such disputes.

⁸ Coe Preliminary Remarks, *supra* note 5.

⁹ For example, in *Plama Consortium v. Bulgaria*, the parties' legal costs were over \$17 million and in *Pey Casado v. Chile* over \$15 million. See UNCTAD No. 1, *supra* note 2 at 11.

¹⁰ *Id.* at 12.

¹¹ Coe Preliminary Remarks, *supra* note 5; Susan D. Franck, “Empirically Evaluating Claims About Investment Treaty Arbitration,” 86 *N.C. L. Rev.* 71 (2007), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=518280.

THE BENEFITS OF MEDIATION OVER DIRECT NEGOTIATION

Designing an Effective Process

Constructing a mediation process is an art form. Each mediation presents its own set of challenges with its unique issues, personalities, sensitivities, and impediments to settlement. Who is at the table, what is on the table, when the discussions should take place, the sequence and manner in which parties and issues are addressed, all have tremendous impact on the likelihood of a successful resolution. A mediator can assess the distinctive characteristics of each mediation to design and shepherd the process. With direct negotiation, there is no one who can embark on and implement such a fine tuned analysis. Direct negotiation simply does not create a vehicle for adjusting the negotiating process to the needs of the specific case.

Persistence in Pursuing Settlement

The mediator is not a champion of any party but is a champion for settlement. Often in direct negotiation the lawyers meet, talk, fail to resolve, and go back to arbitration. Lawyers often feel that being the one to raise settlement again, and perhaps even again as the case unfolds, can be seen as a sign of weakness that will be a disadvantage in achieving the best result for the client. The mediator can persist in pursuing the settlement options as the case progresses and raise the issue again as more optimal times for resolution present themselves.

Providing an Opportunity for a “Day in Court”

Strong emotions are frequently found in the context of any dispute. In such cases, settlement is best achieved after those emotions and frustrations have found an outlet. Many litigants need to be listened to by an empathetic and wise counselor before they can settle, and they need to feel like they have had their “day in court.” The mediator fills that role and enables the litigant to get the cathartic release before a learned professional similar to the arbitrator who would otherwise resolve the dispute.

Identifying Impediments to Settlement

A mediator is in a better position than trial counsel to identify what is going on outside the narrow confines of the dispute that can be an impediment to settlement. Are there political or social ramifications that must be managed? Are there third parties that must be consulted? Is the timing of the payment an issue? The mediator can help craft solutions or bring outside parties into the conversation to obviate impediments to settlement.

Posturing Left at the Door

In direct negotiations, lawyers generally continue to speak to the strength of their client's case and posture in the effort to maximize their negotiating position. No sensible discussion of the strengths and weaknesses takes place. With a mediator, the posturing can be eliminated in the course of the conversations and areas of agreement can be developed. The mediator provides a safe environment in which more meaningful progress to settlement can be made.

Ability to Explore Underlying Interests

The mediator can meet privately with each of the parties and find out what they really care about. Often interests emerge that are not obvious and that a lawyer cannot bring up in a negotiation either because it undercuts some position in the case or could be seen as a sign of weakness or must be kept confidential. A mediator can identify those interests and assist in developing mechanisms to satisfy those interests in the settlement. This can be particularly important in the context of investor-State disputes where the host State might be seeking additional investment and the investor interested in protecting other existing interests in the host country or be interested in additional investment opportunities.

Providing a Realistic Risk Assessment

It is often useful to have an independent fresh set of eyes look at the dispute and assist the parties by helping them analyze the strengths and weaknesses of their case. Lawyers and parties often become convinced as to the strength

of the case beyond any realistic appraisal. The mediator provides that independent unbiased review and can assist in the development of a more realistic analysis of the likelihood of success. Especially in the world of bilateral investment treaty (BIT) arbitrations, where the outcome may be even more unpredictable than in the commonplace commercial case, a neutral evaluation for each party of the different paths a tribunal might follow can be invaluable.

Getting the Client's Attention

A mediation requires the participation of decision makers with authority to settle. The mediation provides the opportunity to get the undivided attention of those who must make the decision on settling the dispute.

Ability to Test Solutions

Using a mediator as an intermediary enables the parties to test settlement positions before they are disclosed to the other side. The mediator can assess whether the settlement proposal is likely to be productive and hold it back if it is not a feasible solution. Thus, parties can explore options without looking like they are giving in or negotiating against themselves. The mediator can utilize various negotiating tools and shuttle diplomacy techniques to drive the settlement process forward that are difficult to utilize in direct negotiation.

THE BENEFITS OF IMPROVED COMMUNICATION

Enables the Parties to Meet

The mediation provides a venue for the parties to meet and talk safely, often in a confidential setting, with the other party. The parties can directly educate the other party about their view of the case thus providing a more realistic view of the case without a lawyer's screening. The appeal of important witnesses can often be assessed at an early stage. These frank exchanges often lead to changes of heart and new perspectives on the matter.

Taking the Litigator Off the Hook

Often the litigator is retained because he or she is viewed as a fighter who will advocate for the client vigorously. It is sometimes difficult for the lawyer to draw back from being a champion for the client's cause as arbitration counsel and become settlement counsel championing the cause of resolving the dispute. The lawyer may feel that the client will view him or her with disfavor if he or she is not able to project continued confidence in the case. The mediator can help the lawyer bring about a reassessment of the case without undermining the client's confidence in the lawyer by facilitating the development of a more realistic view.

Enabling the Party to Have a Voice

There are situations in which the party wants to settle but the lawyer is determined to fight on. The party may not feel so strongly as to change counsel, as so much has already been invested in the lawyer's familiarity with the case, but cannot persuade the lawyer that it is time to settle and move on. The mediator can ensure that the party has a voice and is in fact the last word on whether a settlement should be negotiated and on what terms.

Improving Communication Between Lawyer and Client

Sometimes the lawyer and the client are just not hearing each other. They may have very different perceptions of the case and where they want it to go; they may have had a change of heart since the matter started. Sometimes a lawyer or a client is so locked into a position that they simply are not communicating. The mediator can facilitate that conversation and make sure that each perspective is fully communicated and, most importantly, understood.

THE BENEFITS OF MEDIATION OVER ARBITRATION

Speedier Resolution

As noted above investor-State arbitration proceedings generally take several years to resolve a dispute, and the case may go on even longer if there is

an annulment proceeding under the ICSID rules. The claimant must wait for the recovery and the respondent has the matter hanging over it, with all of the consequent public relations concerns. A settlement in mediation can often be concluded in a much shorter time frame. Even very complex, big dollar cases often resolve in one or just a few sessions which can be scheduled on an expeditious basis.¹²

Reduced Cost

Preparing a case for arbitration is expensive. The expedited resolution of a dispute in mediation avoids many of the costs of that preparation. The earlier in the process the mediation is commenced the more likely the most significant cost savings will be achieved. While the dispute may not be ripe for resolution at an early stage, the mediator can assess when to press for settlement and reduce the costs incurred until that stage is achieved. The cost of the mediation itself is generally a small fraction of the costs incurred during the development of a case.

Streamlining the Issues and Exchange of Information

If the mediation process is commenced at the beginning of the arbitration, the parties can work with the mediator to determine if any exchange of information is necessary before a meaningful conversation can be conducted. Generally such exchanges, if any are deemed necessary, can be streamlined dramatically and involve a small fraction of what might be exchanged in the arbitration if some discovery is to be part of the arbitration process. In many cases, no exchange is needed. Especially in these days of e-mails, streamlining or eliminating document review can lead to huge cost savings.

Ability to Explore Creative Solutions

An arbitrator must sit in a circumscribed universe guided by the law and the facts in meting out remedies that are supported by the law. Mediation

¹² It must be noted that the investor-State disputes that have settled to date have generally settled only after the passage of some years without a significant time advantage. However, as attention is devoted to developing the optimal processes for a mediated resolution of such disputes, the time frame to resolution should be considerably shorter.

provides an avenue for the exploration of remedies unavailable in arbitration that can achieve a successful result for all. An award of money damages or an injunction is not the optimal resolution of many cases, and workable solutions in multiple settings can be achieved in mediation. For example, a mediation may achieve acceptable compromises on how a construction project should be adjusted to suit all, what new commercial arrangement can be made to replace the one in dispute, what substitute investment may be available. Tools unavailable in court can be used to achieve resolution.

Party Control

Mediation affords the parties an opportunity to control the result. The mediator does not sit as an arbitrator but only as a facilitator to a settlement agreed to by the parties. Parties walk away with a result they feel they can live with, as they have been the ones to decide it. The parties are not left to the mercy of whatever the arbitrators might rule.

Confidentiality

Mediation generally enables the parties to keep the settlement discussions private and not available to the public. While the result may be subject to public scrutiny, in many cases, even with a governmental entity, it will be possible to maintain the confidentiality of the negotiations and possibly avoid creating grounds for subsequent challenges to the agreement reached. Moreover, the confidential nature of the mediation itself enables the parties to explore with the mediator their real interests and concerns and discuss the case without informing the other party. The mediator will not disclose information he or she is not authorized to disclose. It also may serve to provide the opportunity for the parties to speak to one another in a confidential setting, which encourages an openness not otherwise achieved and which often enables the parties to find innovative solutions.

Maintains Relationships

Many investor-State disputes are between parties with other important ongoing relationships or with future hoped for investment relationships. Arbitration's adversarial nature can drive a rift between parties who would be better served by maintaining the relationship. Mediation provides a venue for resolution of the dispute in a manner that preserves the relationship, as common

ground is reached consensually in a less contentious setting. Indeed, the relationship is sometimes improved as a result of the collaborative process.

Less Burdensome

Arbitration is a lengthy process and often requires enormous expenditures of time by the parties to work with counsel, review documents, and prepare for the arbitration. All of these steps interfere with daily work and personal schedules. Mediation's prompt resolution relieves the parties of these burdens and minimizes disruption to their schedules.

Elimination of Issues

Even an unsuccessful mediation is often useful to eliminate areas of dispute, narrow the issues in the case, and uncover and organize issues for future discussion and negotiation.

Higher Rates of Compliance

It is said that settlements reached in mediation have a higher rate of compliance than those imposed by an adjudication. As the parties have themselves developed a resolution they feel is fair to them and that they are capable of performing, the likelihood of not fulfilling obligations of the settlement are reduced. Given the frequent difficulties encountered in collecting on awards against sovereign states, this can be a significant advantage.

Flexibility

Mediation is a flexible process. Different alternative dispute resolution techniques can be used as the particular matter dictates. For example, it can be preceded or succeeded by a mini-trial, med-arb can be considered, a neutral "expert" can be appointed to render an opinion on a legal or fact-based point of difference. The process can be fine tuned to meet the needs of the case. If all else fails, the parties can continue in arbitration with a better understanding of the case.

OBSTACLES TO SUCCESSFUL MEDIATION IN INVESTOR-STATE DISPUTES

While one is likely to conclude that virtually all of the benefits of mediation described above are applicable to many investor-State disputes, it must be recognized that there are obstacles unique to the settlement of disputes in this setting that must be considered.¹³

Infringement on Sovereignty

The host State may feel that it simply cannot concede and settle on any basis, as the claims asserted are viewed as a direct attack on the rights and privileges of a sovereign State to regulate its own affairs.

Uncertain Merits

The unpredictability of the result in BIT arbitrations that has been observed by many scholars can be a disincentive to settlement. All parties may feel that they will be the winner, perhaps with more justification than is ordinarily the case. Thus, while this can be a motivator for resolution as the outcome cannot be known, it can also lead to resistance to resolution.

Multiple Agencies

Once an arbitration is commenced, there are likely to be multiple agencies that have some involvement in the dispute. There may be internal conflicts over such issues as who should participate in the mediation, who should dictate the strategy, and what an acceptable result would be. Thus, unlike a corporation, there may not be a clear decision maker with whom the mediator can work to arrive at a resolution. A seminal principle of a designing a successful mediation is ensuring that the real decision makers are involved. This may not be possible, and constant second guessing and backtracking by agency representatives not in the room can be a problem.

¹³ For a general discussion of many of the obstacles, see Coe Preliminary Remarks, *supra* note 5.

Who Is at the Table?

In an investor-State dispute, not only is it likely that the resolution of the dispute will have to be disclosed beyond the participants in the mediation, but the dispute may raise significant issues as to which many stakeholders outside government may have an interest, e.g. a project with significant local environmental impacts. It may be difficult to identify all of the necessary participants, engage them successfully in the mediation process, achieve consensus among so many interests and avoid subsequent legal attacks on any solution reached.

Budgetary Constraints

As more than one agency may be involved, there may be friction and lack of accord as to which agency's budget should pay the settlement amount: is it the agency that committed the acts, the agency responsible for the BIT program, the defending agency, or some other governmental account?¹⁴ Perhaps even more problematically, most countries have provisions that permit them to pay court judgments but have no parallel provisions for paying pre-adjudication settlement amounts.¹⁵ An act of the legislature or specific budgetary authorization may be required raising questions as to the practicality of such a solution and as to the preservation of the confidentiality that is of importance in some cases.

Legislative Act Required

Apart from budgetary issues, the resolution of the dispute that can serve to settle the matter may require an act of the legislature, an obstacle that can vary in magnitude from a mere time delay to an absolute obstruction.

¹⁴ Bart Legum, *The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's "Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch,"* 21(4) *Mealey's Int'l Arb. Rep.* 72 (2006).

¹⁵ *Id.*

Blaming the Tribunal Is Easier

Host governments may find themselves in a difficult position in the dispute and may find it easier to blame a tribunal than to voluntarily accede to any demand even on a modified and negotiated basis. Negative public reaction may be easier for the government to deflect if the resolution is imposed rather than voluntarily agreed.¹⁶ However, some governmental representatives have voiced the view that settling with the assistance of a mediator is helpful in deflecting public criticism and can be more readily accepted than a directly negotiated settlement.

Mediation May Not Be Shorter and Cheaper

Mediation of a complex matter can be long and expensive; complicated issues may have to be confronted that require detailed attention by the parties, counsel, and the mediator. Various constituencies may have to be consulted and brought to agreement. If the arbitration is placed in abeyance while the mediation progresses, years of delay may result. Of course, proceeding down both the arbitration and mediation track simultaneously can alleviate the delay factor, but the additional expense of mediating a complicated matter can remain a disincentive.

Already Negotiated

The parties may feel that mediation is a waste of time. Investors generally do not lightly launch an arbitration proceeding against a host government, especially if the investor has continuing interest in investment in that country. Negotiations to resolve the dispute have often already been attempted. The investor and the host State may feel that a mediation is a waste of time and money, as an amicable resolution has already been attempted.

¹⁶ See Coe Complementary Use, *supra* note 5, at 29-30.

Transparency and Confidentiality

The increasing call for transparency in BIT disputes and the growing inclusion of transparency provisions in BITs brings to the fore the question of whether confidentiality can be maintained in the mediation. Confidentiality can be one of the most important attractions of a mediation in a commercial setting that may not always be available in an investor-State dispute.

Enforcement Issues

An arbitral award can be enforced. A mediated settlement agreement may be just a contract subject to contract defenses and provide only a cause of action for breach of contract. There are ways to attempt to deal with this concern. If the mediation takes place after the arbitration is commenced, it should be possible to have the agreement entered as an agreed award.¹⁷ The parties may include a choice of law designation and an arbitration clause that would empower an arbitrator to assess whether the settlement agreement was breached and award damages. The parties might also establish a standby letter of credit or similar arrangement designed to make enforcement of the settlement comparatively routine and freeing it from sovereign immunity and related obstacles that might arise in a domestic court.¹⁸

Bad Publicity and Bad Precedent

The host State may fear negative local public reaction if it “gives in” to the demands of an investor without being required to do so by a tribunal. It may also fear that “giving in” may encourage other investors to pursue remedies against it or provide ammunition for other investors to demand they be similarly compensated or treated on an expeditious basis without having to prove their case to a tribunal.

¹⁷ See Coe Preliminary Remarks, *supra* note 5; see also Edna Sussman, “The New York Convention Through a Mediation Prism,” 15(4) *Disp. Resol. Mag.* (Summer 2009) (a publication of the American Bar Association) for a discussion of whether an arbitrator appointed after the dispute is settled can issue a valid and enforceable award.

¹⁸ See Coe Preliminary Remarks, *supra* note 5.

No Personal Stake

Those negotiating on behalf of the State may not have the same incentive to settle as a litigant in a garden-variety commercial dispute. Any ultimate award would not come out of the negotiator's pocket and is unlikely to affect his or her compensation. Thus, while assuredly the governmental representative will have the interests of the State in mind, the personal interest in achieving resolution may not be as strong.

CONCLUSION

Others on this panel will review the various suggestions for building capacity for successful investor-State dispute resolution.

The first step must be a review of process issues. Many questions present themselves in this context.¹⁹ These would include the following: Should the mediation be simultaneous with the arbitration? Is there a pool of mediators available who can serve effectively in this arena? Can those who have traditionally served as arbitrators change hats successfully? What should the neutral's role be? Do we need new rules for investor-State mediation? Should ICSID amend its conciliation rules? Should there be presumptions on transparency?

The integration of a mediation step into new BITs as they are negotiated has been suggested as an important avenue for advancing the use of mediation. It is much easier for a host State to consent to mediation before the dispute arises. Facilitation of resolution in mediation through greater involvement of the home State of the investor in resolution of the dispute can also be of tremendous assistance.

Cooperation among the international institutions including ICSID, the Multilateral Investment Guarantee Agency (which has an in-house mediation group), and the World Bank in sharing perspectives on mediation and developing processes and encouraging utilization is a crucial next step.

Some countries are already developing capacity for participating in such mediation efforts for investor-State disputes by creating institutions under domestic law. Peru has established a special commission to evaluate claims. Colombia is developing legislation to create a lead agency to deal with such claims. Korea has an ombudsman to address claims against the state. Others will undoubtedly follow.

¹⁹ *Id.*; Coe Complementary Use, *supra* note 5.

As we look to predict the future of investor-State dispute mediation, we are reminded of the well-known reply of Zhou Enlai, the Chinese premier, when asked by Henry Kissinger in 1976 about the impact of the French Revolution: “on reflection, it is too soon to tell.”²⁰

²⁰ See http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/02/china_party_congress/china_ruling_party/key_people_events/html/zhou_enlai.stm.